

INTRODUCTION

- [1] It is broken, fix it! It is too old; it must be replaced. You pay, no, you pay! These suppositional statements are at the heart of the matter which this Court is called upon to resolve. The Claimants are members of a housing scheme concerned to maintain the aesthetics of their community without overhead electrical cables. The Defendant presently supplies electricity to this community by means of an underground distribution system. These are the protagonists who have since about 2012 been at odds concerning the underground distribution system that serves the community.
- [2] Unable to resolve the issues between them, this claim was brought by the 1st Claimant, Jennifer Mamby-Alexander and by the 2nd Claimant, Alfred Thomas, on behalf of themselves and ninety-four (**94**) other residents (**See list attached**) in the community of Hope Pastures, in the parish of St. Andrew against the Jamaica Public Service Company for the supply of electricity to the residents of Hope Pastures by means of an underground distribution system. For ease of reference the parties will be referred to as **'the Residents'** and **'JPS'** throughout this judgement.
- [3] The Court has determined that the Hope Pastures underground distribution system is obsolete and cannot be repaired. JPS has no legal obligation to replace the underground distribution system. Consequently, the declarations and injunctions sought by the Residents are refused against JPS. There will be no award of damages for breach of the Statutory Duty.

LEGAL BACKGROUND

- [4] The matter was remitted to the trial court by the Court of Appeal in **Mamby-Alexander (Jennifer) et al v Jamaica Public Service Co Ltd [2020] JMCA Civ 48**, for determination of further triable issues and so it is useful to adopt the background set out by Straw JA with whose judgement the other members of the

Court agreed. The judgment will be referred to as the judgment of the Court. She wrote:

On 27 October 2015, the appellants, Jennifer Mamby-Alexander and Alfred Thomas, commenced a claim in the Supreme Court of Jamaica. Pursuant to leave granted by the said court on 17 November 2015, they were allowed to pursue the claim on behalf of themselves and 92 other Residents in the community of Hope Pastures in the parish of Saint Andrew against the respondent, Jamaica Public Service Company Limited ('JPS'). They sought, inter alia, a declaration that JPS is bound to provide and maintain a supply of electricity by underground cables to their premises in Hope Pastures, as well as injunctive relief restraining JPS from taking steps to convert their electricity supply from underground to overhead cable.

[5] Trial of the claim commenced before Sykes J (as he then was). It was agreed that the following preliminary questions of law would be determined first.

- 1) *Whether by reason of the approval by the House of Representatives on 27th April 1961 and the Legislative Council on 5th May 1961 of the Hope Housing Scheme ('the scheme'):*
 - a. *the defendant was obliged by law to install and maintain a supply of electricity to the Residents in the scheme by means of underground wires;*
 - b. *the actions and proposed actions of the defendant between about 2014 and the present day, in installing or seeking to install a supply of electricity by overhead wires were illegal.*
- 2) *Whether the claimants have any legal right to the supply of electricity only by means of underground wires by contract and/or pursuant to the instrument made on the 24th of April 1962 between the Director of Housing and the defendant granting the defendant certain easement liberties and rights.*
- 3) *Whether the claimants and/or Residents of the scheme have a right to seek and obtain relief by way of:*
 - a. *an injunction restraining the defendant from changing the mode of supply of electricity to their residences from underground wires to overhead wires;*
 - b. *a mandatory injunction ordering the defendant to restore a supply by underground wires to those properties which have been provided with a supply by overhead wires;*

- c. *a mandatory injunction ordering the defendant to dismantle all poles and wires and other equipment which have been installed within the area of the scheme;*
- d. *damages for any loss suffered by reason of the illegal installation of an overhead supply."*

[6] Sykes J answered the preliminary questions in favour of JPS and the Residents appealed. Further, the Residents requested an interim injunction, pending the appeal, to restrain JPS from disconnecting the underground supply of electricity provided to them.

[7] The Court of Appeal ruled that JPS does have a statutory responsibility to maintain the Hope Pastures underground distribution system, for which it assumed a statutory responsibility to install under **The Housing (Amendment) Law** 1958 pursuant to the **Electric Lighting Act** and the associated licences granted under it. The Court at paragraph 81 of the judgement pronounced:

The appellants and the other Residents, who have entered into contractual arrangements with JPS, have a legal right for their electricity supply to be maintained, as JPS is statutorily bound to do, albeit not by virtue of the HHS, but by virtue of the Electric Lighting Act and the relevant licences granted under that Act.

[8] The Court of Appeal further ruled that though there was a determination of JPS' statutory obligation, this was '*not the end of the matter*' as the issue of the safety and reliability of the underground distribution system and JPS' ability to properly maintain it, had arisen on the pleadings. At paragraph 83 of the judgement, Straw JA stated:

A question that would arise relevant to this issue is, therefore, whether JPS' assertion that the underground system is unsafe and unreliable is true and would therefore prevent it from supplying an adequate and efficient supply to the Hope Pastures community. This could only be determined after a trial as it was not a preliminary issue resolved by Sykes J and, in fact, could only be resolved with the evidence of expert witnesses.

In the circumstances the Court of Appeal declined to grant permanent injunctive relief. At paragraph 139, Straw JA further stated:

At this stage of the proceedings, it would not be appropriate to accede to the appellants' request in the forms of orders for permanent injunctive relief... Any injunctive relief granted at this juncture, would be limited to a preservation of the status quo until these other relevant issues are determined at the trial.

[9] The Court of Appeal therefore granted the following declarations:

- (a) The respondent is under a statutory obligation to provide a supply of electricity by underground cables to the premises of the appellants in Hope Pastures, pursuant to the provisions of the HHS incorporated into the Housing Law.*
- (b) The respondent is under a statutory obligation by virtue of the Electric Lighting Act, the 2011 Licence and in conjunction with the contracts entered into with the appellants to maintain such an underground connection, pending the determination at trial as to whether such a supply is adequate safe and efficient based on modern standards as required under the relevant legislation.*
- (c) The provision of electricity by the respondent by overhead wires to any part of the Hope Housing Scheme is a breach of the provisions of the statutory scheme of the HHS as it exists at this time.*

[10] The Court of Appeal also granted interim injunctive relief in the following terms:

- I. Pending the trial in the Supreme Court and the determination of the issues relevant to the adequacy, safety and efficiency of the underground connection, an injunction is granted restraining Jamaica Public Service Company Limited whether by itself or any person duly appointed by Jamaica Public Service Company Limited and acting as its servant or agent, from disconnecting the supply of electricity provided by way of underground cables to the premises of the appellants except in accordance with the circumstances stated at paragraphs (a) to (f) of the "JPS Standard Terms & Conditions of Service" as set out below:*
 - (a) For non-payment on due date of bills for electric service. In this case, if the consumer has a deposit with the Company as a guarantee of payment of bills, the amount of the deposit may be applied to the payment of bills for service then due and the remainder, if any, returned to the consumer. The application of such deposit to the payment of unpaid bills shall not affect the Company's legal right to collect unpaid balances by available legal methods:*
 - (b) For refusal or failure to make a deposit or increase a deposit, when requested, to assure payment of bills;*

- (c) *When the Company has reasonable evidence that the consumer has been previously disconnected for non-payment at his present or any other location and is receiving service for his own use under a different name in order to avoid past payments due to the Company;*
 - (d) *Because of a dangerous condition on the consumer's premises in wiring or energy consuming devices;*
 - (e) *Because of a fraudulent use of the service or tampering with the Company's equipment; and*
 - (f) *For any other violation of its Terms and Conditions which the consumer refuses or neglects to correct within 10 days of the date of a notice in writing from the Company specifying such violation and requiring such correction.”*
- II. *Pending the trial in the Supreme Court, an injunction is granted restraining Jamaica Public Service Company Limited whether by itself or any person duly appointed by Jamaica Public Service Company Limited and acting as its servant or agent, from entering upon the premises of the appellants other than in accordance with the right of the easement granted on 24 April 1962 for the maintenance and repair of the installations for the supply of electricity by underground cables and other than in accordance with the “JPS Standard Terms and Conditions of Service” as set out set out at paragraph 4 i. (a) to (f) above.*

[11] Following the ruling of the Court of Appeal, the Residents filed a Re-amended Particulars of Claim and later a Further Re-amended Particulars of Claim seeking inter alia:

1. *A Declaration that the Defendant, Jamaica Public Service Company Limited, is bound to provide and maintain a supply of electricity by underground cables to the premises of the Claimants in Hope Pastures in the parish of Saint Andrew;*
2. *A declaration that the provision electricity by the Defendant by overhead wires to any part of the Hope Pastures scheme is a breach of the provisions of the statutory scheme and is illegal.*
3. *An injunction restraining the Defendant whether by itself or any person duly appointed by the Defendant and acting as its servant or agent, from disconnecting the supply of electricity provided by way of underground cables to the premises of the Claimants;*
4. *An injunction restraining the Defendant whether by itself or any person duly appointed by the Defendant and acting as its servant*

or agent, from entering upon the premises of the Claimants other than in accordance with the right of the easement granted on the 24th April, 1962 for the maintenance and repair of the installations for the supply of electricity by underground cables;

5. *A mandatory injunction ordering the Defendant to reconnect the supply of electricity by underground cable to the premises of Claimants which have been disconnected from the underground supply within one month from the judgement of the court.*
6. *A mandatory injunction ordering the Defendants to restore and maintain the supply of electricity by underground wires to the whole area of the statutory scheme and to remove all poles wires and other things which have been installed by the Defendant in order to provide a supply by means of overhead cables.*
7. *If the mandatory injunction claimed in the preceding paragraph, which is the primary remedy sought by the Claimants, is not granted by this Honourable Court, the Claimants will seek general damages, including aggravated damages, by way of damages in lieu of an injunction, and/or by way of compensation to them for the permanent diminution of the value of their properties, for the loss of amenity and aesthetic value.*
8. *Damages for breach of statutory duty/and or breach of contract, including the reimbursement to each Claimant referred to in paragraph 33 and 33A of the Particulars of Claim of amounts which they have been unlawfully required to pay.*
9. *Interest on special damages at such rate as shall seem just.*
10. *Costs*

PARTIES' POSITION AT TRIAL

[12] The Residents in their written submissions averred that, *'the Court of Appeal has decided the question of liability for breach of statutory duty in favour of the Claimants. What remains to be determined is the remedy which should be granted or which flows from that breach.'* The Residents further submitted that JPS is also in breach of its statutory duty to maintain the underground distribution system. Such maintenance would include replacing the underground distribution system if necessary. The Residents therefore should be granted the mandatory injunctions sought or alternatively, should be awarded damages in lieu of an injunction. It was submitted that based on the expert evidence given on behalf of the Residents, a

proper award of damages would be five percent of the value of their properties for the diminution in value.

[13] JPS contends that the underground distribution system in Hope Pastures has outlived its useful life and cannot be maintained or repaired. As such, replacement of the system is required. JPS further contends that its statutory duty does not include a duty to replace an obsolete underground distribution system. Such replacement cost should be borne by the residents of Hope Pastures. It was further submitted that the current tariffs for the supply of the electricity system is for an overhead distribution system. Accordingly, where customers require an underground supply the difference in cost is to be borne by the customer.

[14] Counsel for JPS, in their submissions, suggested that the issues set out below confront the court.

- a) *Whether the underground system in Hope Pastures is unsafe and unreliable?*
- b) *Whether the state of the underground system in Hope Pastures is attributable to its age and obsolescence or, alternatively, to a failure on part of the Defendant to maintain it?*
- c) *Whether the underground system is capable of repair or requires replacement?*
- d) *If the underground system needs to be replaced, who should pay for it? Or, put differently, whether the Defendant's statutory obligations to install and maintain the underground system include an obligation to replace that system in the event it needs to be replaced?*
- e) *Whether the Claimants are entitled to the remedies claimed?*

ISSUES

[15] The questions of law having been mostly settled by the Court of Appeal, this court was directed largely to a fact finding exercise. The questions of fact may be posed this way:

- 1) Has the underground distribution system failed?
- 2) Is the failure due to a lack of maintenance or obsolescence?

- 3) Can the underground distribution system be repaired or does it have to be replaced?

These questions lead to two questions of law for consideration;

1. Does maintenance of the underground distribution system include its replacement?
2. Who should pay for the replacement?

DISCUSSION

Has the underground distribution system failed?

[16] There was by the end of the trial no dispute that the underground distribution system in Hope Pastures had become unreliable. In their Particulars of Claim, the Residents pleaded that the underground distribution system began to malfunction in 2003. The evidence elicited during cross examination of the Residents' witnesses supported this pleading. Examples are given below:

- a) Mr. Maurice Saunders, Attorney-at-Law, resident since 1978, stated, *"in 2016 was a lot of problems but in the years before that we had problems, it was clear that the system was deteriorating. We had more power outages."*
- b) Ms. Lois Rose, retired medical practitioner, resident since 1972, stated, *"the system did deteriorate in the later years"*.
- c) Ms. Andrea Magnus, a pensioner, resident since 1964, in cross examination, agreed with Counsel that the system had deteriorated over time.

I accept these views as representative of the general view of the state of the underground distribution system held by residents of Hope Pastures.

[17] The evidence of the witnesses Denzil Dickenson, Winston Allen, Osawaki Wickham and Steve Dixon, employees of JPS, all underscored the deterioration of the Hope Pastures underground distribution system. The evidence-in-chief of Mr.

Wickham, Engineering & Standards Manager at JPS, is that only one **(1)** of the nine **(9)** substations in Hope Pastures is in service and is not connected to the overhead distribution system. The remaining eight **(8)** substations have been bypassed with the use of pole mounted transformers and overhead lines. Mr. Dixon, former Director of Transmission and Distribution Asset Management for JPS, further highlights the unreliability of the underground distribution system. He gave evidence in his witness statement that:

There were various distribution issues with the Hope Pastures underground distribution system. Based on the assessment of the Engineering team of JPSCo, the underground system had outlived its useful life resulting in unacceptable electricity supply reliability and power quality, unsafe underground electrical infrastructure and lengthy delays in the restoration of supply during emergency operations.

[18] The expert witness Mr. Daniel Brown, a project engineer, consultant, construction manager and technical services manager, has a wealth of experience in the industry having over thirty-two **(32)** years of experience. His curriculum vitae indicate that he has vast experience in the energy industry to include renewable energy, conventional power generation, nuclear power and fissile remediation. His expertise is relevant to the issues before the court. While I am aware that the Court is not bound to accept the opinion of the expert witness, his findings and recommendations have not been challenged by the Residents though there was some evidence by the Residents concerning the state of the underground distribution system.

[19] Mr. Brown's observations as to the state of the existing underground distribution system are set out below:

Underground Cable System

At a number of the terminal points, it was evident that the cable jacket system was compromised, this was evidenced by observed cable jacket stress fractures, along with signs of moisture ingress, oil sweating and degradation of the external rubber insulation.

Substation #1 :

Transformer, switchgear and all medium voltage underground cables are out of service with evidence of failure.

Substation #2 :

Transformer, switchgear and all medium voltage underground cables are put out of service. Evidence of failed switchgear.

Substation #3 :

Transformer, switchgear, medium and low voltage underground cables are out of service. Evidence of catastrophic transformer and switchgear failure.

Substation #4 :

(Transformer, switchgear, medium and low voltage underground cables are out of service.) Maintenance report indicates failure of transformer and switchgear.

Substation #5 :

Transformer, switchgear, medium and low voltage underground cables are out of service. Evidence of transformer and switchgear failure.

Substation #6 :

The 100KVA distribution transformer, switchgear, and low voltage underground cables are out of service.

Substation #7 :

Transformer, switchgear, medium and low voltage underground cables are out of service. Maintenance records indicate failure of switchgear and transformer.

Substation #8 :

Transformer, switchgear, medium and low voltage underground cables are out of service. Maintenance records indicate failure of transformer and switchgear.

Substation #9 :

Transformer and switchgear are in service. Section of medium and low voltage underground cables are in service.

It is important to note that substation nine **(9)** is currently the only substation in service.

[20] Mr. Brown gave his expert opinion as to the state of the underground distribution system. He wrote:

The simple fact is the core materials and components of the system, that being the failing and antiquated cables along with the transformers and switch gears, are long past their viable "service life" and the system is simply collapsing from being in place for the more than double its effective service life, passage of time, environmental condition and the natural deterioration that all manufactured materials experience.

[21] With all indications pointing in the same direction, there is no doubt about the state of the Hope Pastures underground distribution system. It is presently unable to deliver a reliable supply of electricity to the residents of Hope Pastures. It has failed.

Is the failure due to a lack of maintenance or obsolescence?

[22] The Residents argue that the failure of the underground distribution system was attributable to the failure of JPS to maintain the system. Dr. Jennifer Mamby-Alexander, in her witness statement, alleged a lack of maintenance of the underground sub-stations in Hope Pastures. Dr. Mamby-Alexander alleged, *'In the meantime, this underground system was begging for maintenance.'* I accept the submission by JPS that this evidence carries no more weight than anecdotal evidence since Dr. Mamby-Alexander does not possess the requisite technical knowledge to make such an assessment.

[23] Mr. Allen, Substation Technician, assisted the court by explaining the maintenance process undertaken by JPS technicians. In evidence adduced during cross examination, Mr. Allen stated that a visual inspection is completed on the underground distribution system twice yearly, and routine maintenance is done as needed, based on the results of those visual inspections. These findings were required to have been recorded in an inspection report.

[24] Counsel for the Residents in suggesting that the underground distribution system was not adequately maintained, sought to challenge the adequacy of the

inspection reports on the basis that the reports lack details of what tasks were performed, and the corrective measures undertaken. This challenge was rejected. Mr. Allen further stated that the failure of the underground distribution system was attributable to its age. In his witness statement he said:

...the cables that form part of the Hope Pastures underground system would have been laid in the earth for over 50 years and have since this time been exposed to the soil and the elements. Based on my experience and knowledge and the usual manufacturer's recommendations, the usual life span of these cables is 25-30 years. As far as I am aware, these cables are no longer being made and they have been replaced by newer technology.

[25] Mr. Brown supports Mr. Allen's evidence in his expert report. He notes that the core materials and components of the underground distribution system are past their viable service life. He concluded:

...the system is simply collapsing from being in place for the more than double its effective service life, passage of time, environmental condition and the natural deterioration that all manufactured materials experience.

Mr. Brown also asserted that:

While inspection and maintenance documentation is scarce, it is plain that had regular maintenance and corrective repairs not been performed, this system would have catastrophically failed decades earlier. It is clear by the extraordinary longevity of this installation, that repair crews did far more than the "minimum" requirements and in the vernacular, "babied" this system in years past.

[26] It is undisputable from Mr. Allen's evidence, that there was no proper record keeping in respect of these works of maintenance. But that does not mean that there was a general failure to maintain the underground distribution system. Mr Brown's expert evidence, which was not challenged, makes it clear that all the required maintenance on the system had been carried out, and perhaps then some. Support for the expected life of the underground cables can be found in the 1966 Licence which provides that the useful life of the underground lines for the purposes of depreciation is thirty **(30)** years (**see 1966 Licence Schedule**). The system is approximately fifty-seven **(57)** years old.

[27] Consequently, I am of the view that the evidence presented by the Residents has failed to prove, on a balance of probabilities, that JPS breached its statutory duty to maintain the Hope Pastures underground distribution system. On the contrary, the evidence establishes that its failure was due to age and obsolescence.

Can the underground distribution system be repaired or does it have to be replaced?

[28] It has already been established that the underground distribution system has twice outlived its useful life and as such the supply of power is unsafe and unreliable. In re-examination, Mr. Wickham explained that the current system which exists in Hope Pastures is a type of hybrid system. This meant electricity was supplied to some residents by an overhead transformer mounted on a pole from which cables were connected to the underground network. No changes were needed at the resident's installation for this hybrid system. The further evidence of Mr. Wickham is that the original pad mounted transformers are no longer available on the market and many of the switches on the system are no longer manufactured and cannot be sourced. He concluded that as the necessary parts were unavailable, the system could not be repaired but had to be replaced.

[29] Mr. Brown, in his expert report, opined that it was impossible to safely repair the underground distribution system. In this regard, he stated:

It is not possible or safe in any conceivable manner to attempt to "patch", repair or augment the existing underground distribution system. It has materially failed at a fundamental level and is long past its effective service life. No portion, component or sets of components can be re-used, modified or re-purposed to be placed back into service.

Mr. Brown further noted that 'public safety, system safety, system operability and system reliability all demand that this underground distribution system be replaced in its entirety.'

[30] During examination-in-chief, Mr. Denzil Dickenson bolstered Mr. Brown's opinion as indicated below:

Mr. Patrick Foster QC.: *Any particular reason why the entire line section could not have been replaced?*

Mr. Dickenson: *So for instance, you would have to take an entire section which includes all cables, all switch gears especially your transformers and replace that en bloc. Reason being is that the systems that existed at that time and that are there now is really incompatible with the systems that are now in place. So, for instance, how you terminated your cable at that point in time is totally different from how that cable is terminated now, the fittings, the procedure, the type of material that's used, everything is totally different now.*

[31] The evidence of Mr. Brown and Mr. Dickenson highlights the vast development in technology since the initial construction of the Hope Pastures underground distribution system. It is for this reason that they assert that modern technology would be incompatible with the present system. Mr. Brown has further asserted that there would be great difficulty in sourcing the original components of the system considering that most of those components are no longer being manufactured.

[32] The Residents unsurprisingly accepted the opinion of Mr. Brown that the current underground distribution system is incapable of repair and must be replaced. This convergence means the issue is no longer a matter for debate. The present system is incapable of repair and must be replaced in what I expect to be timetabled in a way that is expeditious and safe, having regard to the Government Electrical Inspector's indication that the current hybrid system is unsafe.

Does maintenance of the underground distribution system include its replacement? And Who should pay for the replacement?

[33] In determining this issue, it is important to reiterate the history of the Hope Pastures Community. The community of Hope Pastures established by statute under the

Housing (Amendment) Law comprises of two hundred and twenty-eight (**228**) properties known as the Hope Housing Scheme ("**the Scheme**"). This was to be a development with special features. Paragraph 3(5) of the Scheme provided that:

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

6) The Jamaica Public Service Co. Ltd. estimated that the cost of the underground system would be £67,810 and €16,800 for the present system of overhead wires, or a difference of £51.010.

The initial purchasers were required to pay in the purchase price:

- (a) the excess cost amounting to £51,000 for underground electric wires;
- (b) the cost of construction of all electric Transformer volts;
- (c) the cost of trenching and back filling for telephone wires along the roads;
- (d) the cost of the duct and also the cost of trenching and back fill to each lot.

[34] The Residents assert that JPS' statutory duty to 'maintain' implies the duty to 'keep in constant supply' the underground supply of electricity. In effect this would mean that at the end of the useful life of the underground distribution system, JPS must bear the cost to replace it. Overarching, the Residents' contention is that the duty to maintain includes the duty to replace.

[35] JPS contrarily contends that the residents of Hope Pastures must bear the replacement cost of the underground distribution system. The initial instalment of the system in the 1950s was paid for by the original purchasers, making them the owners of the system. Accordingly, pursuant to the instrument made on April 24, 1962, JPS was merely given easements to maintain the underground distribution system, to fulfil its contractual obligations under the respective licenses and to ensure that the system was safe. JPS further contends that the Licence, the JPS Line Extension Policy, and the Standard Terms and Conditions of Service all indicate that replacing the underground distribution system should be at the residents cost.

[36] JPS' contention that the underground distribution system belongs to the residents of Hope Pastures is not supported. The first document that speaks to ownership is the Grant of Easement made 24 April 1966 between the Director of Housing, then owner of the lands and Jamaica Public Service Company Limited. Clause 2(a) reads *inter alia*:

*Not to permit to grow or suffer to remain on the said land any tree hedge crops or other plant or vegetation so that the same are or will or may grow to interfere in the judgment of the Company with **its underground** cables or other apparatus of any kind. [Emphasis mine]*

Clause 2(c) reads *inter alia*:

*To cause **its underground** service cables to run ONLY along the driveways leading from the front gate to the carport of each house either presently erected on to be erected on the Grantor's lands. [Emphasis mine]*

The phrase '*its underground cables*' appears several times in the instrument. In my view, this was not a mere fluke of words. As mentioned before the 1966 Licence allowed the company to depreciate its assets which included underground lines.

[37] The Licences also aid the resolution of this question of ownership. The 1966 Licence refers to the charge as a contribution to the company. **(See Clause 20)** In the 2011 Licence *Condition 13: Duty to Connect*, refers to the charge to customers for a complex connection which includes an underground distribution system as a '*contribution in aid of construction*'. It is also instructive that the payment is not mandatory as it is to be paid '*if the licensee so requires*'. **(See Clause 10 (iv))** Such payment could not therefore be interpreted as the purchase price for the underground distribution system. The ownership of the underground distribution system therefore lies with JPS. This does not however answer the question of who pays.

[38] There is no doubt that under the Licence and the Line Extension Policy made thereunder currently in force, JPS may require that applicants for a new underground distribution system bear the upfront cost. It is useful to be reminded

of *Condition 13: Duty to Connect Clause 10 (iv)* of the 2016 Licence which is set out in full.

*(iv) the Licensee will give a supply of energy for any premises as long as the owner or occupier will contribute to the Licensee the cost of Distribution Line extension in excess of the aforesaid distance. The cost of so much of the Service Line as may be passed over the property of such owner or the premises of such occupier and so much of such Service Line **as may be necessary for a greater distance than 30 metres from the point connection to the Distribution Line shall, if the Licensee so requires, be defrayed by such owner or occupier. If the Service Line is required to be laid underground the Licensee may bear the equivalent cost of up to 30 metres of overhead Service Line.** The Licensee may require such owner or occupier for whom such Distribution Line extension is constructed to agree to pay for electricity service for a period of two (2) years at the applicable rate in force from time to time. Should transformation off voltage be required then the Licensee may require such owner or occupier to contribute to the Licensee, part or all of the costs of providing and installing the transformation facilities; ... [Emphasis mine]*

And Provision 12.3 of the Line Extension Policy which states:

12.3 Cost Options

The request for a service upgrade shall be provided to the applicant at a cost to be determined by JPS. The applicant shall be afforded the following payment options:

Option 1 - *Make a non-refundable contribution in aid of construction equivalent to the total estimated cost for the work (including cost of transformers, wires, labour and any other associated cost excluding metering equipment and metering labour), less a sum equivalent to 50% of the cost, which would have applied for equivalent overhead service.*

Option 2 - *Make a non-refundable contribution in aid of construction equivalent to the total cost of the work less a sum equal to the cost, which would have applied for overhead service plus a refundable deposit equivalent to the total cost of the equivalent overhead service.*

[39] The Residents' position is that JPS' obligation to maintain the underground distribution system requires them to replace the entire system if necessary. The Residents find support for this expanded meaning of 'maintain' in **Sevenoaks, Maidstone and Tunbridge Railway Company ("Sevenoaks") v London, Chatham and Dover Railway Company ("Dover")** (1879) 11 Ch D 625.

[40] In this case Sevenoaks was authorised to ‘*make and maintain*’ a railway and was empowered to transfer the railway and all the powers of the company, to Dover. It was provided that the Sevenoaks was to complete the line, and that, when completed, it should be maintained and worked by Dover. On the completion of the line, Dover took possession of it. Sevenoaks then erected some stone steps in the station yard which Dover removed. Sevenoaks sought an action for a mandatory injunction to compel Dover to restore the steps. Dover maintained that the erection of the steps was a work of maintenance and was a wrongful act on the part of Sevenoaks.

[41] Jessel MR. said at p. 634-635:

Now, I have no doubt that these are fairly works of maintenance. It is very difficult to define what works of maintenance are. It is a very large term, and useful or reasonable ameliorations are not excluded by it. For instance, if a company had power to maintain the banks of a river which were faced in a particular way, could it be supposed that they were restricted under the words of maintenance to keeping up the banks in precisely the same way, when the mode which might have been very good when the banks were originally formed had been very much improved on by the subsequent advance of science? So where a railway company have to maintain a railway, I should not at all doubt that in maintaining it they might use any reasonable improvement. If, for instance, the railway were originally fenced with wooden palings, and it were sought when they decayed to replace them by an iron fence, I should say that was fully within their powers. If the railway originally was made in a deep cutting, and it was thought desirable to face the cutting with brick to make it more secure, I should say that was fair maintenance. If a railway station were found inconvenient, and it was desirable when it required repairs to alter the arrangement of the rooms, or to alter the access or form of access, and so to ameliorate it at the same time that it was put in repair, I should say all that was within the powers of maintenance given by the Legislature; that is, you may maintain by keeping in the same state, or you may maintain by keeping in the same state and improving the state, always bearing in mind that it must be maintenance as distinguished from alteration of purpose. I have no doubt, therefore, that this work is authorized by the power to maintain.

[42] JPS argues that the interpretation of the word should be restricted to its ordinary meaning which is to repair. This would not include replacing the system. JPS further submitted that **Sevenoaks** supported its position that ‘*to maintain*’ did not mean ‘*to replace*’.

- [43] To better understand what is required in replacing the underground distribution system, it is necessary to revisit the evidence of Mr. Wickham. He said:

In my assessment, I noted that the replacement of the HPUS would require a whole system redesign. This is as the design of a new underground system would be different from the old HPUS. Unlike the HPUS in which the cables were directly buried, the new underground systems utilize ducts and manholes which allow for easy installation and replacement, and which could not be facilitated on the current HPUS. Furthermore, the new underground systems utilize cables which are not compatible with the HPUS. The new design will utilize XLPE insulated cables, loop connected pad-mounted transformers with mineral insulating oil.

It is clear then that an entirely different underground distribution system would have to be installed.

- [44] The Court of Appeal made it clear that the relationship between the residents of Hope Pastures and JPS is governed by the Licence and individual contracts entered into by each resident with JPS. Neither require JPS to supply the residents only by means of an underground distribution system. However, JPS is legally bound to maintain the existing system. JPS would therefore be required to replace the underground distribution system if it is a function of maintenance.

- [45] A useful starting point for this question is the meaning given in **Black's Law Dictionary 9th edition** of the word "maintain". It states, '*to care for (property) for purposes of operational productivity or appearance; to engage in general repair and upkeep.*' Maintenance is thus synonymous, with or at the very least includes, repair.

- [46] The courts have since **Sevenoaks** had to grapple with the interpretation of the obligation to repair. Quite a number of these cases concern repairing covenants in leases and taxation matters for the purposes of determining allowable deductions. An often used starting point is the dicta of Buckley LJ. in **Lurcott v Wakely and Wheeler ("Lurcott")** [1911] 1 KB 905. At p. 923-924 he states:

"Repair "and "renew" are not words expressive of a clear contrast. Repair always involves renewal; renewal of a part; of a subordinate part. A skylight

*leaks; repair is effected by hacking out the putties, putting in new ones, and renewing the paint. A roof falls out of repair; the necessary work is to replace the decayed timbers by sound wood; to substitute sound tiles or slates for those which are cracked, broken, or missing; to make good the flashings, and the like. Part of a garden well tumbles down; repair is effected by building it up again with new mortar, and, so far as necessary, new bricks or stone. **Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion. I agree that if repair of the whole subject-matter has become impossible a covenant to repair does not carry an obligation to renew or replace.** [Emphasis mine]*

- [47] In **Lurcott**, the lessors required the lessee in keeping with a repairing covenant, to pay the cost of rebuilding a wall. The Official Referee found the wall to have decayed due to old age and which could not be repaired without rebuilding it. The Official Referee further determined that the whole house did not require rebuilding. The new wall was considered to have renewed or replaced a worn out subordinate part of the whole. On that basis, the lessee had to bear the cost of rebuilding the wall in keeping with their covenant to repair.
- [48] This definition given by Buckley LJ. has been applied in several cases. A review of those cases was undertaken in **Ravenseft Properties Ltd. v Davstone (Holdings) Ltd. (“Ravenseft”)** [1979] 2 WLR 897. The facts are given in the head note and repeated below.

Under the terms of an underlease, the tenants covenanted to be liable for the repairs of the demised building. The building had been constructed in concrete with an external cladding of stone. No expansion joints had been included when the building was being constructed because it had not been realised that the different co-efficients in expansion of stone and concrete made it necessary to include such joints. The stones had not been tied in properly to the building so, instead of cracking as a result of pressure as the building expanded, they bowed away from the concrete frame and there was a danger of stones falling. The landlords required the tenants to carry out the necessary work but the tenants denied that they were liable under the covenant to repair the damage caused by the inherent defect in the building of the exclusion of expansion joints. The landlords carried out the necessary work of taking down the cladding stones, retying the stones and inserting expansion joints.

[49] Ravenseft claimed against the tenants to recover the cost of the work done. Ravenseft was successful on the basis that the work was a trivial part of the whole building and did not amount to an improvement which changed the character of the building so as to take the work of reparation out the covenant to repair. Forbes J stated:

The true test is as the cases show, that it is always a question of degree whether that which tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised.

[50] **Lurcott and Ravenseft** has been applied in this jurisdiction (**See Universal Church of the Kingdom of God v Tewani Limited** [2015] JMSC Civ. 100 and **International Hotels Ltd v Cornwall Holdings Ltd** (unreported), Supreme Court, Jamaica, Claim No. C.L. I 036 of 1994, judgement delivered 24 October 1996)

[51] In **A.C.T Construction Ltd v Customs and Excise Commissioners** [1979] 2 All ER 691 (**"A.C.T Construction**), a case concerning taxation with a fact pattern similar to the case at bar, the expanded meaning of repair was rejected. In **ACT Construction**, the appellants carried out work on the foundations of a number of buildings which had been damaged by subsidence.

[52] The original foundations did not comply with modern building regulations and the work of correcting the subsidence could not be carried out merely by repairing or replacing the original foundations. The appellants therefore constructed additional foundations to underpin the buildings, leaving the original foundations unaltered. The work done by them constituted the supply of services *'in the course of ... alteration'* of the buildings. The appellants were assessed to value added tax on the work done on the basis that it was work of *'maintenance'*. The tax tribunal upheld the assessment, holding that the work done was *'maintenance'*, because *'maintenance'* extended to improvements by substitution. On appeal from the tax tribunal, Drake J. rejected the expanded meaning to include replacing the existing building with something different. He said at p. 695:

*I find no fault with the guidelines used by this tribunal and the tribunal in the **Davies** case that 'maintenance' extends to the keeping of something in proper order before it falls out of condition, and does not exclude improvements or a degree of substitution.*

But where alterations, additions, substitutions or improvements to a building are made, I think the question must also be asked whether the building after the work is done is something substantially different in character from that which it was before. If so, I do not think the work can properly be described merely as maintenance or repair. In my judgment, repair to a building necessarily involves the putting into good order or restoration of the condition of some existing building, whilst maintenance of a building is the keeping of the building in good repair. The two may and often will overlap. But where the work is to replace the building which exists with something substantially and significantly different in character it can no longer properly be called repair or maintenance.

I regard this as a proper application of the ordinary meaning of those words.

He found support for this position in the meaning given to the word 'repair' in the context of repairing covenants in leases.

[53] Brown (Inspector of Taxes) v Burnley Football and Athletic Co Ltd [1980] 3 All ER 244, is another case in which the court had to consider whether works carried out were works of repair or renewal. The facts and ruling of the court is comprehensively and clearly set out in the headnote reproduced below.

In 1969 the directors of a football club were advised that a spectators' stand in the club's stadium was no longer safe. In the following years the stand was demolished and replaced with a modern concrete stand in almost the same position and of approximately the same capacity as the old stand at a cost of £209,365. The stadium consisted of the playing field with the surrounding stands and terraces and other facilities such as baths, changing rooms and a car park. The club claimed that the erection of the new stand constituted 'repairs' of the premises occupied by the club and, accordingly, the expenditure was an allowable deduction in computing its taxable profits under s 130(d)a of the Income and Corporation Taxes Act 1970, or, alternatively, that the expenditure on the stand was expenditure incurred on the provision of 'plant' within the meaning of s 41 of the Finance Act 1971. The Special Commissioners held that the stadium, defined as the playing field together with the surrounding stands and terraces, was an entity of which the stand was physically, commercially and functionally an inseparable part, that the replacement of the old stand represented repairs, and that, accordingly, the expenditure was an allowable deduction. They rejected the club's claim that the stand was 'plant' on the ground that the

stand was not part of the apparatus with which the club carried on its trade. The Crown appealed.

Held – (i) Repair is restoration by renewal or replacement of subsidiary parts of a whole. The premises occupied by the club comprised a number of distinct parts each of which had its own distinct function. On the facts, the stand was one such part and, accordingly, its replacement could not be said to be the repair of a larger entity, whether identified as the whole of the premises occupied by the club for the purposes of its business or as the playing field and the surrounding stands and terraces alone.

[54] The question of what constitutes repair continues to befuddle minds. In **London Borough of Hounslow v Waler (“Waler”)** [2017] EWCA Civ 45, the lessor was required to keep in repair and redecorate when necessary the structure of the exterior of a flat or building. The lessee was required to pay a service charge, in respect of the cost of repairs and also to pay a fair proportion of any improvement. The lessor served notice of its intention to, among other things, replace original wooden frame windows with new metal units, which in turn required the replacement of the external cladding and removal of asbestos. The lessor claimed the service charge. Lewison LJ. opined that the question of what constitutes repair is not an easy one and that there was no ‘*bright line*’ division between what is repair and what is improvement. It was held that works of repair was not precluded by the use of better materials or in order to conform with good practices. Lewison LJ. referred to the governing principles culled from the cases saying in paragraph 14.

I do not believe that the following propositions are controversial in the context of contractual liability.

- (i) The concept of repair takes as its starting point the proposition that that which is to be repaired is in a physical condition worse than that in which it was at some earlier time: **Quick v Taff Ely Borough Council** [1986] QB 809.*
- (ii) Where the deterioration is the product of an inherent defect in the design or construction of the building the carrying out of works to eradicate that defect may be repair: **Ravenseft Properties Ltd v Davstone (Holdings) Ltd** [1980] QB 12.*
- (iii) Prophylactic measures taken to avoid the recurrence of the deterioration may also be repair: **the Ravenseft Properties Ltd** case,*

at para 22, **McDougall v Easington District Council** (1989) 21 HLR 310, 315.

- (iv) *In principle where there is a choice of methods of carrying out repair, the choice is that of the covenantor provided that the choice is a reasonable one: **Plough Investments Ltd v Manchester City Council** [1989] 1 EGLR 244.*
- (v) *At common law there is no bright line division between what is a repair and what is an improvement: **the McDougall** case at p 315.*
- (vi) *The use of better materials or the carrying out of additional work required by building regulations or in order to conform with good practice does not preclude works from being works of repair: **Postel Properties Ltd v Boots the Chemist Ltd** [1996] 2 EGLR 60.*
- (vii) *Where a defect in a building needs to be rectified, the scheme of works carried out to rectify it may be partly repair and partly improvement: **Wates v Rowland** [1952] 2 QB 12.*

[55] I have gone into the facts of these cases to get a sense of what type of works was considered as repair and what was considered renewal. It is noted that an important feature of **Sevenoaks** is that a new installation was not envisaged. Nor was that the case in the examples given in the case. The cases in my view made it clear that the obligation to repair, as submitted by the Residents, may involve more than the repair of existing equipment. However, it is beyond peradventure, that while replacement or rebuilding of parts of the existing system may be included in the obligation to repair, an entirely new installation is not. The question then is not whether there is to be some replacement, it is to what degree.

[56] As explained by the JPS witnesses and Mr. Brown, an entirely new underground distribution system has to be constructed as repair or replacing parts of the existing system will be nigh impossible. The new underground distribution system could not in any way be considered to be a part of, repair of, or improvement of the existing system.

[57] The further submission by the Residents that the duty to maintain a supply of electricity meant an obligation to keep the supply of electricity uninterrupted by means of an underground distribution system was implicitly rejected by the Court

of Appeal. The Court of Appeal found that neither the Licence nor the individual contracts compelled JPS to supply electricity to the residents of Hope Pastures only by the underground distribution system. This submission is not sustainable.

[58] I therefore find that the replacement required is not a part of the general obligation of JPS to maintain the underground distribution system. JPS therefore has no obligation to replace it at its own expense. Should the Residents require their supply of electricity by an underground distribution system then the Licence and Line Extension Policy would govern their application. The injunctions sought by the Residents are therefore refused.

[59] The evidence of the Residents of their inability to bear the cost of a new underground distribution system suggests that the question whether the Residents will replace the underground distribution system is moot.

[60] Prior to the commencement of the pilot project, at a Hope Pastures Citizens Association meeting, the residents of Hope Pastures met with representatives of JPS. The residents were presented with three options for the supply of electricity. The first option was the replacement of the underground distribution system at a cost of approximately Five hundred and Twenty thousand dollars (**\$520,000.00 JMD**) per household. The remaining two options was for the supply of electricity by overhead wires which was significantly less expensive than the replacement cost of the underground distribution system. Ultimately, in October 2012, a majority of residents present at the meeting voted for the overhead supply with AMI meter which was the least expensive option. It is vital to note that none of the residents voted for the replacement of the underground distribution system. In re-examination, Ms. Colleen William, then secretary of the Association, stated that based on the options presented, the decision was a "*Hobson's choice*". She explained that the proposal for the replacement of the underground distribution system was not a realistic option as the residents were not able to afford that option. As the Court of Appeal pointed out, it was not possible for some residents to agree to the pilot project. It would have been necessary for all residents of Hope

Pastures to be in agreement. The same would apply here. This has implications for the issue of damages to be discussed next.

DAMAGES

[61] It follows that the Residents having failed to prove that JPS was in breach of its statutory duty to maintain the underground distribution system, the question of damages arises only in respect of the finding by the Court of Appeal that JPS, in commencing the pilot project, had in fact breached its statutory duty to provide a supply of electricity by underground cables to the residents of Hope Pastures. At paragraph 67-68, Straw JA stated:

*The provision of underground electricity for the Hope Pastures community is, therefore, a provision of the scheme enacted into the Housing Law and cannot be construed in any other manner. This conclusion would consequently affect JPS' ability to unilaterally effect changes to the method of supply in the Hope Pastures community... **Since JPS would have been under a statutory obligation to install an underground system to the Hope Pastures community for the supply of electricity, it would be unable to legally establish overhead connections in the manner they have attempted to do.** [Emphasis mine]*

Further to this point, in paragraph 84, the Court also determined that:

the learned judge would have also erred in concluding that the installation of supply by overhead wires was not illegal in the circumstances that existed, as it would have been a breach of JPS' statutory obligation under the HHS and could not be done in the manner in which it purported to do so.

[62] The facts which constitute the statutory breach are not in dispute. In 2014 JPS commenced a pilot project in Keble Crescent Hope Pastures. This project involved JPS erecting concrete and wooden poles in the Hope Pastures community, to facilitate the conversion of electricity from an underground distribution system to an overhead distribution system. Prior to the implementation of the project, JPS hosted several meetings with the residents of Hope Pastures in order to determine the way forward due to them having determined that the underground distribution system had failed. The residents were advised that in order to continue to receive

a supply of electricity from the underground distribution system, they would have to bear the replacement cost of the underground distribution system in the sum of Five hundred and Twenty Thousand Dollars (**\$520,000.00 JMD**) per household. Perhaps not surprisingly, the majority of members of the community at the convened meeting voted to convert to the overhead distribution system. As such, those residents living within the area of the Pilot Project were required to modify their internal wiring at their expense and bear a portion of the installation cost. Those residents whom refused to convert to the overhead supply, sought alternative sources of power, e.g. generators and solar systems.

[63] It is trite law that in a claim for damages for breach of statutory duty, the onus of proving that, on a balance of probabilities, the breach caused or materially contributed to the damage is on the claimant. In **Sim Poh Ping v Winsta Holding** [2020] SGCA 35, the Singapore Court of Appeal provided a hybrid approach to determining causation in breaches of fiduciary duty. I find such an approach beneficial to adopt in the present case. Under this approach, the claimant had the burden of establishing its claim, i.e. proving on a balance of probabilities that the fiduciary had breached his or her fiduciary duty, and that a loss had been sustained. This in essence created a rebuttable presumption that the loss would not have occurred had the defendant not breached his fiduciary duty. The defendant then had the burden of proving that the loss would have been suffered by the claimant, even if the defendant had not breached his duty. Should the defendant show that the loss would have been suffered in spite of the breach, no damages would be awarded for that loss. However, if the defendant was unable to show that the loss would have occurred in spite of the breach, damages may be awarded.

[64] This approach is not new. It was taken in **Corn v Weir's Glass (Hanley) Ltd** [1960] 2 All ER 300 at 306. In **Corn v Weir's Glass (Hanley) Ltd**, the stairs in a building under construction had no handrails. The Claimant, who was employed by the Defendants as a glazier, was descending the stairs carrying a sheet of glass using

both hands when he stumbled and fell over the side of the stairs and sustained injuries. The Defendants were found to be in breach of the **Building (Safety, Health and Welfare) Regulations 1948 Reg. 27(1)**, however, their Lordships said that:

nevertheless, the defendants were not liable because the plaintiff had not established that the presence of a hand-rail... would have protected him from injury, as he had no hand free when he fell and the hand-rail (if it had been provided) need not have been of sufficient strength to bar his fall; accordingly, the plaintiff's injury was not caused by the defendants' breach of statutory duty.

[65] This position was further bolstered by Longmore LJ. in **Ali Ghaith v Indesit Company UK Ltd** [2012] EWCA Civ 642. Addressing the issue of causation. He said:

This is not a separate hurdle for the employee, granted that the onus is on the employer to prove that he took appropriate steps to reduce the risk to the lowest level practicable. If the employer does not do that, he will usually be liable without more ado. It is possible to imagine a case when an employer could show that, even if he had taken all practicable steps to reduce the injury (though he had not done so), the injury would still have occurred eg. if the injury was caused by a freak accident or some such thing: but the onus of so proving must be on the employer to show that that was the case, not on the employee to prove the negative proposition that, if all possible precautions had been taken, he would not have suffered any injury.

[66] The Residents contend that as a result of JPS' breach of its statutory duty, they suffered financial loss. This came from incurring expenses to upgrade the internal wiring in their homes in order to connect to the overhead distribution system, or procuring and installing alternative sources of power, and for food spoilage from power cuts.

[67] The costs relating to the installation of stanchion, pothead wiring and other material in relation to the overhead distribution system varied widely. Notwithstanding that not all Residents produced proof of payment, JPS accepted these expenditures up to a ceiling of Two Hundred Thousand Dollars (**\$200,000.00**) based on an average of the costs claimed. The position by JPS is accepted.

- [68] For the Residents who chose instead to use alternate sources of electricity which included solar power systems and generators, JPS submitted that they failed to reasonably mitigate their losses and should not be compensated for amounts above the costs of the overhead connection. Some of the Residents eventually chose to connect to the overhead system. In addition, the positions of these Residents were improved by the reduction in their monthly electricity charges. For these reasons the costs and expenses claimed by these residents would infringe the principle of compensation and should not be allowed. The residents should not be punished for standing on what they believed to be their legal right. The actions taken in opting to receive electricity other than from the overhead system was not unreasonable. These expenses would therefore be recoverable.
- [69] JPS further submitted that the costs of one resident to receive electricity from his neighbour and costs of replacing a security alarm system were not recoverable as the former is illegal and the latter was due to a problem with a generator and not the connection to the overhead system. This is accepted.
- [70] Ms. Jacqueline M.A Halliburton and Mr. Maurine Saunders claimed sums for food spoilage as a result of the power outage. However, JPS contends they bear no liability as the contract between the parties is subject to the JPS Standard Terms and Conditions of Service which precludes JPS from liability in these circumstances. Sheet no 213 reads as follows:

Liability

*The Company will use reasonable diligence in furnishing as constant a supply of electrical energy as practicable but in case such supply shall be interrupted or fail by reason of strike, fire, Act of God, the Public Enemy, accident, legal processes, interference by Government or Local Authority, breakdown or injury to machinery or lines of the Company's system or repairs, the Company shall not be liable for damages. **The Company shall not be liable to the Consumer for any damage to his equipment or for any loss, Injury or damage of any nature whatsoever resulting from the Consumer's use of the electrical energy furnished by the Company or from the connection of the Company's line or lines with the Consumer's wiring and appliances.** [Emphasis mine]*

I accept the position of JPS in this regard, as the power outage was due to the breakdown of the underground distribution system, making the exclusionary clause applicable. Such loss is not recoverable.

[71] The Residents having proved losses, the burden was now on JPS to show that the loss suffered by the Residents would have occurred irrespective of their statutory breach. But first the question of whether any defence avails JPS.

Whether there are any defences available to the action?

[72] JPS raises the defence of necessity for its breach of the statutory duty as found by the Court of Appeal. I had invited the parties to make submissions on this issue. The Doctrine of Necessity requires that there must be an immediate threat to life or property which causes the defendant to believe that a reasonable response to such threat is to act contrary to the law. Hence, the damage caused must preserve something of greater utilitarian value than that lost or sacrificed. From the list of authorities supplied by JPS and my further readings, I have extracted several principles which I believe must be considered when the defence of necessity is raised. These principles are enunciated as follows:

- 1) The danger must be imminent: **Esso Petroleum Co. Ltd v Southport Corporation** [1956] AC 218

In this case an oil tanker was stranded in a river estuary. Her master jettisoned 400 tons of oil cargo to prevent the tanker breaking her back. The tide carried the oil slick on to a foreshore causing damage. The foreshore owners sued the ship owners in trespass, nuisance and negligence. However, the only negligence alleged on the pleadings was faulty navigation by the master for which it was said the owners were vicariously liable. The owners' case was that the stranding was due to faulty steering gear caused by a crack in the stern frame. The defence of necessity was among the defences raised. Devlin J. upheld it at trial. The Court of Appeal reversed Devlin J.'s judgment but it was restored by the House of Lords.

Jowitt LJ approved Delvin's approach that it was necessary to discharge the oil to save the crew and that this was a sufficient answer to the claim based on trespass or nuisance.

- 2) The defendant must have a reasonable belief that his actions were necessary to avert danger or threat: **R. v. Bourne** (1939) 1 KB 687

In this case, a 14-year-old young girl was raped by five soldiers and became pregnant. The defendant was a gynaecologist. He performed an abortion with the consent of the girl's parents since as he believed that a victim of rape could die if permitted to give birth. He was charged with unlawfully procuring a miscarriage. The court held that the defendant had acted in good faith and had exercised his clinical judgement. The possible consequence of the continuance of the pregnancy would have had a negative effect on the physical and mental health of the girl. The defendant was found not guilty.

- 3) There was no other reasonable alternative available for averting the danger or threat: **R v Dudley and Stephens** 14 Q.B.D. 273 (1884)

In this case a yacht crew was cast away in a storm on the high seas in a lifeboat. They ran out of food, and on the twentieth day, they had not eaten for approximately eight days. The defendants killed and fed upon another crew member for four days and on the fourth day they were rescued by a passing vessel. When they were rescued, they were brought before the court and charged with murder. They raised the defence of necessity on the basis that it was necessary for their survival to act in this manner. According to the defendants, but for that act, they probably would not have survived as there was no other reasonable prospect of relief other than feeding upon the body of the deceased. Furthermore, the deceased was in a much weaker condition and was likely to have died before them. The Court held that killing an innocent person in order to save one's own life does not justify murder even though it was

committed under the extreme necessity of hunger. They were found guilty of wilful murder.

- 4) The damage caused was less than the harm that would have occurred: **Esso Petroleum Co. Ltd v Southport Corporation** [1956] AC 218 (*supra*)
- 5) The defendant did not cause the danger: **Rigby v Chief Constable of Police** [1985] 1 WLR 1242

In this case the police fired a CS gas canister into the plaintiffs premises with the intent to extract a psychopath who broke into the first plaintiff's gunsmiths shop and spread on the floor inflammable smokeless powder from a tin which he had found in the back of the shop. A fire started in the shop on account of the gas and which spread very rapidly, doing serious damage to the shop and its contents, including guns belonging to the second plaintiff. The plaintiffs claimed damages from the defendant in respect of those losses for, inter alia, trespass in firing the canister into the first plaintiff's premises without his consent, permitting the escape of a dangerous thing, and negligence. The police relied on the doctrine of necessity. The court held that the defence of necessity was a defence to trespass, but only where the need to act had not been brought about by the defendant's own negligence. That once a plaintiff had raised the issue of negligence, the burden was on the defendant to show that he had not been negligent by the ordinary standards of the tort of negligence.

- [73] In the instant case all witnesses for JPS indicate that the threat to the underground distribution system was imminent.

Evidence of Mr. Wickham

The remaining 8 substations have been bypassed with the use of pole mounted transformers and overhead lines. This was necessary to maintain supply to the Residents of Hope Pastures with electricity.

Evidence of Mr. Dixon

This process (underground cable replacement works) would not have been a timely one and one which would not allow for the supply of electricity to be returned to the customers in a reasonable time.

Evidence of Mr. Allen

With the unavailability of those type of switches in order to keep the system running and safe they were replaced with overhead switches for the overhead transformers.

Evidence of Mr. Dickenson

A decision was taken to replace the padmounted switch and transformer with overhead equipment which provides the timely and efficient restoration of power supply... A decision was taken to replace the underground cable with overhead conductor this is a more, reliable, efficient and timely and cost effective solution for a prompt restoration of power supply. Underground cable replacement works, would, to list a few examples, include excavation of sidewalks, roadways, and driveways. This process would not have been a timely one and one which would not allow for the supply of electricity to be returned to the customers in a reasonable time

With the repeated failure of the padmounted transformers switch gears in hope pastures over time JPS co came up with the measures which I mentioned before to address the problems with a view to restore power to the Residents

[74] I wish to reiterate that the statutory breach occurred as a result of the commencement of the 2014 pilot project. Prior to this project, JPS engineers had determined that the underground distribution system had deteriorated beyond the point of maintenance, and as a result was unsafe and unreliable. Serious power outages occurred in Hope Pastures in 2015. It cannot be coincidental that approximately a year after implementing the pilot project, serious power outages forced JPS to further implement an overhead distribution system. I take this occurrence as evidence of the dire state of the Hope Pastures underground distribution system.

[75] It is clear from this evidence that a reliable power supply could not be guaranteed to the Residents of Hope Pastures without the actions taken by JPS. In the

circumstance where there existed equipment that either could not be repaired or could only be replaced over a lengthy period, it was the only response that could be taken by JPS to fulfil their statutory duty to maintain a supply of electricity to the Residents of Hope Pastures.

- [76] It was not sufficient for the Residents to contend that as an alternative to the implementation of the overhead supply, JPS could have replaced the parts of the underground distribution system. The unchallenged evidence is that modern equipment would not be compatible with an underground distribution system built approximately sixty (**60**) years ago. Furthermore, the replacement parts are no longer being made for this existing system. Additionally, the proposed replacement of the underground distribution system would take years and in that period JPS would have needed to fulfil its obligation to provide a supply of electricity. The overhead installation by JPS was necessary to provide a reliable supply of electricity to the residents of Hope Pastures and the Pilot Project was part of that process.
- [77] I find that the actions taken by JPS were necessary to preserve for the Residents a continuous supply of electricity, as they are statutorily bound to do by virtue of the **Electric Lighting Act** and the licences thereunder. The defence of necessity would avail JPS. In the circumstance no award of damages could be made.
- [78] There is another bar to the Residents' recovery of damages. As it is clear that the underground distribution system will not be replaced by the residents of Hope Pastures, all the residents will have to connect to the overhead distribution system or obtain their supply of electricity by alternative means, as the underground distribution system must be taken out of service. The expenses incurred by the Residents would therefore have to be borne by them based on their individual choices. As a result, there is in effect no loss sustained by the Residents as a result of the actions taken by JPS. Consequently, JPS would have discharged its burden to show that irrespective of their statutory breach, the financial loss suffered by the Residents would have been sustained in any event. On this basis, I decline to

award damages to the Residents for JPS' breach of its statutory duty. Additionally, to allow recovery of these expenses would advantage the Residents as against the other residents of Hope Pastures and would be inequitable.

COSTS

[79] The Defendant being successful on all issues is to have its costs in keeping with the principle that costs follow the event.

CONCLUSION

[80] The findings of fact favour JPS. The present underground distribution system in Hope Pastures has failed due to age and obsolescence and not from a lack of maintenance. It is not possible to repair the system as newer technologies and methodologies have emerged. Support for the system by way of replacement parts is not possible as some parts are no longer being manufactured and are difficult to source. The replacement of the underground distribution system does not fall within the JPS' statutory obligation to repair as it is a totally new system. Any new system will be subject to the provisions of the Licence and the Line Extension Policy which provide that the cost is to be met by the applicant.

[81] The residents of Hope Pastures have indicated their inability/unwillingness to pay for a new underground distribution system. The expenses already incurred by the Residents would therefore still have to be made by them when the overhead distribution system, by which JPS is obliged to supply electricity to the island of Jamaica without cost, is installed. The net effect is that there is no financial loss to the Residents for which they should be compensated by an award of damages.

[82] In closing I would like to accord the Residents highest commendation for their actions. The virtue of the activism displayed by them cannot be overstated. Counsel's assistance to the Court by way of the breadth of the submissions was invaluable in the determination reached. My failure to refer to them, except as needed in my analysis, belies the use made of the submissions.

ORDER

Judgment for the Defendant with costs to be taxed if not sooner agreed.

UPDATED LIST OF HOPE PASTURES RESIDENTS AGAINST JPSCO December 2020

Residents making a claim against the JPSCO in **BOLD**

Total Number of Residents on List = 96

<u>NAMES</u>	<u>ADDRESSES</u>
1. Paulette Morgan	2 Cousins Close
2. Evelyn Smart	4 Cousins Close
3. Mara HoSang	8 Cousins Close
4. Avis Kerr	1 East Charlemont
5. Leslie Samuels	2 East Charlemont
6. Sandra Daley	3 East Charlemont
7. Norris Pinto	9 East Charlemont
8. Effie McDonald	15 East Charlemont
9. Donovan Rose	18 East Charlemont
10. Michelle MooSang	1 Gibson Close
11. Denis Valentine	8 Gibson Drive
12. Chris Burgess	14 Gibson Drive
13. Cowell Lyn	15 Gibson Drive
14. David Bain	17 Gibson Drive
15. Maxine Ruddock Small	22 Gibson Drive
16. Adolph Edwards	13 Glendon Circle
17. Cynthia/Anthony Marchand	15 Glendon Circle
18. Everard Cox	31 Glendon Circle
19. Denise Eldemire Shearer	34 Glendon Circle
20. Olivene Thomas	36 Glendon Circle
21. Andre Earle	41 Glendon Circle
22. Marie Thompson	45 Glendon Circle
23. Barbara Cover	47 Glendon Circle
24. Frank Villers	55 Glendon Circle
25. Owen Codner	2a Hope Boulevard
26. John Maxwell	3 Hope Boulevard
27. Clarence Dwyer	5 Hope Boulevard
28. Patricia Douce	6 Hope Boulevard
29. Marcia Sherman	7 Hope Boulevard
30. Dorothy Zaidie	9 Hope Boulevard
31. Louis Knight	11 Hope Boulevard
32. Philip Samuel	13 Hope Boulevard
33. David Samuel	13 Hope Boulevard
34. Calvin Blackwood	15 Hope Boulevard
35. Melrose Davis	19 Hope Boulevard

36. Donovan Lym	21 Hope Boulevard
37. Ann Marie Wyss	23 Hope Boulevard
38. Joy Wilson	25 Hope Boulevard
39. Eric Choo-Kang	29 Hope Boulevard
40. Maurice Saunders	30 Hope Boulevard
41. Trevor Armstrong	34 Hope Boulevard
42. Evelyn Gordon	38 Hope Boulevard
43. Gavin Bellamy	39 Hope Boulevard
44. Michael Wilson	41 Hope Boulevard
45. St. Stevens Church	42 Hope Boulevard
46. Jackie Haliburton	44 Hope Boulevard
47. Ruddy Fearon	46 Hope Boulevard
48. Aline Cheung	48 Hope Boulevard
49. Lana Smith	63 Hope Boulevard
50. Andrea Magnus	65 Hope Boulevard
51. Clifford Smith	69 Hope Boulevard
52. Stafford Oliver Neil	67 Hope Boulevard
53. Dr. John Hall (owner)	61 Hope Boulevard
54. Lloyd Brooks	71 Hope Boulevard
55. Gary Lee	73 Hope Boulevard
56. Philip & Phillan Prendegast (joint owners)	5 Keble Cres
57. Louilta Nicholson	14 Keble Cres
58. Beverley Shirley	17 Keble Cres
59. Earle Spencer	19 Keble Cres
60. Cheryl Wright	25 Keble Cres
61. Errol & Hermine Huie	45 Keble Cres
62. Shirley Lachan	53 Keble Cres
63. Orville Heslop	2 Simms Close
64. Jennifer Alexander	4 Simms Close
65. Judith Chin	6 Simms Close
66. Evadne Crooks	10 Simms Close
67. Dennis Hamilton	3 South Monterey Dr
68. Margaret Minott	5 South Monterey Dr
69. Carlton Watson	7 South Monterey Dr
70. Louis Forbes	8 South Monterey Dr
71. Peter Gentles	9 South Monterey Dr
72. Rupert Andrews	11 South Monterey Dr
73. Judith Thomas	12 South Monterey Dr
74. Derek Lue	13 South Monterey Dr
75. Alfred Thomas	14 South Monterey Dr
76. Richard Brown	16 South Monterey Dr
77. Opal Neil	18 South Monterey Dr

78. Jayant Thakur	19 South Monterey Dr
79. Ashley and Winifred Smith	20 South Monterey Dr
80. Ester Tyson	22 South Monterey Dr
81. Wesley Miller	23 South Monterey Dr
82. Yvonne Gunning	24 South Monterey Dr
83. Trevor McCartney	25 South Monterey Dr
84. Helen Morris	26 South Monterey Dr
85. Dawn Shim	27 South Monterey Dr
86. Eric Heslop	33a South Monterey Dr
87. Paula Gracie	33 South Monterey Dr
88. Neville Mair	34 South Monterey Dr
89. Ozzie Tai	38 South Monterey Dr
90. Claudia Doig	40 South Monterey Dr
91. Lowell McKensie	44 South Monterey Dr
92. Vanda Levy McKensie	46 South Monterey Dr
93. Peter & Colleen Williams	1 Seberg Close
94. Roydel Hylton	7 Seberg Close
95. Alexander Michael Williams	2 Hope Plaza
96. Sylvia Green	6 Hope Plaza