Privy Council Appeal No. 41 of 1987

General Engineering Services Limited Appellants

v.

Kingston and Saint Andrew Corporation Respondents

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST NOVEMBER 1988

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD ACKNER
LORD OLIVER OF AYLMERTON
SIR JOHN STEPHENSON
[Delivered by Lord Ackner]

The appellants carry on the business of mechanical and electrical engineers and at all material times owned 27 Dunrobin Avenue Kingston, Saint Andrew where they stored specialised medical-electrical equipment and other material connected with their business. At about 5.45 a.m. on 13th October 1977 a Mrs. Enid Holding, who lived at 29 Dunrobin Avenue, heard a slight crackling sound coming from number 27. On looking through her bedroom window she saw smoke and flames coming from a section of the building. She dialled the fire brigade at Half Way Tree, which is only one and a half miles away, involving a journey which normally takes the fire engine no more than three and a half minutes. When some fifteen minutes later the fire brigade had not arrived, she telephoned again and was told the unit was on its way. It arrived shortly after the telephone call, having taken some seventeen minutes to drive this short distance. It was common ground that if the fire brigade had arrived with its usual expedition, the fire would have been speedily extinguished and the complete destruction not only of the office and store room, but also of its contents involving a

total loss of approximately $6.2 million, would have been avoided.

The reason why it took some five times longer for the fire brigade to reach this fire than normally was that the firemen, in furtherance of an industrial dispute, were operating a "go slow" policy in order to bring pressure upon their employers to satisfy their grievances. Mrs. Holding, who became very anxious at the non-arrival of the fire brigade after making her second telephone call, went up the road along which she was expecting them to arrive. She saw them turn the corner, enter Dunrobin Avenue and then noticed the fire engine slowly moving forward, then stopping, then moving slowly again and then once more stopping. Evidence was given by Mr. Dixon, the appellants' Managing Director, who arrived at the scene of the fire about an hour later, that he asked the Chief Officer in charge of the fire brigade "why did you let the place burn down?" This question elicited the reply "we are on a go-slow and even if my mother was in there, it would have to burn down. I want my raise of pay". Although this reply was denied, Mr. Cotran, on behalf of the appellants, did not seek to challenge that the clear inference from the facts was that the firemen had, in pursuance of their go slow policy, decided to take so long to get to the fire that by the time of their arrival the property would have been substantially destroyed.

On 17th August 1978 the appellants issued a writ against the respondents alleging that, under the Kingston and Saint Andrew Fire Brigade Act, the respondents had a statutory duty to extinguish this fire, that in breach of this duty, they failed to respond promptly to the emergency call and were vicariously responsible for the negligence of the members of the fire brigade. Had the respondents complied with their statutory duty and had the fire brigade travelled to the scene of the fire with due expedition, the fire, so it was alleged, would have been extinguished with minimal damage and loss to the appellants.

On 14th December 1984 Malcolm J. in the Supreme Court of Jamaica dismissed the appellants' claim with costs and on 2nd October 1986 the Court of Appeal of Jamaica (Carey, White, and Wright JJ.A) unanimously dismissed their appeal with costs.

Mr. Cotran, in opening the appeal before the Board, accepted that in order to succeed, he had a number of findings in the Court of Appeal to overturn e.g. that upon a true construction of the Act, the duty to extinguish fires was directly imposed on the members of the fire brigade and had not been merely delegated to them by the respondents, and that no cause of action against the respondents had been conferred upon the appellants by the Act (the views of the majority in the Court of Appeal (White and Wright JJ.A)). His main and principal hurdle, however, was the court's unanimous decision that the respondents could not properly be held to be vicariously liable for the default of the members of the fire brigade. Accordingly, with characteristic realism, Mr, Cotran elected to concentrate his submissions initially upon that issue, since, if he failed to persuade their Lordships that the respondents were vicariously liable, the appeal would be bound to fail and there would be no useful purpose in his making further submissions.

It is of course common ground that a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. Further it is well established that the act is deemed to be so done if it is either (1) a wrongful act authorised by the master or (2) a wrongful and unauthorised mode of doing some act authorised by the master. Mr. Cotran contended that the conduct of the members of the fire brigade could properly be categorised as a wrongful and unauthorised mode of doing some act, i.e. driving to the scene of a fire, which was authorised by the respondents, their employers. He relied upon the much quoted and approved passage in Salmond on Tort to be found in the current (19th) edition at page 521:-

> "But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does

> mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment but has gone outside of it."

Their Lordships have no hesitation in agreeing with the unanimous decision of the Court of Appeal, upholding that of Malcolm J., that the members of the fire brigade were not acting in the course of their employment when they, by their conduct described above, permitted the destruction of the building and its contents. Their unauthorised and wrongful act was so to prolong the time taken by the journey to the scene of the fire, as to ensure that they did not arrive in time to extinguish it, before the building and its contents were destroyed. Their mode and manner of driving- the slow progression of stopping and starting - was not so connected with the authorised act, that is driving to the scene of the fire as expeditiously as reasonably possible, as to be a mode of performing that act.

For all the practical difference that it would have made, they might, after answering Mrs. Holding's call, just as well have waited in the fire station, until they were confident that the building and its contents were beyond saving and then to have proceeded expeditiously to the scene of the fire: or having arrived expeditiously, then to have refused to take any action until it was too late. The negligence which would then have been asserted, namely the failure to answer the alarm or extinguish the fire with proper expedition, could not have been said to have been so connected with the authorised act, that is, immediately answering the alarm, or extinguishing the fire on arrival at the scene, as to be a mode of performing the acts.

Here the unauthorised and wrongful act by the firemen was a wrongful repudiation of an essential obligation of their contract of employment, namely the decision and its implementation not to arrive at the scene of the fire in time to save the building and its content. This decision was not in furtherance of their employers' business. It was in furtherance of their industrial dispute,

designed to bring pressure upon their employers to satisfy their demands, by not extinguishing fires until it was too late to save the property. Such conduct was the very negation of carrying out some act authorised by the employer, albeit in a wrongful and unauthorised mode. Indeed in preventing the provision of an essential service, members of the fire brigade were, by virtue of the provisions of the Jamaican Labour Relations and Industrial Disputes Act, guilty of a criminal offence.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs.