[2015] JMCA Civ 65

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 139/2010

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS MCDONALD-BISHOP JA (AG)

BETWEEN	**D & LH SERVICES LIMITED**	**1ST APPELLANT**
AND	**ISADRA INTERNATIONAL LIMITED**	**2ND APPELLANT**
AND	**DALEY WALKER & LEE HING (firm by the Estate, Clifton Daley Represented by Executors Louise Daley And Clifton George Eustace Daley)**	**3RD APPELLANT**
AND	**THE ESTATE CLIFTON DALEY (Represented by the Executors Louise Daley And Clifton George Daley)**	**4TH APPELLANT**
AND	**THE ATTORNEY GENERAL**	**1ST RESPONDENT**
AND	**THE COMMISSIONER OF THE JAMAICA FIRE BRIGADE**	**2ND RESPONDENT**

Allan Wood QC instructed by Livingston, Alexander & Levy for the appellants

Miss Althea Jarrett instructed by the Director of State Proceedings for the respondents

27 April and 18 December 2015

PHILLIPS JA

[1] I have read in draft the judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and have nothing useful to add.

BROOKS JA

[2] I too have read in draft the thorough judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and have nothing else to add.

MCDONALD-BISHOP JA (AG)

[3] The central question for determination in this appeal is whether members of the Jamaica Fire Brigade (the fire brigade) acted negligently when they failed to extinguish, in a timely manner, fire that destroyed a building situated at 114-120 Tower Street in the parish of Kingston on the night of 22 October 1997. This is an appeal against the judgment of Edwards J (Ag) (as she then was), delivered on 22 October 2010, in which she found that the fire brigade was not negligent and that the respondents, the Attorney-General and the Commissioner of the Jamaica Fire Brigade, are not vicariously liable for the damage. Accordingly, she entered judgment in favour of the respondents with costs.

The background

The parties

[4] By a writ of summons, filed in the Supreme Court on 24 November 1997, the original claimants, D & L H Services Limited (D & L H), Isadra International Limited (Isadra), Daley Walker & Lee Hing (firm) (Daley Walker) and Mr Clifton Daley (an attorney-at-law) brought a claim against the respondents for breach of statutory duty and negligence of the fire brigade in respect of the destruction of the building by the fire.

[5] At the time of the fire, D & L H (now 1st appellant) was the registered proprietor of the premises. Isadra (now 2nd appellant) was the owner and operator of a private free zone at the premises. Daley Walker was a law firm carrying on business at the premises with Mr Daley as one of its partners. Mr Daley died in 2005 before the proceedings down below had been completed and so his estate was substituted and represented by his executors, Mrs Louise Daley, his wife, and Mr Clifton George Eustace Daley. The estate now stands in these proceedings as the 4th appellant in place of Mr Daley and as 3rd appellant in a representative capacity for Daley Walker.

[6] The 1st respondent, the Attorney General of Jamaica, was sued as the representative of the Government of Jamaica pursuant to section 3 of the Crown Proceedings Act on the basis that the acts or defaults complained of by the appellants arose from breaches of the Fire Brigade Act, 1988 (the Act), for which the Commissioner of the Jamaica Fire Brigade, the 2nd respondent, as the servant or agent

of the Crown, has statutory responsibility. The 2nd respondent, according to the pleadings, is sued in his official capacity as being responsible for the efficient conduct and administration of the fire brigade pursuant to the provisions of the Act.

The case

[7] The shape of the case is succinctly and vividly presented in the facts outlined in paragraphs 1 to 4 of the written judgment of Edwards J, which, for the sake of convenience, have been adopted *verbatim.* Those background facts are as follows:

> "1. In Kingston, Jamaica, at the corner of Temple Lane and Tower Street, there once existed a concrete building, identifiable as 114-120 Tower Street, with the enviable claim of being in close proximity to that great edifice, the Supreme Court of Jamaica.
>
> 2. On October 22, 1997, at the end of the work day, the owners and occupiers of this building, locked the doors, windows and grill, brought down the shutters, locked the locks and they and all their staff went home. But by the next day this building was a mere shell of its former self. It had gone up in smoke. However, it did not go up in a puff of smoke; instead, it fell victim to a slow burning fire that started from 8 pm that same evening, until it erupted and blazed well into the early hours of the next morning.
>
> 3. The owners say the destruction of the building was the fault of the fire brigade who were summoned to the scene quite early; from as early as 8 pm. The owners say that the fire men [sic], in breach of their statutory duty and or due to their negligence, caused the building to go up in flames when they failed to pour water on the fire as soon as they arrived on the scene. They further say that the fire was early evidenced by smoke spiraling under the shutters and rising through the windows, but the firemen did nothing to quell this smoke until the building became engulfed in flames and it was too late.

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

The evidence at trial

[8] Given the grounds of appeal raised for consideration in this appeal which, largely, direct attention to the learned trial judge's treatment of the evidence at trial, it is deemed necessary to provide from the outset a broad synopsis of the evidence presented at trial by the parties, particularly, in relation to what had transpired at the scene of the fire after the arrival of the fire brigade. This specific focus on that aspect of the evidence is in an effort to fit the impugned findings of the learned trial judge within their proper context. The core aspects of the evidence at trial that relate to the grounds of appeal being advanced will now be outlined, commencing with the case for the appellants.

The appellants' case

[9] The appellants, in support of their case as to the occurrences at the scene of the fire, called four live witnesses and also relied on the affidavit evidence of Mr Clifton Daley, pursuant to the Evidence (Amendment) Act, he having died by the time of the trial. The four live witnesses on whom the appellants relied were: Inspector of Police Raymond Robinson (police officer in charge at the scene of the fire); Mrs Louise Daley (wife of Mr Clifton Daley and one of the executors of his estate); Mr Clive Savage

(worker from a nearby building); and Mr Anthony Pearson (an attorney-at-law and an owner/ occupier of an office on the premises).

[10] Inspector Raymond Robinson was the first witness for the appellants to have arrived there. The other witnesses later arrived at various times between 8:00 and 8:40 pm. On his arrival, Inspector Robinson saw one unit of the fire brigade at the scene and he called for others. Six units subsequently arrived.

[11] At the material time that each of the appellants' witnesses arrived at the scene, they observed smoke coming from the ground floor of the building but saw no flames. Inspector Robinson advised members of the fire brigade to break a glass window on an upper floor to see if they could control the fire on the ground floor from above. They did so and entered the building but came back out saying that the heat was unbearable. Both Inspector Robinson and Mr Clive Savage told the firemen to pump water on the ground floor so as to extinguish any fire that might have been there, but they did not apply water to the ground floor as directed by the two witnesses. They indicated that they did not see any fire and so they could not apply water. Mr Anthony Pearson, after he arrived, also called the attention of the firemen to what was happening on the ground floor. The firemen expressed a view of getting into the first floor, which was not open.

[12] The firemen eventually entered the first floor by breaking a glass across the width of the building. They remained on the first floor after gaining entry but took no steps to control the spread of fire on the ground floor. They began to ask for the keys

to the front grill in order to gain access to the building. They did not enter the ground floor even when the keys came. There were padlocks on shutters that could easily have been chopped off or be opened by keys to gain access to the ground floor but no attempt was made to open the shutters from under which huge clouds of smoke were coming.

[13] The firemen were not taking any firefighting action and the water in the hose was allowed to run on the road. It was not until fire was seen on the ground floor, after a shutter was opened, that being about two hours after the arrival of the fire brigade, that the firefighting (that is to say, the actual application of water to the ground floor) actually commenced.

[14] The fire, however, continued to spread until it reached the ceiling of the first floor causing it to collapse and fuel the fire resulting in a huge blaze. The fire began to spread rapidly up the roof. By that time, it was too late to save the building. By the time the fire was brought under control, the building had been destroyed. There was no organized approach to the firefighting.

The respondents' case

[15] In disputing the appellants' claim, the respondents, for their part, relied on the evidence of four live witnesses who were, at the material time, all members of the fire brigade. They were District Officer Dennis Lyon; Sergeant Lawrence Campbell; Acting Assistant Commissioner Denroy Lewis and Assistant Commissioner Herbert Hall.

[16] Mr Dennis Lyon was the first witness on the scene. At about 8:00 pm, he got a report of the fire at the scene and went there. On arrival, he saw a small amount of smoke coming through a window on the first floor of the building. The firemen disembarked from their vehicle and a ladder was pitched within the vicinity of the window from where the smoke was observed. Two firefighters proceeded up the ladder, broke a pane of glass to saturate the area with water from a hose. They sprayed for about three or four minutes. There was no fire or flames only a small amount of smoke.

[17] The firemen came off the ladder but the smoke was getting thicker and was coming from the shutters on the Tower Street side of the building. Mr Lyon concluded that the fire was not on the upper floor but on the ground floor and so steps were taken by the firemen, on his instruction, to enter the building on the ground floor. Some firemen tried to enter the building but could not do so because of a locked shutter on the ground floor at the Tower Street side of the building. Mr Lawrence Campbell and another fireman entered the ground floor but they were not able to pass a point because of the "magnitude of heat and smoke".

[18] The firemen eventually broke the locks on the shutter by use of a sledge hammer and within 10 minutes, that was by about by 8:30 pm the shutter was eventually opened. On the other side of that shutter was a large glass pane with grilled bars behind it. The firemen broke the glass and when that glass pane was broken, fire was seen on the ground floor. The firemen immediately sprayed water through the grill to douse the flames. The firemen had also used the hose to spray the shutter with water. The fire was already controlled in the area of the first shutter. There was,

however, a second shutter to be opened. The locks on that shutter were also opened with a sledge hammer. There was also a large glass pane behind that shutter along with grilled bars, which was identical to the condition at the first shutter. The firemen broke the glass pane at this shutter and water was directed at both shutters.

[19] Beside the second shutter was a grilled door, which was the entrance to the building. The door was made of metal sheeting and so one could not see behind it. An attempt was made to break the grill bars with a sledge hammer but that was unsuccessful. The firemen were at the entrance of the building attempting to get inside through the door but could not get inside because they were not able to secure keys for the door. Eventually, they obtained some keys from a lady but the grilled door took a long time to be opened with the keys. After it was opened, they were still not able to enter the building to continue the firefighting efforts because a back draught occurred that caused an explosion. This was about 9:00 pm. The fire spread rapidly after the explosion and led to the destruction of the building. Water could not have been applied to the back draught.

[20] The firemen adopted standard firefighting procedures but they were not able to get a good strategy or firefighting angle to get to the seat of the fire because the building was compartmentalized and so some points were not easily accessible due to the closed shutters, grills and doors.

[21] The protocol of the fire brigade is that when the firemen go on a scene they have to first conduct an assessment in order to determine the seat of the fire and the

methodology in extinguishing it. The assessment and determination of methodology are simultaneous and are put into operation. The fireman in charge will continue applying the methodology but it may change as the situation evolves. Firefighting management requires a determination as to where the men are put to work in order to attack the fire while bearing in mind the safety of the firemen.

Findings of the learned trial judge

[22] The learned trial judge in a comprehensive judgment embarked upon a review of the evidence presented by both sides and an analysis of the applicable law and having done so gave judgment for the respondents. Given the extent of her findings, it is not convenient to detail them all at this juncture as they are rather comprehensive and only some aspects are materially relevant to the grounds of appeal. It is, therefore, deemed prudent, in the interest of efficiency, to, at the relevant time, highlight those aspects of her findings in treating with the specific grounds of appeal to which they relate. Suffice it to say at this juncture, by way of setting the stage for a clearer understanding of the grounds of appeal, that the learned trial judge found, basically, that in the circumstances of the case the appellants had failed to show, on a balance of probabilities, that the fire brigade was in breach of its statutory duty or acted negligently.

[23] In her judgment, the appellants had failed to prove to the requisite standard that the members of the fire brigade was not acting bona fide in the execution of their duties and that they had failed to act (paragraph 168). She also stated, *inter alia*:

> "177. It is not sufficient for the [appellants] to say the members of the fire brigade did not fight the fire in a manner they would have liked or expected. To succeed the [appellants] must show that the actions of the fire men [sic] were so grossly wanting in the care and skill of ordinary firemen as to call into question their abilities as firemen; that it was this action which created the danger or increased the risk which resulted in their loss. This, the [appellants] have failed to do.
>
> 178. …
>
> 179. There is no evidence that the operational choices made by the firemen were as a result of lack of care and skill…Operationally it cannot be said that, in trying to locate its origin, the seat of the fire so to speak, the firemen were acting negligently."

She then expressed her decision in these terms:

> "194. Firemen are employees of the Crown. Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer. However, there must be a fault found in the employee before the principle can apply. There is also no evidence or allegations that the [respondents] were themselves otherwise directly liable. I find therefore, that;
>
> a. The [respondents] were not in breach of their statutory duty; and
>
> b. The [respondents] were not negligent."

The grounds of appeal

[24] The appellants filed 23 rather comprehensive grounds of appeal against the decision of the learned trial judge. Given the inherent constraints of time to detail all these grounds *verbatim*, an attempt has been made to summarise them as best as

possible. In doing so, the grounds of appeal, which do overlap or which share some commonalities, have been grouped under convenient headings, some of which have been usefully employed by counsel for the appellants in their written submissions.

[25] It should be stated too that notwithstanding the attempt at compressing the grounds of appeal, every effort has been made to ensure that the substance of the appellants' grievance with the learned trial judge's decision is fully identified and sufficiently addressed during the course of the analysis of the grounds of appeal. When examined, the grounds of appeal are found to fall conveniently under two broad headings, being (a) failure of the trial judge to properly assess the evidence and (b) failure of the learned trial judge to find that the respondents were negligent and to enter judgment for the appellants.

[26] The grounds, as summarised are set out under the two respective headings as follows:

Grounds 1-13

Failure of the learned trial judge to properly assess the evidence

(1) The learned trial judge failed to pay any or any sufficient regard to the evidence of the appellants' witnesses, who testified and or deponed to the fact that the members of the fire brigade were on the location for some two hours before making any effort to combat the fire (grounds 1, 6, 7, 8, 9, 10).

(2) The learned trial judge failed to pay any or any sufficient regard to the evidence of the witnesses who were disinterested third parties (Mr Clive Savage and Inspector Raymond Robinson) and she failed to appreciate the significance of the fact that those witnesses were not challenged in cross–examination on any of their observations (grounds 2, 3, 4, 5).

(3) The learned trial judge erred in law and in fact in that she failed to appreciate that the evidence from the respondents' witnesses in some way corroborated the appellants' evidence (ground 11).

(4) The learned trial judge erred in her failure to appreciate that the firemen in their evidence provided no explanation for the fact that the building was totally destroyed although, according to them, they arrived at 8:00 pm and at the time of their arrival only smoke was visible (ground 12).

(5) The learned trial judge failed to appreciate that the evidence of the members of the fire brigade is questionable for several reasons (as detailed) (ground 13).

(Grounds 14-23)

Failure of the learned trial judge to find that the respondents were negligent and to enter judgment for the appellants

(6) The learned trial judge failed to appreciate that the overwhelming weight of the evidence supported a finding of gross negligence and/or misfeasance by the members of the fire brigade (ground 14).

(7) The learned trial judge erred in law in that section 15 of the Act is irrelevant as it only protects the individual fireman from liability for damages. The appellants have sued their employers who are vicariously liable for their acts of negligence and who cannot benefit from the limited statutory exemption in section 15 (ground 15).

(8) The learned trial judge also erred in law in that she failed to appreciate that section 15 of the Act only applies where the members of the brigade have acted "bona fide" in the execution of their duties. The learned trial judge failed to appreciate that conduct which is negligent, reckless and/or malicious is not bona fide (ground 16).

(9) The learned trial judge appears, by virtue of her decision, not to have appreciated that bona fide*s* does not only refer to honesty in the sense of not having a "guilty" mind. It is interpreted in a broad sense of meaning a real effort to carry out one's duty (ground 17).

(10) The learned trial judge erred in law and in fact in failing to appreciate that the evidence before her clearly established gross negligence/ recklessness of the fire brigade and that this caused the loss (grounds 18, 19, 20).

(11) The learned trial judge erred in law and fact when she failed to give judgment for the appellants and to award damages by applying the principle of *restitution in integrum* (grounds 21, 22, 23).

Grounds of appeal not pursued

[27] At the commencement of the hearing of the appeal, learned Queen's Counsel, Mr Wood who appeared for the appellants, indicated to the court that ground 15 (paragraph (7) of the summarized grounds as stated above) would not be pursued. That ground, is therefore, abandoned.

[28] It is also observed that in the 'findings of law' appealed against, it is stated, at paragraph (h), "[t]hat Section 5 did not create a private right of action in a member of the public (p.44)". This, however, has not formed part of the grounds of appeal, and neither was any argument advanced in relation to it. So for all intents and purposes, an appeal against that finding is treated as having not been pursued and is, in effect, abandoned.

The subject of appeal

[29] The appeal is, therefore, concerned with the appellants' claim in negligence at common law. In this regard, Mr Wood, aptly noted that the appeal turns, primarily, on the manner in which the learned trial judge treated with the evidence in arriving at her decision. Miss Jarrett, in making her submissions on behalf of the respondents, also correctly observed within this context that the pith and substance of the appeal is whether, having regard to the evidence, the learned trial judge ought to have found that the respondents were negligent and whether her failure to do so had resulted from a faulty or improper analysis of the evidence.

The law

The approach of the appellate court in treating with findings of facts

[30] Based on the grounds of appeal and the orders being sought by the appellants, it is clear that this court is being asked to disturb the learned trial judge's decision on matters pertaining to how she carried out her functions in treating with the facts. As

such, it is necessary to note from the outset the applicable law that governs the approach of this court in dealing with the decision of the learned trial judge.

[31] In a relatively recent case on appeal from Trinidad and Tobago, **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, the Judicial Committee of the Privy Council was to again lend its voice to the issue as to the approach an appellate court should take in dealing with appeals from a trial judge's findings of fact. Under the heading "*The role of an appeal court"*, their Lordships undertook an extensive review of the numerous authorities that have treated with the question, including most importantly, the oft-cited **Thomas v Thomas** [1947] AC 484. The principles from those cases cited by their Lordships have been applied time and time again by this court and are, by now, so well-known to the extent that they are fast becoming trite.

[32] Be that as it may, it is nevertheless necessary to simply indicate that the principles enunciated by their Lordships in **Beacon Insurance Company Limited v Maharaj**, as extracted from the various authorities cited by them, have provided the necessary guidelines within which the decision of the learned trial judge and the grounds of appeal have been considered. Their Lordships, after distilling the applicable principles from those cases, stated, at paragraph 12:

> "…It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'…This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts…Rather it directs the appellate court to consider whether it was permissible

> for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…"

[33] The dictum of Lord Neuberger, in **re B (A Child)** [2013] 1 WLR 1911, cited by their Lordships in **Beacon Insurance Company Limited v Maharaj**, is also worthy of particular note within this context. In that case, his Lordship opined, at paragraph 53:

> "This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."

[34] The burden on the appellants in this case is, therefore, to persuade this court to the view that the findings of fact of the learned trial judge, on which she has based her

decision to grant judgment in favour of the respondents, are such as to warrant the interference of this court.

Negligence of the fire brigade

[35] It should also be noted that the question as to whether the fire brigade was negligent, thereby grounding vicarious liability in the respondents, is a mixed question of both fact and law. Therefore, it is imperative that the findings of fact and law that form the subject matter of this appeal are viewed against what is required by law to establish negligence of the fire brigade. The applicable legal principles do serve to delineate the scope of the enquiry that ought to be conducted into the grounds of appeal against the learned trial judge's findings of both fact and law.

[36] In Halsbury's Laws of England, Fourth Edition Reissue, Volume 18(2), paragraph 4, it was stated, under the rubric, "(i) Liabilities of Fire Authorities, Occupiers etc":

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

[37] This principle was enunciated in the consolidated appeals of three cases: **Capital & Counties Plc v Hampshire County Council; Digital Equipment Co Ltd v**

Hampshire County Council; John Munroe (Acrylics) Ltd v London Fire and Civil Defence Authority and Others; Church of Jesus Christ of Latter-Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority [1997] QB 1004 (collectively referred to, for convenience, as "**Hampshire County Council**"). Stuart-Smith LJ, in delivering the judgment on behalf of the court, noted the applicable principles as it pertains to the fire brigade at page 1031:

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

At page 1032, the learned judge continued:

> "… But it seems to us that there is no difference in principle if, by some positive negligent act, the rescuer/protective service substantially increases the risk; he is thereby creating a fresh danger, albeit of the same kind or of the same nature, namely, fire …"

[38] Reference was also made by their Lordships in **Hampshire County Council** to the instructive dicta from the House of Lords in **East Suffolk Rivers Catchment Board v Kent and Another** [1941] AC 74 (**East Suffolk**), which also provided much guidance in the consideration of the issue in the instant case. Viscount Simon LC, in **East Suffolk**, usefully opined at page 87:

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

Lord Romer, for his part, said at page 102:

> "…Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If in the exercise of their discretion they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages that he would have suffered had they done nothing. So long as they exercise their discretion honestly, it is for them to determine the method by which and the time within which and time during which the power shall be exercised; and they cannot be made liable, except to the extent that I have just mentioned, for any damage that would have been avoided had they exercised their discretion in a more reasonable way…"

Lord Porter was also to express his views, at pages 104-105, thus:

> "…Damage caused by anything negligently done by the appellants in the course of the exercise of their power which would not have occurred if they had refrained from exercising it at all would undoubtedly have to be made good on the principles set out in the well known words of Lord Blackburn in *Geddis v. Proprietors of Bann Reservoir* (1), already quoted by Lord Romer; but where, as here, the damage was not caused by any positive act on the part of the appellants but was caused and would have occurred to the like extent if they had taken no steps at all, I cannot see that the loss which the respondents suffered was due to any breach of a duty owed by the appellants. Their duty was to avoid causing damage, not either to prevent future damage due to causes for which they were not responsible or to shorten its incidence. The loss which the respondents suffered was due to the original breach, and the appellants'

> failure to close it merely allowed the damage to continue during the time which they took in mending the broken bank. For that I do not think them liable nor can I find any case the decision in which would lead to that result…"

[39] The views of their Lordships in **East Suffolk** were influenced by dicta of the House of Lords in **David Geddes v Proprietors of the Bann Reservoir** (1878) 3 App Cas 430. The headnote of that case reads:

> "Where persons are incorporated by Act of Parliament for a particular purpose, and have full powers given them to effect that purpose, if the effecting of it may occasion (not only in the course of originally executing the necessary works for the required purpose, but at recurring intervals afterwards) inconvenience or injury to others, they may be treated as under an obligation to take, from time to time, measures to prevent the occurrence of such inconvenience and injury.
>
> Where the Legislature has authorized certain persons to effect a certain purpose, and has given them the powers necessary to effect it, they may exercise those powers to their full extent without incurring responsibility, but in so doing they must not occasion any needless injury to any one…"

[40] The learned trial judge in the instant case, after an exhaustive review of the relevant authorities (including those mentioned above), concluded that the members of the fire brigade were not in breach of their statutory duty and not negligent at common law. The ultimate question for this court, therefore, is whether she erred in so finding on the facts, on the law or on both the law and the facts. The grounds of appeal will now be examined in order to resolve this question.

Grounds 1-13

Failure of the learned trial judge to properly assess the evidence

[41] In grounds of appeal 1 to 13, the core contention of the appellants is that the learned trial judge, in coming to her conclusion that the respondents were not liable, had failed to properly treat with the evidence adduced before her. The various components of this complaint are encapsulated under the following sub-headings:

(1) Failure to pay sufficient or any regard to the evidence of the appellants' witnesses

(2) Failure to accept the evidence of the appellants' witnesses on matters on which they were not challenged in cross-examination

(3) Failure to give reasons for rejecting the appellants' witnesses

(4) Failure to have regard to the inconsistencies/discrepancies/questionable features in the evidence of the respondents' witnesses

(5) Findings of fact that are not supported by the evidence and making errors in assessing the evidence

(6) Failure to recognize that the case for the respondents was corroborated by the appellants' witnesses and

that the respondent's had not provided an explanation for the damage

Analysis and findings

(1) Failure to pay sufficient or any regard to the evidence of the appellants' witnesses

[42] In considering the grounds of appeal that embody the complaint that the learned trial judge had failed to have sufficient regard for the appellants' evidence, it is accepted that there was a conflict between the evidence of the witnesses for the appellants and those for the respondents. This conflict relates to the issue as to what was done or not done by the firemen for the two hours after their arrival on the scene, especially, in relation to the time it took for them to apply water to the ground floor. The learned trial judge, in the face of the conflict between the parties on that point, has not expressly stated which version of the events she had accepted and the reasons for doing so. Notwithstanding that, she did recognise the dispute between the parties and also did appreciate the case being advanced by the appellants. In this regard, paragraph 3 of her judgment is deserving of special note. There she presented, in clear terms, the gist of the appellants' case as follows:

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

> until the building became engulfed in flames and it was too late."

Then at paragraph 19, she continued noting the very kernel of the appellants' case:

> "The evidence of the [appellants'] witnesses was that the fire fighters [sic] were on location for approximately two (2) hours during which time they made no attempt to fight the fire…"

[43] The learned trial judge then proceeded to thoroughly examine the evidence of the witnesses for the appellants, from paragraphs 20 to 52 of the judgment (pages 180-187 of the record of appeal), starting with the evidence of Mrs Louise Daley. She commenced with Mrs Daley's evidence for the reason, as stated by her, that that evidence "gives a comprehensive picture of the layout of the building as it stood prior to its destruction".

[44] Paragraphs 172 to 175 of the judgment (pages 219-220 of the record of appeal) serve to demonstrate that the learned trial judge had not lost sight of the dispute and the salient contention of the appellants. She noted, in part, in paragraph 172:

> "…The subject of the alleged breach seem [sic] to me to be directed at the manner in which the fire brigade attempted to exercise their statutory duty to fight the fire. They in fact turned up at the fire. They in fact turned up at the fire on time and in sufficient numbers. The complaint seems to be regarding what was done or not done thereafter…"

Then at paragraphs 174 and 175, she continued:

> "174. It was alleged that when the Firemen arrived on the scene there was no fire evidenced by flames but there was smoke emitting from the ground floor and visible through the first floor window. There was evidence of what had been described as little smoke emerging

> from the building that witnesses claim could have been easily extinguished by water being sprayed inside the building. The [appellants] allege that the firemen, instead of immediately eradicating the smoke which could be clearly seen, spent hours doing nothing to actively fight the fire by dousing the smoke.
>
> 175. It was further alleged that the firemen took no steps to protect property which was in danger of the fire and actively prevented others from doing so."

[45] It cannot reasonably be said that the learned trial judge had failed to give due and full consideration to the appellants' evidence of the failure of the fire brigade to fight the fire for approximately two hours, which was the very essence of their case. The learned trial judge undertook a painstaking review of the appellants' case and managed, quite clearly, to properly extract the kernel of their case. So, while her reasoning is, unfortunately, silent as to whom she believed or rejected on this disputed fact as to what was happening for two hours, it cannot be said that she had disregarded or did not regard sufficiently the evidence of the appellants' witnesses on the point.

[46] The critical question for us would be what use, if any at all, did she make of that bit of evidence in coming to her ultimate finding that the members of the fire brigade were not negligent. In considering this question, it is noted that after reiterating the gravamen of the appellants' case, as she saw it (paragraph 175 of her judgment), the learned trial judge then stated at paragraphs 176 and 177 (pages 220-221 of the record of appeal):

" 176. It is clear to this court, that for the [appellants] to succeed they must prove the following;

a. That there was a fire;
b. That the fire brigade was called to the fire and that they attended the scene in answer to the call;
c. In attempting to extinguish the fire they acted in so negligent or reckless a manner as to create a new or increase the existing risk of damage over and above that which the [appellants] would have suffered in any event;
d. As a result the [appellants] suffered loss and or damage.

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

[47] The learned trial judge, by the above statements, clearly recognised the legal principles that govern the issue before her as to whether the firemen acted negligently in law and in fact. In extracting what was necessary to satisfactorily prove negligence of the fire brigade, she laid down the necessary facts that the appellants must prove to her satisfaction on a balance of the probabilities. Nowhere in the extracted portion of the learned trial judge's reasoning as set out above can it be said that she had disregarded the evidence of the appellants' witnesses concerning the inaction or action of the fire brigade. Indeed, it may accurately be said that she did, in fact, implicitly accept the appellants' witnesses that there was no firefighting going on before the fire

was seen on the ground floor and that the firemen had failed to douse the ground floor with water before the fire was seen.

[48] The assertion of the learned trial judge in paragraph 179 of her judgment also serves to bring home, even more clearly, that she had duly considered the case of both sides and, in particular, the case presented by the appellants. There, she said (page 221 -222 of the record of appeal):

> "There is no evidence that the operational choices made by the firemen were as a result of a lack of care and skill. The evidence was that there was smoke seen on the ground floor and from the windows of the first floor. No fire was seen. The evidence from both sides indicated that the fire brigade attempted to locate the seat of the fire. There is no evidence that this operational approach was as a result of any gross want of care and skill. The [appellants] evidence was that the smoke was there for sometime with no evidence of its origin. Operationally it cannot be said that, in trying to locate its origin, the seat of the fire so to speak, the firemen were acting negligently."

At paragraph 180, the learned trial judge said:

> The [appellants] submitted that the seat of the fire was the ground floor, but in my view there is no evidence pointing to this with any degree of certainty. The evidence was that smoke was on the ground floor but there is no evidence pointing unequivocally to the source of the fire being on the ground floor…"

She further stated at paragraphs 186 and 187:

> "186. …the [appellants] have failed to show (a) any other reason for smoke to be smoldering for several hours without any sign of an obvious blaze (b) any other explanation for the tuffs [sic] of smoke seen emanating from underneath the shutters of the ground floor and through the windows of the second floor and the heat in the surrounding environment without any early sign of a blaze; and (c) that if water

had been sprayed on the ground floor where smoke was seen, then the later conflagration would not have occurred.

187. …There was no localized seat of the fire seen. The evidence of smoke and heat coming from that section of the ground floor with no visible evidence of a fire simply supports the respondents' theory."

[49] There is every indication from the reasoning of the learned trial judge that she did pay due regard to the critical aspects of the evidence advanced by the appellants and that she did not reject the evidence for lack of credibility but rather on the grounds of insufficiency of the evidence to prove negligence as required by law. She clearly had put the alleged inactivity of the fire brigade, in direct firefighting before the fire was seen, of which the appellants complained, and their effort to gain access to the building to locate the seat of the fire, down to being part and parcel of the operational choice made by them. She came to that conclusion clearly on a full consideration of the case advanced by both parties.

[50] So, while I accept the legitimacy of the complaint that the learned trial judge did not offer much assistance by expressing which version of the events she preferred as to the inaction of the fire brigade in fighting the fire and the duration of it, her assessment of the evidence and her conclusions based on it do not reveal any disregard for the case of the appellants. She, obviously, was of the view that the firemen were charged with the discretion to make a decision as to how to approach the task of extinguishing the fire and that whatever they did or did not do, even if they were not fighting the fire in the manner desired by the appellants for the period of time stated, it was a matter of

their operational choice and their subjective judgment, for which they cannot be faulted in law. Whether she is correct in so finding, of course, is the subject of discussion under the heading whether she erred in concluding that the fire brigade was not negligent.

[51] This court cannot interfere with her decision on the ground alleged unless it is established that, in treating with the evidence in the way she did, she was plainly wrong in law. This has not been established on this complaint under consideration. It is sufficient to simply say at this juncture, therefore, that there is no merit in the complaint that the learned trial judge had paid no or insufficient regard to the evidence of the appellants' witnesses that the firemen did nothing to fight the fire for two hours when smoke was seen coming from the ground floor. The grounds of appeal that are based on this complaint cannot succeed.

(2) Failure to accept the evidence of the appellants' witnesses on matters on which they were not challenged in cross-examination

[52] The appellants have advanced too, as a ground of appeal, that there was no cross-examination of the appellants' witnesses challenging their account that the firemen did nothing for approximately two hours to fight the fire while smoke was emitting from the ground floor of the building. Also, they argued, that at no time did the respondents put their contending facts of the case to any of the appellants' witnesses. Therefore, the failure of the respondents to cross-examine the appellants' witnesses on the critical issue as to whether the firemen did nothing to put out the fire for the first two hours meant that the learned trial judge ought to have accepted their

evidence on that crucial matter and the respondents should be taken to have accepted the witnesses' account.

[53] The appellants also maintained that in the light of the authorities, the uncontradicted aspects of the appellants' evidence ought properly to have led to the conclusion that notwithstanding the increasingly heavy smoke filling the ground floor, the firemen had failed to take steps to treat the area with water. Therefore, as a result of their inaction, the building was totally destroyed by the sudden explosion of fire. For that reason, the decision of the learned trial judge should be set aside. In advancing this point, the appellants relied on Halsbury's Laws of England, Fourth Edition Reissue Volume 17(1), paragraph 1024; **Browne v Dunn** (1894) 6 R 67; Phipson on Evidence, Fourteenth Edition at paragraph 12-13; **Reid v Kerr** [1974] SASR 367; **O'Connell v Adams** [1973] RTR 150; and **Phillip Granston v Attorney General of Jamaica** HCV 1680/2003, delivered on 10 August 2009.

[54] In treating with this aspect of the appeal, it is, indeed, recognised, as pointed out by the appellants, that the witnesses who spoke to the conduct of the firemen were not challenged in cross-examination concerning the veracity of their assertions, that is to say, that at no time was it ever suggested to them that they were not speaking the truth when they said that the firemen were there not fighting the fire for approximately two hours when smoke was seen coming from the ground floor. Rather, the cross-examination was aimed, primarily, at establishing the layout of the premises; that the witnesses had no formal training in firefighting; and that the firemen were seen with the fire hose extinguishing the fire at some point during the course of the night.

[55] In Halsbury's Laws of England, Fourth Edition Reissue, Volume 17(1), paragraph 1024, the purpose of cross-examination was explained to be as follows:

> "Cross-examination is directed to (1) the credibility of the witness; (2) the facts to which he has deposed in chief, including the cross-examiner's version of them; and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose. Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of the evidence…"

[56] This is, in fact, a re-statement of the law as extracted from the relevant authorities, most notable of which is the oft-cited, **Browne v Dunn**. The head note of that case reflects the gist of the applicable principle on the matter. It states, in summary, that if in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, the witness' attention must be directed to that fact by some questions put to him in cross-examination (that is to say while he is in the witness box) showing that that imputation is intended to be made so that he may be afforded the opportunity to give an explanation which is open to him. Therefore, the credibility of a witness ought not to be impeached upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion, in the course of the case, that his account of events is not accepted. This is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.

[57] The general rule that the witness should be cross-examined when it is intended to ask the tribunal of fact to disbelieve him on a point, however, is not absolute and inflexible. In the same case, **Browne and Dunn**, it was recognised that the witness need not be cross-examined on an issue in question if it is otherwise perfectly clear that he has had full notice beforehand, in which it has been "distinctly and unmistakably given" that there is an intention to impeach the credibility of his story or if the story is of an "incredible and of a romancing character". In other words, the rule may be departed from if, for instance, the point upon which the witness is to be impeached is so manifest, that it is not necessary to waste time in putting questions to him upon it. Also, it is not always necessary to put to the witness explicitly that he is lying, provided that the overall tenor of the cross-examination is designed to show that his account is incapable of belief (see Adrian Keane, The Modern Law of Evidence, 7th edition, pages 195-196).

[58] In **Reid v Kerr**, Wells J, after a review of **Browne v Dunn**, helpfully noted in this regard at page 373:

> "…The jurisprudence and practice of the courts does not imperatively require counsel in every case to abide, to the letter, by the general rule laid down by their Lordships; that rule will, I apprehend, yield to special circumstances…what is essential is compliance with the spirit of their Lordships' pronouncements, which, I apprehend, are derived from two basic precepts designed to ensure a fair trial according to law…"

[59] In considering the circumstances of this case against the background of the applicable law, the pivotal question is whether the respondents, through their counsel, had suggested or, seemingly, intended to suggest that the witnesses were not speaking the truth on the particular point as to how long it took the firemen to apply water to the ground floor after their arrival. A consideration of this question necessitated an examination of the cross-examination of the witnesses; the written submissions of counsel for the respondents, filed for the purposes of the trial (pages 159-174 of the record of appeal); as well as the submissions recorded in the judgment of the learned trial judge at paragraphs 85 to 112 (pages 194-202 of the record of appeal).

[60] This examination of the record has revealed some significant facts worthy of note in treating with this aspect of the appeal. Firstly, it is observed that the cross-examination of the appellants' witnesses was primarily aimed at adducing evidence about the layout and configuration of the building; what the witnesses saw the firemen doing while water was not being applied; and, more than anything else, the training of the witnesses in firefighting. This, undoubtedly, was geared at eliciting evidence in support of the respondents' case that the firemen had difficulty accessing the building; that the firemen were trying to gain entry to the building to locate the seat of the fire; as well as, to suggest that the witnesses had no formal training in firefighting and were, therefore, not in a position to properly give any opinion on what the firemen should or should not have done.

[61] Secondly, in relation to the written submissions of the respondents' counsel that were filed for the benefit of the trial judge, it is observed that in treating with the

evidence of the appellants' witnesses there was no suggestion made that they were to be disbelieved when they said the fire men were not fighting the fire for approximately two hours by failing to apply water to the ground floor. The core submission by counsel for the respondents to the court was that the witnesses were not qualified firefighters and, by extension, had no training in firefighting strategies and so no weight should be attached to their evidence that the failure of the firemen to apply water to the ground floor, when smoke was seen, has rendered the respondents liable.

[62] A brief insight into the submissions of learned counsel for the respondents in treating with the relevant evidence of the appellants' witnesses should prove useful. He noted in his written submissions under the heading, "THE [APPELLANTS'] WITNESSES" (page 162 of the record of appeal):

> "21. The [appellants] called five (5) witnesses to support their claim. All five were not qualified fire fighters [sic] and by extension had no training in the techniques and strategies used in extinguishing fires.
>
> 22. It is submitted that the observations made by these witnesses and the subsequent conclusions they arrived at, were merely opinions in the circumstances…"

[63] He then proceeded to put before the court his submissions in relation to the evidence of each of the appellants' witnesses. In relation to Inspector Raymond Robinson, he opined (pages 162-163, paragraph 22 of the record of appeal):

> "…Raymond Robinson, retired Inspector of the Jamaica Constabulary Force in his witness statement, gave evidence that he advised the members of the Jamaica Fire Brigade to

> carry out specific activities. Respectfully, which he had no authority or competence to advise members of the Fire Brigade on matters pertaining to the fighting of fires. No weight should be placed on his evidence."

In speaking of Mrs Louise Daley, he submitted (page 163, paragraph 24 of the record of appeal):

> "…As submitted earlier, she was a mere lay person in the circumstances and cannot give expert evidence in relation to the method used by the fire fighters to extinguish the fire."

In relation to Mr Clive Savage, he stated (page 163, paragraph 26 of the record of appeal):

> "Clive Savage in cross-examination testified that he had no formal training in firefighting. His evidence, relative to the approach used to extinguish the fire, was merely his opinion, which should not be relied on."

As for Mr Anthony Pearson's evidence, he highlighted, in so far as is relevant (pages 163 to 164, paragraph 27 of the record of appeal):

> "Anthony Pearson in cross-examination and re-examination said that at some stage he saw firemen using hose to extinguish the fire. He said that to get to his to office you had to access a steel roller shutter that one had to push up. Behind this shutter is a glass door opened by a key. He said there may have been a grill behind the glass door and that he was not trained in fire fighting [sic]. In answering questions from counsel for the [respondents] arising from answers to questions from the bench, Mr. Pearson said he pulled locks, rolled up shutters and got into his office. He said he cannot recall if the firemen assisted him in opening the locks. Pearson's evidence corroborates that of Mrs. Daley with regards to seeing the firefighters using the hose to extinguish the fire."

[64] Learned counsel then juxtaposed, against those submissions, his submissions on the evidence of the respondents' witnesses. Speaking of those witnesses and as to why their evidence on the material issue should be accepted, he pointed out that in contradistinction to the appellants' witnesses, "[t]hese witnesses were all trained firemen. Two of them were retired senior officers".

[65] The respondents' approach in challenging the case of the appellants is also clear from the submissions recorded in the judgment of the learned trial judge at paragraphs 85 to 112 (pages 194-202 of the record of appeal). There the learned trial judge noted the gravamen of the submissions of the respondents, which, basically, were that the duty imposed on the firemen at common law was largely operational and so the firemen had a discretion as to the manner in which they should carry out their duty. In paragraph 109 of her judgment (page 201 of the record of appeal), she framed it this way:

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

[66] There is nothing recorded in the judgment of the learned trial judge that points to counsel for the respondents asking the court not to believe the evidence of the appellants' witnesses concerning the non-application of water for two hours. The

suggestion to the court was basically that no weight should be attached to the evidence of the appellants' witnesses that had the firemen applied water to the ground floor immediately when smoke was seen, the building would not have been destroyed.

[67] While it is appreciated that there were areas of dispute between the parties as to what transpired for roughly two hours after the fire brigade had arrived on the scene, which could have been ventilated in cross-examination, the pivotal point relied on by the respondents, as gleaned from the record of appeal, was not the veracity of the appellants' witnesses on the disputed point, but rather their competence to speak to the strategies employed by the fire brigade at the time. That was the focus of attention.

[68] In the light of that, the discharge of the obligation to cross-examine on the disputed evidence would not have been critical because it was not being suggested that the evidence of the witnesses was not to be believed because they were not witnesses of truth. Indeed, the respondents could well be taken to have accepted the witnesses' evidence on that and, in any event, are to be so treated. But, even more importantly, there is nothing in the learned trial judge's reasoning to indicate that she disbelieved the evidence of the appellants' witnesses on the point and on that basis came to a decision that the fire brigade was not negligent. The case was not resolved on the issue of credibility, in the sense of which witnesses were speaking the truth.

[69] In such circumstances, the general rule expounded in **Browne v Dunn** and the related authorities relied on by the appellants would not be engaged for this court to say that the failure of learned counsel for the respondents to cross-examine the

appellants' witnesses on the point was unfair and would have been fatal to the respondents' case at trial. Based on the learned trial judge's reasoning, cross-examination as to credit, as contemplated by the authorities, would not have taken the appellants' case any higher at trial. It means, therefore, that the rule in **Browne v Dunn** cannot be invoked by this court to hold that the learned trial judge was duty bound to accept the evidence of the appellants' witnesses to ground negligence on the part of the fire brigade.

[70] In the circumstances, the contention that the learned trial judge was duty bound to accept the appellants' unchallenged evidence as going to proof of negligence of the fire brigade is not accepted. Similarly rejected is the appellants' contention that the judgment should be set aside on the basis that the learned trial judge had ignored the fact that the respondents did not challenge the evidence of the appellants' witnesses on this aspect of the case during cross-examination. The grounds of appeal embodying this complaint about the failure of the respondents to cross-examine the appellants' witnesses on certain matters in dispute, therefore, fail.

(3) Failure to give reasons for rejecting the appellants' witnesses

[71] The appellants further contended that the learned trial judge's error was compounded by the fact that she gave no reasons at all for preferring the respondents' account of the sequence of events and, in particular, their evidence of the efforts that were made to fight the fire, including the use of the water hose from the very start. They contended that in circumstances where the factual evidence was so diametrically

opposed, it was even more incumbent on the learned trial judge to state her reasons for a conclusion that was essential to her decision on the issues on the claim.

[72] The appellants cited **Flannery and Another v Halifax Estate Agencies Ltd** [2000] 1 WLR 377 in support of their contention that the learned trial judge ought to have indicated her reason for accepting the evidence of the respondents' witnesses and rejecting that of the appellants' witnesses. In that case, their Lordships stated that the failure of a judge at first instance to give reasons for a conclusion essential to his decision may, itself, constitute a good ground of appeal.

[73] It would have been desirable, helpful and in the interest of greater transparency in the decision-making process if the learned trial judge had expressly indicated who and what she believed where there was an obvious conflict in the evidence. For the reasons already given above, however, her failure to do so is not, in my view, sufficient to impugn her decision in the circumstances of this case. For as already indicated, it is implicit in her reasoning and conclusion that she accepted that the firemen were not just standing there doing nothing in their effort to fight the fire, but were taking steps to find the seat of the fire because up to the point before water was applied to the ground floor, only smoke was seen. This, as already explained, seemed to be an acceptance that the firemen, in fact, as the appellants had contended before her, did not undertake any active firefighting on the ground floor for sometime, which would mean saturating the ground floor with water before seeing any flame. This was a finding that was supported on undisputed evidence coming from both sides and so it

was open to the learned trial judge to conclude that it was an operational choice of the fire brigade not to apply water when no fire was seen.

[74] She stated, at paragraph 188 of her judgment (page 224 of the record of appeal), in keeping with dicta from **Hampshire County Council**, that:

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

[75] Then in treating more directly with the question of negligence, she said, in part, at paragraphs 171 and 172 (page 219 of the record):

> "171. The test for negligence applied at first instance in the [**Hampshire County Council**] case was that applied in ***Bolam v Friern Hospital Management Committee*** (1957) 2 All ER 116…
>
> 172. Applying the ***Bolam*** test in this case, the court must ask itself whether the conduct of the fire brigade that night was that of reasonably well-informed and competent firemen or whether their actions amounted to negligence. The subject of the alleged breach seem [sic] to me to be directed at the manner in which the fire brigade attempted to exercise their statutory duty to fight the fire. They in fact turned up at the fire on time and in sufficient numbers. The complaint seems to be regarding what was done or not done thereafter…"

[76] Then, she concluded at paragraph 177 (page 221 of the record of appeal):

> "It is not sufficient for the [appellants] to say the members of the fire brigade did not fight the fire in a manner they

> would have liked or expected. To succeed the [appellants] must show that the actions of the fire men [sic] were so grossly wanting in the care and skill of ordinary firemen as to call into question their abilities as firemen; that it was this action which created the damage or increased the risk which resulted in their loss. This, the [appellants] have failed to do."

[77] This conclusion clearly demonstrates, to my mind, that the learned trial judge had within her contemplation the case being advanced by the appellants that the fire brigade was negligent because there was no active firefighting for almost two hours. So, as I have earlier concluded, she did not disregard the appellants' case. Her finding was quite clear that whatever was done or not done by the fire brigade was a matter of their professional judgment and operational choice which were not sufficiently proved to have been wanting or lacking to such a degree as to constitute negligence. This warranted no more reasons from the learned trial judge.

[78] Indeed, it cannot be said that she had failed to indicate the reasons for accepting the respondents' evidence when there is no indication that she had accepted, expressly or implicitly, their evidence that water was applied immediately or shortly after their arrival on the scene. On the contrary, the fact that she accepted that they were seeking to find the seat of the fire, and were hampered in doing so by the difficulty in accessing the building, means that she accepted that there was no immediate firefighting taking place on the ground floor when smoke was seen. That would be in keeping with the appellants' case. This does not point to any acceptance of the respondents' case and a rejection of the appellants' case on that point. There is no good reason, therefore, for this court to interfere with the learned trial judge's decision on the basis as advanced by

the appellants that she has given no reason for accepting the respondents' case on the point in question. This aspect of the appeal also fails.

(4) Failure to have regard to the inconsistencies/discrepancies/ questionable features in the evidence of the respondents' witnesses

[79] The appellants have also complained that the learned trial judge had failed to appreciate that the evidence of the members of the fire brigade is questionable due to discrepancies and or inconsistencies in several areas of their evidence. They contended, too, in this regard, that it would appear that the learned trial judge did not address her mind to and/ or resolve the inconsistencies in the respondents' evidence, which ought to have impacted negatively on the witnesses' credibility, as there was no reference to them in the judgment.

[80] These alleged questionable aspects, in a nutshell, relate to the following issues:

(a) whether the padlocks were on the grills of the building up to after 10:00 pm (evidence of Mr Hall) or had been removed by then (evidence of Messrs Campbell and Lyon);

(b) whether the firemen had cut through the shutters (evidence of Mr Hall) or whether the locks were hit off with a sledge hammer (evidence of Mr Lyon);

(c) when and how the back draught occurred, that is to say, whether it was when a grill door on the ground floor was opened (Mr Lyon) or whether it was when a door on the first floor was opened (Mr Campbell); and

(d) whether the upstairs door led only to a staircase or whether the door led to a staircase that led outside.

[81] It is accepted that contradictions (inconsistencies and discrepancies) in the evidence of witnesses may be a sign that the truth is not being spoken and so are matters that go to the issue of credibility that falls to be treated with by a tribunal of fact. It is also accepted that contradictions in the evidence of witnesses may be slight or serious, material or immaterial. It is for the tribunal of fact to decide whether there are, in the first place, any such contradictions and to determine whether they are slight or serious, material or immaterial by reference to the central issue in the case that has to be determined. It is accepted that where a judge sits alone, he or she is required to demonstrate how contradictions in the evidence (if any) have been treated with and resolved within the context of the issues raised for resolution, particularly, if those contradictions are serious and material. It is against this background that the instant ground of appeal has been considered.

[82] An appropriate starting point, in treating with this complaint of the appellants as to the allegedly questionable aspects of the respondents' evidence seems to be to clearly identify the central issue that the learned trial judge had to determine. It is

recognised that the central question for the learned trial judge, as she had identified from the very outset, was whether the firemen had, by their own action, added to the danger that had already existed or had created a new and different risk that resulted in the damage caused and which would not have occurred had it not been for their action.

[83] In examining the reasoning of the learned trial judge, it is seen that she did treat with the alleged discrepancy between the two witnesses for the respondents as to when and how the back draught occurred. The contention of the appellants is that the evidence as to the occurrence of a back draught is an invention by the firemen and so their credibility was in issue. The learned trial judge confronted the argument of the appellants made before her that there was this discrepancy between the two firemen as to the occurrence of the back draught, which affected their credibility. After examining the evidence from Mrs Daley, on behalf of the appellants, along with that of Mr Lyon and Mr Campbell, for the respondents, as to the location and layout of the staircase in relation to the ground and first floors, the learned trial judge concluded at paragraph 185 (page 223 of the record of appeal):

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

[84] The conclusion of the learned trial judge was that there was no other plausible explanation for the occurrence of the explosion, and the appellants, as far as she was

concerned, had provided none, as she was not persuaded that it had resulted from the caving in of the first floor ceiling as alleged by them. Clearly, the learned trial judge did not view the alleged discrepancy surrounding the occurrence of the back draught as affecting the credibility of the witnesses concerned, in particular, or the case for the respondents, in general.

[85] Indeed, the learned trial judge, after examining the issue surrounding the back draught went on to state immediately thereafter that, "more importantly to [her] mind", the respondents had failed to show, among other things, any other reason for the smoke to be smoldering for several hours without any sign of obvious blaze (paragraph 186 of the judgment, page 223 of the record of appeal). What is clear, and as the learned trial judge had found, is that even if no back draught had occurred, the appellants themselves had put forward no acceptable explanation for the cause of the explosion that destroyed the building.

[86] Having examined the evidence against the background of the law on negligence of the fire brigade, it is my respectful view that the question as to which fireman it was that had experienced the back draught, if at all, and from where on the building it was experienced is not material to the resolution of the central issue that the learned trial judge had to decide, which is whether the firemen acted negligently.

[87] It does seem to me that any discrepancy on the respondents' case in this regard, as a matter going to lack of credibility, could not have assisted the appellants in proof of their case, in the light of the question to be determined on the totality of the

evidence. This is particularly so as the learned trial judge did not base her conclusions on the veracity of the witnesses. Therefore, the discrepancy, in so far as it would have gone to affect the credibility of the witnesses, was not so serious or material in the scheme of things to justify interference from this court with the findings of the learned trial judge.

[88] In examining the other matters identified by the appellants as being questionable in the evidence of the respondents' witnesses, it is, indeed, correct to say that the learned trial judge had failed to demonstrate that she had paid due regard to those highlighted aspects of the evidence. The learned trial judge had not treated with the evidence in such minute detail as may have been desired by the appellants. The fact, though, is that the learned trial judge was not required to make a decision on every single point that had been raised during the course of the trial but only on those facts that form the body of facts necessary for her to say whether the claim of breach of statutory duty or negligence had been made out against the fire brigade. The crucial question, therefore, would be whether the omission in addressing those matters highlighted by the appellants had caused her to err in her ultimate finding that the respondents were not liable.

[89] In treating with this aspect of the appeal, it is noted that the learned trial judge's conclusion from all the evidence presented by the respondents was that the firemen were trying to find the seat of the fire by taking steps to access the building and were not able to easily do so up to when the explosion was later heard. The discrepancies in the evidence of the respondents' witnesses, as to, for instance, whether or not the

padlocks were already off before 10:00 pm and whether the firemen had to cut shutters or had to hit the locks off with a sledge hammer, are not serious or material when one considers the totality of the evidence and what had to be established by the appellants in order to prove negligence.

[90] The clear case on both sides was that the firemen were seeking to gain access to the interior of the compartmentalized building in order to fight the fire and that they had difficulties doing so up to when the explosion was heard. So even though the learned trial judge may have failed to specifically refer to the facts noted by the appellants as being questionable, it cannot be said, with any degree of conviction, that she had failed to pay due regard to those facts that would have been important for her to determine whether the appellants had proved their case to the requisite standard. Those facts noted by the appellants as being questionable were not of sufficient materiality to the issue the learned trial judge had to decide.

[91] In disposing of this complaint of the appellants, it may be said, then, that the failure on the part of the learned trial judge to expressly identify what is referred to as questionable aspects of the respondents' case, as pointed out by the appellants, and to expressly treat with them, is not seen to be such an omission that is sufficiently material to render her decision flawed. Accordingly, this ground of appeal is not accepted as a proper basis for setting aside the decision of the learned trial judge.

(5) Findings of fact that are not supported by the evidence and making errors in assessing the evidence

[92] It was also contended by the appellants that the findings of the learned trial judge on certain facts were wrong or insupportable in the light of the evidence. Paragraph 180 of the judgment was the first to be noted in this regard. There, the learned judge stated, among other things (page 222 of the record of appeal):

> "…The blaze which eventually showed itself manifested on the first floor and not on the ground floor."

[93] The learned trial judge did make an error in saying that the fire first manifested itself on the first floor. The evidence does, in fact, reveal that when the blaze was first seen, it was on the ground floor when the first shutter was opened. In assessing this error within the entire context of the case and the conclusions arrived at by the learned trial judge, it is hard to discern its materiality to the final decision. This error is, therefore, not fatal.

[94] The learned trial judge has also been criticised for her treatment of Mr Pearson's evidence at paragraph 187 of her judgment (page 224 of the record of appeal). It was contended that her treatment of the evidence was unsatisfactory when she stated that it went against the weight of the evidence. There she said:

> "In his witness statement, Mr. Pearson alleged that the firemen entered the ground floor but made no visible effort to put out the fire which was allowed to spread for sometime. I believe respectfully, that this statement goes against the weight of the evidence, as it was clear that there was no visible blaze for sometime and the source of the smoke was unknown. Mr. Pearson himself was unable to

> identify the direction of the smoke in the section of the building in which he claimed to have entered…"

However, the relevant portions of Mr Pearson's evidence in his witness statement, at paragraphs 10 and 11 (page 68 of the record of appeal), were that:

> "10. The members of the Fire Brigade did not enter the ground floor which they obviously could easily have done in the same way I entered and no attempt was made to put out the fire.
>
> 11. After having entered the first floor no visible attempt was made to put out the fire and the fire was allowed to spread for some time without any significant attempt being made to extinguish it."

[95] In cross-examination as well as in re-examination, Mr Pearson gave evidence that would have clarified his witness statement (page 119 of the record). In that evidence, he indicated that he had seen no fire when he arrived on the scene and that when he went to his office on the ground floor, he saw smoke and felt heat that caused him to retreat (or "back off"). The smoke, he said, was in the building, that is, the ground floor as a whole, but he could not say any particular section. So at the end of the day, his evidence was really in keeping with the rest of the evidence in the case that only smoke was seen on the ground floor at the time the firemen entered the first floor and that no fire was on the first floor.

[96] The learned trial judge evidently limited her attention to Mr Pearson's witness statement (without reference to his other evidence that had clarified the statement) and in so doing came to an erroneous conclusion that the statement was against the weight of the evidence. The appellants' criticism of the learned trial judge in this regard

is justified. However, her treatment of that piece of evidence cannot assist them in any meaningful way in advancing their appeal because her ultimate decision was not based on, or influenced by, what she erroneously stated that Mr Pearson had said. It cannot be said, therefore, that her treatment of the evidence was so unsatisfactory to the extent that it has rendered her finding on the ultimate issue flawed.

[97] The learned trial judge was also criticised for stating at paragraph 189 of her judgment (page 224 of the record of appeal):

> "…The evidence is that the brigade made various efforts to enter the building at varying entry points but was defeated by the numerous locked doors and shutters as well as smoke and heat."

It is contended by the appellants that such evidence did not come from the members of the fire brigade at all.

[98] An examination of the evidence does reveal that there is evidence from both the appellants' and respondents' witnesses that the firemen did make effort to enter the building at different entry points. There is evidence also that they were repelled by smoke and heat when effort was made to enter the ground floor as well as when they entered the first floor. Also there was evidence from the witnesses from both sides that the firemen had problems accessing the building because of locked shutters and grills. The learned trial judge did, however, use terms such as "numerous" (to describe the locked doors and shutters), and "various" (to describe the efforts made to gain access to the building). The highest the appellants could go with their complaint is that the

words used could be said to amount to some measure of exaggeration of the evidence by the learned trial judge.

[99] While the criticism may be justified because of the descriptive words chosen by the learned trial judge, there is nothing said by the learned trial judge that would have been so far removed from the evidence as to detract from her finding on the ultimate question that she had to determine as to whether the damage resulted from the negligence of the fire brigade. This criticism therefore lacks potency, within the context of all the evidence, as a basis on which to disturb the finding of the learned trial judge that the respondents were not negligent.

[100] At paragraph 192 (page 225 of the record of appeal), the learned trial judge made a statement that also managed to draw a complaint from the appellants. There she said:

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

There is, indeed, no evidence from the fire brigade that they thought that the protection of life was paramount to the security of property. The learned trial judge, in making such a statement, herself recognised its limitations when she said, "not much evidence was led by either side in this regard". It might have been unnecessary, therefore, for her to have made the statement but in the end, it is not seen that it had played any part in her reasoning that had led her to conclude that the firemen were not

negligent. In other words, this does not seem to have formed part of the body of facts on which she had grounded her decision. That statement is, therefore, of no materiality so as to go to the root of the judgment entered in favour of the respondents. As such, it does not stand out as providing a valid reason for the judgment to be disturbed.

(6) Failure to recognize that the case for the respondents was corroborated by the appellants' witnesses and that the respondent's had not provided an explanation for the damage

[101] The appellants have also contended that the decision of the learned trial judge should be set aside based on her improper and inaccurate assessment of the evidence in other ways noted. They complained that she failed to appreciate that the evidence from the respondents' witnesses, in some way, corroborated the appellants' evidence (ground 11). They have complained also, that the learned trial judge erred in her failure to appreciate that the firemen provided no explanation for the fact that the building was totally destroyed although they said that they had arrived at the scene at 8:00 pm and only smoke was visible (ground 12).

[102] It is observed in considering these grounds of appeal that the learned trial judge had undertaken a thorough examination of the evidence and duly noted the points at which the evidence of the parties converged and where it diverged. The fire brigade had also given their explanation as to what caused the destruction of the building, which the learned trial judge accepted. It is not correct to state that the learned trial judge failed to appreciate the evidence in the ways complained of.

[103] Having been guided by the principles derived from the relevant authorities as to how this court should approach the findings of fact of the learned trial judge, it is clear that the identification of a material mistake or fundamental omission is a necessary requirement for the decision to be disturbed. I have found no such sufficiently material mistake or fundamental omission in respect of the various matters complained of by the appellants under the several sub-headings of grounds of appeal 1 to 13 that would justify an interference by this court with the decision of the learned trial judge. This is so even though it may be said that some aspects of her treatment of the evidence is not totally satisfactory. These grounds, therefore, fail. This conclusion leads, inevitably, to a consideration of the final grounds of appeal.

Grounds of appeal 14, 16-23

Failure of the learned trial judge to find that the respondents were negligent and to enter judgment for the appellants

[104] The gravamen of the complaint embodied in grounds 14 and 16 to 23, is that the learned trial judge erred in concluding that the respondents were not liable in negligence. In this regard, the appellants maintained that the learned trial judge did not appreciate that the overwhelming weight of the evidence supported a finding of gross negligence/recklessness/misfeasance. According to them, she had failed to deal with the evidence regarding the failure of the fire brigade to include the use of the water hose in the initial firefighting for the period of approximately two hours until the sudden explosion. They argued that the learned trial judge appeared, by virtue of her decision, not to have appreciated that "bona fide" as referred to in section 5 of the Act does not

only refer to honesty in the sense of not having a "guilty" mind but rather that it is interpreted in a broad sense of meaning real effort to carry out one's duty. Inaction, they contended, cannot amount to a bona fide carrying out of one's duty because no effort has been made to carry out the duty.

[105] The appellants contended further that the failure of the learned trial judge to deal with the evidence of the omission of the firemen to engage the use of the fire hose for the time alleged was a major error on her part. This is so, they contended, because it is only from a careful consideration of the evidence and upon a proper finding of fact that she could properly have made any conclusion whether the fire brigade was negligent. According to them, the learned trial judge merely focused on the efforts of the firemen to enter the building and that the back draught was the defining incident which caused the total loss of the building. It is evident, they said, that had reasonable firefighting measures been adopted, the building would have been saved. Therefore, the learned trial judge ought to have found that on the unchallenged facts of the case, the fire brigade had carried out its duties negligently and or recklessly and is liable to the appellants for the loss they sustained.

Analysis

[106] It is already established on the strong authority of **Hampshire County Council**, which was considered by the learned trial judge, that a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending at the scene of a fire and fighting the

fire. This is so, it is stated, even though the senior officer actually assumes control of the firefighting operation. Therefore, the court must first be satisfied that in all the circumstances, it is fair, just and reasonable to impose a duty of care on the fire brigade. That was the legal question that the learned trial judge had to confront and deal with.

[107] At several paragraphs of her judgment, the learned trial judge has demonstrated that she was mindful of the applicable principles of law and had applied them. From paragraphs 113 to 157 of her judgment, she conducted a thorough review of the authorities governing the question before her. Then, in applying the principles she distilled from them, she stated at paragraph 172 of her judgment (page 219 of the record of appeal):

> "Applying the ***Bolam*** test in this case, the court must ask itself whether the conduct of the fire brigade that night was that of reasonably well-informed and competent firemen or whether their actions amounted to negligence. The subject of the alleged breach seem [sic] to me to be directed at the manner in which the fire brigade attempted to exercise their statutory duty to fight the fire…"

Then, at paragraph 173 (page 220 of the record of appeal), she noted:

> "In this case it appears to me that we are confronted with the situation at (b). Although s. 5 of the Act speaks to the duty to extinguish fires, it is an operational duty which is exercisable, in a discretionary manner. A duty of care will arise in the manner in which the duty is implemented. In exercising its operational discretion the only duty the Fire Brigade owes is a duty to not itself create or cause any further injury or damage; or not to, by its own actions, increase the risk of damage thereby causing additional loss. In such a case the Fire Brigade is liable in negligence in

> respect of that damage unless it would have occurred in any event."

[108] In coming to her decision on the facts before her, the learned trial judge had to closely examine the action of the firemen at the time in order to see whether their action amounted to negligence. The appellants' have maintained that the learned trial judge had ignored the length of time that the firemen would have been at the scene before applying water to the fire, which they say, was critical to a finding of negligence. This complaint, however, lacks validity when one closely examines the learned trial judge's treatment of the evidence as seen, for instance, at paragraphs 174 and 175 of her judgment. She clearly paid due regard to the crux of the appellants' case, noting what were their complaints against the actions of the fire brigade. Those were, basically, as stated by her that the firemen, instead of immediately eradicating the smoke, which could clearly be seen, had spent hours doing nothing to actively fight the fire by dousing the smoke and that they took no steps to protect the property which was in danger of the fire and actively prevented others from doing so. So, she clearly took into account the appellants' case.

[109] On the other hand, she also had the evidence of the respondents' witness, Mr Denroy Lewis, which indicated that the protocol of the fire brigade, upon attending on the scene of a fire, is to first make an assessment and to decide on the methodology to be employed in reaching the fire and extinguishing it. It is quite clear from the evidence of the appellants themselves that for the time they alleged that no firefighting was going on, the firemen on the scene were concentrating on gaining access to the

building, which was, undeniably, in their effort to locate the seat of the fire. There is nothing to say that this was not in keeping with what the respondents presented as being standard firefighting procedures neither does it establish that by doing so the firemen had acted incompetently and outside of the statutory discretion given to them.

[110] There is, indeed, some force in Miss Jarrett's submissions that what the appellants perceived as inaction or no firefighting was the operational choice of the firemen to first locate the seat of the fire before applying water to the smoke that was seen coming from the ground floor when no fire was seen. Bearing in mind all that evidence, against the background of the appellants' case, the learned trial judge then found, as stated in paragraph 179 of her judgment (page 221 of the record of appeal):

> "There is no evidence that the operational choices made by the firemen were as a result of a lack of care and skill. The evidence was there that there was smoke seen on the ground floor and from the windows of the first floor. No fire was seen. The evidence from both sides indicated that the fire brigade attempted to locate the seat of the fire. There is no evidence that this operational approach was as a result of any gross want of care and skill. The [appellants'] evidence was that the smoke was there for sometime with no evidence of its origin. Operationally it cannot be said that, in trying to locate its origin, the seat of the fire so to speak, the firemen were acting negligently."

[111] It is worth reiterating that at no time did the learned trial judge indicate, inferentially or expressly, that she had accepted the evidence of the firemen that they had applied water to the ground floor immediately upon their arrival. Had she accepted the respondents' version that water was applied almost immediately, she would not

have needed to go on to state that they were trying to locate the seat of the fire and that doing so was part of their operational choice. She could have simply stated that they had expeditiously applied water to the ground floor and so could not be held to have been inactive in fighting the fire. The period of inactivity in direct firefighting was evidently at the forefront of her contemplation in addressing the question whether the fire brigade acted negligently during the period.

[112] The critical hurdle that the appellants would have had to surmount to establish negligence in the fire brigade was to prove that the firemen did something that increased the danger that already existed or created a new or different danger that resulted in the damage or loss complained of. The evidence is clear that the firemen tried to get inside the ground floor, which itself was compartmentalized, at an early stage but had to retreat due to smoke and heat. The evidence from the appellants as well as from the respondents also shows that as soon as fire (as distinct from smoke) was seen, the firemen immediately proceeded to apply water at that time. The firemen then tried to gain further access to the ground floor of the building to continue the firefighting when they were thwarted in their effort by the explosion that occurred.

[113] Up to the end of the case before the learned trial judge, it had not been established on the evidence where the seat of the fire may have been. It could not be inferred reasonably and inescapably that had water been applied to the smoke at the time it was seen on the ground floor that the fire would have been extinguished and the building not destroyed.

[114] Also, it cannot be said that the attempts made by the firemen to gain access to the building in an effort to locate the seat of the fire, as the learned trial judge found, was an unnecessary and unreasonable act done with a gross want or lack of care and competence on the part of the firemen. Neither was it shown that they did anything that added to or had created a new and different damage than that which would have occurred had they not undertaken the task to extinguish the fire. In essence, the firemen's failure to apply water to the ground floor when smoke was first seen is really no different from them being absent from the scene of the fire. In such circumstances, they would have added nothing to the danger or the damage.

[115] In examining the issue, the facts of both **East Suffolk** and **Hampshire County Council** have proved to be of considerable utility. The basic facts of **East Suffolk** were as follows: High tide caused a breach in the sea wall that resulted in flooding of the respondents' land. In the exercise of their statutory powers, the appellants, a public authority, embarked on repairing the wall. However, the work was done inefficiently and caused the flooding of the land to continue for 178 days. That resulted in serious damage to the respondents' pastureland. The breach in the wall could have been repaired in 14 days had reasonable skill been exercised in carrying out the repair. The contention of the respondents was that the appellants did not act with sufficient skill to stop the flooding more promptly. This, indeed, is similar to the appellants' complaint in this case. The trial judge and the majority of the Court of Appeal held that the appellants were liable. However, the House of Lords (by a majority) held that they were not liable. In the opinion of their Lordships, where a statutory authority embarks upon

the exercise of the power to do work, the only duty owed to any member of the public is not thereby to add to the damage, which that person would have suffered had the authority done nothing. In their view, the appellants in that case had not added to the damage that would have resulted had they done nothing and so they could not be found to have been negligent.

[116] In **Hampshire County Council**, on the other hand, the fire brigade was held liable in negligence when one of its members, during the course of taking steps to locate the seat of the fire in the building in question, disabled sprinklers in the building. Those sprinklers were installed by the owners to assist in the extinction of fire. At the time the sprinklers were turned off, the members of the fire brigade had not yet found the seat of the fire and were not effectively fighting the fire themselves. The sprinklers at that stage were the only operative means of fighting the fire. Disabling the sprinkler had an adverse effect on the restraint of the fire and rapidly led to it getting out of control. It was not possible to control the fire on one section of the building, even after the seat of the fire was found. The fire brigade later reactivated the sprinklers, but by then, a significant part of the sprinkler system had been destroyed rendering it practically useless. The building was a total loss about two hours after the fire had begun. The learned judge at first instance found that it was fair and just to impose a duty of care on the fire brigade and to hold it liable in negligence. The Court of Appeal affirmed that decision. Their Lordships found that by turning off the sprinklers, the fire brigade had added to or increased the danger of the building being destroyed by fire.

In such circumstances, they concluded that there was no ground for giving the fire brigade immunity from suit.

[117] Looking at the instant case against the background of the facts of the two cases above and the principles derived from them, it is clear that on the totality of the evidence in this case, or even on the case for the appellants standing alone, it cannot be said that the firemen at the scene of the fire, by their own actions, had increased the risk of danger that caused damage to the appellants' premises. It cannot be said too that they had done anything to create a new and different damage than that which would have resulted if they had not attended the scene. On the strength of the authorities, it may be said that once the members of the fire brigade had taken it upon themselves to render service, they cannot be held liable for simply failing to do what the persons they are helping believed that they should do and that is so even if they should fail "to render reasonably adequate and efficient service" (Viscount Simon LC in **East Suffolk**). It must be shown that by their "unskilful intervention" (borrowing, again the words of Viscount Simon LC), they had created new dangers or added to the risk of danger that resulted in damage to the building. This, clearly, has not been established by the appellants in this case. So, in keeping with the facts and reasoning in the two cases examined, this case would fall squarely on the side of the decision in **East Suffolk**, which would be to not hold the fire brigade liable.

[118] In taking the analysis a bit further, it would also have had to be proved by the appellants in order to successfully establish liability on the part of the fire brigade that in exercising their statutory discretion in determining the methods to be employed in

extinguishing the fire and the time at which to employ them, the firemen had failed to act honestly, that is bona fide, in the execution of their duties. The learned trial judge, contrary to what the appellants contended, did not lose sight of that requirement in law and the appellants' submissions in relation to it. In several paragraphs of her judgment, she did make reference to the core contention of the appellants in this regard that "conduct which was negligent and/or malicious was not bona-fide [sic]" and that "inaction could not therefore amount to a bona-fide [sic] carrying out of one's duty" -see paragraphs 88, 100–102 (pages 195, 199 and 200 of the record of appeal).

[119] Then, at paragraphs 117 and 118 (page 203 of the record of appeal), the learned trial judge reasoned:

> " 117. It would appear therefore, that in order to avail themselves of the immunity afforded by the Act, the members of the fire brigade must also have carried out their duty not only bona fide in good faith, but also without recklessness or negligence. It seems to me therefore, that the members of the fire brigade may be guilty of (a) mala fides, (b) acting ultra vires and (c) acting negligently while carrying out their bona fide functions under the Act.
>
> 118. The upshot of it all is that, where the members of the fire brigade carry out their duties under the Act bona fide and without negligence they are not liable to anyone who suffers injury, loss or damage as a result…"

So, in concluding that the respondents were not liable to the appellants, who suffered damage or loss, the learned trial judge, based on her line of reasoning, would have had to also determine whether the members of the fire brigade acted bona fide. In the end, she found that there was no evidence that they acted with mala fides. This finding is

one that she could properly have made on the evidence that was before her and so there is no proper basis in law for this court to disturb that finding.

[120] Accordingly, the bone of contention in grounds of appeal 16 and 17, that the learned trial judge had failed to appreciate that section 15 of the Act only applies where the members of the fire brigade have acted bona fide in the execution of their duties, is without merit.

[121] At the bottom line, even though the learned trial judge had made errors or had failed to sufficiently disclose how she had treated with certain aspects of the evidence, she cannot be faulted in finding, on the totality of the evidence and as a matter of law, that the fire brigade was not negligent. Her finding was not against the weight of the evidence and so she cannot be faulted for entering judgment for the respondents. Accordingly, there is no merit in grounds 14, and 16 to 23. These grounds of appeal, therefore, fail.

Conclusion

[122] In **Eurtis Morrison v Erald Wiggan and Hyacinth Wiggan** SCCA No 56/2000, delivered 3 November 2005, K Harrison JA cited an instructive dictum of Berridge JA in the Eastern Caribbean States Court of Appeal's case, **Edwards v Buxton** [1982] 30 WIR 82, that:

> "The trial judge had an advantage which this court does not have and, while the **trial judge is not infallible and may, on occasions, go wrong on a question of fact, this court will only disturb a judge's decision on facts**

where there is no evidence at all, or only a scintilla of evidence, to support it…" (Emphasis added)

[123] It cannot reasonably be said that there was no evidence or that there was insufficient evidence to support the decision of the learned trial judge that the fire brigade was not negligent. The appellants have failed to establish, on a balance of the probabilities, that the members of the fire brigade, in responding to the call and undertaking their statutory function to extinguish the fire, had by their own actions, created or increased the risk of the danger that caused the damage to the premises. They have also failed to establish that the firemen did anything that had created a new and different danger that resulted in damage and loss to them. There is no sufficiently material error or omission found in the learned trial judge's treatment of the evidence that would go to the heart of her reasoning thereby rendering her ultimate decision flawed.

[124] The learned trial judge was correct to hold, on the totality of the evidence and within the framework of the applicable law, that the appellants were not entitled to judgment, and by extension, damages as claimed. She was, therefore, correct in entering judgment for the respondents. In all the circumstances, the appellants have not produced any basis on which this court would be justified in disturbing the decision of the learned trial judge.

Disposal of the appeal

[125] Accordingly, I would dismiss the appeal and affirm the decision of the learned trial judge with costs to the respondents to be taxed, if not sooner agreed.

PHILLIPS JA

ORDER

1. The appeal is dismissed.
2. The judgment of Edwards J dated 22 October 2010 is affirmed.
3. Costs of the appeal to the respondents to be taxed, if not agreed.