



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

**CICA (Civil) Appeals No. 1 & 2 of 2021
(G 214 of 2019 & G 215 of 2019)**

BETWEEN:

**THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS
In right of the Cayman Islands Government, pursuant to s.11 of the Crown Proceedings Act
(1997 Revision)**

Appellant

-and -

JASON MCCOY

Respondent

-and-

GARFIELD RITCH

Respondent

BEFORE: **The Rt. Hon. Sir John Goldring, President
The Hon John Martin QC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal**

Appearances: **Mr. Isaac Jacob instructed by Paul Keeble of Hampson and
Company for the Appellant
Mr Hugh Southey QC instructed by Rupert Wheeler of KSG
Attorneys for the Respondents.**

Heard: **3 November 2021**

Draft Circulated: **12 November 2021**

Judgment delivered: **30 November 2021**

JUDGMENT

The Rt. Hon Sir John Goldring

Introduction

1. The Respondents are fire officers employed by the Cayman Islands Fire Service, which, as is common ground, is an emanation of the Crown. On 5 January 2017, they were both injured

during the course of a routine test of their fire truck. For present purposes, it is agreed that the accident was caused by an unsafe system of work. A rusty bolt on their truck had sheared off. The system of inspection and maintenance was inadequate. In Further and Better Particulars of their Statements of Claim, they allege their employer was in breach of its direct common law duty to provide a safe system of work. The Appellant sought to have the Respondents' claims dismissed under GCR Order 14 r. 12 as having no prospect of success, on the basis that section 9(5)(d) of the Fire Brigade Act (2006 Revision) ("the 2006 Revision") provided the Crown with immunity from any liability for breach of its common law duty of care as an employer to provide a safe system of work. The Appellant further submitted, on the same basis, that the claims should be struck out on the grounds that no cause of action was disclosed and/or that the claims were frivolous or vexatious and/or an abuse of the process of the Court. On 6 January 2021 the Honourable Madame Justice Ramsey-Hale dismissed the Appellant's applications. The Appellant, by leave of the judge, now appeals her decision.

The relevant legislation and its history

2. The first Fire Brigade Act in the Cayman Islands was in 1979. For present purposes, the court may start with the Fire Brigade Act (1995 Revision) ("the 1995 Revision").

The 1995 Revision

3. Section 5 of the 1995 Revision defined the Chief Fire Officer's duties in the following terms:

"The Chief Fire Officer's duties and responsibilities include:

- (a) the preservation, care and control of all stores and fire and other equipment...*
- ...(c) control of firefighting;*
- (d) the elimination or reduction of fire hazards; and*
- (e) the enforcement of this Law."*

4. By section 8:

"The duties of officers include-

- (a) firefighting;*
- (b) the elimination and reduction of fire hazards;*
- (c) the enforcement of this Law;*
- (d) the maintenance of stores and equipment..."*

5. Section 9 read:

"(2) In the performance of their firefighting duties officers may, in order to extinguish any fire or to avert any calamity-

- (a) enter upon any premises...with or without...consent...*

- (b) *enter, break into, sink, move or demolish any vessel, vehicle or aircraft with or without the consent of any person...*
 - (c) *take any such steps including the use of any water supply or water storage, the closure of any street...and the demolition of any building, as in their opinion are desirable or necessary...*
- (4) *when engaged in their duty of eliminating and reducing fire hazards, the Chief Fire Officer and any [authorised] officer...has...right of entry...of any premises...for the purpose of detecting such hazards and devising remedies...*
- (5) *No action for damages may be brought against-*
- (a) *the Brigade or any member thereof;*
 - (b) *any constable;*
 - (c) *any member of the public acting at the request of any officer;*
- or*
- (d) *the Crown,*
- in respect of death, injury or loss incurred by any person occasioned in the course of carrying out firefighting duties or averting a calamity.”*

The Fire Brigade (Amendment) Act 1996

6. The 1995 Revision was amended by the Fire Brigade (Amendment) Act 1996 (“the 1996 Amendment”) in several respects. It was preceded by a Bill which, by its “*Memorandum of Objects and Reasons,*” stated that:

“...2. *Since the original enactment of the Fire Brigade Law in 1979, development in the Cayman Islands has brought a widening in the responsibilities of the Brigade, which now, in addition to firefighting and prevention, undertakes the rescue of persons involved in vehicle accidents and other dangerous events such as chemical spills. This Bill seeks to give statutory recognition to these new functions and to provide the basis for the promulgation of a modern and comprehensive Fire Code.*”

7. The extension of the duties upon the Fire Service foreshadowed by the Bill were contained in the 1996 Amendment. It extended the duties of the Fire Service under section 5 by deleting section 5(e) of the 1995 Revision and adding the following:

- “(e) *the release and rescue of persons and property from vehicles, aircraft and vessels in hazardous situations;*
- (f) *the control and mitigation of the effects of the escape or spilling of any hazardous substance;*
- (g) *any other responsibility or duty imposed on him by this Law; and*
- (h) *the enforcement of this Law.”*

8. Section 9(2) was also amended. The words “*firefighting*” and “*calamity*” were deleted. Substituted were the words:

“immediate danger from any hazard to which this Law relates.”

9. Section 9(4) was deleted. Substituted was the following:

“Without prejudice to the provisions of subsection (2), the Chief Fire Officer and any [authorised] officer...has...right of entry...of any premises...for the purpose of carrying out any duty imposed upon him by this or any other Law”

10. In section 9(5), the words “*firefighting duties or averting a calamity*” were deleted. Substituted were the words, “*carrying out any responsibility or duty imposed by this or any other Law.*”

11. Section 9(5) as amended therefore read:

“No action for damages may be brought against-
(a) the Brigade or any member thereof;
(b) any constable...
(d) the Crown,
in respect of death, injury or loss incurred by any person occasioned in the course of carrying out any responsibility or duty imposed by this or any other Law.”

The Fire Brigade Act (1999 Revision)

12. The statutory provision in its present form first appeared in the Fire Brigade Act (1999 Revision) (“the 1999 Revision”). Section 9(5) of the published version of the 1999 Revision read:

“No action for damages may be brought against-
(a) the Brigade or any member thereof;
(b) any constable...
(d) the Crown,
in respect of any death, injury or loss incurred by any person occasioned in the course of carrying out any other responsibility or duty imposed by this or any other law.”

13. It is agreed that the addition of the highlighted “*other*” was a draftsman’s error. The Respondents submitted that the reference to ‘law’ was another error. (All the other references to Law in the 1996 Amendment were similarly changed). Mr Jacob submitted that the change

from Law to law made no difference to the meaning. It did no more than reflect what was the legislative intention under the 1996 Amendment. This is a topic to which I briefly return below.

The 2006 Revision

14. The 1999 Revision definition remained in the 2006 Revision (the relevant provision for present purposes). Sections 8 and 9 provide:

“Officers’ duties

8. The duties of officers include—

- (a) firefighting;*
- (b) the elimination and reduction of fire hazards;*
- (c) the enforcement of this Law;*
- (d) the maintenance of stores and equipment;*
- (e) compliance with the lawful orders of superior officers;*
- (f) the carrying out of the duties imposed on them by this or any other law; and*
- (g) such other duties as may be assigned to them, from time to time, by or from the Chief Fire Officer.”*

“9.(1) When engaged in their duties officers shall, in relation to the public, have all the powers of constables and when engaged in fighting a fire which is out of control shall take precedence over constables of equivalent rank.

(2) In the performance of their duties, officers may, in order to extinguish any fire or to avert any immediate danger from any hazard to which this Law relates—

- (a) enter upon any premises or place with or without the consent of any occupant or occupier;*
- (b) enter, break into, sink, move or demolish any vessel, vehicle or aircraft with or without the consent of any person in charge thereof; or*
- (c) take such steps including the use of any water supply or water storage, the closure of any street or way and the demolition of any building, as in their opinion are desirable or necessary.*

(3) Whether or not, for the purpose of this section and section 7, a fire is out of control is a question for the decision of the senior officer present thereat.

(4) Without prejudice to subsection (2), the Chief Fire Officer and any officer authorised in writing by him has, subject to section 13, right of entry to and search of any premises at all reasonable times for the purposes of carrying out any duty imposed upon him by this or any other law.

(5) No action for damages may be brought against—

- (a) the Brigade or any member thereof;*
- (b) any constable;*

(c) any member of the public acting at the request of any officer; or
(d) the Crown,
in respect of death, injury or loss incurred by any person occasioned in
the course of carrying out any other responsibility or duty imposed by
this or any other law."

The Crown Proceedings Act (27 of 1965) (1997 Revision)

15. Finally, I should refer to the Crown Proceedings Act (27 of 1965) (1997 Revision) ("the CPA").

16. Part I (which is "Introductory,") defines Crown as meaning "Her Majesty in right of Her Government in the Islands." (see section 2(1))

17. Part II sets out the "Substantive Law." Section 3 is said to deal with "Liability of the Crown in tort." By that section:

"(1) Subject to this [Act]...the Crown is subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property;

Provided that no proceedings lie against the Crown under paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from this [Act], have given rise to a cause of action in tort against that servant or agent...

(3) *Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of common law or by statute, and that officer commits a tort while performing...those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.*

(4) *An enactment which negatives or limits the amount of the liability of any Government department or officer in respect of a tort committed by that department or officer applies, in the case of proceedings against the Crown under this section in respect of a tort committed by that department or officer, in relation to the Crown as it would apply in relation to that department or officer if the proceedings against the Crown were proceeding against that department or officer."*

18. Part III deals with "Jurisdiction and Procedure." Section 9 enables a person with a claim directly to sue the Crown.

The judgment

19. The judge's view is encapsulated in the following paragraphs of her judgment:

- “18. Having considered the submissions and the provisions of the statutes...it seems to me plain beyond peradventure that section 9(5) is directed to claims for damages for injury resulting from a breach of any of the statutory duties imposed on the fire officers pursuant to section 8 of the Law or any other law. In these proceedings, the fire officers are not asserting a claim for damages for any injury sustained as a result of the breach by any fellow officer of any statutory duty...Rather, they are claiming against the Crown for breach of its statutory common law duty to provide a safe system of work.*
- 19. That duty arises out of its contractual relationship with fire officers into which the common law implies a duty of care. It is a duty which is owed to each and every employee of the Crown pursuant to section 3(1)(b) of the Crown Proceedings Law. The fire officers' right of action is not barred by section 9(5) as it speaks only to actions for damages for injuries which result from a breach of the fire officers' duties and not to breaches of the Crown's common law duty of care owed to its employees...*
- 26. As the breach of duty upon which the Plaintiffs rely is the breach of the Crown's common law duty of care as an employer, there are no grounds for finding that the claim is bound to fail by reason of any statutory immunity conferred on the Crown by section 9(5) of the Law.”*

The Appellant's submissions

20. Although put at greater length, Mr Jacob's argument can shortly be summarised. The Fire Brigade Acts impose no direct duties on the Crown. The Crown does not fight fires or avert calamity leading to possible death, injury or loss. Its only possible liability towards members of the public could be vicarious. Section 9(5)(a)-(c) and the proviso to section 3(1) of the CPA exclude that. The reference to the Crown in section 9(5)(d) could not therefore refer to possible liability to members of the public. It cannot refer to liability to any officer or member, for that too is excluded. However, meaning and effect must be given to section 9(5)(d). What other direct liability on the Crown could there be, asked Mr Jacob rhetorically, but liability arising from its failure to provide a safe system of work. That is the only way to give meaning and effect to section 9(5)(d). That is the case whether the unsafe system of work arose when the officer was performing his duty to maintain equipment under 8(d) of the 1995 Revision or, even more plainly, submitted Mr Jacob, if, as here, he is doing so under section 8(d) of the 2006 Revision. For the amendment made the position unambiguously clear, he submitted. A failure to provide a safe system of work is a breach of the common law and plainly amounts to “any other law.” That is the position whether the claim in respect of the failure to provide a safe system of work simply relies on a breach of the employer's duty to provide employees with a

safe system of work or whether it relies on a breach of an implied term in the Respondents' contracts of employment to provide a safe system of work (about which I shall deal in more detail below).

21. Section 3(4) of the CPA contemplates that an enactment might negative or limit liability on the Crown, submitted Mr Jacob. He drew to the court's attention a number of other Cayman provisions which did so.
22. In support of his submissions Mr Jacob sought to explain why the Legislative Assembly introduced this wide immunity from suit merely one year after the 1995 Revision. Without going into any detail, he submitted that a piece of litigation commenced in March 1995 involving a machete attack by one firefighter upon another in which the Chief Fire Officer and the Crown were sued, was likely to have been the impetus behind the introduction of the final words of section 9(5).
23. Mr Jacob also set out in some detail why, as he submitted, the Legislative Assembly decided to exclude any liability for damages for any failure to provide a safe system of work. It struck a balance between the interests of the tax paying public (as he put it) and the generous benefits provided to fire officers. He set them out.
24. Although in argument Mr Jacob accepted that the failure of the Fire Service to provide the Respondents with a safe system of work was a breach of its contractual duty to do so, in subsequent written submissions, Mr Jacob has argued that was not so. He submitted that if the duty were contractual, there would have been no need for a case such as *Wilsons and Clyde Coal Company v. English* [1938] AC 57, in which the House of Lords considered an employer's duty to his employees. He cited Lord Sumption's analysis in *Woodland v Swimming Teachers Association and others* [2014] AC 537. Putting it shortly, he submitted that the duty to provide a safe system of work, arose out of the relationship between the employer and employee. It was a common law duty arising in tort. Because section 3(1) of the CPA speaks of the Crown being "subject to all those liabilities in tort," and section 3(1)(b) speaks of "any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer," the CPA 'states' that the duty owed by employers to employees is a common law duty arising in tort, submitted Mr Jacob.

Analysis

25. As the Respondents rightly submit, it is trite law that an employer has a duty to provide a safe system of work for its employees. It is a duty which an employer cannot delegate. An employer

who fails to do so is directly liable in damages. (see *Wilson and Clyde Coal v English* [1938] AC 57).

26. If the employer is the Crown, similar obligations are placed upon it: section 3(1) of the CPA.
27. It also seems to me quite clear that implied in the Respondents' contracts of employment was a duty upon the Fire Service to provide a safe system of work. I reject Mr Jacob's submissions to the contrary. In failing to provide a safe system of work, the Fire Service was therefore in breach of the Respondents' contracts of employment. I need only cite the headnote from the Court of Appeal decision in *Matthews v Kuwait Bechtel Corp* [1959] 2 Q.B. 57 (an authority not drawn to the court's attention by either party), in which it is said that:

"...the common law placed an employer under a duty to take all reasonable care for the safety of his servants in the course of their work; that the plaintiff, having suffered injury owing to the defendants' alleged breach of such duty, was entitled to claim damages either in tort or for breach of contract..."

28. In giving the leading judgment of the court, with which Willmer LJ agreed, Sellers LJ considered all the relevant authorities.
29. Neither do I accept, as Mr Jacob submitted, that section 3(1) of the CPA means that the duty owed by employers to employees is a common law duty arising in tort. That section is dealing with the position when the Crown is liable in tort. It does not deal with the position of the Crown when it is in breach of contract. In his monograph in 1948, entitled "*Crown Proceedings: An Account of Civil Proceedings by and against the Crown as affected by the Crown Proceedings Act 1947*" Professor Glanville Williams wrote:

"The Crown Proceedings Act does not effect any considerable change in the liability of the Crown in contract; the principal change is one of procedure rather than of substantive rights."

30. In paragraph 85 of his speech in *Matthews v Ministry of Defence* [2003] UKHL, Lord Millett agreed with Professor Williams' analysis.
31. Finally on this aspect, Section 9 of the CPA deals with the procedure to be followed when there is an allegation of breach of contract by the Crown.
32. The issue therefore is whether by section 9(5) of the Fire Brigade legislation it was the intention of the Legislative Assembly to exclude liability for a failure by the Fire Service to provide fire officers with a safe system of work.

33. As Lady Arden recently said (at §27), when giving the judgment of the Privy Council *Shanda Games*, [2020] UKPC 2, an appeal from the Cayman Islands:

“The court has to ascertain the intention of the legislature from the words used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision.”

34. The words of section 9(5), both before and after the 1996 Amendment, must be read in the context of the provisions as a whole. The purpose of the immunity provided by section 9(5) at (a) to (c), was plainly directed to preventing claims for death, injury or loss suffered by anyone during the course of fighting fires (under the pre-amendment legislation) and fighting fires and/or dealing with other hazards (under the post-amendment legislation). It was an outward looking provision plainly intended to protect fire officers, the Fire Service and others in the course of fighting fires or dealing with other hazardous situations. That is the mischief which the section was seeking to address. I do not accept that in a provision plainly intended to deal with that issue, the intention of including sub-section (d) was to deal with a wholly different possible liability, namely the failure of the Fire Service to provide its employees with a safe system of work, let alone a failure to do so in breach of their contracts of employment. In my judgment, the explanation for including sub-section (d) is much more straightforward. It was included as a ‘belt and braces’ provision in case someone should sue the Crown for damage suffered during the course of fighting fires and/or dealing with other hazards.
35. Furthermore, it seems to me that if it were the intention of the Legislative Assembly to introduce so fundamental a provision as depriving fire officers of their right to sue their employer (under section 3(1) of the CPA) for failing to provide a safe system of work, let alone their right to sue in respect of the Fire Service’s breach of its contractual obligation to do so, it would not have done so by the side wind of adding sub-section (d) to section 9(5) or, in an Act plainly intended to increase the duties and responsibilities of the Fire Service, by introducing without more, the words “*any other law.*” In my view, those words were added to accommodate the possibility that someone who had suffered damage in the course of fighting a fire, or when the Fire Service was exercising its wider responsibilities following the 1996 Amendment, might suggest it had acted outside its powers, and that the protection provided by section 9(5) did not consequently apply. The added words were, in other words, another ‘belt and braces’ provision to protect the Fire Service. They again reflected the outward looking aspect of these provisions. They had nothing to do with the duty of the Fire Service to provide a safe system of work, let alone to protect it from actions by its employees for failing in its contractual duty to do so.

36. It also may well be that the parliamentary draftsman included the lower case ‘l’ in the 1999 Revision because he realised that the upper case ‘L’ in the 1996 Amendment (see paragraph 13 above) was too restrictive and might not achieve the objective of sub-section 5. Unfortunately, at the same time, he erroneously introduced the word ‘*other*’ in a position which made no sense.
37. As to Mr Jacob’s submission that this wide immunity was introduced as a result of the litigation involving a machete attack by one firefighter upon another, that seems to me improbable and highly speculative, to put it at its lowest. As to the submission that the final words of section 9(5) were intended by the Legislative Assembly to reflect a balance between the interests of the tax paying public and the generous benefits provided to fire officers, that again seems to me far-fetched. There is nothing in the legislation to suggest this was so. The Bill introducing the 1996 Amendment did not mention it. I cannot accept that section 9(5) reflected a considered intention by the Legislative Assembly to deprive fire officers of their entitlement to sue their employer for its breach of duty following consideration of the balance between the tax paying public and fire officers’ benefits.
38. In the result, this appeal fails, irrespective of whether the Fire Service’s breach of its obligation to provide a safe system of work amounted to a breach of the Respondents’ contracts of employment.
39. Finally, I should mention an argument advanced by the Respondents. They submitted that if the Appellant was correct in its construction of section 9(5), it would be in breach of various provisions of the Cayman Islands Bill of Rights. In the circumstances, that is a submission with which it has not been necessary for the Court to deal.
40. For the reasons I have set out, I would dismiss this appeal.

The Hon Sir Richard Field, Justice of Appeal

41. I agree.

The Hon John Martin QC, Justice of Appeal

42. I also agree.