



2018 JMSC CIV 75

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2015HCV05028 NOW 2017CD00289

BETWEEN JENNIFER MAMBY-ALEXANDER

**FIRST
CLAIMANT
SECOND
CLAIMANT**

**AND ALFRED THOMAS
(ON BEHALF OF THEMSELVES AND 92 OTHER
RESIDENTS IN THE COMMUNITY OF HOPE
PASTURES IN THE PARISH OF ST ANDREW**

**AND JAMAICA PUBLIC SERVICE COMPANY LIMITED DEFENDANT
IN OPEN COURT**

Lord Anthony Gifford QC, Emily Shields and Jetina Wilson instructed by Gifford Thompson & Shields for the claimants

Patrick Foster QC and Symone Mayhew for the defendant

November 28 and 29, 2017 and May 10, 2018

**STATUTORY INTERPRETATION - HOUSING LAW, 1958 – SECTIONS 46A (2) (g),
46B, 46C – WHETHER STATUTORY CAUSE OF ACTION EXISTS - WHETHER
JAMAICA PUBLIC SERVICE COMPANY OBLIGED BY LAW TO REPLACE
UNDERGROUND ELECTRICITY CABLE AT OWN EXPENSE**

SYKES J Context

[1] Mrs Jennifer Mamby-Alexander is a medical doctor. She lives in Hope Pastures. Mr Alfred Thomas also lives in Hope Pastures. They are the lead claimants in a representative action (ninety four claimants in all) against the Jamaica Public Service ('JPS') the provider of electricity in Hope Pastures and Jamaica. JPS wishes to abandon the underground cable electricity supply system that provided electricity to the residents of Hope Pastures since the 1960s. JPS says that the underground system is difficult to maintain and in the case of Hope Pastures, the underground system is no longer viable. It believes that the overhead system is more appropriate. In keeping with this view, it began to install the equipment and power lines necessary to deliver the electricity to its customers in Hope Pastures. Some customers agreed to this new method of electricity delivery. Others have rejected it. They want JPS to replace the underground cable system at JPS's cost, that is to say, JPS is to absorb all the costs related to digging up the earth, removing the cable and replacing them then re-covering them with earth. All this over an eighty-two-acre area.

[2] Dialogue has failed to resolve the impasse. Those who objected have taken legal action to enforce their point of view on JPS. JPS has put up stout resistance. JPS says that it is under no legal obligation – whether from statute or contract or any other source of law – to replace the underground system at its expense. JPS says that those customers who wish to have the underground system need to pay for it.

[3] As can be seen this dispute is ultimately about who should pay for the underground cable system, if it is to be replaced, now that it has to come to the end of its useful life. There is no dispute about the facts. This state of affairs permitted the matter to be heard without oral evidence being called. Since there was agreed facts and agreed documents the matter proceeded by way of formulating the issues that arose for decision. The preliminary questions were framed in this way:

(1) Whether by reason of the approval by the House of Representatives on 27th April 1961 and the Legislative Council on 5th May 1961 of the Hope Housing Scheme ('the scheme'):

- a. *the defendant was obliged by law to install and maintain a supply of electricity to the residents in the scheme by means of underground wires;*
- b. *the actions and proposed actions of the defendant between about 2014 and the present day, in installing or seeking to install a supply of electricity by overhead wires were illegal.*

(2) Whether the claimants have any legal right to the supply of electricity only by means of underground wires by contract and/or pursuant to the instrument made on the 24th of April 1962 between the Director of Housing and the defendant granting the defendant certain easement liberties and rights.

(3) Whether the claimants and/or residents of the scheme have a right to seek and obtain relief by way of:

- a. *an injunction restraining the defendant from changing the mode of supply of electricity to their residences from underground wires to overhead wires;*
- b. *a mandatory injunction ordering the defendant to restore a supply by underground wires to those properties which have been provided with a supply by overhead wires;*
- c. *a mandatory injunction ordering the defendant to dismantle all poles and wires and other equipment which have been installed within the area of the scheme;*
- d. *damages for any loss suffered by reason of the illegal installation of an overhead supply.*

The legal context

A. *The Housing Laws*

[4] In 1955 the legislature passed Act No 67 of 1955 which was stated to be 'a law to repeal the Slum Clearance and Housing Law and to dissolve the Central Housing Authority established thereunder, to provide for the appointment of a Director of Housing with functions, duties and powers similar to those hitherto performed and exercised by the Central Housing Authority, and for purposes incidental to or connected with the matters aforesaid.' This law was the Housing Law of 1955.

[5] According to the 1955 statute, the Minister with responsibility for housing had the power to declare a geographical location as a housing area, a slum clearance area and an improvement area. Before such a declaration could be made the Minister had to be satisfied that the statutory preconditions for the declaration existed. Regarding the housing area, the Minister had to consider the housing conditions of the area and the needs of that area were such that further housing was needed. If he concluded that statutory standard was met, then he declared the area a housing area under section 4 (1). When he did so, the Minister was then obliged to prepare proposals for the 'further housing' and submit them to the Governor in Council. The scheme under this section was known as a housing scheme. This may well have been the origin in Jamaica of the expression 'housing scheme.'

[6] In order to declare any area a slum clearance area the Minister had to be satisfied that the 'houses in such area are, by reason of disrepair or sanitary defects, unfit for human habitation, or are by reason of their bad arrangement or the narrowness or bad arrangement of the streets, or by reason of overcrowding in the area, dangerous or injurious to the health of the inhabitants of the area; and that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings of the area' (section 5 (1)). If the Minister made such an order he was obliged to produce to the Governor in Council a scheme called a slum clearance scheme.

[7] The criteria for declaring an area an improvement scheme was the same as that of the slum clearance scheme except that the remedy was either acquiring the land in question and demolishing or repairing such houses as the circumstances require or demolishing, reconstructing or repairing only those buildings that were unfit for human

habitation. In similar manner the Minister had to produce to the Governor in Council a scheme called an improvement scheme.

[8] What is clear then is that in all three types of schemes once the Minister made the relevant declaration he was obliged to submit a scheme for approval by the Governor in Council.

[9] To give effect to the policy of the Minister when approved by the Governor in Council the Housing Law of 1955 established the office called the Director Housing. Section 3 of the Housing Law states that the Director of Housing could sue and be sued; has an official seal and could own property. Section 4 (1) authorised the Minister (which meant member of the Executive Council charged for the time being with responsibility for the subject of housing) to declare an area to be a housing area. When that was done, by section 4 (2) a proposal for housing accommodation for the area so designated was to be provided to the Governor in Council. The statute then particularised the responsibilities of the various persons who had some role in the provision of housing. The premise of the statute was that the houses in the designated area were in disrepair, insanitary, unfit for human habitation or by other reasons were thought to be 'dangerous or injurious to the health of the inhabitants of the area' (section 5 (1)). The Minister also had power to declare the area 'a slum clearance area' after he did so he had to submit to the Governor in Council a scheme for the area.

[10] There was another type of scheme contemplated but this latter one will be left out of account for the time being and will not be counted as the fourth type of scheme permitted by the statute. This addition scheme is provided for by section 15 which speaks to an emergency housing scheme 'by reason of the occurrence or apprehended occurrence of any public calamity.'

[11] This Director of Housing, according to section 3 (2) (a) was a corporation sole; (b) could sue and be sued; (c) had his own official seal which was to officially and judicially noticed; (d) held all land vested him in trust for Her Majesty and (e) all

land or other property of whatever kind including choses in action vesting in his predecessor shall vest in him.

[12] This Act was amended by the Housing (Amendment) Law of 1958. One of the significant features of this amendment was that it made provision for a fourth type of scheme which was described as 'a scheme under Part VIIA of this Law.' This fourth scheme was by private developers and called a 'housing association.'

[13] The following is section 46A:

(1) A housing association may prepare and submit to the Minister a scheme for the laying out or subdivision of land and the construction of houses thereon.

(2) Every scheme submitted under subsection (1) of this section shall be accompanied by a plan of the area to which such scheme and a statement showing –

(a) the manner in which it is intended that the area to which the scheme relates shall be laid out and the land therein used and, in particular, the land intended to be used for the provision respectively of houses, roads and open spaces and for public and commercial purposes;

(b) the appropriate area of the land to which the scheme relates;

(c) the approximate number and nature of the houses and other buildings to be provided;

(d) the average number of houses to be constructed per acre;

(e) such details as may be required by the Minister in regard to the type of houses to be constructed, the method of construction to be employed and the materials to be used;

(f) particulars relating to water supply, drainage, sewage disposal and so such other matters of like nature as the Minister may require;

(g) the prices at which it is proposed to sell the houses upon completion;

(h) the financial arrangements made or proposed to be made in regard to the payment for houses by the purchasers thereof;

(i) the time within which it is proposed to complete the scheme and, where it is proposed to undertake the scheme in stages, the time within which it is proposed to complete each stage

(3) In this Part of this Law 'housing association' means any person, company or society established for the purpose of, or amongst whose objects and powers are included those of, constructing and facilitating the construction of houses, and deemed and certified by the Minister to be a housing association.

[14] Section 46B provides:

(1) The Minister shall not submit a scheme for approval under section 46C of this Law unless –

(a) the scheme contains provisions empowering the Director to carry out the scheme at the cost of the housing association in the event of the failure or neglect of the housing association to do so and the Director shall have power to act accordingly;

(b) the housing association has furnished each Local Authority within whose area the scheme is to be operative, for the approval of such Local Authority, a layout plan of the area to which the scheme relates, and a statement which together give particulars in regard to the matters referred in paragraphs (a), (b), (c), (d) and (f) of subsection (2) of section 46A of this Law

(2) ...

(3) Where a layout plan and statement are furnished in accordance with this section the Local Authority may propose modifications of the plan or any matter contained in the statement and any modifications agreed on by the housing association and accepted by the Minister shall form part of the scheme to be submitted to the Legislative Council and the House of Representatives as hereinafter provided.

(4) ...

[15] Section 46C states:

(1) Where the Minister considers that any scheme submitted under section 46A of this Law should be approved, he shall submit the scheme to the Legislative Council and the House of Representatives with a statement that the layout plan and statement ...have been approved by the Local Authorities concerned or by the Minister, as the case may be.

(2) Where the Legislative Council and House of Representatives approve any scheme submitted under subsection (1) of this section, the following provisions shall apply with regard to the carrying out of such scheme-

....

(e) the Director shall have power from time to time to carry out or cause to be carried out such inspections as he may think fit to ascertain whether the scheme as approved under this section is being carried out, and the Director may require the housing association to remedy any failure to conform with the scheme and the housing association shall comply with such requirement;

(f) ..

(g) the provisions of the scheme shall have effect as if they were enacted in this Law.

[16] Having set out the statutory framework relevant to this case, the court now turns to the specific circumstances of this case.

B. *The Hope Scheme*

[17] How did the electricity come to be part of the services provided to the residents of Hope Pasture? History tells the story. The Minister of Housing and Social Welfare made a specific request of Housing Estates Limited ('HEL'), the developer certified by the Minister to be a housing association, to include as a feature of the scheme an underground system for the provision of electrical and telephone services. Upon this request being made the developer negotiated with the two companies for the

provision of these systems. The outcome of such negotiations was captured in a document entitled Hope Housing Scheme, Parish of St Andrew – Jamaica. This document was the submission for approval by HEL as required by section 46A of the Housing Law. The document was signed by Mr E N Bird, a director of HEL. The document is dated September 22, 1960.

[18] The first paragraph is as follows:

(1) This Scheme is submitted under the provisions of the Housing (Amendment) Law, 1958, Law 5 of 1958 by Housing Estates Limited, a Housing Association, as certified by the Minister of Housing and Social Welfare on the 16th day of August, 1960.

(2) ...

(3) Following are the required particulars.

Sect 46A (2) Plan is enclosed showing the area to which the scheme relates.

5) Utilities in the form of telephone and electric services will be available. The respective Companies were asked in keeping with the request from the Ministry to make provision for the undergrounding of the wires and this has been done.

6) The Jamaica Public Service Co. Ltd. estimated that the cost of the underground system would be £67,810 and £16,800 for the present system of overhead wires, or a difference of £51,010.

7) Settlement of the negotiations with the two Companies provides for the following expenditure to be met by Housing Estates Ltd.: -

a) The excess cost amounting to £51,000 for the underground electric wires, which amount will be refunded on a pro rata basis on completion of the buildings from time to time.

b) The cost of construction of all electric Transformer volts – (estimated total 20 units).

c) The cost of trenching and back filling for telephone wires along the roads.

d) The cost of the duct and also the cost of trenching and back fill each lot.

[19] It must be noted that the document tells us that the provision of electricity was settled by negotiation which can only mean that no obligation was placed on JPS by the approval of the legislature. The obligation at all material times was on HEL which in turn contracted with JPS so that it could meet its obligation under the approval. JPS was not the housing association and therefore could not be the subject of statutory obligations. Any obligation on JPS would have to be found in the law of obligations. Only private law arrangements could oblige JPS to provide electricity to the residents by underground cable. From the agreed evidence, there was not contract between JPS and the residents to lay underground cables and therefore no private law obligation could arise in favour of the residents since the residents were not party to contract between HEL and JPS.

[20] The document explicitly referred to the Local Authority, in this case, the Kingston and St Andrew Corporation as it was then known, and went on to note at paragraph 16

(b) that the ‘scheme was approved by the Corporation on 9th September 1960, and the conditions of approval have been forwarded to the Minister’. The same paragraph closes with the words ‘[a]ll the conditions and modifications have been agreed to and form part of the scheme.’

[21] The scheme document stated at paragraph 17 that a copy of the proposed Restrictive Covenants is attached for approval. In the attached documents called the “Hope Housing Scheme Proposed Restrictive Covenants” it was provided as follows:

Note: Provision to be made to include Easements for the Water Commission, Jamaica Public Service Co. Ltd., and Jamaica

Telephone Co. Ltd., the draft Easements to be approved by the Crown Solicitor or other officer on behalf of Government.

[22] With the inclusion of all of the above-mentioned particulars in addition to other required particulars, the Hope Housing scheme was approved by the Minister who then brought the scheme before the House of Representatives by Ministry Paper No 14 of 1961 dated April 6, 1961, for approval. Paragraph 9 of this paper reads:

Provision has been made in the scheme for the undergrounding of wires for telephone, light and power in keeping with the requirements of the Ministry of Trade and Industry. The consequent additional cost involved in connection with the light and power wires is £51,010.

[23] The scheme, on April 27, 1961, was approved by the House of Representatives and by the Legislative Council on May 5, 1961.

[24] By instrument dated April 24, 1962 JPS was granted easement rights by the Director of Housing in an instrument made on April 24, 1962 titled 'Jamaica Public Service Company Limited Grant of Easement for Transmission and/or Distribution Lines'. The easement rights and liberties granted to JPS are set out in the second schedule. The court will quote only the second schedule which contains the terms of the easement:

*Full and free right and liberty to the Company now and at all times hereafter of installing ... erecting ... maintaining and operating its systems and undertakings including underground electrical transmission and/or distribution lines ... necessary for the purpose of the transmission and/or distribution of electric energy and current from any of the electricity stations belonging to or used by the Company by means of an underground system **in through upon***

***over and under the grantors lands** ... and of inspecting repairing ... removing and/or replacing the said systems and undertakings AND ALSO the liberty and right at all times hereafter of making all necessary excavations ... for the purpose aforesaid procuring the efficient operation of the said system or for any purpose relating to any portion of the Company's electrical undertakings. (Emphasis added and capitals in original)*

[25] It will be recalled that the scheme was being erected on Crown land. At the time the Director of Housing granted the easement no part of the land had been transferred to the residents. The scheme was not yet built. This easement was entered on the Certificates of Title for all the registered proprietors in the Hope Pastures scheme. It states:

Full and free right and liberty to the Jamaica Public Service Company Limited and to the Jamaica Telephone Company to carry out such works and inspect, repair and maintain such installations and to do such other acts and things as are mentioned and referred to in Grants of Easement sated the 24th day of April 1962 lodged in the Office of Titles.

[26] The grant of easement was simply to prevent JPS being a trespasser. That, respectfully, is not a source of legal obligation to provide electricity by underground cable.

The analysis

[27] The Hope Pastures scheme was the fourth type of scheme introduced by Act 5 of 1958, that is to say, it was a Part VIIA scheme. Nowhere in Part VIIA is there any express requirement that the housing association is to provide electricity. Section 46A (2) makes no mention of electricity. Section 46A requires the association to prepare and submit to the Minister a scheme and that scheme is to be accompanied by a plan and a statement dealing the issues specified in section 46A (2). The closest one comes to a requirement of providing any kind service is in section 46A (2) (f) which speaks to ‘particulars relating to water supply, drainage, sewage disposal and such other matters of like nature as the Minister may require.’ But there is no mention of electricity. This is not hard to understand because the provision of and supply of electricity is subject to its own statutory regime supplemented by private law provisions.

[28] Mr Patrick Foster QC contends that ‘the Housing (Amendment) Act gives the law making power to the House of Parliament to approve a scheme based on the particulars provided under 46A (2). Any other feature added to the scheme outside of the scope of

the legislation does not have the force of law as the House was not at large to give legal effect to any element of a scheme.’ The court agrees with this proposition. The Minister could not insist on any provision not in the statute. He could make a request but not impose an obligation to provide electricity.

[29] It is to be observed that there is nothing in the statute that precludes the Minister or the Local Authority from making requests to the housing association to make provision for an amenity or service not stated in the statute. The distinction must be made between what the law requires and what can be requested. The documents referred to gives the plain understanding that the provision of electricity by underground cables was a request made by the Government. There is no power in the legislation enabling the Minister to compel the housing association to make provision in the plan for underground cabling through which electricity passed.

[30] The evidence is that HEL agreed to provide the electricity in the manner **requested**. The accommodation of that request is reflected in Ministry Paper No 14. When the legislature approved the scheme it also approved the provision of the electricity by underground cable. It must be noted that JPS is not the housing association and therefore could not be made the subject of obligations under the Housing Act. The only person who can be made the subject of obligations under Part VIIA schemes is the housing association.

[31] When section 46C (2) (g) speaks of provisions of the scheme having effect as if they were enacted in law, all that was happening was that the statute was recognising that there may be matters spoken of in the scheme that were not required by the law and once the scheme was approved then those matters were treated as if they specifically stated in the actual text of the statute. This ties in with the power of the Director of Housing under section 46C (2) (e) where he could inspect the scheme and require the association to remedy any failure to conform to the scheme as approved by the Legislative Council. It is to be noted that the power to remedy the failure of the housing association is given to the Director of Housing. That is the only remedy provided by the statute.

[32] The result of all this is that a proper understanding of what happened between JPS and HEL is necessary. This can only be gleaned from the documents presented to the court. Upon careful consideration of the provisions of the scheme, it is clear that the Minister requested from HEL the implementation of the unique feature of an underground electrical system. HEL in fulfilment of that request negotiated with the relevant utility company, JPS, for their services. The services they sought from JPS involved the installation of the underground electrical system. JPS gave HEL a quote and installed the system at their cost. They were then reimbursed by HEL through the purchase of the properties, that is to say, the cost was included in the purchase price. Furthermore, on closer reading of the scheme, its provisions did not indicate that JPS was to maintain or install underground wiring. JPS installed the system in fulfilment of its **contractual arrangement** with HEL. The scheme document did not outline any duties for JPS; rather it only indicated that HEL negotiated with JPS and that certain expenditures were to be met by HEL for the installation of the underground wiring.

[33] The more time the court spends reflecting on the contract the more the court is convinced that the residents' position is unsupportable. There must have been at least two contracts: one between HEL and JPS to lay the cable as a conduit for the electricity and the other between the residents and JPS in which JPS agreed to supply the electricity and the residents to pay for the supply. There is no contract between the JPS and the residents regarding the underground cable. No privity, no cause of action on the contract to provide an underground cable conduit for the supply of electricity. HEL and JPS having performed there is nothing left under that contract for either party to do.

[34] The approved scheme is silent on who should replace the underground cable should that be required. In keeping with the analysis so far unless the documentation made explicit provision for that replacement obligation to be on JPS then there is no rational basis to infer that JPS took up such a responsibility. This perhaps explains why in this entire case there has been no talk of a contract between the residents and JPS for the supply of electricity by underground cable.

C. *The installation of overhead power lines*

[35] It was the submission of Lord Gifford QC that the installation by JPS of overhead lines was illegal having regard to their statutory duty to provide electricity by underground means. Counsel cited the cases of **The Attorney General v National Transport Co-operative Society Limited** [2009] UKPC Case Ref 48; Privy Council Appeal No 0017 of 2009. In that case the court found that the Franchise Agreement entered into by the Minister of Public Utilities and Transport on behalf of the Government of Jamaica with the National Transport Co-operative Society was illegal. This illegality was as a result of the Minister exercising authority he did not have, to grant a licence to the Society to operate bus services in Portmore when his powers were limited to the Corporate Area. Lord Gifford submitted that by parity of reasoning JPS as a statutory undertaker, was mandated by Parliament to provide electricity by underground means to the Hope Pastures Community. The ultimate conclusion was that the contracts entered into by JPS and select residents of Hope Pastures for the conversion from an underground to an overhead connection was illegal. In light of the court's reasoning earlier, the court cannot accept this proposition.

[36] The court finds that the contract entered into between the residents of Hope Pastures and JPS was not illegal on the basis of JPS breaching a statutory duty as JPS was not mandated by the Act to provide electricity only by underground means. As the court has found it was HEL which had the duty to ensure that the development include underground cables to provide electricity.

D. *Do the claimants have any cause of action under the Housing Act against JPS?*

[37] The court is of the view that there is no cause of action against JPS at the behest of the residents of Hope Pastures. JPS was not the housing association under the statute. If JPS is not the housing association then it cannot be the subject of statutory duties under the Housing Act.

[38] The test for determining whether private citizens have a cause of action under an Act of Parliament has been stated in **X (Minors) v Bedfordshire County Council** [1995] 2 AC 633. Lord Brown-Wilkinson said at page 731:

*The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v Wandsworth Stadium Limited*; *Lonrho Ltd v Shell Petroleum Co. Ltd (No. 2)*. However, the mere existence of some other statutory remedy is not necessarily decisive. It is possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statutes of criminal penalties for breach: *Groves v Wimborne**

[39] There is nothing in the circumstances of the present case that remotely suggests that the legislation was crafted to give a private law cause of action. Any defect in the building of the scheme was to be remedied by the Director of Housing taking action under section 46C (2) of the statute.

Disposition

[40] The questions repeated for ease of reference and the answers follow.

(1) Whether by reason of the approval by the House of Representatives on 27th April 1961 and the Legislative Council on 5th May 1961 of the Hope Housing Scheme ('the scheme'):

- a. the defendant was obliged by law to install and maintain a supply of electricity to the residents in the scheme by means of underground wires;*
- b. the actions and proposed actions of the defendant between about 2014 and the present day, in installing or seeking to install a supply of electricity by overhead wires were illegal.*

[41] The short answer to this first question is no. No obligation was imposed on JPS by law.

(2) Whether the claimants have any legal right to the supply of electricity only by means of underground wires by contract and/or pursuant to the instrument made on the 24th day of April 1962 between the Director of Housing and the defendant granting the defendant certain easement liberties and rights.

[42] The answer to this is also no.

(3) Whether the claimants and/or residents of the scheme have a right to seek and obtain relief by way of:

- a. an injunction restraining the defendant from changing the mode of supply of electricity to their residences from underground wires to overhead wires;*
- b. a mandatory injunction ordering the defendant to restore a supply by underground wires to those properties which have been provided with a supply by overhead wires;*
- c. a mandatory injunction ordering the defendant to dismantle all poles and wires and other equipment which have been installed within the area of the scheme;*
- d. damages for any loss suffered by reason of the illegal installation of an overhead supply.*

- [43]** The court understands this to mean that the claimants are seeking to find out whether on the agreed facts it can succeed against JPS. The answer is no.
- [44]** Costs of the defendant to be agreed or taxed. Leave to appeal refused. Injunction discharged. Matter to be set down for case management conference to determine whether rest of the claim can go forward.