



[2016] JMSC Civ. 167

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007HCV00044

BETWEEN	JOHN OUTAR	1ST CLAIMANT
AND	JACQUELINE OUTAR	2ND CLAIMANT
AND	JAMAICA PUBLIC SERVICE COMPANY LIMITED	DEFENDANT

IN OPEN COURT

Michael Howell and Matthieu Beckford, instructed by Knight, Junor & Samuels, for the claimants

Daniella Gentles- Silvera and Miguel Williams, instructed by Livingston, Alexander & Levy, for the defendant

May 1, 2 & 3, 2012, September 27 & 28, 2012, January 28, 2013 & March 18, 2016.

Breach of contract- Negligence- Duty of care- Breach of duty of care – Sufficient relationship of proximity or neighbourhood- Burden of proof- Balance of probabilities- Experts' evidence

ANDERSON, K., J.

THE CLAIM

[1] This is a claim by the claimants for damages for trespass to property and/or negligence and/or breach of contract, arising from a fire which destroyed an apartment building, which then also functioned as the claimants' residential address. From the onset, it ought to be noted that the 1st claimant, Mr. John

Outar, filed a notice of discontinuance on May 02, 2012, during the course of the trial. This was on the premise that he was not a proper party to the matter as there was no contract for the provision of electricity between himself and the defendant. Hereinafter, the defendant is referred to as 'J.P.S.' or 'the defendant', interchangeably. The claim was thereafter only pursued against the defendant, by the 2nd claimant, Mrs. Jacqueline Outar.

- [2] The 2nd claimant in her particulars of claim contended, that it was an expressed or implied term of the contract of service for electricity, that the provision of electricity would be done with care, caution and in a manner so as to not cause fire or any damage to the claimant's property. Also, it is her contention that the electrical wiring owned and/or managed and/or controlled and/or constructed by the defendant, which ran from the defendant's pole to her property, caused a fire and said fire was caused by negligence of the defendant.
- [3] Her particulars of negligence contained averments which included, inter alia, that the defendant used defective electrical wiring to provide electricity from the defendant's pole to the claimants' property, failed to take reasonable care to use wiring and/or equipment in providing electricity to the claimants' property that would not cause a fire to the property and failed to carry out the requisite checks and/or maintenance of electrical wires to prevent internal heating of the wires and consequently, a fire on the claimants' property.
- [4] The defendant in its defence denies liability. It contends, inter alia, that it is only responsible for the service wire which is connected to the pothead located on the property and it was not negligent in installing the service wire nor did it install a defective service wire.

BACKGROUND TO THE CLAIM

- [5] On January 04, 2007, the 2nd claimant filed her claim form and particulars of claim, claiming for damages against the defendant, arising from the damage to the apartment building, which was caused by the fire, which occurred on January

17, 2001, at premises located at Knollis District, Bog Walk, in the parish of St Catherine. The 2nd claimant and Mr. John Outar, are allegedly the owners of this property.

- [6] Several witness statements and the reports of three expert witnesses were filed in this matter. The expert report of Kenston Tomlinson, whose testimony formed part of the defendant's case, was filed on March 14, 2011. Two expert witness statements prepared by Fitzmore Coates, whose evidence was part of the 2nd claimant's case, were filed respectively on April 04, 2011 and April 05, 2011. The original fire report prepared by Mr. Coates on February 14, 2001, was attached to his witness statement filed on April 04, 2011. The expert report of Kevin Donaldson, whose testimony was also part of the defendant's case, was filed on May 06, 2011. A judge's bundle and supplemental judge's bundle were filed respectively, on June 21, 2011 and May 1, 2012, by the claimant.
- [7] On July 13, 2011, Mr. Fitzmore Coates was unavailable and trial was adjourned to May 1 - 3, 2012.
- [8] On May 1, 2012, the claimants were permitted by Anderson J. to file and serve an amended particulars of claim and an amended witness statement of Mr. John Outar and the defendant was permitted to file and serve an amended defence and granted an extension of time to file and serve its skeleton arguments. The claimants' skeleton arguments were filed on April 27, 2012. An amended particulars of claim and the amended witness statement of John Outar were filed on May 01, 2012 and an amended defence and skeleton submissions of the defendant were filed on May 03, 2012.
- [9] The trial commenced on May 01, 2012, with the sworn testimony of John Outar and continued over the next three days with evidence from the 2nd claimant and her other witnesses, namely: Oattie Williams and Andy Santo. One of the experts, Mr. Fitzmore Coates also gave sworn testimony. On May 03, 2012, an order was made requiring, inter alia, further disclosure of documents by the 2nd claimant

and providing the option for further cross-examination of her witnesses by the defendant, if they so desired, on issues/ matters arising from the supplemental list of documents to be filed by the 2nd claimant. The trial was adjourned to September 27 and 28, 2012.

[10] The 2nd claimant's supplemental and further supplemental list of documents were filed on May 29, 2012 and September 28, 2012, respectively, and on June 19, 2012, the defendant filed a notice of intention to cross examine Mr. Coates and Mr. Santo at the continuation of the trial.

[11] On September 27, 2012, counsel for the defendant indicated that the defence was no longer seeking to cross-examine Mr. Santo but it had a few further questions for Mr. Coates. Mr. Coates was however absent and the defence proceeded with its case by calling its first witness, Mr. Kevin Donaldson; thereafter, Mr. Coates gave further evidence. On September 28, 2012, the defence called another witness, Ms. Deidre Wedderburn and Mr. Coates was also further cross-examined. The trial was adjourned to January 28 and 29, 2013 and the 2nd claimant ordered to file and serve an amended further supplemental list of documents. Said amended further supplemental list of documents was filed by the 2nd claimant on January 28, 2013.

[12] On January 28, 2013, Mr. Donaldson continued his evidence. Mr. Kenston Tomlinson also gave sworn testimony. This court reserved its judgment and ordered that closing submissions and bundle of authorities be filed by February 07, 2013.

ISSUE:

[13] This court has concluded that from the submissions and evidence presented in this matter, there is one primary issue which arises for determination and that is:

- (i) Whether the defendant breached the duty of care it owed the 2nd claimant and as a consequence, the claimants' home/ apartment complex, was destroyed by a fire.

SUBMISSIONS

[14] The 2nd claimant has essentially, via her attorney, submitted that:

- (i) the leaning of the light post outside the property affected the wires in such a way that an over-current/ over-voltage/ surge was produced which caused a short circuit inside the breaker box in the property which caused the fire which destroyed the property;
- (ii) in addition or in the alternative, the defendant by the very nature of its operations to supply electricity, produced an over-current/ over-voltage/ surge which caused a short circuit inside the breaker box in the property which caused the fire which destroyed the property;
- (iii) the case of **Donoghue v Stevenson** [1932] UKHL 100 is applicable in that it was foreseeable that negligence by the defendant created a real risk of fire to customers;
- (iv) the claimant, John Outar and Andy Santo have proven to be credible witnesses and the truth of their statements should be accepted;
- (v) judicial notice could be taken of the fact that the defendant at times, compensates its customers for damaged equipment due to, inter alia, power surges caused by its operations;
- (vi) it was an express, or implied term of the contract between the parties that the defendant's provision of electricity would be done with such care, caution and in such a manner as to not cause a fire or any damage to the claimants' premises;

- (vii) the defendant failed in its duty to inspect and/ or maintain its equipment in good working order, or in such a condition that would not cause damage to the property; and
- (viii) Mr. Tomlinson, who was employed to the defendant and Mr. Donaldson, an expert employed by the defendant in several cases for pay, could possibly be biased in their findings.

[15] The defendant essentially, has, through its attorney, submitted that:

- (i) the 2nd claimant has failed to show that the defendant breached any duty of care that it owed and has failed to establish any liability on the part of the defendant, with respect to negligence or breach of contract;
- (ii) the evidence of Messrs. Donaldson and Tomlinson is to be preferred and relied on, rather than that of Mr. Coates and other witnesses. The evidence of Mr. Coates is inconsistent, unreliable and not credible;
- (iii) the corona effect only happens on wires of extremely high voltage and this phenomenon was highly unlikely, as the wires that ran to the claimants' house, were not high voltage and there was no evidence of a power surge.

ANALYSIS

[16] This court foremost observes that in order for the 2nd claimant to establish her claim for damages for negligence, she must prove that the defendant, "*the supplier of electricity, had a duty of care to her, that in providing its service, it would exercise the care expected of such a utility company involved in that business activity; that there was a breach of that duty; and that as a consequence of that breach her business place was consumed in flames*":- see **J.P.S v Marcia Haughton**, SCCA No. 136/2000 delivered on December 20th, 2007, per Cooke J.A. at para. 3. The claimant must therefore establish all three elements, in order to prove, that the defendant was negligent.

- [17] Harris J.A. in **J.P.S v Marcia Haughton** (op.cit.), at pg. 31, agreed that “*the question as to whether negligence on the part of the appellant has been established is one of fact. A claimant’s success in an action for negligence is dependent on whether there is cogent evidence to establish that the defendant’s negligence caused his injury. In discharging the burden of proving the defendant’s negligence, the claimant must show the existence of sufficient relationship of ‘proximity’ or ‘neighbourhood’ between the defendant and himself, the foreseeability of damage by reason of the defendant’s negligent performance of an operation resulting in injury to the claimant*”- see **Caparo Industries Plc v Dickman** (1990) 1 ALL ER 56.
- [18] The 2nd claimant is tasked therefore, with the burden of proving, that on a balance of probabilities, the defendant was negligent and the fire resulted from its negligence.
- [19] There has been no dispute and the evidence clearly indicates that the parties were engaged in a contractual relationship, that is, one for the provision of electricity. Simultaneously, it is patent that the defendant would have also owed the 2nd claimant, its customer, a duty to take reasonable care in its provision of electricity so as to ensure that the 2nd claimant suffered no injury. The nature of the interaction between the 2nd claimant and the defendant created a sufficient relationship of proximity, as Mrs. Outar was someone who was closely and directly affected by the defendant’s actions, and as such, she ought to have been within its reasonable contemplation when it undertook its act(s) and/ or omission(s). The question for determination therefore, is whether the defendant breached the duty of care it owed to the 2nd claimant and consequently, the claimants’ house was destroyed by a fire.
- [20] The evidence of the 2nd claimant’s witnesses as to the possible cause of the fire, perhaps expectedly, conflicted with that of the defendant’s witnesses. In such an instance, the court must sufficiently evaluate the totality of the evidence and draw reasonable inferences. The evidence of the experts, which this court finds

to be critical in the instant case, must also be properly and thoroughly assessed- see Cooke J.A. in **J.P.S v Marcia Haughton** (op. cit), at para. 12.

- [21] This court considers that a critical starting point is whether the defendant was responsible for the electrical wiring beyond the pothead.
- [22] From the evidence presented, two of the experts (Fitzmore Coates and Kevin Donaldson) agreed that the wires from the pothead (the point where the defendant's power supply connects to the wires in the building) to inside the home and the wiring inside the home, were the sole responsibility of the owners. Mr. Coates further averred that the defendant's responsibility was for its service wires which ran from the pole to the pothead. Mr. Andy Santo, an electrician and a witness for the claimant, testified that it is the workman (someone employed to the owner) who is responsible for purchasing and installing the pothead, panel box and wires. It was also manifest from the evidence, that the defendant only becomes involved in the process of providing electricity, after the building is passed by a Government Electrical Inspector and the meter is paid for. The 2nd claimant and her husband testified that the house was passed by a Government Electrical Inspector.
- [23] This evidence is critical because, from such, it can be and has been inferred by this court that, unless the cause of the fire was associated with some surge and/ or defect on the defendant's service wire and/ or pole, the defendant would not have been in breach of its duty and liable for any loss occasioned.
- [24] It has been the 2nd claimant's contention that a light post belonging to the defendant impacted its service wire in a way which produced a surge that caused a short circuit inside the breaker box and caused the fire. The evidence of the 2nd claimant's witnesses, including Mr. Coates, whose evidence formed a part of her case, indicate that the said light post from which the defendant's service wire ran, leaned towards the road. The defendant's witnesses did not refute, or in any way

challenge this evidence nor did they offer any other evidence on the maintenance and/ or condition of the pole.

[25] The evidence presented to this court on behalf of the 2nd claimant, that the defendant's pole, from which its service wire ran to the claimants' property, leaned towards the road, was consistent. The angle of the leaning of that pole though, was not made known to the court. In other words, it was not made known to the court, how far away from the ground the pole was leaning, nor was it made known to the court, how long the pole had been leaning, whether in terms of hours, days, weeks, months or even years, before the fire. This court observes that sufficient evidence was not presented before it, to substantiate counsel's contention that the leaning of the light post impacted the wire in such manner as to produce a surge which caused the short circuit, that eventually led to the fire which destroyed the property. Notably, Mr. Coates admitted on cross-examination that the details of a leaning wooden light post were not mentioned in his report prepared in February, 2001. Such an omission is curious, as undoubtedly, one would anticipate that a Chief Forensic Analyst, with expertise in fire investigation, would appreciate the potential significance of such details. In the circumstances therefore, it does appear to this court that the said contention, which was placed before this court, by the 2nd claimant's counsel, as part and parcel of his written closing submissions, was unsupported by any evidence and in reality, appeared to be nothing more than an afterthought, of that counsel.

[26] Mr. Donaldson, another expert, also averred and this is something with which the 2nd claimant took no issue, that it is the owner's prerogative to maintain the electrical integrity of the premises from time to time. Hence, as far as the evidence permits, ostensibly, the 2nd claimant and her husband, were responsible for maintaining in a proper and safe condition, all the wires that ran from the pothead to the apartment complex and inside the apartment, where the 2nd claimant and her husband lived and which is hereinafter described as, 'the house.'

- [27]** The sole eyewitness to the fire was Mr. Andy Santo. His testimony was that the fire (blue flames) was at the point where the wires were attached to the post, which leaned over the road. He then alerted the owners and thereafter, he heard a loud explosion and saw black smoke coming from the ceiling of the house. The 2nd claimant also testified that she heard Mr. Santo shouting that fire was on the wire and thereafter heard a loud explosion and there was smoke coming from the ceiling into the house.
- [28]** Det. Inspector Oattie Williams had also stated in his witness statement at para. 8, as part and parcel of his examination-in-chief evidence, that the fire started from the pole and went to the house. He however agreed on cross-examination, that he had no proper basis for saying how the fire started and he would not know how the fire started until the forensic experts arrived. His evidence, as such, in that regard, does not offer the court much assistance.
- [29]** The evidence of an eyewitness in such a matter as this, could have been of importance. In the instant case though, the eyewitness could only speak to the question as to where, from his viewpoint, the fire began. That does not, in and of itself, assist this court in ascertaining evidence, as to the cause of the fire. Accordingly, while that evidence from Mr. Santo has been considered and given some importance, it is not, by any means, evidence which is, in any way, in and of itself, indicative as to the cause of the fire. It was the evidence of the three experts, as to the cause of the fire, which was very important. As aforementioned, Mr. Coates- who is a former employee of the Forensic Services Department of the Government, gave testimony that formed part of the 2nd claimant's case; the evidence of Mr. Donaldson, a Professional Engineer and Mr. Tomlinson, a Claims Engineer, who was employed at all material times, by the defendant, on a permanent basis, formed part of the defendant's case. The expert witnesses agree that the fire started in the roof and more significantly, that the fire was caused by an electrical short circuit, which originated in the roof of the 2nd claimant's house. The major point of incongruity arises however, on what

precipitated the said short circuit. This court has found it prudent, in answering that question, to analyze the evidence of each expert witness.

THE EVIDENCE OF THE EXPERT WHO TESTIFIED AS PART OF THE 2ND CLAIMANT'S CASE.

[30] Mr. Coates has consistently maintained that, based on his special observations, which included, inter alia, findings that the electrical wiring from the defendant's pole to the building showed signs of extensive internal heating, the wires to and from the electrical circuit breaker on the upper sections of eastern wall of the central bedroom showed signs of extensive heating, fusing and beading and that the building burnt from top downwards with the fire radiating out and mainly from the upper section of the central bedroom, the fire was caused by an electrical short circuit which set the roof alight. There have however, been several inconsistencies regarding his averments as to what caused the said short circuit.

[31] In his report prepared in February 2001, he does not state what caused the short circuit, but in his statement filed on April 04, 2011, he avers that it was caused by arcing between the electrical wires from the pole due to sustained high current surge. Arcing, he defined as the jumping of the current between conductors. On cross-examination, he stated that when a high volume of electrical current reached a short circuit, it could cause an arc. When asked by the court whether, when current passes through wires and reaches a point where there is a short circuit, an arc is created, he responded that it is the arcing that creates the short circuit. At a later point, he testified that a short circuit can create an arcing and an arcing does not always, but can create a short circuit.

[32] The inconsistency in his evidence above is manifest. He has averred in his witness statement that arcing causes a short circuit but later in his oral testimony, he states that it is the short circuit that causes the arcing, although arcing may create a short circuit. It was the evidence of Mr. Kevin Donaldson, that it is arcing which can result in a short circuit.

- [33]** Mr. Coates had certified two witness statements. His original witness statement is dated April 04, 2011, and his 'amended expert witness statement' is dated April 05, 2011. In both of those witness statements, he averred that his investigations revealed that there were no low voltages or power surges in the area immediately prior to the fire. On cross-examination however, he stated that the short circuit occurred as a result of the over-current and the effects of the over-current manifested itself at the weakest point in the circuit, by generating a short. He also agreed with the court, when he was questioned by the Judge, that his determination that there was no power surge in the area, immediately before the fire, would be inconsistent with his conclusion, that the short circuit which caused the fire was due to a sustained power surge.
- [34]** Additionally, it was his evidence that the wires in his report which he said showed signs of extensive heating, were wires in the junction box (where the breakers are located) which was located on the upper section of the wall in the central bedroom, where the short circuit occurred. The short circuit, he agreed, would have generated a lot of heat. This is more in accordance with there having been a power surge, which explains why said wires were so heated and conflicts with part of his evidence in chief, where he testified, that there was no power surge.
- [35]** In his amended witness statement, he averred that the short circuit was caused by sustained shorting of the electrical leads from the defendant's pole, to the building. He further stated that the events which led to the fire, would have started at the defendant's pole and manifested itself at the weakest point in the circuit, which is the breaker panel on the upper section of the wall in the bedroom. Nevertheless, he also agreed that, the heating up of the wire arising from the short circuit inside the house could lead to sparks on the wire leading to and on the defendant's pole.
- [36]** Det. Inspector Williams testified that the police took the burnt wire from the possession of the defendant's personnel and the wire was taken to the station.

He averred that they called a forensic officer to conduct an investigation of the property and that Mr. Coates went to the scene to do an investigation and came to the station to examine the burnt wire, which was stored in the evidence locker. The 1st claimant also testified that, as far as he was aware, the wire was sent to the lab. Mr. Coates stated however, that on January 23, 2001, when he visited the premises, he saw the service wire on the ground of the said premises. This however could not be so, because as he agreed on cross-examination, Det. Inspector Williams had removed the wire from the premises on January 17, 2001.

[37] The reasonable observer would realize that Mr. Coates' evidence, as to where the service wire was, when he first saw them, is patently in stark contrast to that of Det. Inspector Williams and even, the 1st claimant. Mr. Coates agrees that the wire was removed but maintains that he saw the wire on the ground, when he visited the property six (6) days later. In the circumstances, this court finds the evidence of Mr. Coates on the issue as to where the service wire was located, when he first saw it, to be inconsistent and not credible and accepts, that the defendant's service wire could not and was not present at the premises on the day when Mr. Coates visited the property and that, he did not see it on the ground, as the said wire was confiscated and taken to the police station on January 17, 2001, and was subsequently, examined by Mr. Coates at the police station.

THE EVIDENCE OF THE EXPERTS WHO TESTIFIED AS PART OF THE DEFENDANT'S CASE.

[38] Mr. Kevin Donaldson and Mr. Kenston Tomlinson have essentially averred that, the fire radiated from a point (upper section of the central bedroom) far removed from the point on the building to which the defendant's service cables were attached and the damage suffered by the 2nd claimant, was not from a cause relating to the quality of the defendant's infrastructure up to the pothead before the meter, or the quality of electricity being supplied to the premises.

- [39]** Mr. Donaldson stated that if a short circuit occurred between the defendant's pole and the customer's pothead, the current would flow away from the customer and back to the street, which would cause damage to only the defendant's service wire, not a fire in the roof of the central bedroom of the premises. The short circuit, he explained, is a short-cut of the current flow which originates from the transformer, takes a u-turn and heads back to the transformer. Thus, where a short circuit occurs at the defendant's pole, no current can flow beyond that point towards the direction of the house. This is significant, he says, because no extra high current will flow or can flow within the home, the extra high current being the initiator of any possible fire. He further noted that where the short circuit is, is the point of the most heat, which could cause the fire.
- [40]** On cross-examination, he admitted that he did not personally investigate the source of the fire and has no experience in investigating the origin and cause of fires. He also agreed, that the likelihood of a fire occurring was dependent upon the condition of the wires in general but on re-examination, he stated that it was extremely improbable that the condition of the wire in itself would be a contributing factor to the fire within the household, as those wires were subjected to rigid standards and last for decades. He opined however, that where there is a connection of wires, the point of connection is more likely to contribute to a fire in the household.
- [41]** Mr. Tomlinson gave similar evidence in relation to the nature of a short circuit. He averred that a short circuit is an electrical fault that causes a very large current to flow and this generates substantially higher than normal heat. Only the wires between the source and the point of short circuit, experience this excessive current flow and thus, since the current flows from source and back to source, no current flows beyond the point of the short circuit. He further explained, that, in an energized electric circuit, although voltage is present, no current will flow unless there is a demand for it, due to the presence of a load; in the household situation, the demand may be due to, inter alia, the presence of a short circuit. The value of the current drawn when there is a short circuit is very large and if

the current flow due to short circuit condition is not quickly interrupted, it will lead to a fire.

[42] He also testified, that the defendant supplied its residential customers, 110/ 220 volts, but agreed on cross-examination, that a surge would influence the amount of voltage that passes through the wires and said amount of voltage can increase or decrease and that a 6% deviation from the standard voltage was within the defendant's policies, but that it was possible for the fluctuation in voltage to exceed 6%.

[43] The evidence of the experts, who testified on behalf of the defendant, was largely similar but the court wishes to highlight a point of divergence, which arises from their testimonies. There are three specific aspects of evidence, which relate to that divergence and those three aspects are highlighted immediately below.

(i) The experts each defined direct and alternating current in different terms. Mr Donaldson averred that with alternating current, the polarity of the conductor is alternating between positive and negative, it is neither always negative or always positive but with direct current, one conductor is always positive and the other always negative. Mr. Tomlinson defined direct current as current which travels outward in one direction from the source to the load and from the load back to source, except that it is generally supplied by batteries. Alternating current, he says travels in the same direction as direct current, except that once it gets to the source, it reverses its direction, retraces its steps and goes back to the source. This forward and reverse motion goes on indefinitely.

(ii) Further, it was Mr. Donaldson's evidence that he was not certain that the defendant did not supply direct current but Mr. Tomlinson averred that the defendant only uses alternating current to supply its customers.

(iii) Mr. Coates had testified in this regard that he did not know that the defendant's system is alternating current but stated, that the wires to and from the top of the circuit breaker, are each always positive and always negative and disagreed with the suggestion that none of the wires leading to the circuit box are called positive or negative wires.

[44] Mr. Donaldson averred that with a short circuit at the defendant's pole, no extra high current would flow in the home. Mr. Tomlinson stated that a short circuit on the service conductor would not result in a corresponding current within the 2nd claimant's installation as short current flows between the point of the short circuit and the source of the power supply. It does seem however, from Mr. Donaldson's evidence, that even with a short circuit on the defendant's pole and/or service wire, some amount of current could still flow into the claimants' house. There is no doubt that the current would still be flowing as Mr. Tomlinson did testify, that a short circuit could prove to be a demand for electricity, in the household. There is nothing to suggest that it would be otherwise in the case of a short circuit on the defendant's service wire.

[45] There is no doubt that neither of the experts who gave evidence, as part of the defendant's case, investigated the fire originally and/ or personally and Mr. Donaldson has admitted to having no experience in investigating the origin and causes of fire. Both experts have essentially agreed that the fire was not caused by some defect in the quality of the defendant's infrastructure. Nonetheless, Mr. Tomlinson has stated that prior to the fire, there was no indication of the status of the defendant's service conductors to the claimants' premises and it is always possible that the defendant could deviate from its standard voltage, with a resultant surge. It does appear, that the true status of the service wire prior to the fire was unknown to the defendant. Even more, there was no evidence proffered on the maintenance of the wires, the last time prior to the fire that the wire was evaluated, or the results of any test, if any, done by the defendant on said wire after the fire. In the circumstances therefore, none of the experts who gave testimony as part of the defendant's case, was able to accurately attest to

the quality or condition of the wire before the fire. This though, it should be noted, is equally true, as regards the expert evidence being relied on by the 2nd claimant.

POINTS OF DIVERGENCE

- [46] Mr. Coates averred on cross-examination that there could have been an over-current, which generated a lot of heat in the system which eventually led to the short and that would have been a function of something outside of the building. He further stated that there was heavy burning at one end of the service wire and some scorching at the other end. The heavy burning he said, was from the end coming from the pole and he knew this from his examination of the wire as the other end was detached from the pothead. He explained that the end of the wire which had the fused insulation, had raw wire. At the other end, the insulation had gone all the way and corresponded to the insulation at the pothead. The most damage he observed was on the positive wire carrying the current from the pole to the house.
- [47] He further stated that the damage caused by the heat was much greater at the point where the wires intersect with the pole, than where the pothead intersects with the wires from the home. He averred that, if the fire had originated from the circuit box, then the damage by the heat seen at the pothead would have been far greater than it actually was. However, he admitted further on in cross-examination, that he did not mention in his report prepared in 2001, that the wires leading to the pothead were scorched and there was fusing and beading of wires in the living room. He was unable to explain why he had made these omissions, other than a possible oversight. Importantly, he agreed with defence counsel that, it was very significant that the wires in the pothead were scorched, as that could help to determine the cause of the fire.
- [48] Expectedly, the defendant disagreed with him. Mr. Kevin Donaldson stated that it is a short circuit which causes an over-current and an over-current cannot cause

a short circuit. He also proffered that a person cannot tell by looking at the defendant's service wire, which has been subjected to heat, which end of the wire the heat came from. Furthermore, he opined that he would not expect to see scorching on the pothead, if there was some problem on the defendant's pole, because, if there is a short at the defendant's connection, there is no current flow beyond that point and it is not possible to have scorching at the pothead or panel. Mr. Coates agreed that no current flows beyond the point of the short circuit.

[49] Although Mr. Coates stated that the scorching could have come from the burning building, it becomes very obvious that this information regarding the scorching of wires connected to the pothead is critical because, as agreed by the experts, it could provide a clear indication of the cause of the fire. The unusual occurrence however, is that Mr. Coates did not include this vital detail in his report of February, 2001, nor in any of his witness statements. Yet he admits that it was significant. One would fathom that a man of Mr. Coates' experience, as he has admitted to being called on, on prior occasions to do fire investigations, and expertise, would, with the state of events so fresh in his mind, understand the importance of recording such information in his report of February, 2001. He testified that, he signed and is familiar with the contents of the report, which illustrates that he has a comprehensive understanding of the contents of same.

[50] There were also several observations contained in his witness statement and amended witness statement, which were not present in his notes or in his report of 2001. He denied that he made up these observations but could not explain their absence and stated that he just did not include these observations in his 2001 expert report. When asked if he kept the observations in his mind for a decade, he responded that he recalled certain things. This court is puzzled by the fact however, that he is able to recall such detailed observations after a decade but was delinquent in so far as he failed to record details, which he found to be significant, weeks after the fire occurred.

[51] Another point of divergence between the experts was the distinction, if any, between transmission and distribution wires. Mr. Coates, while he was being cross-examined, disagreed with the suggestion that transmission lines and distribution lines are not the same. In other words, to paraphrase, he sought to have this court accept his evidence, that transmission and distribution lines are the same. He stated that all lines that carry power are transmission lines. He defined transmission lines as lines that carry power to a residence or area and distribution lines, as lines which carry power from the pole to a residence and further added that there are transmission lines that are designed to carry high voltages and distribution lines designed to carry lower voltages. In response to the suggestion that distribution lines which carry much lower voltage than transmission lines, were the ones connected to the household in question, he said that distribution lines have been referred to as transmission lines. This court is however, led to ask the question, that if, as averred by Mr. Coates, distribution lines are also properly referred to as transmission lines, why then did he state, that transmission lines are designed to carry high voltage and distribution lines are design to carry low voltage; for what reason, in light of Mr. Coates evidence that transmission and distribution lines are the same, would they not carry equal voltage? That question, can only be asked rhetorically, at this stage.

[52] Mr. Kenston Tomlinson, averred that distribution lines are lines used to supply electricity service to customers, whilst transmission lines are those lines used to link sub-stations with each other, as well as to link them to the power stations. He stated that transmission lines have a minimum of 69,000 volts, whilst distribution lines are 110/ 220 volts. He testified that in his experience, transmission lines are never linked to households, as their voltage is too much for consumers to utilize and under the contract of supply, the defendant supplies its residential customers, 110/ 220 volts.

[53] This court observes that Mr. Coates testified during cross examination, that it is the distribution lines which ought to have 110/120 or 200/240 volts. He also said that the transformer regulates the power and limits the current that is supplied to

the premises and it will do so, at either 110 or 220 volts. It would appear then, that Mr. Coates is in agreement with the evidence of Mr. Tomlinson that distribution lines are the ones used to supply electricity to the customers. He seems to accept that distribution lines are low voltage wires and were the ones connected to the pothead on the premises in question. This court also finds that there is a distinction between transmission and distribution lines, with the former being of a much higher voltage and being used to supply substations.

[54] The experts also disagreed on what caused what appeared to be blue flames which emitted from the point where the wires were attached to the defendant's pole. Mr. Santo averred that he saw blue flames at the point where the wires were attached to the post. Mr. Coates stated that an electrical discharge and ionization around the area would result in blue flames. This he referred to as the Corona Discharge Effect, which he explained is simply that what appears to be the blue/ purple light seen emitting from the transmission lines, is as a result of the space/ air between or around the lines (also called conductors) becoming charged. This may result from high current being transmitted. The said blue/ purple light will cover the area of the lines which are being charged. It is something that occurs on transmission lines but has been observed on distribution lines and could be caused from, or assisted by dust and moisture in the atmosphere.

[55] He also, however, agreed with defence counsel, while he was being cross-examined, that high voltage results in an intense electro- magnetic field around the wires, which would then, combined with moisture or dust, cause an effect. Pursuant thereto, it was suggested to him that the corona effect was not caused by ionization of the space between the lines but by the electro-magnetic field mixing with the dust and/ or moisture. He however responded that both events were the same. He further explained that it is the extra high voltage which causes the space around and between the lines to become ionized and such ionization, leads to the discharges, which is the corona effect. The presence of moisture between the lines, assists in the manifestation of the effects.

- [56]** He also stated that an over-current could cause a corona effect, which in turn generates additional electricity in the system and further heats the conductors. He further explained that even if there was a corona effect on wires leading from the defendant's pole, electrical current could still be carried from the pothead to the claimants' home.
- [57]** As aforementioned, Mr Coates agreed that the heating up of the wire arising from the short circuit inside the house could lead to sparks on the wire leading to and on the J.P.S. pole, but disagreed with the suggestion that the said sparks could have appeared to be blue in colour to an observer and that the reason for the blue appearance was the composition of the insulating material. He was adamant that the blue colour was as a result of the ionized air, but later agreed that the burning of the wire, depending on the metal they were made of, could give a blue appearance. He disagreed that if a corona effect occurred, the transformer on the defendant's pole would have blown and shut down power to everything.
- [58]** Mr. Donaldson stated that the corona effect cannot cause an over-current. He stated that instead, it would have a dissipation effect. He further explained that the corona effect is associated with extremely high voltage. The extremely high voltage produces an intense electro-magnetic field encircling the line. The said electro-magnetic field ionizes the air surrounding the line and causes the air to become a temporary conductor. At that time, the line conductor can discharge electricity which is usually seen as a bluish discharge, radially around the line conductor. The bluish discharge occurs only in the surrounding air and then dissipates and the charge goes nowhere.
- [59]** He continued in his evidence that the typical type of utility lines that this phenomenon occurs on, are transmission lines, which particularly in Jamaica, carry voltage in excess of 69,000 volts. These lines, he said, interconnect a utility company's generating plant sub-distribution stations and generally, are run in non-populous areas. He further stated that it was extremely improbable for a corona effect to occur on a service wire to a residential home, as a corona

effect occurs on extremely high voltage only and a service wire handles J.P.S.' lowest available voltage, like 110 or 220 volts. This voltage, he opined, just does not have the resulting high electro-magnetic field necessary to produce the corona effect, or a corona discharge.

- [60]** He opines that the most likely reason why persons saw a blue flame coming from the wire, is the result of a short circuit current. He explains that a short circuit current can be abnormally high, in the range of thousands of amps. This high current will generate extreme heat which can cause material surrounding the wire to catch on fire or be degraded. That, he says, is expected at a joint such as where the service wire connects to the defendant's take off pole (the last J.P.S.' pole before it supplies the customer's premises). The service wire connects to the defendant's pole and it also connects to the customer's pothead. These connection points are wrapped with tape and these are the points that could have resulted in exhibiting a flame, a blue flame, as a result, only from a short circuit current.
- [61]** Mr. Coates had essentially averred that there is no distinction between his explanation of the corona effect and that of Mr. Donaldson, as it is the high voltage, which results in the ionization of the space between and/ or around the lines and when combined with dust or moisture, it manifests as the corona effect. Importantly, this court observes that the defendant has maintained that the corona effect only occurs on wires of high voltage, that is, transmission wires and these lines do not serve to supply current to residences.
- [62]** That is important evidence, which Mr. Coates has not convincingly or sufficiently countered. He has given conflicting evidence regarding the distinction between transmission and distribution wires. He has defined both in the same vein, but simultaneously, accepts that one carries high voltage and the other, low voltage. He has said that the corona effect can occur on both lines but agrees that the transformer regulates the power and limits the current that is supplied to the premises and it will do so, at either 110 or 220 volts, which he accepts, is the

voltage of distribution lines. If the transformer regulates the current going to the premises at 110 or 220, then that means and the court accepts, that distribution lines were the wires used to transmit electric current to the premises of the claimants. Further, he agreed that the burning of the wire, depending on the metal they were made of, could give a blue appearance. On an evaluation of the totality of the evidence presented, this court finds that the corona effect only occurs on high voltage wires, transmission lines and therefore, did not occur on the defendant's service wire in question. This court agrees with the defendant that what appeared to be blue flames were more likely to have resulted, from a combination of the short circuit current and the material on the wire.

WHAT PRECIPITATED THE SHORT CIRCUIT

[63] Mr. Coates has said that the short circuit was caused by arcing between the electrical wires from the pole due to a sustained high current surge and/ or sustained shorting of the electrical leads from J.P.S.' pole to the building. In the latter regard, he has said that the events which lead to the fire would have started at the defendant's pole and manifested itself at the weakest point in the circuit which is the breaker panel, which was on the upper section of the wall in the bedroom. He has also stated that there was no power surge or low voltage, but he made no communication or checks with the defendant, which would possess the relevant technical information required and in any event, he agreed with the court that his determination that there was no power surge in the area immediately before the fire would be inconsistent with his conclusion that the short circuit which caused the fire was due to a sustained power surge.

[64] He also stated that electricity travels in loop; it flows from a source (transformer) through the lines to a load and then flows back to the source. He further agreed that where a short circuit occurs, no current flowed beyond that point and the portion of the wire from the power source to the short circuit would be extremely heated or even overheated, since the current is not flowing beyond the short circuit. Perhaps even more importantly, he averred that where there was a short

circuit on the defendant's line that ran to the house, then electrical current should not flow beyond the short circuit. He testified that the wires in his report, which he said showed signs of extensive heating were wires in the junction box (where the breakers are located) which was located on the upper section of the wall in the central bedroom and that the short circuit occurred at the said junction box.

- [65]** He also admitted that if a short circuit occurred on the service wire, it should have caused the transformer on the pole to, 'trip'. He agreed that a tripping mechanism would shut down the transformer whenever an oversupply of current is being fed through the loop back into the transformer and once the said mechanism operates and shuts down the transformer, all premises attached to it would have been affected.
- [66]** Furthermore, it was his evidence that it was rare for an over - supply of electrical current from the defendant, to result in a short circuit and fire in a house except, where certain conditions exist, such as a lightning strike. He posited that he looked at the defendant's pole from which the service wire ran, but did not examine it in detail. From his observations however, there was nothing defective about the wiring from the defendant's pole to the 2nd claimant's pothead.
- [67]** Mr. Donaldson and Mr. Tomlinson agreed that no current would flow beyond the point of the short circuit. Mr. Donaldson essentially averred that because no current would flow beyond the point of the short circuit on the defendant's pole, there could be no degradation of the service wire or customer wire, after, or between that short circuit point on the pole and the home.
- [68]** Furthermore, he stated that para. 16(d) of Mr. Coates' special observations contained in his witness statements, that is, that the wires to and from the electrical circuit breaker on the upper sections of the eastern wall of the central bedroom showed signs of extensive heating, fusing and beading, demonstrate that there is a little bit more happening at that point. He explained that the heat is going to cause the fire and if there is anything semi-combustible nearby, it would

cause it to burn. In relation to para. 16(b), that is, that electrical wiring from the defendant's pole to the building showed signs of extensive internal heating, the extensive internal heating is suggesting that not all of the insulation at this point was burnt off, which suggests that this point is some distance away from where the short circuit is occurring; the further away you are from the short circuit point, is the less damage and degradation of wire that you can expect.

- [69]** Finally, he averred that if the short circuit occurs in the middle section of the home, all the wires internal to the home leading back to the service wire which connects to the defendant's pole, would be affected by the short circuit current originating from within the home. Consequently, there would be damage and degradation on the wires in the home and the service wire. He stated that if there is fire on the defendant's pole and fire within the home simultaneously, the short circuit could only have originated in the home, thus producing contemporaneous fire sightings. It was electrically impossible, he said for a short circuit on the defendant's pole, to produce a fire in the premises.
- [70]** Mr. Tomlinson opined that the fusing and beading of the wires as well as the molten insulation are clear signs that a very large current flowed through these service cables and caused excessive internal heating. The fact that there was no sign of burning on the outside of the insulating material indicates that there was no fire on the defendant's service cable. He testified that the signs of extensive heating and fusing observed on wires between the breaker panel and the eastern wall of the central bedroom, indicate, that the damage to these wires were of electrical origin but that was not as a result of a short circuit on the defendant's service cable.
- [71]** There is no doubt that a large volume of current flowed through the service wire and the wires of the 2nd claimant's breaker, as manifested by the extensive heating observed on these wires. Mr. Tomlinson did give evidence that it was possible for the defendant to deviate from and exceed its standard voltage. Nevertheless, it has also been the evidence of both parties that it is a short circuit

which causes an overcurrent and rarely does an oversupply of electrical current from the defendant result in a short circuit and a fire. It has also been the evidence and accepted by both parties, that where there is a short circuit, that point generates a lot of heat and there is no current flow beyond it. It has also been accepted that where there is a short circuit on the service wire, the tripping mechanism would shut down the transformer and all the premises attached to that pole would have been impacted. It is also agreed that the heating up of the wire arising from the short circuit inside the house could lead to sparks on the wire leading to and on the defendant's pole and a short circuit can occur even if appliances are not plugged in.

[72] In the circumstances, the court finds that the evidence of the experts who testified on behalf of the defendant is more consistent and plausible. This court understands the defendant to be contending that if there was a short circuit on the service wire, the current would flow from the transformer along the line to the point of the short circuit and would return to the transformer, which eventually would have generated more heat and current within that confine and the transformer may have tripped. In any event, none of the wires from after that point, particularly, none of the wires from the pothead into the claimants' home would have been burnt or in any other manner impacted as the current would have only been in transit between the transformer and the point of the short circuit. Where however, the short circuit occurred along any of the 2nd claimant's wires or in the junction box, the current would have been travelling to and from the transformer along the service wire, through the pothead and generating heat and overcurrent between those two points. This would explain the scorching of the wires in the pothead and the melting of the insulation from the inside of the service wire but no burning on the outside and the extensive heating of both the service wire and the wires in the junction box.

[73] In coming to its decision, this court has noted the submission made by counsel for the claimants, that Mr. Coates' evidence is to be preferred as he is, essentially, an independent witness, who investigated the fire in his capacity as

then, an employee of the Government of Jamaica. Counsel further contended that the experts who gave evidence as part of the defendant's case, may be biased given that, Mr Tomlinson was formerly employed by the defendant and Mr. Donaldson has been employed and paid, as an expert, in several cases by the defendant. This court however, does not accept that, that would be the correct approach. In fact, the correct approach involves, each expert's evidence being assessed on the basis of the quality of the evidence given, by each of them. In the final analysis, for the reasons given above, on the critical issue for the purpose of the 2nd claimant's claim, as regards the cause of the fire, Mr. Coates' evidence falls well below the standard required, of proof on a balance of probabilities. In that regard, it makes no difference that at the material time, Mr. Coates was employed in the government forensic services.

[74] An expert may not have reason to be biased in reaching his expert conclusion, but that does not automatically mean that his conclusion is correct, or even, that it is more probably correct, than not. The converse is also true. Ultimately, this court has weighed carefully, the respective evidence given by each expert, so as to determine what weight, (if any), should be given to all of such evidence. That is also the approach which this court has taken as regards the evidence given by lay witnesses.

CONCLUSION

[75] On a comprehensive assessment of all of the evidence, the testimony of Mr. Coates has been found wanting. It was fraught with inconsistencies and he has proven to be an unreliable witness. He has been inconsistent with his explanations of what caused the short circuit. There were several unexplained omissions and his testimony raised several questions, to which he has offered minimal and/ or insufficient answers. On an assessment of the experts' testimonies, this court finds that it prefers the evidence of the expert witnesses who testified on the defendant's behalf, but in particular, prefers the evidence of Mr. Kevin Donaldson, as regards whether the claimants' postulation as to the

cause of the fire, as has been disclosed in the claimants' statement of case and as put forward by Mr. Coates, is more probable than not.

[76] The evidence presented by the defendant indicated that the claimant's meter readings were on average, on the lower end of residential consumption. Mr Coates' unchallenged evidence was that there was no evidence of illegal connections or tampering. This court does acknowledge, that the occurrence of the fire and consequential damage, constituted an unfortunate happening for the claimants. The evidence presented though, has not proven, on a balance of probabilities, that the defendant breached the duty of care it owed to the 2nd claimant in its provision of electricity and thereby caused a fire which destroyed the claimants' apartment complex and home. The 2nd claimant was unable to prove that it was the actions or omissions of the defendant, which resulted in the fire having occurred, much less, that it was due to the negligence of the defendant, that the said fire occurred. Negligence will not be presumed and the burden of proof as regards negligence has not shifted, such as to require the defendant to prove that the fire would not have occurred in the absence of negligence. *Res ipsa loquitur* cannot apply in the circumstances of this case and, in fairness to the 2nd claimant, her counsel did not submit, that the same would have any applicability to the present case, as part of the claimants' counsel's written closing submissions.

[77] It follows inexorably, also, that the 2nd claimant's claim for breach of contract, also must fail, since, on a balance of probabilities, the 2nd claimant has failed to prove that, it was the actions or omissions of the defendant which resulted in the fire. The proof of that, is a *sine qua non* of a successful claim for damages for breach of contract. Accordingly, the failure to prove that element, has in turn, led to the 2nd claimant having failed to prove her claim for damages for breach of contract.

[78] ORDERS

- (i) Judgment on this claim for damages for negligence and for damages for breach of contract, is awarded in favour of the defendant;
- (ii) The costs of this claim are awarded to the defendant, with such costs to be taxed, if not sooner agreed;
- (iii) The defendant shall file and serve this Order.

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Hon. K. Anderson, J.