

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT NO. C.L. G-087 OF 1978

BETWEEN GENERAL ENGINEERING SERVICES LIMITED PLAINTIFF

A N D KINGSTON AND ST. ANDREW CORPORATION DEFENDANT

R. Carl Rattray Q.C. and C. Cousins instructed by Rattray, Patterson and Rattray for Plaintiff.

Dr. L. G. Barnett and John Vassell instructed by Dunn Cox and Orrett for Defendant.

Heard on: December 3, 4, 5, 6, 7 and 14 1984

MALCOLM, J:

This action has its genesis in a fire which broke out at the premises of the plaintiff company at 27 Dunrobin Avenue, St. Andrew on the 13th of October, 1977. It is not in dispute that the building was completely gutted and considerable damage and loss was in point of fact suffered. The amount claimed as special damages is slightly in excess of Seven Million Dollars.

The plaintiff's amended statement of claim reads in part -

" The defendant is a statutory corporation established under the Kingston and St. Andrew Corporation Act and has statutory charge and control over the Kingston and St. Andrew Corporation Fire Brigade. The aforementioned Kingston and St. Andrew Corporation has a statutory duty to extinguish all fires within the fire limits and to protect life and property in the case of any such fire."

When one looks at Section 7 of the Kingston and St. Andrew Fire Brigade Act it reads:

" It shall be the duty of the Fire Brigade to extinguish all fires within the fire limits and to protect life and property in the case of any such fire."

The amended statement of claim goes on -

" The premises of the plaintiff are in the parish of St. Andrew and within the fire limits referred to in paragraph 3 hereof."

The plaintiff claims that the statutory duty imposed on the Kingston and St. Andrew Fire Brigade, and referred to in paragraph 3, is owed to the plaintiff in respect of premises 27 Dunrobin Avenue in the parish of St. Andrew.

The amended statement of claim goes on -

" On the 13th of October, 1977, a fire started on the premises 27 Dunrobin Avenue, St. Andrew, at approximately 5:45 a.m. "

The plaintiff claims that shortly after the outbreak of the said fire the Fire Brigade at Half-way Tree was notified and requested to take immediate steps to attend to and extinguish the said fire in connection with the duty on the Kingston and St. Andrew Fire Brigade referred to before.

The plaintiff further claims that reasonable performance of the afore-mentioned duty would have resulted in the extinguishment of the said fire with minimal damage and loss to the plaintiff.

Paragraph 9 reads:

" At the time of the said fire the members of the Kingston and St. Andrew Fire Brigade were engaged in industrial action, to wit, a go-slow, for the purpose of obtaining increased emoluments and fringe benefits."

Section 8(1) of the Kingston and St. Andrew Fire Brigade Act reads:

" The Minister responsible for Defence may, whenever he is satisfied that it is necessary so to do, by order direct that such members of the Jamaica Defence Force whom the Chief of Staff from time to time nominate may extinguish fires within the fire limits and protect life and property in case of any such fire."

And here I might add that what is being complained of is that the Corporation failed to request the Minister to exercise his powers so that the Army would be available to carry out the function of the men on go-slow. Actually that was done when it was too late.

I might here pause to mention that under section 4 of the Act, and I mean the Kingston and St. Andrew Fire Brigade Act, a Committee is established, and the section reads:

" For the purpose of this Act there shall be established a Committee to be called the Corporation Fire Committee, and all powers of the Council in relation to the control and discipline of the Brigade are thereby delegated to such Committee."

Well, let us look at the evidence that was called in support of the claim by the plaintiff company. I do not intend to go at any

length into it, but Mrs. Enid Holding was called by the plaintiff and she said that in October of 1977 she was living at 29 Dunrobin Avenue which adjoins 27, the premises owned by the plaintiff company, and she said that Mr. Alexander Dixon occupied those premises - so she puts it. She tells us of what happened on the 13th of October; that at about 5:45 a.m. she was awakened by a slight crackling sound coming from No. 27. She looked through her bedroom window and saw slight smoke and some flames coming from a section of the building at No. 27. Subsequently she went to the telephone and dialled the Fire Brigade at Half-way Tree. She made a report and told them that there was a fire at No. 27. She said as she saw it she went directly to the telephone. About 15 minutes after, at about 6 a.m. they hadn't come and she telephoned the Brigade again and she was told that the unit was on its way.

Then she mentioned that at about 6:10 a.m. she heard the siren coming from the direction of the bridge. She also mentioned "I am guessing in a way", but she went on to strengthen her position further by saying, "it is an estimate I am giving of the time." She got the impression from the sound that the fire engine was on the bridge, and this bridge is about half a mile from No. 27 Dunrobin Avenue.

She had become very distressed, naturally, and she wondered why the brigade was taking that long. It struck her as odd. She went up the road. Traffic was quite clear. Then she saw the fire brigade turn the corner and enter Dunrobin Avenue. She said it went 'slow, forward, stop, then slow, forward, stop', and that went on for a long time. It took about 20 minutes from the corner to reach up to No. 27.

She said when it stopped at No. 27 it was about 6:30 a.m. She mentioned something which was explored by both sides. She said, "My own son pointed out a fire hydrant to the fire brigade. It was about 2 yards from the western side of 27. The Firemen said it was not a hydrant, they were most emphatic about it." She continued -

"They went on Lindsay Crescent, came back about 15 - 20 minutes later." According to Mrs. Holding, "the premises was blazing in the meanwhile. They came back to No. 27 Dunrobin Avenue and attached a hose which they had to the very hydrant which they had previously said was not a hydrant and water poured out. They tried to put out the fire. Smoke went down. In about 10 minutes they had put out the fire".

She said when she first saw the fire it was a small one which was coming from the floor. The point was raised, and arguments were advanced, as to when this fire broke out, as to where it broke out, or whether where Mrs. Holding saw it was where it started. Expert evidence was given, which I shall refer to, the opinion by some of the Firemen was that it must have been a fire in progress for about 3 - 4 hours.

When the Firemen came the evidence is that they directed the water at the spot mentioned by Mrs. Holding. It would not be an unsafe inference or line of thinking to say that when Firemen come on a scene and they see fire, they are going to direct water at the spot where it is needed and not say on the other side. Suffice it to say that, from all appearance, (I am satisfied as to that) where Mrs. Holding saw it was where the fire originated.

Mrs. Holding was asked by the attorney for the defence about the crowd around. She said that there were many other people congregating on Dunrobin Avenue. By the time the fire brigade came there were even more people, and she denied that there was a second unit on the scene, or to put it as she puts it, "I at no time noticed a second fire brigade unit come on the scene". The suggestion from Dr. Barnett is that there was.

She said it was when the fire brigade came first that they concentrated on the middle portion. And again the question was put to her as to the number of persons there and her reply was that there were a large number of persons present. Her son, she repeated, was the one who pointed out the hydrant to a fireman - a man who came off the fire engine.

Mr. Alexander Dixon, Engineer and Managing Director of the plaintiff company, gave evidence. He told that he owned the office building at 27 Dunrobin Avenue; that he maintained equipment for various customers, installed equipment, supplied equipment and spare parts - a wide range of electronic equipment, and we, as will be recalled, had embarked on the question of what was lost, values, etectera, until on inquiry by me from Mr. Dixon, when he had reached item 81, I understood from him that there were 2,083 items. At this stage I thought it the best course, in the interest of the case, not to record 2,083 items so we decided that we would go into the question of liability.

Mr. Dixon went on to describe that the contents of the building were completely destroyed - everything was destroyed. He went on to say something further, which is of importance as regards the second limb of what is being alleged:

" I went to the office - that is the Corporation office - after the fire. I spoke to the Mayor, Mr. George Mason, (who is unfortunately deceased). 'He said he was very sorry for what had happened to me'. I said 'Your Worship, why didn't you request that the Army send soldiers to man the Fire Brigade when the go-slow began?' He said he thought about it but he did not get around to doing it."

An important point - Mr. Mason isn't here to speak for himself and to say, 'I did not say so', so we have to look to other witnesses who, if we believe them may be able to throw some light on the matter.

Mr. Dixon went on to explain to the court and to tell the court about the Fire Brigade and the measurements he took and the plans he drew. He said that he knows where the Half-way Tree Fire Brigade Station is and that he made measurements, and he told what distance he found; and he told of a time when he actually clocked the Fire Unit and it took 3½ minutes from the Fire Brigade Station to 27 Dunrobin Avenue. He was mentioning that one day he saw the Fire Brigade going up that direction and to use a loose expression he just followed it and it took 3½ minutes. I was constrained to ask him whether he saw the Fire Brigade coincidentally or he was

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waiting there prepared to do a time check. To Dr. Barnett he said "I just followed the Fire Brigade".

He was asked about the traffic lights and he gave a certain reply. He was asked by Dr. Barnett about the building. In some detail he told of electrical signals and bells; that the signals transmitted alarm sirens and bells. He had placed sensors on the building. He said there was in every section of the building two heat-detecting heads, these were wired into the alarm system. From his evidence, if one accepts it, he had taken the necessary precautions although there was no employee on the building, and that point did come up, that nobody was left there overnight; but one cannot say that there was a disregard for the protection of the building.

Mr. Dixon went on to say that when he got there the building was practically burnt down. He said it was the Mayor who raised the question of the fire, not he. The Mayor was sympathetic. Dr. Barnett explored the question of the construction of the building - where the walls ran, how they ran, the state of the doors - whether the doors were solid or not.

After these two witnesses, Mr. Rattray intimated to the court that that was the evidence he wished to be considered as regards liability.

Dr. Barnett opened for the defence and stated that the plaintiff's allegation of breaches on the part of the Kingston and St. Andrew Corporation, in his view, fell under two heads - failure to act promptly, and, secondly, failure to advise the Minister responsible for defence of the situation and the circumstances relating to the industrial unrest. He called a Mr. Keith Miller who told us, and I won't go into it in too much detail, that in October 1977, he was employed to the Kingston and St. Andrew Corporation as Senior Assistant Town Clerk responsible for Industrial Relations. He said that on the 11th of October 1977, he received a report from Superintendent Binns and as a result he had a discussion with the Mayor.

Himself and the Mayor visited York Park Brigade. The go-slow of the Firemen was just about starting. They spoke to a meeting of the Firemen at the station, they heard their grievances and told them that they should resume duty immediately in a normal way. They did not return to normalcy on the Wednesday.

He went on to say, "We made contact with the Military. I spoke with Colonel Mignon of the Jamaica Defence Force". He went on to explain that the Military would not take over until there was a complete break-down, but they would be on the alert. All this is as to what transpired when one had action of this sort. He said, "We advise and alert the Army. We cannot finally make the decision. We alert the Army". That was his answer.

Another of his replies which we might consider is one to the suggestion - "Is it correct that the practice was that the J.D.F. would not be put into operational charge of the Fire Brigade during a go-slow whilst the men were on duty"?, and he said that was the practice. On the 13th of October it was a go-slow and the men were on duty then. This, I think, was all said to Mr. Rattray. Yes, it was to Mr. Rattray, because I remember Mr. Rattray probing into that aspect of it, and he replied, "I spoke to Colonel Mignon on the 12th, I told him of the go-slow. I spoke to him on several occasions between the 12th and the 14th. Can't recall how many times".

It was suggested to him - and it was put this way: "Isn't that the practice" (talking about the practice of the Army not being called in to take over the functions) - "Isn't that the practice because in the industrial relations climate one has to balance the advantages and disadvantages of putting the J.D.F. in charge of operations?" His answer - "Clearly, there has to be a balance struck". He went on further to say that request has to be made by the Mayor and decision taken by the political directorate.

Mr. Alexander Binns the next witness, said, and this is not in dispute, that in October of 1977, there was industrial unrest in the fire services in the Corporate Area. He testified that he himself

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would have no direct contact either with the Minister of Local Government or the Minister of Defence.

He was asked, on a separate subject now - another angle - as to the building. Dr. Barnett put Mrs. Holding's evidence to him, and he was asked, "Having regard to the nature of the structure described, for how long in your opinion had the fire been in progress before the flames went above the building?". He said that having regard to the nature of the structure, as Dr. Barnett described it the fire would, in his opinion have been in progress for about 3 to 4 hours before the flames went above the building.

Mr. Rattray put it to him as to whether his answer would have been different if the contents of the building turned out to be flammable, highly flammable materials, and he said he would expect it to burn more quickly if it was material that was highly flammable, but he conceded the contents would have an effect on his answer. So that answer as to 3 to 4 hours has to be qualified by all this.

Mr. Monnthen Powell, District Officer in the Kingston and St. Andrew Fire Brigade, gave evidence. He told of the receipt of the call, of his response to the call at 5:51 a.m. with a crew under his command. He said he arrived at approximately 6:08 a.m. - a total of 17 minutes, and at 30 M.P.H., driving normally, it would take 3 minutes. So here we have a 3 minutes journey taking 17 minutes, or if we accept Mr. Dixon's estimate, a 3½ minute journey. He said there was no stop and go in the way of the progress. He said that when they arrived sections of the roof had already caved in. When the fire was first attacked the water being supplied came from the unit's water tank, and his endeavour was to activate the nearest hydrant he could find. We have evidence on that from Mrs. Holding, as to where he went - up Lindsay Crescent. Nothing in dispute in that. He said the unit did go into Lindsay Crescent because while the water was being used from the tank "my Sergeant had located and flushed a hydrant on Lindsay Crescent in preparation for the water tank to be refilled."

It was put to him, "You heard Mrs. Holding say her son pointed out a fire hydrant on Dunrobin Avenue close to the fire.

What do you say about this?" He said, "I heard nobody indicate the presence of any such hydrant". He went on to say that people started moving about. There were questions and answers about different types of hydrants - Pillar type and the underground type. The one on Dunrobin Avenue was the underground type. To Mr. Rattray he said he was on go-slow at the time. "I didn't have strong feelings about emoluments and pay". He was asked about the job. He said, "I do take my job seriously. I was involved in the go-slow". And it is enlightening to see this answer. I have recorded also this further evidence: -
Question - "Isn't all part of the go-slow tactic to allow the building to burn?

His answer - Don't know of any such tactic".

Remember it was being said that one officer remarked that even "if my mother was in there that building going burn down". It was put to him and he said I never heard the Chief Fire Officer say "we are on a go-slow and it would have to burn down even if my mother was in there". He spoke about the lighting in the area. He made it a little darker than Mrs. Holding said it was.

So there we have evidence called by both sides as to liability. Dr. Barnett in his submission said that the 'shall' in the Act does not indicate an absolute liability. He said, and it was not in issue - that industrial action had commenced on the 11th October, and it is not suggested that any failure in response to the call, or the manner of the response, was due to any negligence or fault of the Kingston and St. Andrew Corporation in the maintenance of the Fire Brigade. That is the point he was making. He said the act of the firemen could not be deemed to be action expressly or impliedly authorised by the Corporation, or as action which the Corporation condoned, and he went on to say, "where it is clear that the action being taken is in direct contravention of the law and in repudiation of the employee's relationship with its employer, or is such that it cannot reasonably be said that it was done with the authority of the employer, then the employer cannot be liable for what followed".

He cited authorities to me and he mentioned that there was considerable evidence of deep concern and quick action in relation to the crisis created by the unauthorised and criminal acts of the Firemen. He cited the case of Warren vs. Henly's Limited, (1948) 2 All E.R., page 935; The Keppel Bus Company case (1974) 1 W.L.R., page 108; Barnett vs. Chelsea and Kensington Hospital Management, (1968) 2 W.L.R., page 422.

Mr. Rattray in his submissions dealt with the question of causation - and dealt with what caused the damage or what made a material contribution to the injuries and the damage sustained. He dealt with statutory duty, and among other things he submitted that if the Authority which is empowered by the Statute to do something does that thing and does it badly, then it is liable for having done it badly.

We come into the region of misfeasance. He went on to say that when a Statute create a duty, flowing from that duty is a common-law duty to take care in the performance of the duty, and if reasonable care is not taken and damage flows as a result, the Authority is liable in an action for damages brought by a person who suffers that damage.

He cited Carpenter vs. Finsbury Borough Council, (1922) Q.B.D., page 195 as also several other cases among them Marsh vs. Moores, 1949 2 K.B.D., page 208. So there we had the law, there we had the facts, there we had the submissions.

I have given this matter serious thought because it is a case of considerable importance, not only in respect of the quantum of damages claimed, but the legal principles involved.

My view, gentlemen, is that although in the relevant section of the Act 'shall' is used, it is not intended to be an absolute duty. The question is whether the Kingston and St. Andrew Corporation took all reasonable and necessary steps within its capabilities to carry out its functions. It is my view that the Council did provide an adequate and efficient service. It cannot be said it failed to do so because its employees, in breach of their contract and in criminal repudiation of there responsibility, failed to adequately perform the

the functions for which they were employed. The default resulted, as was pleaded on both sides, from the industrial action taken by the members of the Fire Brigade. There is evidence, and I accept it, that the action of the Firemen was not approved by the Kingston and St. Andrew Corporation, and that efforts were made to encourage the men to return to normalcy.

Were the Firemen acting in a criminal manner? Let me direct my mind to that. The Labour Relations and Industrial Disputes Act of 1975 categorises Firefighting Services, in its first Schedule, as an essential service, with the consequence that a worker who, being guilty of any unlawful industrial action, prevents or reduces the provision of services in the undertaking or activity in which he is engaged is deemed to be guilty of a criminal offence.

The act of the Firemen was criminal. As was submitted by the Defence, it is certainly not an easy construction to place on the Statute that even when the Statutory Body provides an efficient service the criminal conduct of its employees, who have defined and specific statutory responsibilities, can be visited on the public authority by a civil action brought by a person who suffers injury. No doubt there are cases in which an employer may be liable for the criminal act of an employee but it is my view that the instant case is not such a one. I accept the submission of the defence that where it is clear that the action being taken is in direct contravention of the law and in repudiation of the employee's relationship with his employer, or is such that it cannot reasonably be said that it was done with the authority of the employer, then the employer cannot be liable. I accept that submission as being sound.

As regards the second limb, as to the failure to call out the Army, a piece of evidence adduced was that Mr. Dixon, when he spoke to the Mayor, received his sympathy, and then Mr. Dixon addressed the enquiry, "Your Worship, why didn't you request that the Army send out men to man the Fire Brigade when the go-slow began?" The reply as stated by Mr. Dixon was, "I thought about it but never got around to

doing it". He said he had called out the Army on the 15th - two days after the fire.

Mr. Mason, as I mentioned before, unfortunately is dead, but if Mr. Keith Miller's evidence is accepted as being factual, and I so accept it, then the statement attributed to Mayor Mason does not accord - I put it higher, it is in complete conflict with his subsequent behaviour. In any event the Statutory provision relied on in in section 8 of the Act does not **authorise** Mr. Mason to call out the Army. It is the Minister responsible for Defence, whenever, as the Statute reads, "he is satisfied that it is reasonable so to do", who may order the members of the Jamaica Defence Force to carry out the duties of the Firemen. Here, possibly, we enter the realms of speculation. If the Corporation requested the Minister of Local Government to intervene he may not have intervened, and even if he did the Minister of Defence may not have felt satisfied that he should act. One cannot say that if all the hypotheses were satisfied that the Minister of Defence would have utilised the Army and placed it in command of the Fire Service before the 13th.

Particulars of the alleged negligence, as contained in paragraph 10 of the Statement of Clai, were asked for and supplied. Letter of June 21, 1984, to the plaintiff company from the defendant asked "what are the allegations of negligence contained in paragraph 10 of your amended statement of claim?". They pleaded (a) the defendant failed or neglected to advise the Minister responsible for Defence that having regard to all the circumstances he should direct members of the Jamaica Defence Force to carry out the statutory duty; (b) the defendant failed or neglected to advise the Chief of Staff of the Jamaica Defence to place or alert those members of the Force, who he had nominated, to extinguish fires within the fire limit and to protect life and property as permitted by the Statute. In my view the evidence adduced by the plaintiff has failed to establish such failure or neglect.

This case is truly unique. Many cases, none of them local,

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have been cited by either side. I remember by brother Mr. Justice Patterson giving judgment in a case against the Clarendon Parish Council, but it dealt with a situation where the water had been locked off, and because of that the Brigade could not perform normally, and when I read it I realised it did not assist me.

As I said, the case is truly unique, but when one considers the unusual features present in the instant case, merely because no previous local decisions are present as a guide, does not permit me to abdicate my judicial responsibility to a silent past.

A comment I make here - someone once remarked, "far better it is to have a strike than a go-slow". "When you have an outright strike the employer can easier deal with the situation and take decisive action to cure it if even temporary: Go-slows are in my view insidious and more often than not callous, as Mr. Rattray described it, or inhuman, as Mrs. Holding described it. Firemen leave their stations to do a job and they arrive on the scene and fiddle while Rome burns. Be that as it may, a judge must give judgment from his head where the seat of reasoning is and not from the heart where his emotions lie.

I am persuaded on the facts and on the law as it stands that the defendant Corporation is entitled to judgment as the plaintiff, on a balance of probability, has not established its case. Accordingly, there will be judgment for the Kingston and St. Andrew Corporation - the defendant - with costs to be agreed or taxed.