[2025] JMSC Civ 142

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV02752

BETWEEN	**COLBERT FRANCIS**	**CLAIMANT**
AND	**TRANSJAMAICAN HIGHWAY LIMITED**	**DEFENDANT**

IN OPEN COURT

Akheme Harris instructed by Kinghorn & Kinghorn, Attorneys-at-law for the Claimant

Kerry-Ann Sewell and Kadene Davidson Ramsay instructed by Kerry-Ann D. Sewell, Attorney-at-law for the Defendant

Heard: 21st July 2025 and 21st November 2025

Occupier's Liability - whether toll road a highway - whether the Occupier's Liability Act applies to highways

Negligence - nature of common law duty in respect of highways - motor vehicle collision on toll road due to presence of smoke from fire on adjoining lands - whether concessionaire of toll road who had contracted out obligation for operation and maintenance to a third party had a duty of care to the user of the highway at common law

Breach of Contract - whether there is evidence of contract.

C. BARNABY, J

BACKGROUND

[1] The claim against the Defendant company arises out of a rear-end collision on 16th April 2018. It involved a motor vehicle being driven the Claimant and a motor vehicle being driven by another - against whom no claim subsists - along the westbound leg of the East-West Corridor of Highway 2000 Phase 1 (hereinafter called "the Toll Road"). The Claimant alleges that he suffered personal injury, loss and damage as a result of the collision, which he says was caused by smoke which engulfed the road. The Defendant, a developer and concessionaire of the Toll Road denies the Claimant's allegations, including on the basis that it had contracted out operation and maintenance works for the said road to a third party.

[2] The matter came on for trial on 21st July 2025 when judgment was reserved to today's date to facilitate the filing and service of written submissions and authorities by the Claimant and supplemental submissions by the Defendant, on or before 22nd September 2025. The submissions from the Defendant and the Claimant filed on 15th July and 28th August 2025 respectively were received by the court and their contents considered. At the time of reservation of judgment the parties were also permitted to file responses to authorities by 29th September 2025, but no responses were received for the court's consideration.

ISSUES

[3] On consideration of the parties' pleadings which are summarised below, I find that the resolution of these three issues are dispositive of the claim.

(i) Whether the OLA applies to the Toll Road.

(ii) Whether a duty of care was owed to the Claimant by the Defendant at common law:

(a) in respect of a smoke hazard on the Toll Road which emanated from an unplanned bushfire originating on land adjacent to the said road, over which the Defendant had no control; and

(b) in circumstances where obligations for the operation and maintenance of the Toll Road were contracted out by the Defendant to a thirty party.

(iii) Whether there was a contract between the Claimant and the Defendant.

THE PLEADINGS

Breach of the OLA and/or *Negligence*

[4] The Claimant contends that the Toll Road was engulfed in smoke, and that it was this state of affairs that caused the collision. He seeks to recover damages for negligence and/or breach of the OLA on the ground that the collision was caused by the negligent and unsafe manner in which the Defendant maintained, controlled and/or managed the Toll Road; and alleged that there were no signs, notices and/or warnings of the foreseeable danger presented by the smoke. The claims are made against the Defendant in its alleged capacity as owner, controller and/or occupier of the Toll Road at the time of the collision.

[5] The Claimant relies on the same particulars in alleging negligence as he does breach of the OLA. They are that the Defendant failed to take such care as in all the circumstances of the case was reasonable to see that the Claimant would be reasonably safe in using the Toll Road for the purposes of which he was permitted to be on it; failing to maintain the Toll Road in a safe state to prevent a foreseeable risk of injury; maintaining the Toll Road in a dangerous and unsafe condition; inviting or allowing the Claimant to travel on the Toll Road which was manifestly dangerous and unsafe; failing to provide any warning signs or any sufficient warning of the dangerous and unsafe condition of the Toll Road; and failing to take reasonable care to put in place a safe system that would prevent collisions along

the Toll Road in the event that heavy smoke engulfed it, as had previously occurred.

[6] It is the Defendant's defence that it was contracted by the Government of Jamaica as the developer responsible for design, construction, operation and maintenance of the Toll Road, and that its duties in this regard is subject to the **Toll Roads Act** (hereinafter called "the TRA"), and the Concession Agreement between itself and the National Road Operating and Construction Company Limited (hereinafter called "NROCC").

[7] The Defendant contends that its duty under the TRA is to maintain the road in good repair and condition in accordance with sound engineering and operating practices. It further contends that the alleged loss and/or damage suffered by the Claimant was not caused by any breach of this duty; and that the Toll Road complies with all design, construction, operating, maintenance and safety standards as required by law and any relevant authority.

[8] In denying that it owed a duty of care to the Claimant, the Defendant goes further to say that Jamaica Infrastructure Operations Limited (hereinafter called "the JIO") is the party which is contractually obligated to implement emergency preparedness and response procedures to ensure observance and/or maintenance of proper safety protocols in cases of emergency. It is the Defendant's case that on the relevant date JIO received a report that smoke was coming across the Toll Road in the vicinity of Windsor Bridge and that a Patrol Officer (hereinafter called "the PO") was dispatched to the location and arrived at it within the time period stipulated by contract. Upon arrival at the location, the PO established tapers with orange traffic cones along the East Bound leg of the affected area of the Toll Road and placed warning signs 300m away from the smoke affected area, which warned motorists of the danger posed by the smoke. While the tapers were being so erected, the collision occurred.

[9] The Defendant denies that the collision was caused by the negligent and/or unsafe maintenance of the Toll Road. It adopted particulars of negligence alleged by the Claimant against the other driver involved in the collision, and says further that the collision was caused and/or contributed to by the Claimant's own negligence. That negligence is particularised as the Claimant failing to have any or any adequate regard for his own safety, failing to have any or any adequate regard for the safety of other road users, and in continuing to drive along the Toll Road where and when it was manifestly unsafe to do so.

[10] The Defendant admits there was smoke but denies that it engulfed the Toll Road and says it was limited to the vicinity of 15/000 along its Westbound leg. It also denies that there were no signs and/or notices and/or warnings of the danger of smoke on the Toll Road and says that a sign was placed at 13/000 along the Westbound leg.

[11] The Defendant's denial of liability under the OLA is threefold and may be stated thus:

(i) the OLA does not apply to the Toll Road as its users are neither licensees nor invitees as contemplated by the Act;

(ii) at the material time it was neither the owner nor occupier of the Toll Road and accordingly did not owe the Claimant a duty of care pursuant to the OLA; and

(iii) no duty was owed under the OLA as the proximate cause of the collision was not the physical condition of the Toll Road but smoke which emanated from a place outside it, over which the Defendant has no control or responsibility.

Breach of contract

[12] Further and in the alternative, the Claimant claims damages for breach of contract against the Defendant. It is alleged that at the material time, it was agreed that in consideration of the Claimant paying a toll to the Defendant, he would be permitted to drive on the Toll Road. The Claimant goes on to contend that it was an implied term of the agreement that the Highway would be managed, controlled and maintained by the Defendant in a manner which would not expose him to unnecessary risks, injury and danger; and that in breach of that agreement the Defendant failed and or refused to take reasonable care to control, maintain and manage the Toll Road in a manner to avoid his exposure to such risks.

[13] The Defendant denies the existence of a contract between itself and the Claimant and says that the Toll Authority is responsible for regulating the payment and collection of tolls, and the relevant Minister for making Toll Orders. Further, the charging of tolls is part of the funding mechanism adopted by the Government of Jamaica for the construction of the Toll Road.

DISCUSSION

Whether the OLA applies to the Toll Road.

[14] The Claimant's submission under this head is that the Defendant owed him a common duty of care in respect of his use of the Toll Road, pursuant to section 3 of the OLA.

[15] Among the authorities cited by the Claimant in submissions is **Danielle Archer v Jamaica Infrastructure Operator Limited** [2013] JMSC Civ 76. In that case the claimant driver of a motor vehicle collided with a herd of goats which had suddenly made their way onto Highway 2000, a toll road, in the vicinity of Old Harbour. She

alleged negligence, breach of the OLA and breach of contract against the defendant operator of the toll road.

[16] In respect of the OLA, the defendant operator submitted that the TRA applied, and the OLA did not. From the judgment it appears the defendant had also submitted that *"the highway was not "premises" within the meaning of the Occupiers Liability Act. This because in the United Kingdom a duty to maintain lighting was created by the United Kingdom Act 1959. Toll roads and turnpikes were regulated by statute."* Reliance is said to have been placed on the decisions in **Burnside and Anor. v Emerson and Ors.** [1968] 3 All ER 741 and **Haydon v Kent County Council** [1978] Q.B. 343 for the submission.

[17] Batts, J rejected the defendant's contention and concluded that on consideration of the evidence before him and on review of the submissions, the operator of the toll road was liable pursuant to the OLA.

[18] The **Burnside case** was an action for non-feasance against a highway authority which had become available pursuant to the United Kingdom's Highways (Miscellaneous Provisions) Act, 1961; and the **Haydon case** was concerned with a breach of the duty imposed on the highway authority by the Highways Act 1959 to *"maintain"* the highway. The cases do not concern the application of occupier's liability legislation to highways, and it does not appear that any case which was so concerned were cited in argument. In these circumstances I come to the view that my learned brother's conclusion on the applicability of the OLA to Highway 2000 was likely made *per incuriam*, and accordingly decline to apply it.

[19] The gravamen of the Defendant's submissions in the instant case is that the Toll Road was designated and constructed for the benefit of the travelling public thereby creating a public right of way, to which the OLA does not apply. No attempt was made to set out the facts on which Counsel for the Defendant relies in so submitting but on review of the evidence and authorities, I find the submission meritorious.

[20] The Defendant relies heavily on the decision in **Erlene Melbourne v Jamaica Infrastructure Operator Limited** [2022] JMSC Civ 121 where Nembhard, J determined that the OLA is not applicable to the very Toll Road on which the collision in the instant claim occurred. For reasons set out subsequently, I agree with the learned judge's conclusion.

[21] The OLA is in all material respects, an equivalent of the United Kingdom Occupiers' Liability Act 1957, which had as its purpose

> *[the eradication of] some of the unsatisfactory features of the way in which the common law had developed as regards the liability of occupiers of premises for injuries sustained by third parties lawfully resorting there, the extent of the duty owed varying according to whether the person injured was vis-à-vis the occupier, an invitee or a licensee. The Act removed this distinction and substituted a single common duty to all visitors, whether licensees or invitees, but it was not its purpose to enlarge the overall class of persons to whom the duty was owed.* Per Oliver L.J. in **Holden v White and Another** [1982] Q.B. 679[1] at 682

[22] To the above observation I would add that it was also not its purpose to expand the class of persons on whom the duty was imposed.

[23] The scope of the legislations is evident on their face. Sections 2(1) and 2(2) of the OLA, which is in like terms as sections 1(1) and 1(2) of the UK Act expressly prescribe that:

> *(1) The **rules enacted by sections 3 and 4 shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors** in respect of dangers due to the state of the premises or to things done or omitted to be done on them.*

[1] This decision was cited in the **Erlene Melbourne case** relied on by the Defendant.

> *(2)* ***The rules so enacted shall regulate the nature of the duty imposed by law*** *in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises,* ***but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed****; and accordingly,* ***for the purpose of the rules so enacted, the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees.***
>
> *[Emphasis added]*

[24] The following paragraphs at section 3 of the OLA which correspond with section 2(1) and (2) of the legislation's English counterpart provide that:

> *(1)* ***An occupier of premises*** *owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
>
> *(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*
>
> *[Emphasis added]*

[25] On a reading of the foregoing provisions of the OLA, it is clear that the common duty of care referenced in the Act is owed by an *"occupier of premises"*, not an occupier in vacuo, to his *"visitors"*; and that the rules in sections 3 and 4 of the OLA do not alter the rules of common law as to the persons on whom the duty of care is imposed or to whom the duty is owed.

[26] The concern in this case is the Toll Road and whether it constitutes a *"highway"* in law is critical to the issue under discussion.

[27] As observed in **Butterworth's Planning Service**, Issue 105 at [3002],

> *The term 'highway' is often used interchangeably with 'public rights of way'. Highway is sometimes used to denote the physical route rather than the right itself and is essentially a public right to pass over a defined linear route and consists of the following elements:*
>
> *(a) the way must be open to the public at large;*
>
> *(b) the public must have a right to use the way;*
>
> *(c) the public right must be primarily for passage; and*
>
> *(d) the public right of way must follow a defined route.*[2]

[28] From the foregoing extract, the term *"highway"* can be seen as used in two senses: (i) what I would call "the legal sense", which is the incorporeal and intangible right to members of the public to pass over another person's land; and (ii) what I would describe as "the physical sense", that is, the physical and tangible route over which the legal right to pass over is exercised.

[29] At common law, the occupier of land does not owe any duty to the user of a highway which runs across the land. The point is well made in the **Holden case** where Lord Omrod L.J. put the matter this way at page 687.

> *The common law imposed no duty on the owner of land, towards a person exercising a right of way over his land, to maintain the way in reasonable condition; his only duty was not to obstruct it. This is clearly established where public rights of way are concerned (*Gautret v. Egerton *(1867) C.P. 371 and* Greenhalgh v. British Railways Board [1969] 2 Q.B. 286*); and no authority has been cited to us to show that the user of a private right of way is in any better position. In fact, this must be so because, although at first sight the grant of a right of way may seem to be equivalent to a licence, in fact it is quite different, as the language, which is universally used, demonstrates. It is a legal "right" to pass over another person's land which is "subject to" the right, so that on transfer of the land the grantee takes an*

---

[2] It is observed that the elements of a *"highway"* from the **Butterworth's Planning Service** extract are the same as those which the Defendant's Counsel attribute in submissions to work by Sauvain, QC but that authority was not supplied to the court.

> *encumbered title. The customary words "dominant" and "servient" express the position accurately. It would be quite illogical, therefore, to impose on the servient owner any obligation other than not to obstruct, i.e. diminish, the right of way.*

[30] The absence of a common law duty to maintain a right of way in reasonable condition is not limited only to owners of the land over which the right is exercised, for as Lord Widgery endeavoured to show in **Greenhalgh v. British Railways Board** [1969] 2 Q.B. 286 at page 295,

> *… there was at common law no duty on an occupier of land over which there is a public highway towards persons using the highway and arising out of his occupation or control… His liability was limited to acts of positive misfeasance and nothing else.*

[31] Additionally, the common law does not regard a person who crosses land in pursuance of a public or private right of way as a *"visitor"*. As observed by Lord Denning M.R. in the **Greenhalgh case** at pages 292-93,

> *… Section 1(2) [the equivalent of section 2(2) of the OLA] shows that, in order to determine whether a person is a "visitor," we must go back to the common law. A person is a "visitor" if at common law he would be regarded as an invitee or licensee: or be treated as such, as for instance, a person lawfully using premises provided for the use of the public, e.g., a public park, or a person entering by lawful authority, e.g., a policeman with a search warrant. But a "visitor" does not include a person who crosses land in pursuance of a public or private right of way. Such a person was never regarded as an invitee or licensee, or treated as such.*

[32] The undisputed evidence before the court is that in or about 1999 the Government of Jamaica decided to construct a highway across the east and west of the island to enhance accessibility to and from major cities and towns, along that corridor. The idea was projectized. Also undisputed is that the Defendant, together with JIO are two (2) of three (3) privately owned entities involved in the project, together

with NROCC, a company wholly owned by the Government of Jamaica. The latter is the sole public entity involved in the project and was incorporated for its implementation.

[33] The TRA is the legislative framework governing and regulating the maintenance and operation of toll roads in this jurisdiction.

[34] In addition to project participants already referenced, there is also a Toll Authority which is established pursuant to section 4 of the TRA as a body corporate, to which section 28 of the Interpretation Act applies. It operates as an agency of the Ministry responsible for transportation. Its functions are prescribed at section 5 of the TRA as: the regulation of the operation and maintenance of toll roads and necessary facilities on or adjacent to toll roads subject to toll orders made pursuant to section 8 of the Act; to monitor compliance of concessionaires with the terms and conditions of concession agreements; advise the Minister on matters of general policy relating to design, construction, safety, regulation, operation and maintenance of toll roads in the island; and perform such functions as assigned by the Minister, under the legislation, or any other enactment. The Minister may also give directions of a general character as to the policy to be followed by the Authority in the performance of its functions as appears necessary in the public interest, after consultation with its chairman. The Authority is required to give effect to such policies.

[35] Pursuant to powers vested by section 8(1) of the said TRA, the **Toll Roads (Designation of Highway 2000 Phase 1) Order** was made by the Minister of Transport and Works on 12th March 2002 (hereinafter called "the Designation Order"). By this Order, clear routes are defined and designated as "Highway 2000 Phase 1" and a toll road. In accordance with section 3(2) of the TRA, certain provisions of the **Main Roads Act**, with such modifications as may be necessary applies to the Toll Road. It is not necessary for the resolution of this case to repeat the provisions incorporated by specific reference.

[36] NROCC, the wholly owned Government of Jamaica company is granted authorisation by the Designation Order to design, finance, construct, maintain, operate and improve the Toll Road, as well as levy, collect and retain toll in respect of the use of the road in accordance with the Concession Agreement of 21st November 2001 between it and the Defendant developer; and to delegate these rights and obligations pursuant to the said Concession Agreement which was amended and restated in 2011 consequent on the decision to extend the Highway 2000 with the addition of Phase 1B (hereinafter called "the Concession Agreement"). Alternative routes accessible to the public by vehicular or other traffic are also designated.

[37] On the evidence, the Defendant is the developer selected by the Government of Jamaica for project; and a *"concessionaire"* of the Toll Road within the meaning of the term at section 2 of the TRA, pursuant to the authorisation of the Minister under section 8(1)(b) to manage the road under the Concession Agreement.

[38] Pursuant to section 12, the Defendant concessionaire is permitted to assign or delegate his rights or any part thereof, subject to the terms and conditions as it thinks fit with the prior approval of the Minister in writing, or as may be specified in the agreement. Such delegations are revocable by the Defendant but only with the prior approval of the Minister in writing. The delegation of the rights do not preclude their performance by the Defendant.

[39] In 2003, the Defendant entered into an Operation and Maintenance Agreement (hereinafter called the "O&M Agreement") with JIO, which was also amended and restated in 2011 consequent on the revised scope of works under the Concession Agreement. Under the O&M Agreement, JIO is responsible for operation and maintenance works on the Toll Road.

[40] Pursuant to section 14 of the TRA, the toll road functions exercisable by the concessionaire may be exercised by the Toll Authority with the consent of the Minister, in accordance with the toll order in cases of emergency as if it were not

a toll road, where it appears to the Authority that it is necessary or expedient in the interests of road safety to exercise the powers of the concessionaire, or if the concessionaire has failed or is unable discharge its toll road functions.

[41] Section 15 makes provision for concessionaires to enter into arrangements with specified organizations for the provision of prescribed utility service on a toll road in relation to the exercise of toll road functions. In the event of failure of a concessionaire to agree with a specified organization in these regards, on the request of either party, the Minister may intervene in the public interest and make a binding determination on the issue after hearing the parties.

[42] Subject to the giving of statutory notice to the Toll Authority and obtaining approval of the Minister for closures of a certain duration, a concessionaire may also close a part of a toll road to traffic in order to do work on the toll road but is required to keep it open to traffic travelling in both directions at all times. A concessionaire may also close a toll road on the occurrence of incidents which endanger the life, health or safety of persons using the road and notify the Toll Authority as soon as practicable after the closure. Persons who use any part of a toll road closed to traffic in these circumstances, do so at their own risk and the concessionaire shall not be liable for any injury, loss or damage sustained by the person. This is provided for at section 17 of the TRA.

[43] In consideration of all the foregoing, while the Defendant and the JIO as private entities undoubtedly have some interest in the operations of the Toll Road pursuant the Concession and O&M Agreements, the Toll Road appears to me to be a public right of way and thus a *"highway"* in the legal sense. I so conclude having regard to the manner in which the Toll Road was developed, designated and is required to be operated; and the controls retained by the Government of Jamaica through NROCC, the Toll Authority, and the responsible Minister in respect of the said road.

[44] While the Defendant is authorised to collect and retain toll in respect of the use of the Toll Road, it is evident on a reading of the TRA, section 8(1) in particular, that

the right is in return for the Defendant undertaking the obligations for the design, financing, construction, operation, maintenance and improvement of the Toll Road. This is the mechanism adopted by the Government of Jamaica for financing the development of its highway project.

[45] Historically, rates have been levied to discharge the common law duty imposed on the inhabitants of a place to put and keep their highways in repair. While not cited by either party, I have found the decision in **Gorringe v Calderdale Metropolitan Borough Council** [2004] 1 WLR 1057 useful in this regard. Lord Hoffman in tracing the development of the duty imposed on inhabitants relative their highways said this at paragraphs 11 to 12.

> *11. At common law it was the duty of the inhabitants of a parish to put and keep its highways in repair. A highway had to be, as Diplock LJ said in* Burnside v Emerson *[1968] 1 WLR 1490, 1497, "in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition".*
>
> *12. The inhabitants appointed a surveyor of highways to carry out this duty on their behalf and the expense was met by levying a rate…*

[46] The levying and collection of a toll for the use of the Toll Road does not stand in the way of a finding that it is as a public right of way or *"highway"* if you will. Further, the evidence before the court is that the Toll Road is open to the public at large, and that the public has a right to use the way provided by it, primarily for passage. It also follows a definite route.

[47] In all these premises, I find that the Toll Road has all the elements of a public right of way or *"highway"* to which common law principles relating to occupier's liability apply. Considering that the common law does not impose a duty of care on an occupier of land across which a highway runs, and does not regard a person who crosses land in exercise of a public or private right of way as an invitee or licensee,

the OLA does not apply here. As expressly stated in section 2(2) of the OLA, the rules enacted at sections 3 and 4 *"shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed".* It is accordingly my judgment that the OLA does not apply to the Toll Road.

[48] The above conclusion disposes of the issue under consideration but before proceeding to my assessment of the other aspects of the Claimant's case, I wish to address the following further finding of Nembhard, J in the **Erlene Melbourne** case on which the Defendant relies.

> *[82] Further, the Court finds that JIO is not an "occupier" for the purposes of The Occupiers' Liability Act, 1969, nor does the highway constitute "premises", as defined or contemplated by the statute. It is important to note that the word "premises", as defined in the statute, means any "fixed or moveable structure". The word "structure" is defined by the New Concise Oxford English Dictionary, 11th ed., as "a building or other object constructed from several parts." This Court is of the view that the highway does not satisfy this definition of the word "premises". The Court also finds that Mr Melbourne was not a "visitor", for the purposes of The Occupiers' Liability Act, 1969, nor was he the "visitor" of JIO.*

[49] It is my view that if the OLA applied to highways in Jamaica generally or the Toll Road in the instant case, contrary to my earlier finding; and *"premises"* is defined as indicated in the dictum, the enquiry begins and ends with whether a highway constitutes *"premises"* to which the duty of care could properly attach.

[50] The word *"premises"* is not defined in the OLA, but section 2(3)(a) which is reproduced below, provides context for its construction.

> *The rules so enacted [at sections 3 and 4] in relation to an occupier of premises and his visitors shall also apply, in like manner and to the same extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate*

> *(a) the obligations of a person occupying or having control over any* ***fixed or moveable structure, including any vessel, vehicle or aircraft****; …*
>
> *[Emphasis added]*

[51] Nembhard, J appears to have relied on the words *"any fixed or moveable structure"* which appear in the foregoing provision in arriving at a definition of *"premises"*, and had resort to the dictionary definition of *"structure"* as "*a building or other object constructed from several parts".*

[52] I go further to consider the words *"including any vessel, vehicle or aircraft"* that follow the words *"any fixed or moveable structure"* at section 2(3)(a), which suggest to me that *"premises"* for the purposes of the OLA are comprised in something corporeal or tangible. An incorporeal intangible right of way - which is the essence of a highway in law - cannot be so regarded in order to give rise to the duty imposed on an *"occupier of premises"*, or to make the user of the highway his *"visitor"*. For this additional reason I find that the OLA does not apply to the Toll Road.

Whether a duty of care was owed to the Claimant by the Defendant at common law:

(a) in respect of a smoke hazard on the Toll Road which emanated from an unplanned bushfire originating on land adjacent to the said road, over which the Defendant had no control; and

(b) in circumstances where obligations for the operation and maintenance of the Toll Road were contracted out by the Defendant to a thirty party.

[53] The Claimant's submission in respect of negligence commences with the statement that the Defendant *"as occupier, was aware that the Hill Run was prone to fires and smoke hazards [and] that its own manager admitted that fires had occurred in adjoining lands."*

[54] **In Wheat v E. Lacon Co. Ltd** [1966] A.C. 552 a case cited by the Claimant, Lord Denning at pages 577-8 aptly observes that the word *"occupier"*

> *… was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to the premises… The duty of the occupier had become simply a duty to take reasonable care to see that the premises were reasonably safe for people coming lawfully on to them… wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an "occupier" and the person coming lawfully there is his "visitor": and the "occupier is under a duty to his "visitor" to use reasonable care. In order to be an "occupier" it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be "occupiers."…*

[55] Section 2(1) of the OLA having prescribed that the provisions enacted by sections 3 and 4 have effect *"in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors"*, claims of a duty on the basis that a defendant is an occupier are regulated by the legislation. I have already found that it does not apply to the Toll Road.

[56] On consideration of the Claimant's case where negligence is pleaded in addition to or as an alternative to occupier's liability and breach of contract, it seems to me that is the ordinary principles of negligence at common law which are sought to be engaged.

[57] The parties observe in submissions that the elements of the tort of negligence are trite law. The Defendant nevertheless relies on **Lochgelly Iron and Coal Co. Ltd v McMullan** [1934] A.C. 1 where it was stated that "… *in the strict sense "negligence" means more than heedless or careless conduct, whether in omission or commission; it*

properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

[58] The Defendant's submission is that Nembhard, J in the **Erlene Melbourne case** had considered whether the Defendant may be found liable for negligence and repeats aspects of the court's findings. The submission is factually incorrect. The Defendant here was not the defendant in the case referenced, JIO was the defendant. On the evidence before me, JIO is a separate legal entity. Nembhard, J could not properly make any findings in respect of the instant Defendant, and on my reading of the decision, she did not seek to do so.

[59] The Defendant's Manager of Quality and Maintenance Engineering gave evidence and admitted in cross-examination that fires on adjoining lands in the vicinity of Hill Run have been experienced prior to the accident and have affected the Toll Road. The Claimant submits that despite this knowledge, no adequate fire detection or monitoring system was in place, patrols were limited to once per shift, there was no immediate intervention or diversion of motorists, and warning signage ("Smoke Area") was inadequate in the circumstances of the case. Reference was also made to the Claimant's evidence that the latter sign was not visible on the day of the accident.

[60] Reliance was placed on the **Archer case** referenced previously, and Counsel for the Claimant submits that Batts J held that the operator of Highway 2000 could be liable where unusual dangers were known but not adequately addressed. The Claimant argues that smoke engulfing a toll highway constitutes an unusual danger, and the Defendant failed in its duty to prevent or mitigate it. It is further contended that the duty of the Defendant was to take reasonable steps in the circumstances which would have included adequate surveillance technology such as thermal cameras/fire sensors to detect fires early; more frequent patrols; effective emergency response procedures; and clear, visible, and sufficient signage at entry points. Counsel argues that the absence of these measures amounts to negligence. I do not agree with the statement as to the nature of the

duty imposed for reasons which I will endeavour to show later in these reasons for judgment.

[61] In arguing that the toll road operator JIO was negligent in the **Archer case**, the claimant submitted that the defendant's knowledge as to the danger of goats on the highway was similar to the knowledge of the defendants in **Mowser v George De Nobriga and Ors.** [1909] 15 WIR 147.

[62] In the **Mowser case** the claimant was among a crowd of persons who had gathered about 400 feet from a racetrack when a riderless horse escaped therefrom onto a public area on adjoining lands, ran over her and caused her injury. The defendants who were trustees and members of the management committee of a turf club which held a Crown lease on the racetrack were held liable to the claimant in negligence. It was held that the defendants who were aware that there are large crowds in the public area on race day - some of whom usually congregated about 400 ft from the race track - had a duty to see to it that those persons were protected from being injured by a horse escaping from the racetrack. The court determined that such persons fell within the Atkinian definition of *"neighbours*", famously articulated by Lord Atkin in **Donoghue (or McAlister) v Stevenson** [1932] All ER Rep 1, at page 11 in this way.

> *… You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*

[63] Smoke on the Toll Road is the danger complained of. The first question which therefore arises on enquiry into the alleged negligence of the Defendant concessionaire, is whether it owed a duty of care to the Claimant in respect of the danger of which he complains. It is my judgment that the question is answered in the negative.

[64] Under the O&M Agreement, the Defendant concessionaire contracted JIO to perform operation and maintenance works (hereinafter called “O&M works”) on the Toll Road for which the latter is paid an “Operator’s Fee”. JIO is permitted to subcontract any of the operation and maintenance works and although the Defendant may propose the recruitment of some employees, the obligation and costs to hire and train qualified and competent personnel required for performance of the O&M works lie with the JIO. The latter so subcontracts with the Defendant’s written consent, which cannot be unreasonably withheld.

[65] The O&M Agreement requires the JIO to submit operational manuals to the Defendant which provide for appropriate emergency procedures to deal with events which are likely to affect safety on the Toll Road, and an effective liaison system with relevant competent authorities and emergency services in charge of enforcement of traffic laws, emergency, medical and fire services. Manuals in these regards were admitted into evidence by agreement.

[66] JIO is contracted to perform obligations in respect of emergency measures and accident management, and notify the Defendant immediately of any emergency or accident, and of any emergency repairs to be undertaken by the Defendant; inspect and submit a report following emergency repairs or implementation of safety measures; and take action which in JIO’s reasonable opinion is necessary for the protection of life and property. The evidence before the court is that JIO responded to the smoke on the highway and submitted a report. Fire and smoke reports were also admitted in evidence by agreement of the parties.

[67] It is also JIO’s responsibility to provide all superintendence, labour and materials required to perform O&M works with the exceptions of equipment and Operation and Maintenance Centers belonging to the Defendant; operate the Toll Road; and perform regular patrol services to monitor and inspect the Toll Road. These obligations are performed by JIO at its own risk and without recourse to the State or other public funds or guarantees, save as expressly provided in the Concession Agreement.

[68] Under the O&M Agreement JIO is responsible for day-to-day operations, including the maintenance of the physical infrastructure of the Toll Road, and the collection of tolls for its use on behalf of the Defendant. This is to be contrasted with the Defendant's responsibility for the monitoring of JIO's activities to ensure compliance with the O&M Agreement and what its witness describes as "heavy maintenance" of the Highway 2000 toll road project. There is no evidence that the Defendant was involved in the day-to-day operations of the Toll Road to place it in a position to respond to an emergent danger of the kind complained of.

[69] As stated previously, the alleged negligence of the Defendant is particularised as failing to take such care as was reasonable in the circumstances to see that the Claimant would be reasonably safe in using the Toll Road for the purpose for which he was permitted to be on it; failing to maintain the Toll Road in a safe state to prevent a foreseeable risk of injury; maintaining the Toll Road in a dangerous and unsafe condition; inviting or allowing the Claimant to travel on the roadway which was manifestly dangerous and unsafe; failing to provide any warning signs or any sufficient warning of the dangerous and unsafe condition of the Toll Road; and failing to take reasonable care to put in place a safe system that would prevent collisions along the Toll Road in the event that heavy smoke engulfed it as had previously occurred.

[70] When I consider the allegations of negligence against the Defendant in the context of the role it plays in respect of operation and maintenance of the Toll Road under the O&M Agreement, vis a vis JIO; the fact that the Toll Road was being operated at the material time by JIO, the entity contracted for the O&M works and has among its specific responsibilities the implementation of appropriate emergency procedures to deal with events which are likely to affect safety on the Toll Road including effective liaison systems with relevant competent authorities and emergency services, including fire services; the fact that JIO responded to the hazard; and the nature of the hazard complained of, I am unable to find that the Defendant owed a duty of care to the Claimant who was using the Toll Road at the

material time. The Claimant and the Defendant were not *"neighbours"* in the Atkinian sense having regard to the particular circumstances of the case.

[71] The foregoing conclusion disposes of the claim in negligence but before moving on, I wish to say something of the duty imposed at common law in respect of a highway. I find it necessary to do so in light of the Claimant's submission that Batts J in the **Archer case** "*held that the operator of Highway 2000 could be liable where unusual dangers were known but not adequately addressed."* On my review of the judgment, there is no such broad finding and if there was, I would not think it correctly reflects the common law position.

[72] Although not cited by either party, I have found the decision of **Yetkin v Mahmood and another** [2011] 2 WLR 1073 useful in distilling in a brief yet sufficiently comprehensive way, the development of and the duty imposed upon persons relative to hazards on a highway at common law. At paragraph 17 of the judgment Smith, LJ observes that

> *… long before there was any private law duty of highway maintenance on a parish or highway authority, that authority could be* ***liable to a road user on exactly the same basis as any other person whose positive actions affected the safety of the highway and caused damage****. Such a liability could arise in a great variety of ways, not limited to the physical condition of the road surface or the placing of obstructions on the roadway. Restricting visibility by creating clouds of smoke was one type of activity which could give rise to liability. It would matter not whether the action was taken by an adjacent landowner burning off stubble, a private individual setting a bonfire on the verge or similar actions undertaken on behalf of the parish.* ***The common law recognised a duty on any person not to create a hazard on the highway which would affect the safety of road users. The extent of the duty would be a matter of fact and degree; the common law has only ever imposed a duty to do what was reasonable (or avoid doing that which was unreasonable) in all the circumstances.*** *[Emphasis added]*

[73] It is the evidence of both parties in this case that the source of the smoke hazard was a bush fire. The evidence of the Defendant's witness, which has not been impugned and is therefore accepted by the court, is that the fire was unplanned and originated at a place that is adjacent to the Toll Road, over which the Defendant has no control. In these circumstances it cannot be said that the Defendant created the smoke hazard on the Toll Road to give rise to a breach of the common law duty not to create a hazard on the highway which would affect the safety of the Claimant road user. Even if I should have found that the Defendant had a duty to the Claimant, the claim in negligence would also fail on this enquiry.

Whether there was a contract between Claimant and the Defendant.

[74] In his claim for breach of contract the Claimant relies on the submissions made in respect of negligence previously referenced and contends there was a breach of contract. The Defendant's submissions are entirely silent on the point.

[75] It is settled law that the constituent elements of a contract are offer, acceptance, consideration, and an intention to create legal relations. On consideration of the evidence presented in the proceedings I am unable to find that there was a contract between the Claimant and Defendant as alleged in the pleadings, or at all, which could give rise to a claim for breach of contract. The claim in this regard also fails.

[76] In all the foregoing premises, I find that the Defendant is entitled to judgment on the claim and make the orders below.

ORDER

1. Judgment is entered for the Defendant against the Claimant.

2. Costs of the claim to the Defendant to be taxed if not sooner agreed.

3. The Defendant’s Attorney-at-law is to prepare, file and serve this order.

Carole S. Barnaby

Puisne Judge