[2023 Gib LR 338]

PIZARRO and OTHERS v. CHIEF FIRE OFFICER

SUPREME COURT (Ramagge Prescott, J.): May 5th, 2023

2023/GSC/020

Fire and Rescue—fire hazard—abatement notice—residents of buildings who had expanded their properties without permission served by Chief Fire Officer with fire hazard abatement notices on basis that encroachments into smoke ventilation shafts created fire hazard—Magistrate upheld notices—decision quashed on appeal as no fire hazard (defined in Fire and Rescue Service Act, s.2) created—evidence showed that shafts not fit for purpose as smoke ventilation shafts and residents' encroachments did not materially increase likelihood of fire or danger to life or property from fire

The appellants were served with fire hazard abatement notices.

Owner/occupiers of flats in a residential development had expanded their properties without permission by building into sections of a shaft which adjoined their individual flats. The Chief Fire Officer served fire hazard abatement notices pursuant to the Fire and Rescue Service Act alleging that they had created a fire hazard by blocking the shafts, which were said to be smoke ventilation shafts and an essential part of the buildings' fire safety engineering. The notices required the blockages to be removed.

Fifteen owner/occupiers appealed to the Magistrates' Court. Two experts on fire engineering gave evidence, one engaged by the Chief Fire Officer and the other by the appellants. The experts produced individual reports as well as a joint statement of issues. The appellants submitted that the basis upon which the respondent's expert was instructed called into doubt his independence as an expert. He was engaged by the safety officer of the Gibraltar Fire and Rescue Service, rather than by counsel, who sought a fire engineer's statement to back up the Service in court by stating that firefighting operations would be hindered by the smoke ventilation shafts being blocked by the encroachments. The respondent's expert produced three reports, none of which mentioned the relevant statutory test. The first report had as its remit the investigation of the effect of removing the shafts. This report was disregarded by the respondent when it became apparent that the appellants' expert had carried out a physical inspection of the buildings and found that the actual shafts did not resemble the shafts as designed. The respondent's expert produced a second report the objective of which was stated to be investigating fire safety in the flats with the aim of objectively establishing whether a suitable level of safety was provided

or if a hazard existed that could in the event of fire pose threat to life. The conclusion of the second report was that the state of the shafts before the encroachments had already rendered them ineffective as smoke shafts, although the encroachments had made the situation slightly worse. The expert produced an unsolicited third report in which he concluded that the shafts would function as smoke shafts if the encroachments and the airbricks were removed and some remedial work carried out.

The Stipendiary Magistrate ruled that the notices should be complied with and the shafts returned to the state they were in before the encroachments were made. He set out the position of the Gibraltar Fire and Rescue Service that the shafts were smoke ventilation shafts and an essential part of the buildings' fire safety engineering, and the position of the appellants that the shafts were not fit for purpose as smoke ventilation shafts and that given their construction and current state, far from creating a fire hazard, the encroachments made the buildings safer by preventing the uncontrolled upward spread of smoke and fire. The Stipendiary Magistrate set out the test to be applied, namely that he had to be satisfied to the civil standard that the encroachments materially increased the likelihood of fire or danger to life or property that would result from an outbreak of fire or which would materially hamper the Service in the discharge of its duties in the event of fire. The Stipendiary Magistrate preferred the evidence of the respondent's expert. The Stipendiary Magistrate found that the shafts were smoke ventilation shafts. He concluded that the encroachments materially increased the danger to life or property that would result from an outbreak of fire or which would materially hamper the Service in the discharge of its duties in the event of fire.

Twelve owner/occupiers ("the appellants") appealed to the Supreme Court on the basis that a fire hazard pursuant to s.2(g) of the Act had not been created. The appellants raised four grounds of appeal: (1) the Stipendiary Magistrate gave no adequate reasons for his decision nor did he make the necessary findings of fact to reach that decision. This was an error of law and the Stipendiary Magistrate's decision ought to be set aside on this basis; (2) the evidence of the respondent's own expert was that the appellants had not created a fire hazard at the time that the notices were served or at the time of the hearing. As such, there was no basis upon which the Stipendiary Magistrate was entitled to find that a fire hazard had been created. Therefore, this was a decision that no reasonable Magistrate properly directing himself could reach and the decision ought to be set aside; (3) the Stipendiary Magistrate ought to have acceded to the appellants' submissions on the unreliability of the respondent's expert's evidence. This was a decision that no reasonable Magistrate properly directing himself could reach and the decision ought to be set aside; and (4) the Stipendiary Magistrate ought not to have rejected the evidence of the appellants' expert. This was a decision that no reasonable Magistrate properly directing himself could reach and the decision ought to be set aside.

Held, allowing the appeals:

(1) A "fire hazard" was defined in s.2 of the Act and included (in s.2(g)):

> "any other matter or circumstances which materially increases the likelihood of fire or danger to life or property that would result from the outbreak of fire or which would materially hamper the Service in the discharge of its duties in the event of fire . . ."

The parties agreed that "materially" should be given its ordinary meaning of "in a significant or considerable way." This was the statutory test which governed the question of whether the encroachments constituted a fire hazard (paras. 7–8).

(2) The Stipendiary Magistrate (i) failed to address the manner in which the respondent's expert was instructed or the impact this was bound to have had on his status as an unbiased, competent and reliable expert; (ii) failed to address the issues regarding the contents and non-adherence to the CPR guidelines of the respondent's expert's three reports; (iii) failed to address the challenges raised by the appellants with regard to the reliability of the respondent's expert as an expert witness; (iv) failed to mention those parts of the evidence of the respondent's expert which in fact supported the case for the appellants in a material way; (v) failed to address properly why he preferred the evidence of the respondent's expert over that of the appellants' expert and failed to address why he rejected the latter's evidence; (vi) failed to give any or any adequate consideration to the crucial aspects of the joint statement which in fact supported the view that no fire hazard had been created; (vii) having correctly identified the statutory test, failed to apply it to the evidence; (viii) made findings which were unsupported by the evidence; (ix) made findings or reached conclusions before taking account of submissions; (x) failed to properly reference the source of his findings; and (xi) failed to take proper account of the appellants' submissions. The decision of the Stipendiary Magistrate would be quashed. On the evidence before him no reasonable Stipendiary Magistrate properly directing himself could have reached the decision that the encroachments created a fire hazard as defined in the Act. The court would therefore allow the appeals and find that within the meaning of the Act the appellants did not create a fire hazard (paras. 86–87).

Cases cited:

(1) *Cruz (t/a Julnic Holdings)* v. *Trade Licensing Auth*., 2016 Gib LR 1, referred to.

(2) *Flannery* v. *Halifax Estate Agents*, [2000] 1 W.L.R. 377; [2000] 1 All E.R. 373; (1999), 11 Admin. L.R. 465; 15 Const. L.J. 313; [2000] C.P. Rep. 18, considered.

(3) *Garcia* v. *R.*, 2016 Gib LR 221, referred to.

Legislation construed:

Fire and Rescue Service Act 1976, s.2(g): The relevant terms of this provision are set out at para. 8.

s.11(1): The relevant terms of this subsection are set out at para. 6.

s.11(2): The relevant terms of this subsection are set out at para. 7.
s.11(3): The relevant terms of this subsection are set out at para. 7.
s.12: The relevant terms of this section are set out at para. 10.
s.28: The relevant terms of this section are set out at para. 11.

Magistrates' Court Act, s.62: The relevant terms of this section are set out at para. 12.
s.64: The relevant terms of this section are set out at para. 13

A. Cardona and *C. Smith* (instructed by Phillips Barristers & Solicitors) for the appellants;
J. Fernandez (instructed by Office of Criminal Prosecutions and Litigation) for the respondent.

1 **RAMAGGE PRESCOTT, J.:**

Introduction

On November 27th, 2017 the Chief Fire Officer ("CFO") served several fire hazard abatement notices ("the notices") on various owner/occupiers of Montagu Gardens. The notices were all substantially identical in content, related to the same allegation and required the same action to be taken by the recipients.

2 The owner/occupiers in question had expanded their properties by building into sections of a shaft which adjoined their individual apartments. None of the owners/occupiers had received permission for the expansions. The notices alleged that the appellants had created a fire hazard by blocking the shafts. The CFO alleged that the shafts were smoke ventilation shafts and in that capacity were an essential part of the buildings' fire safety engineering. The notices required that the blockages be removed. Fifteen owner/occupiers appealed to the Magistrates' Court by way of complaint. By a judgment dated June 10th, 2020 the Stipendiary Magistrate ("SM") ruled that those appellants should comply with the notices and return the shafts to the state they were in before the encroachments were made. It is from that decision that twelve of the original fifteen owners/occupiers ("the appellants") appeal to this court. The appeal is by way of case stated.

3 For the avoidance of doubt, I shall refer to the expansions into sections of the shafts by the appellants, as "encroachments," that term does not include any other obstructions there may have been in the shafts prior to the issues of the notices.

Factual background

4 The notices all relate to apartments in Montagu Gardens, this is a residential development built in 1991–92 which comprises several blocks of flats. The certificates of fitness in respect of the buildings were issued in 1992 upon the completion of the development. There appears to be no

documentary evidence of any inspections carried out by the Gibraltar Fire and Rescue Service ("GFRS") prior to the issue of certificates.

5 The first encroachment took place in 1992. In September of 1992 the GFRS wrote to Land Property Services with regard to what was described as encroachments into "smoke extracting shafts." It appears that a report was commissioned and in October 1992 that report compiled by A.J. Ward from the Buckinghamshire Fire and Rescue Service was completed. Thereafter, between that date and March 2017 there appears to have been some correspondence involving the GFRS, various individuals and Montagu Gardens Management Ltd. In March 2017 the GFRS carried out inspections of the encroachments, and in May 2017 letters were sent to the appellants by Mark Celecia for the GFRS, informing them that the encroachments were considered to be fire hazards and should be removed. Between May 2017 and November 2017 there was some correspondence between Mr. Celecia and Mr. Bishop (one of the appellants). On November 1st, 2017 the GFRS once again wrote to the appellants, and on November 27th, 2017 the notices were served on the appellants. On December 14th, 2017 the appellants filed appeals in the Magistrates' Court by way of complaint.

Applicable legislation

6 The notices were served pursuant to s.11 of the Fire and Rescue Service Act 1976 ("the Act") which provides that:

> "11.(1) The Chief Fire Officer, if satisfied of the existence on any premises of any fire hazard, may serve—
>
> (a) upon the person by reason of whose act, default or sufferance the fire hazard arose, or in the case of a proposed building may arise, or continues;
>
> . . .
>
> a notice in Form 3 in Schedule 2 (in this section referred to as a fire hazard abatement notice) requiring him to abate the fire hazard within the period specified in the notice, or, in the case of a proposed building to prevent such fire hazard arising, and to do all such things as may be necessary for that purpose, and the notice may, if the Chief Fire Officer thinks fit, specify any works to be executed for that purpose."

7 Sections 11(2) and (3) of the Act respectively provide that:

> "(2) The Chief Fire Officer may also, by such notice or by a further fire hazard abatement notice, require the person on whom the notice is served to do what is necessary for preventing the recurrence of the fire hazard to which the notice relates and, if the Chief Fire Officer

thinks it desirable, specify any works to be executed for that purpose, and a notice containing such a requirement may, notwithstanding that the fire hazard to which it relates may for the time being have been abated, be served if the Chief Fire Officer considers that the fire hazard is likely to recur in the same premises.

(3) Where a fire hazard abatement notice requires the execution of works such notice may, in addition to specifying the time within which such works are to be completed, specify the time by which such execution shall commence."

8 Section 2(g) of the Act defines a "fire hazard" as:

"any other matter or circumstance which materially increases the likelihood of fire or danger to life or property that would result from the outbreak of fire or which would materially hamper the Service in the discharge of its duties in the event of fire . . ."

This is the statutory test which governs the question as to whether the encroachments constituted a fire hazard. It was agreed by the parties that "materially" should be given its ordinary meaning of "in a significant or considerable way." Consequently, the notices identified the fire hazard as being one "caused by a blockage of the smoke ventilation shaft caused by unlawful works" and required the recipients of the notices to "remove the aforesaid unlawful works and to restore the blocked shaft to its original state."

9 For the avoidance of doubt, the fact that the works were described as unlawful has no real bearing on the issue under consideration. As I understand it, the reference to unlawful refers to the fact that the encroachments were erected without the relevant permission first having been sought. That was not a matter before the lower court nor is it a matter before me.

10 Section 12 of the Act allows for an appeal to be made to the Magistrates' Court against the issue of an abatement notice and s.27 stipulates that such appeal shall be made by way of complaint for an order. Sections 12(5) and (6) provide that:

"(5) On the hearing of the appeal the court may make such order as it thinks fit with respect to the person (being either the appellant or a person upon whom a copy of the notice of appeal was served) by whom any requirement of the notice served by the Chief Fire Officer is to be complied with and the contribution to be made by any other such person towards the cost of complying with the requirement or as to the proportions in which any expenses which may become recoverable by the Crown are to be borne by any such persons.

(6) In exercising its powers under this section the court shall have regard to the degree of benefit to be derived by the different persons concerned and all other circumstances of the case including (as between an owner and an occupier) the terms and conditions whether contractual or statutory of the tenancy."

11 Section 28 of the Act provides that:

"28. Any person aggrieved by any decision or order of the court may appeal to the Supreme Court and the provisions of Part VI of the Magistrates' Court Act shall apply to such appeal."

12 Section 62 of the Magistrates' Court Act specifies that:

"62.(1) Any person who was a party to any proceeding before the court or is aggrieved by the order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the Supreme Court on the question of law or jurisdiction involved:

Provided that a person shall not make an application under this section in respect of a decision which by virtue of any law is final."

13 Section 64 of that Act with regard to enforcement provides that:

"64. Any order, determination or other proceeding of the court varied by the Supreme Court on an appeal by case stated, and any judgment or order of the Supreme Court on such an appeal, may be enforced as if it were a decision of the court."

14 For the purposes of this appeal, the appellants are challenging the notices only on the basis that, contrary to what was alleged, a fire hazard pursuant to s.2(g) of the Act was not created.

15 Computational fluid dynamics ("CFD") modelling refers to equations which describe the fluid flow and heat transfer from the growth and spread of fire, they predict the smoke and heat movement in buildings and they are increasingly used in fire safety engineering.

Case stated

16 In the case stated, the SM summarized the position of the parties, and set out the legal test, thereafter he set out two sets of questions with regard to his findings in law. The first set of questions relates to findings made in relation to the decision he was required to make, and the second set relates to the consequences flowing from that decision. The SM asked whether he was right in law to find that:

"1. A fire hazard was created?

2. Any alteration to a building which creates a fire hazard is a free standing hazard which cannot be masked by an earlier overlapping fire hazard?
3. By enlarging the shafts to the size they were designed to be they could perform their function as smoke ventilation shafts?
4. That the presence of some electrical boards and services in the shafts presented a potential risk but any such potential risk was outweighed by the benefits to occupiers of using the shafts as smoke ventilation shafts?
5. That smoke finding its way into the lobbies through the permanently open grilles was acceptable given the size of the lobbies?
6. That removing the encroachments improved the tenability of the stairways?
7. That smoke in lobbies was an acceptable pay off for tenability of the stairways?"

The decision of the SM

17 The SM gave a reserved judgment which was 24 paragraphs long. Of those 24 paragraphs, 14 dealt with the substantive issue which was whether the encroachments caused a fire hazard. The remaining 10 paragraphs discussed the options open to the SM as a consequence of his finding that a fire hazard had been created.

18 The appeal hearing before the Magistrates' Court lasted six days. The appellants gave live evidence which was agreed, Mark Celecia, the safety officer of the GFRS also gave live evidence, as did Norman Neale, a building control officer. In addition, there were two experts in the field of fire engineering who also gave evidence, Mr. Brown, engaged by the CFO and Mr. Todd, engaged by the appellants. The experts produced individual reports as well as a joint statement of issues.

19 The SM began his judgment by helpfully setting out a description of the layout of the area of the lobbies and stairwells:

> "The blocks in which they own their properties are all of a similar design, at least to the extent that access to the upper floors is provided by means of one stairway and a lift. Both the stairs and the lift open onto small self-contained lobbies through which access is gained to the flats. Each lobby has on either side of the lift doors a louvered metal grille. Behind these grills there is a shaft extending virtually the entire height of the building, connected to open air through openings at the level of the roof. Over the years extensions have been made to some flats and the shaft, which does not form part of the Appellants'

> properties, has been encroached upon. In some cases these fully block the shaft and partially do so in others"

20 The SM then summarized the position of each of the parties highlighting that the GRFS: "allege that the shafts are smoke ventilation shafts and an essential part of the buildings' fire safety engineering," whereas the appellants—

> "maintain the shaft is not fit for purpose as a smoke ventilation shaft, if that is what it is, and that given the construction and current state of the shafts, far from creating a fire hazard, the encroachments make the blocks safer preventing the uncontrolled upward spread of smoke and fire."

21 At para. 2 of his judgment, the SM set out the test to be applied, noting that he would need to be satisfied to the civil standard that the encroachments—

> "materially increases [*sic*] the likelihood of fire or danger to life or property that would result from the outbreak of fire or which would materially hamper the Service in the discharge of its duties in the event of fire."

22 The SM went on to clarify that the "fire hazard complained of must have existed on the date the fire hazard abatement notice was issued." The parties agree as do I, that this is a correct interpretation of the law.

23 The SM then went on to discuss the fire management policies governing modern purpose-built blocks of flats, the most usual being the "stay put policy" where, in the event of a fire, only those residents who find themselves in the flat which is the source of the fire evacuate, and all other residents stay put. Such a policy relies on compartmentation of the building. The SM noted that:

> "Each flat and each floor is designed as a fire resisting and smoke containing unit, containing the smoke and fire in that compartment or, in the case of a more serious fire, delaying its spread and the escape of smoke in order to give occupiers time to escape and fire services time to act. Effective compartmentation requires fire and smoke resisting construction (including shafts), and doors to the flats and between the lobbies and the stairs which are both fire resisting and smoke proof. Keeping the stairs as clear of smoke as possible is central to the strategy as they are the only means of escape for residents and of access by the fire service. The parties agree that ideally the stairs should be free of smoke and that at the time of construction buildings such as those at Montagu Gardens were designed with that aim in mind."

The SM accepted that there was evidence that the management company, whose responsibility it was to implement a fire safety policy, had a "stay put" policy in place in Montagu Gardens, and that was in fact the understanding of the GFRS.

24 At para. 4, the SM helpfully described the construction of the shafts in the Montagu Gardens development:

> "The construction of Montagu Gardens involved the laying of concrete floors using a then new technique by which crisscrossing concrete beams were put down and the spaces between the beams infilled by means of hollow bricks, all of which was then covered in concrete. In order to make the openings to create the shafts, the builders roughly cut out holes on the concrete slab with the holes to some extent mirroring the space occupied by the hollow bricks respecting the concrete beam in the middle of the shaft. The Court heard evidence that the shafts could be completely hollowed out, as in the plans, without affecting the structural stability of the buildings. The size and number of the openings varies, with some floors having two openings and others just one. The majority have two openings of unequal size the larger measuring 600mm x 400mm and the smaller 300mm x 400mm but the size of the openings and the number of openings on different floors varies. Ventilation to open air is provided not on each floor but by openings at the top of the building. When the GFRS and building control became involved in this process which now concerns us, several of the holes were to some extent, and in some cases totally, blocked by debris and building material left behind by the contractors. This we are told has been cleared. Ventilation to open air is provided not at each floor but by openings at the top of the buildings. The openings connecting the shafts to open air have a smaller area than they ought to in order to more effectively release smoke into the open. The use of airbricks, installed for decorative reasons or to stop birds entering the shafts, further reduces the shafts' effectiveness. On some floors in some of the shafts cabling and electrical boards belonging to individual flats can be seen inside the shaft. Services are in fact provided by means of another shaft. All of this compromises the efficacy of the shafts, if they are smoke shafts. These factors also create concerns in terms of fire safety as it is agreed that the shafts does [*sic*] not meet the standard of fire resisting construction required by compartmentation."

25 It was the SM's view that the question of why the shafts were built, and what purpose they served, was central to the appeal before him. He found that the shafts were smoke ventilation shafts. His finding was premised on the following:

(i) the shafts must have had a purpose when they were built;

(ii) in the original designs the shafts were portrayed as: "completely hollow from the first floor to the vents at the top of the building, connecting the shafts to open air";

(iii) the shafts have been referred to as smoke ventilation shafts in reports and assessments made over the years;

(iv) "the design of the buildings does not provide any other way for smoke that has found its way to the lobbies to escape other than through the stairs";

(v) fire safety engineering identified keeping stairwells smoke free for escape and access by Fire Rescue Services;

(vi) unless the shafts were categorized as smoke shafts, fire safety as a concept would have been collectively ignored.

26 After finding that the shafts were smoke shafts, the SM set out the submissions of the appellants in support of the shafts not being smoke shafts:

(i) that the size of the shafts as designed was smaller than current regulations would now require;

(ii) that the shafts as built were smaller than as described in plans;

(iii) that the shafts because of their dimensions, blockages, size and number of holes on each floor, openings to open air at the top of the building, and use of airbricks, did not enable sufficient smoke to escape to open air;

(iv) that the lobbies all have permanently open louvre grilles or permanently open vents ("POV"); this would allow smoke to spread from the origin of fire potentially into all of the lobbies. This is to be contrasted to automatically opening vents which only open on the floor where the fire is detected, thus allowing for the escape of smoke from the floor where the fire originates;

(v) that the presence in some of the shafts of services connections and electricity boards breached the integrity of the shafts and created a fire hazard by introducing combustible material into the shafts, but the encroachments removed those hazards "by blocking the upward spread of smoke and fire and thus making the buildings safer."

27 The SM then set out further submissions advanced by the CFO. In the context of discussing blockages generally, the SM expressed his view that: "Whilst none of this should be in place, their presence cannot be used as an excuse for further compromising the efficacy of the shafts."

28 The first discernible reference to the fire engineering experts, Mr. Brown (for the CFO) and Mr. Todd (for the appellants), at least by name, is made at para. 11 thus:

> "In answer to Mr. Zammit (28/52019 pl 59) Mr. Todd for the Appellants once again admitted that blocking the shafts would increase the amount of smoke on the stairs, but stated that this would not be a problem to residents or the GFRS because after the adoption of the simultaneous evacuation most residents would have left the building before smoke logging on the stairs became a problem. It is conceded by Mr. Brown for the Respondent that it is not just the encroachments that create this problem, but also the airbricks at the top and the inadequate openings restricting the upward flow of air in the shaft."

29 Thereafter, at paras. 11–13, the SM discussed the shafts, the encroachments, blockages and smoke flow.

30 By way of conclusion the SM found at para. 14 that:

> "the effect of the encroachments is that they 'materially increases [*sic*] the . . . danger to life or property that would result from the outbreak of fire or which would materially hamper the Service in the discharge of its duties in the event of fire."

Grounds of appeal

31 There are four grounds of appeal:

(i) Ground 1: The SM gave no adequate reasons for his decision nor did he make the necessary findings of fact to reach that decision. This is an error of law and the SM's decision ought to be set aside on this basis alone.

(ii) Ground 2: The evidence of the respondent's own expert was that the appellants had not created a fire hazard at the time that the notices were served or at the time of the hearing. As such, there was no basis upon which the SM was entitled to find that a fire hazard had been created. Therefore, this was a decision that no reasonable Magistrate properly directing himself could reach and the decision ought to be set aside.

(iii) Ground 3: The SM ought to have acceded to the appellants' submissions on the unreliability of the respondent's expert's evidence. This was a decision that no reasonable Magistrate properly directing himself could reach and the decision ought to be set aside.

(iv) Ground 4: The SM ought not have rejected the evidence of the appellants' expert. This was a decision that no reasonable Magistrate properly directing himself could reach and the decision ought to be set aside.

32 Grounds 2–4 all have as their common denominator the issue of expert evidence, and although Ground 1 appears at first blush to be distinct, it is intrinsically related to the other grounds (notwithstanding that it may go beyond them) and I shall therefore deal with all the grounds together.

33 Mr. Cardona makes the point, which (rightly) is not disputed, that a judge is under a duty to give adequate reasons for his decision and that whilst the extent of those reasons will be fact specific to the circumstances of the individual case, the parties should be left in no doubt as to the basis of that decision. In support he relies on *Flannery* v. *Halifax Estate Agencies Ltd.* (2). I do not need to refer to that judgment any more than to highlight the importance of reasons in the context of expert evidence ([2000] 1 W.L.R. at 381):

> "The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases."

34 *Garcia* v. *R.* (3) and *Cruz (t/a Julnic Holdings)* v. *Trade Licensing Auth.* (1) leave no doubt that the duty extended to cases in the Magistrates' Court.

35 Mr. Fernandez qualified the above with the submission that whilst reasons need to be given such reasons do not have to address every single point raised during the hearing. I agree, with the proviso that those points which go to the core issue to be decided, must be considered and determined.

Discussion

36 There is no doubt that the SM clearly set out the background to the issue of the notices, and at para. 2 of his judgment, correctly identified the test the court was bound to apply. Thereafter there followed at paras. 3–12 a multifarious discussion touching upon *inter alia*, construction of the buildings, fire safety protocols, the purpose, description and state of the shafts, the ventilation of lobbies and the spread and escape of smoke in the event of fire from the seat of the fire to lobbies and stairwells. Striking by its absence in the context of such a discussion, is clear and consistent reference to the sources of the information relayed. This results in a degree

of uncertainty as to whether the statements made by the SM are redactions of submissions, expert opinions, or findings of facts. With the exception of a brief reference to Mr. Brown and Mr. Todd, there is no reference to any of the witnesses who gave evidence at trial, or the contribution they made to the view adopted by the SM.

37 With particular reference to the expert evidence, there is no identification of the experts by way of their qualifications and expertise, no summary of their respective positions, no summary of points of dispute and consensus, and no discussion of the submissions of the appellants with regard to concerns they raised over the reliability of the evidence of Mr. Brown. It is of course open to a judge to prefer the evidence of one expert over another but the basis of that preference must be clearly identified; in this case it was not.

Instructions to Mr. Brown

38 For the appellants submitted before the SM, that the basis upon which Mr. Brown was instructed called into doubt his independence as an expert, and having been thus instructed, Mr. Brown's behaviour post instruction confirmed that he was not unbiased.

39 Mr. Brown was engaged by Mr. Celecia (the safety officer of the GFRS) by letter of February 23rd, 2018. The background to this letter according to the evidence of Mr. Celecia was that senior counsel in the Government Law Offices had suggested to him that the GFRS seek the opinion of an expert. Acting upon this advice, Mr. Celecia wrote to Mr. Brown in the following terms:

> "Once again the Chief and Government wants to use your specialized advice and are willing to engage you into this with a professional fee. Basically, what the Attorney General Chambers wants is a statement from a Fire Engineer backing the philosophy of the GFRS towards a case they want to present in Court. See if you can help."

40 Mr. Celecia ended the letter by summarizing the situation in respect of which "help" was required thus:

> "Government is taking legal action against 17 tenants within the same estate who live in separate buildings, who have encroached into their respective smoke ventilation shaft (occupying the smoke ventilation shaft by extending their kitchen into it). This smoke ventilation shaft was built in the 1990, but was not built to the standards required by CP3 or the BS at the time. The smoke ventilation shaft is a hollow shaft communicating from the first floor to the top floor with ventilation grills on all lobbies and an opening at the top. These shafts where certified correct and a Certificate of Fitness was issued by the Building Control Officer. In 1999, some engineers identified that the

> shafts were inadequate and referred this to the GFRS and Government. The Chief Fire Officer at the time did confirmed in writing that these shafts were adequate because during the few incidents that had occurred these shafts did work reasonably well. He also said that the system is one of the many features which [are] incorporated into the building which together with others provide the adequate protection.
>
> GFRS have abated these 17 tenants on the grounds that by blocking these shafts they will be making the smoke ventilation shafts unusable thus making the building worse. (Any fire occurring in that particular floor will lead to excessive accumulation of smoke and hot gases leaking into the staircase and making the staircase unusable for firefighting operations) BS9991 2015 14.1, BS 5588 2004 13.1, BS9999: 2017, BS 5588 1990 part 1 36.1, CP3 2.4.1. states that the main criteria of having a ventilation system is to protect the staircase for firefighting operations. Therefore, what we are saying is that if these smoke ventilation shafts are blocked they will hamper the staircase and make firefighting operations worse."

41 At the end of the summary Mr. Celecia reiterated: "As I stated above the AG wants a fire engineers' statement to back us up in order for it to be used in Court."

42 There are various obvious concerning flaws regarding the instruction of the expert:

(i) the letter of instruction to the expert came from GFRS and not from counsel;

(ii) the letter set out several factual statements which were inaccurate. It described the smoke ventilation shaft as a hollow shaft, it stated the shafts were certified as correct by the building control officer, it said that the (fire protection) system provided adequate protection, and it said that the encroachments made the smoke ventilation shafts and the staircases unusable in the event of a fire;

(iii) the letter failed to make any reference at all to the statutory test that the expert was expected to consider; and

(iv) crucially the letter did not request an opinion but specifically identified the conclusion the expert was requested to arrive at.

43 That instructions to the expert should not have originated from counsel, that they should have made no proper reference to the subject under discussion, that they should have made no reference to the statutory test, or to the creation of a fire hazard and, most particularly, that they should have identified the conclusion that was desired, are a cause for concern. It is evident that from the very outset Mr. Brown was told that what the GFRS needed him to do was back them up and say that if the

smoke ventilation shafts were blocked by the encroachments that would impact upon the stairs and make "firefighting operations worse." The origin and nature of the instructions to Mr. Brown was so unorthodox and concerning as to make it inconceivable that the SM would not have referenced it. He did not, and therefore cannot have factored it in as part of the necessary assessment of the reliability or independence of Mr. Brown as an expert witness.

44 A point of concern is that in the course of the evidence it became apparent that there was a significant question hanging over the issue as to whether Mr. Brown had understood that his duty was to the court, as distinct from his client, and that his role was not to advance the position of the CFO come what may. The evidence of Mr. Todd was that at the second experts' meeting Mr. Brown had with him notes of what the GFRS wanted included in the joint statement of issues, and that Mr. Brown had said that he could not agree issues without first reverting to the GFRS. Mr. Brown denied this, but accepted that he had some notes with him at the meeting. Mr. Todd gave a specific example of an issue where Mr. Brown said that the GFRS had asked him to include a point in the joint statement, even though Mr. Brown himself had accepted that the point being made should not be included, because it was a misunderstanding on the part of the GFRS or the guidance in CP3. Mr. Todd gave further evidence that Mr. Brown had told him on several occasions that he needed to check with his client before he could make any admissions in the joint statement of issues. At this point the SM quite rightly invited the CFO to re-call Mr. Brown, so that he could be afforded the opportunity to respond to the allegations raised by Mr. Todd. The CFO declined to re-call Mr. Brown, despite the fact that Mr. Brown was present in court and had been privy to Mr. Todd's evidence. The appellants then sought to rely on the witness statement of Paul Clayton who was also present during the discussion between Mr. Todd and Mr. Brown, and who corroborated the evidence of Mr. Todd. Permission was refused.

45 The possibility that Mr. Brown may have been set on achieving a predetermined result for the CFO, regardless of whether it reflected the objective position, is fortified by the fact that Mr. Brown said in cross-examination that the reason he had conducted a third CFD modelling was because the previous studies "showed that merely removing the encroachments was insufficient to make the shafts work given the current other factors involved in the shafts." This, taken against the background of his instructions and his alleged behaviour at the joint experts meeting, makes the possibility that Mr. Brown was persevering in order to get the result that had been requested from him hard to ignore.

46 The allegation made by Mr. Todd against Mr. Brown was one that went to the root of the independence and competence of Mr. Brown as an expert witness, and was therefore capable of directly impacting upon the

reliability of his conclusions. By the time Mr. Cardona was making his closing submissions before the SM, the issue of bias and competence was manifest, it was an obvious concern, which, in the interests of fairness, it was necessary for the SM to have addressed. There is no mention of it in the judgment. If, as it appears, the SM was in fact minded to prefer the evidence of Mr. Brown over that of Mr. Todd, it is difficult to understand how he could have done so without addressing a point as fundamental and, in the circumstances, as obvious as bias.

The Brown reports

47 Having received instructions from Mr. Celecia, Mr. Brown compiled a report ("the first Brown report") dated April 16th, 2018. The appellants complain that the first Brown report (in fact, all the Brown reports) was not CPR compliant. Given the nature of this action, I suspect (although I have not been addressed on the issue) that CPR is not necessarily engaged; that said, I am in no doubt that experts should nevertheless comply with and follow the guidance of the CPR in relation to reports and their duties to the court. The first Brown report did not set out Mr. Brown's qualifications and experience, it made no reference to the duty owed by an expert to the court, it failed to state that Mr. Brown had complied with that duty, it failed to set out the basis upon which Mr. Brown had been instructed, or the issue that the court required assistance on; instead Mr. Brown described the purpose for the report as an investigation "into the effects of removing smoke shafts from a block of flats."

48 In addition, the first Brown report showed two different dates on its front page and on the last page and, more importantly, was compiled based solely on the plans of the buildings and in the absence of a physical inspection. From its introduction it is apparent that the purpose of the report as understood by Mr. Brown, not only bore no correlation to the statutory test (which itself was not mentioned), but also had as it remit an entirely irrelevant ambit, that of investigating the effect of removing the shafts.

49 After the CFO had received a report from Mr. Todd dated September 4th, 2018 ("the Todd report"), it became apparent that, unlike Mr. Brown, Mr. Todd had carried out a physical inspection of the buildings and found that the actual shafts did not resemble the shafts as designed. As a consequence of that, the first Brown report was disregarded by the respondents in favour of a second report dated November 6th, 2018 ("the second Brown report"). The second Brown report did set out Mr. Brown's qualifications and experience, however it did not include any undertakings with regard to the duty owed by the expert to the court, it made no reference to the statutory test, and again the purpose behind the commissioning of the report appeared to be misconceived, the author stating that the report had the objective of:

> "investigating specific elements of fire safety in the flats of Montagu gardens with the aim of objectively establishing if a suitable level of life safety is provided or if a hazard exists that could in the event of fire pose threat to human life."

Clearly the investigation did not require an assessment of fire safety "in the flats" and its purpose was not to identify a "hazard" that could pose a threat to life, but to assess whether the encroachments specifically had created a fire hazard in the shafts. The objective of the second Brown report as stated by Mr. Brown is so far removed from the issue in point as to place an immediate exclamation mark over the relevance of the report, even before one considers its contents. That pause for concern must, by necessary implication, extend to the reliability of its author as a competent expert. Surprisingly the SM failed to mention the commissioning of the reports, or the basis upon which they were premised.

50 The second Brown report concluded that:

> "the presence of airbricks makes the shafts fail to perform as effective smoke exhaust points . . . that the encroachments into the shafts by residents have exacerbated the situation so that conditions in the staircase are even worse than before . . . while it cannot be said that the encroachments alone have made the hazard of the untenable staircase exist, they are a contributory factor and they remain an obstacle to achieving a safer environment while they still block the shafts."

51 Given the agreed state of the shafts before the encroachments (*i.e.* blocked with airbricks, cables *etc*.), Mr. Brown appears to conclude that the shafts were not effective as smoke shafts even before the encroachments, the obvious implication which follows from that is that it was not the appellants who had been the primary cause for the failure of the shafts to function as smoke ventilation shafts. Although Mr. Brown does say that the encroachments have made the situation worse, he does not address the statutory test, or assess whether the encroachments have made the situation materially worse. Be that as it may, a third report ("the third Brown report") was produced on April 5th, 2019. Of some concern is that that report appears to have been unsolicited, and the incentive to produce it appears to have originated from Mr. Brown himself. The third Brown report again failed to set out Mr. Brown's qualifications and experience, failed to mention the duty owed by the expert to the court, failed to state that Mr. Brown had complied with that duty, failed to state the request behind the report, or the purpose for the report, and was not signed by Mr. Brown. In that report Mr. Brown appears to conclude (as confirmed in the respondent's response to the appellant's note of May 22nd, 2019) that the shafts would function as smoke shafts if the encroachments and the airbricks were removed and if some remedial works were carried out to the holes within

the shafts. He states that prior to the encroachments, the level of fire safety had been compromised because holes in the shafts had not been properly installed, or were not installed at all and because of the presence of airbricks at the top of the shafts. Mr. Brown described the encroachments as the third reason why fire safety was compromised.

52 The issues raised regarding all three of the Brown reports were legitimate concerns raised by the appellants, which the SM ought to have considered in deciding how much weight to attach to Brown's evidence; he did not.

Evidence relating to Mr. Brown

53 Submitted for the appellants during the course of this appeal and also in their closing arguments before the SM, that in the course of the cross-examination of Mr. Brown various matters came to light which impacted further upon his credibility/reliability. I summarize them as follows:

(i) this was the first time that Mr. Brown had acted in the role of expert witness. That of itself would not render him unreliable but when considered in the context that twice in the course of his evidence Mr. Brown confused the difference between an expert witness and a witness of fact, it becomes a relevant concern;

(ii) when Mr. Brown was asked to define a fire hazard for the purposes of these proceedings, he stated that he could not remember the legal definition and then offered a definition far removed from that which appears in statute and which it would not be unreasonable for him to have been familiar with. He said of a fire hazard, that "the hazard is something that has the potential to cause harm." After the definition of a fire hazard pursuant to the Act was read to him, Mr. Brown conceded that "in these proceedings we have the materially increase" [*sic*] but then proceeded a second time to define a hazard as: "whether the shafts, the encroachments and subsequently the airbricks created a hazard, but by creating a hazard they have to increase the likelihood of danger to life." Although, when prompted, Mr. Brown made reference to the word "materially," notable that after that (and having been reminded of the statutory test) when he paraphrased the definition, he omitted reference to the word "materially" altogether and made it clear that he was considering, not just whether the encroachments were a hazard, but whether the combination of the encroachments the shafts and the airbricks constituted a hazard;

(iii) following the first aborted experts' discussion, Mr. Todd sent Mr. Brown a copy of the "Guidance for the instruction of experts in civil claims" annexed to CPR 35. Mr. Brown stated that he "didn't think that the CPR applied in Gibraltar," and even after having been sent the Guidelines, Mr. Brown failed to follow the guidelines in the third Brown report;

(iv) Mr. Brown conceded on more than one occasion that the encroachments did not create a fire hazard within the Act, but then appeared to contradict himself on various occasions in relation to whether he considered the encroachments to be a fire hazard pursuant to the statutory test;

(v) in cross-examination Mr. Brown sought at times to resile from concessions he had agreed in the joint statement of issues;

(vi) Mr. Brown stated that it was not necessary to have inspected the shafts before issuing the notices;

(vii) Mr. Brown said "Given if [*sic*] the shafts aren't fit for purpose anyways then I can see that the encroachments don't make the situation any worse."

(viii) Mr. Brown stated that a Mr. Halstead had done the CFD modelling because "he'd been on a course";

(ix) with regard to the CFD modelling, Mr. Brown accepted that the results were only indicative and were only as good as the information fed into it. Mr. Brown conceded that he had only inspected a sample of half a dozen of the shafts and accepted that certain parts of his report were misleading as to the dimensions of the shafts. He admitted that the precise dimensions of the shafts were not fed into his CFD modelling, even though the program was capable of factoring in those variations. When challenged as to why he had not done this his response was "it would take too long" and "it didn't seem worthwhile doing";

(x) Mr. Brown accepted that if even one small hole was fed into the CFD modelling program, it would impact the results in a material way, and on that basis he accepted that removing the airbricks would not make any difference and the problem would persist even in the event of the removal of airbricks;

(xi) Mr. Brown was unsure whether the CFD modelling was based on the presence of 3 or 4 airbricks at the top of the shaft; and

(xii) Mr. Brown accepted that he had not taken account of the narrowing of the shaft between the seventh floor and the airbricks and that he had failed to take account of the impact of a wire mesh, which he accepted would have to be applied to the airbricks.

54 The appellants submit that taken together, the manner of instruction of Mr. Brown, the deficiency in his reports and the statements he made in evidence point to the fact that:

(i) Mr. Brown was unreliable as an expert witness;

(ii) Mr. Brown was not aware of the distinction between an expert witness and an ordinary witness, ergo of his duty to the court;

(iii) Mr. Brown was on mission to do as his clients asked, regardless of the objective position;

(iv) Mr. Brown gave contradictory evidence which called into question the veracity and reliability of his evidence as a whole;

(v) Mr. Brown was slapdash, not thorough in his preparation and had not properly appraised himself of points of contention; and

(vi) The three Brown reports (because of the deficiencies highlighted) are simply unreliable.

The view of the SM on the reliability of Mr. Brown

55 In the course of his discussion as to what order to make, at para. 21, the SM explained his preference for Mr. Brown's evidence thus:

> "21. Challenges have been made to Mr. Brown's status as an expert witness, allegations that he was following instructions and that the way he had been instructed meant that he was out to prove a case rather than impartially assist the Court with his expertise. These were raised late in the day and after there had been much cooperation between experts, despite any misgivings which Mr. Todd may have felt. Their very ability to cooperate and to produce a Joint Statement plus the exchanges in court with counsel leaves me in no doubt as to Mr. Brown's expertise and his understanding of the role of an expert witness and as such his duty to the court."

56 The SM correctly identifies that challenges were raised as to Mr. Brown's standing as an expert witness, but he fails to identify what the challenges were other than to say, by way of broad-brush comment, that there were allegations that Mr. Brown was following instructions and that it was alleged that the manner of how he came to be instructed impacted upon his impartiality. Upon any consideration, the particularization of the challenges raised is inadequate in detail and context and fails to take any account of the comprehensive submissions raised by the appellants at the hearing. The SM fails to set out the origin of the allegations, the specifics and whether he accepted there was any truth or justification behind some or all of them. The SM omits to make any comment in his judgment as to how Mr. Brown was instructed, the nature and content of his instructions, and whether or not that was capable of impacting upon his impartiality. Further, the SM did not comment on or discuss any of the issues arising from the cross-examination of Mr. Brown.

57 The reasons given by the SM as to why the "challenges" were not successful are deficient not only in their brevity but also in their substance. With respect to the SM, the fact that challenges may have been raised late in the day is not a ground for their outright rejection. Whether or not challenges to Mr. Brown were raised in the run up to trial, it is evident from

the appellants' opening submissions at trial that challenges were raised at that point. Challenges were also raised in closing submissions. Trite that challenges which arise from cross-examination are only capable of being raised post cross-examination. The lateness of challenges should not frustrate their articulation and consideration, provided there is merit in the argument. This is not a sustainable reason for the rejection of the challenges raised.

58 The SM refers to there having been "much cooperation between the parties," and "their ability to cooperate and to produce a Joint Statement" as a further reason why he did not accept the criticisms levelled against Mr. Brown. It seems to me that the fact that experts may be able to cooperate cannot bolster the expertise or reliability of an expert where specific unresolved objections have been raised as to their competence. In any event, the fact that the experts have produced a joint statement of issues is not necessarily reflective of the fact that there was much cooperation between them. In fact, the appellants argue that there was not such extensive cooperation and that at one point discussions broke down with the experts having to resort to the court for the provision of an agenda.

59 In addition to the ability to cooperate, the SM refers to the exchanges of the experts "in court with Counsel" as a further reason for not accepting the challenges to Mr. Brown. I am unable to identify what exchanges the SM is referring to and between whom. At the risk of stating the obvious, the entirety of the cross-examination of both Mr. Brown and Mr. Todd can legitimately be described as exchanges between the experts and counsel. The SM is effectively saying no more than that he made a decision on which expert he preferred, based on the evidence which arose from cross-examination of the experts. That is too general and vague a comment to provide any assistance as to his thought process. From the transcript, apparent that the cross-examination of both experts was detailed and lengthy, and the evidence which those sets of cross-examinations produced substantial. It is impossible to decipher from the words "plus the exchanges in court with counsel" on what basis and with reference to what parts of the evidence the SM based his view that challenges to Mr. Brown were unsubstantiated.

60 Not only does the SM not give adequate reasons why the challenges raised in relation to Mr. Brown should be disregarded, but he also does not give reasons as to why Mr. Todd should not be preferred over Mr. Brown, or indeed whether all or only some parts of Mr. Brown's evidence is preferred.

61 A matter of some concern is the timing of the SM's acceptance of Mr. Brown's expertise. The SM's assessment of the challenges raised in relation to Mr. Brown, and his acceptance of Mr. Brown as the preferred expert (para. 21 of the judgment), comes after his final determination that

the encroachments materially increased the risk of danger to life or property resulting from a fire (para. 14 of the judgment). Logic would dictate that the conclusion at para. 14 could only have been reached after having taken regard of the expert evidence and after having assessed which expert was preferred, yet that assessment comes some seven paragraphs after the SM's conclusion on the issue of the encroachments. This indicates that the SM may not have conducted the assessment of which expert was preferable and why before he reached his conclusion on the issue of the fire hazard.

The correct interpretation of the evidence of Mr. Brown

62 The appellants submit that, in any event, as long as it was agreed (which the SM did at para. 2 of the judgment) that the statutory test had to be applied to the situation as it was at the time the notices were issued ("the relevant time"), then the evidence of Mr. Brown, in actual fact, points to the conclusion that the appellants did not create a fire hazard. Mr. Cardona submits that even on the evidence of Mr. Brown, there is no basis upon which the SM could have found that a fire hazard had been created.

63 Submitted for the appellants, that the correct application of the statutory test necessarily involves conducting a comparative analysis of the situation in the event of fire with the shafts blocked by the encroachments and then with the shafts unblocked. The second Brown report attempts to address the comparative analysis by using CFD to model the behaviour of smoke in some of the blocks in question.

64 In the second Brown report, Mr. Brown created two CFD modelling scenarios (at para. 6.12 of the report) one in respect of a relatively large fire of 2,000kW by the front door of the apartment and another in respect of a smaller fire of 500kW further inside the apartment. Each scenario showing the situation with the smoke shafts unblocked by the encroachments (diagram on the left) and the situation with the smoke shafts blocked by the encroachments (diagram on the right). The passage of smoke is measured at 10, 50, 100 and 150 second intervals.

65 Mr. Brown in his observations with regard to the 2000kW (larger) fire states:

> "With smoke shafts open (left hand side) the visibility after 150 seconds has dropped to between 6m and 9m in the staircase above the fire floor. With the smoke shafts shut by the encroachments (right hand side) the visibility is even worse, perhaps as low as 3m after 150 seconds.
>
> Neither case maintains tenability in the staircase as people cannot be expected to travel through smoke with a visibility less than 10m."

66 Put simply Mr. Brown's opinion is that in the case of a larger fire, the encroachments increase the presence of smoke and make visibility somewhat worse but on a practical level that makes little difference, because even without the encroachments the stairs are still untenable. Applying the statutory test to that assessment, it seems to me that on Mr. Brown's own evidence, the effect of the generation of smoke in the stairwells, by reason of fire, is so bad that the encroachments only make a bad situation worse, therefore it cannot be said that the encroachments in this situation make the situation materially worse. By way of analogy, if someone has a tibia fractured in three places so as to make it impossible for them to walk, it would be difficult to conclude that a fourth, less severe fracture could be said to make the situation significantly worse, it would of course be a factor which contributes to the dire situation, but that is a different consideration altogether.

67 In relation to the smaller 500kW fire, Mr. Brown observed that visibility on the stairs would be untenable whether the shafts were blocked or unblocked.

68 Mr. Brown concluded that:

> "The above results show that in the worst case situation (the larger fire), which has to be considered a real possibility, the staircase will not remain tenable whether the shafts are blocked off by encroachments or not. This is a real hazard that should be addressed. The encroachments do not help the situation as conditions are slightly worse where the encroachments have taken place, but removing the encroachments will not fully remove the hazard."

He describes the encroachments as making the conditions on the stairs "slightly" worse; the use of that adjective to describe the impact of the encroachments on the passage of smoke of itself means that the encroachments did not make the situation worse in a material, significant or considerable way, and on that basis alone the statutory test is not met. In the circumstances, even if the evidence of Mr. Brown was preferred over that of Mr. Todd, it is evidence which prays in aid of the encroachments not creating a fire hazard within the meaning of the Act.

69 Mr. Brown created a third scenario where he considered the impact of a 200kW fire in the shafts, this time, with the shafts unblocked and the airbricks removed. In relation to the first two scenarios (discussed above) Mr. Brown addresses the situation with regard to visibility only and not temperature, yet when he went on to consider the shafts with the airbricks removed, he ran the study on both temperature and visibility. There is no reason given for this discrepancy and I find it surprising. In any event the result was that with the airbricks removed, both visibility and temperature in the stairs remain tenable. Given that the situation needed to be assessed in relation to the condition of the shafts as they presented at the relevant

time, that exercise must be of limited assistance, other than in the context of recommending steps which have as their objective rendering the shaft fit for the purpose it may likely have been designed to fulfil.

70 Although in answer to questions in cross-examination, Mr. Brown commented on the situation in the lobbies, he ignored the lobbies altogether in the comments which he made in his report on his CFD study. I find this remarkable, I do not think it unreasonable to presume that the issue of visibility and temperature must be at least as relevant in the lobbies as it is on the stairs, in terms of viability of routes of escape from fire, as well as access routes for the Fire Service. Mr. Cardona submits that failure to address the lobbies is suspect because looking at the diagrams on the right (those with the smoke shaft blocked by the encroachments) and comparing those to the diagrams on the left (those with the smoke shafts without encroachments) it is abundantly obvious that the visibility in the lobbies is rendered greater if the shafts are blocked. Mr. Cardona submits that this shows that whilst the encroachments make the situation in the stairs only slightly worse, they actually make the situation in the lobbies considerably better, and this makes it even less likely that the encroachments made the risk of fire or danger to life or property materially worse. There is merit in that argument. Moreover Mr. Brown's failure to set out the results of an investigation fully and fairly, particularly where results may go against him, is a worrying indication that that expert's impartiality may have been compromised and that he may have failed in his duty to the court. That the SM should have failed to address this is surprising.

71 Mr. Brown's position as reflected in the second Brown report was reinforced in the course of his cross-examination. He explained the blue and red colour markings in the CFD models in both the larger and smaller fires. The dark blue indicates less visibility and the darker the blue the less the visibility. The red indicates better visibility. With regard to the lobbies, Mr. Brown said he was not advocating that the diagrams on the left were better than the diagrams on the right. Mr. Brown stated that neither situation, the blocked (by encroachments) or unblocked shafts as depicted in his diagrams, made the situation safer for a person trapped in their flat. Mr. Brown's evidence was that the shafts had to be made safer, but that the encroachments had not made them less safe. When it was put to him, Mr. Brown accepted that at the 150 second mark with the smaller fire, in the diagram on the left, there was dark blue in the stairwell as well as the lobbies, but in the diagram on the right (blocked shafts) there was dark blue in the stairwells but red in the lobbies, indicating the lobbies were not smoke logged. He agreed that in the case of the blocked shafts, there was slightly more smoke in the stairwells, but the conditions on the stairwells were terrible both in the blocked and the unblocked shafts. Mr. Brown was asked:

"MR. CARDONA: So you would agree with me wouldn't you that also in that respect, that modelling does not prove that a fire hazard within the meaning of the Act has been created by the blockage?

MR. BROWN: Yes.

MR. CARDONA: You agree with me?

MR. BROWN: Yes."

72 Mr. Brown, in cross-examination, further stated (referring to the shafts) that "the system already didn't work because of the airbricks, and the encroachments did not get any worse." He clarified that if the airbricks remained *in situ* (as they were at the relevant time) then the encroachments could not on that basis be said to have created a fire hazard.

Joint statement of issues

73 The experts were able to reach consensus upon on various matters some of which had an important bearing on the evidence in this case. It is useful to consider some of the facts upon which they agreed.

74 The experts agreed that a stay put policy could be described as a strategy where the occupants of a flat in which a fire occurs evacuate, whilst occupants of other flats remain in their flats. Such a policy is adopted in most modern purpose-built blocks of flats. With regard to such a policy, compartmentation is important to ensure that any fire within a flat is enclosed within the flat in which it originated, and also to ensure that the fire does not spread to other floors. The experts agreed that the shafts as built breached compartmentation of the lobby. They explained that:

"In a block of flats the compartmentation is such that every floor of every storey is what is known as 'compartment floor' which has substantial fire resistance. Any shafts passing through the compartment floor are required to be enclosed in fire resisting construction (so that they are what is known as a 'protected shaft') or the shaft must be fire stopped with a fire resisting floor on every storey. The shaft in question breaches the compartment floors as it presents an unprotected opening on every floor level."

75 The experts agreed that the primary objective of a smoke control system at the time of construction would have been to protect the staircase as opposed to the occupants of the flats. They also agreed that the fire safety documents which applied to the construction of the blocks at the time they were constructed were the CP3 Chapter IV Part I, and they agreed that the shafts were not built in accordance with the CP3 guidance. The experts agreed that the CP3 guidance is based on ensuring that the stairwells and lobbies are smoke free or relatively smoke free.

76 Both experts agreed that the shafts prior to the encroachments were not fit for purpose and both agreed that the shafts as they were prior to the encroachments: "did materially increase danger to life or property that would result from the outbreak of fire compared with a system of smoke control that was fit for purpose."

77 Both experts agreed that without the encroachments smoke and hot gases spread from the floor of origin to other floors, but provided the encroachments were complete throughout the building the smoke and hot gases would not spread from the floor of origin to other floors.

78 The experts concurred that a notable feature in relation to the shafts, which compromised their efficacy as smoke shafts, was the presence on each floor of permanently open vents (POVs). Both experts agreed on the dangers of having POVs, they explained that in the event of fire only the vents on the floor of fire origin should be open, while others should be locked shut. They recognized the dangers inherent in the incorrect programming of automatically opening vents ("AOVs") which could in fact, render vents permanently open. The SM at para. 7 of his judgment stated that: "Permanently open vents (POV), are replaced in more recent designs by automatically opening vents (AOV)." Notwithstanding, both experts agreed that POVs had never been a feature of vertical smoke shafts and neither had ever seen a vertical shaft with POVs that opened to the inside of a building; furthermore, POVs had never existed as a feature of fire safety. Whilst this underlines the further ostensible inadequacy of the shafts as fire safety measures, it also points to a possible misunderstanding on the part of the SM regarding the position of POVs.

Other issues

79 At para. 9 the SM states: "It is however admitted that smoke logging would be worse on a floor below an encroachment than where there is no encroachment." As discussed, the CFD modelling and reports prepared by Mr. Brown did not address the effect of the encroachments on the lobbies below the fire floor, and that concession was not made by Mr. Todd, it is therefore unclear wherefrom the SM drew such a conclusion. He went on to to say that: "It is also admitted that the amount of smoke on the stairways would be greater as a result of the encroachments." It is not clear to me who is alleged to have made this admission, but it seems to me that what was admitted, in the sense of "agreed between the experts," was that the encroachments made the situation in the stairs slightly worse, with the important qualification that the stairs even without the encroachments are entirely untenable because of the inefficacy of the existing shaft.

80 At para. 11 the SM states:

> "The shafts are meant to draw smoke upwards and, in conjunction with self-closing doors, keep the stairways free of smoke . . . The

> stairways are by design the sole means of escape for residents so it is essential that they be smoke free . . . The shafts provide the only means of escape for smoke in the event of fire . . . The shafts are thus central to the fire safety of the blocks and their residents. That is how the blocks are designed and therefore any interference that prevents smoke escaping via the shafts necessarily compromises to some extent the safety of residents and hampers the work of the GFRS."

With respect it seems to me that the SM is confounding what the shafts were designed to do—"draw smoke upwards," "keep the stairways free of smoke" and "provide the only means of escape for smoke in the event of fire"—with what they actually did. The shafts can only be central to the fire safety of the blocks if they were, *ab initio* or subsequently, rendered fit for purpose. It is difficult to understand how the shafts at the time they were built, or in the condition they presented at the relevant time, could be central to fire safety, the opposite is quite probably true; at the relevant time they had no positive contribution to make to the fire safety of the buildings.

81 At para. 11 the SM states:

> "CFD modelling shows the stairs are more tenable without encroachments than with encroachments. The encroachments simply leave nowhere for the smoke to go. By blocking the shafts, the Appellants materially hamper the Service, the smoke having nowhere to go would now have to escape through the stairs . . ."

Contrary to what the SM concludes, the CFD modelling in fact shows that with or without the encroachments the stairs are untenable. It is not the encroachments that leave nowhere for the smoke to go but the unsuitability of the shafts which prevents proper dispersal of smoke. Whilst I agree with the SM that each hazard is free standing and can be addressed separately, any such hazard must be addressed in relation to the statutory test. It is simply wrong to assess a blockage as a hazard because it contributes in some way to the inefficacy of the shafts as fire safety shafts. I have no doubt that the encroachments, to the extent agreed on by the experts, are factors which contribute to the inefficacy of the shafts, but there is a significant difference between the encroachments contributing to the problem in the shafts, and materially increasing the gravity of that problem. Upon the evidence, there is no basis for the finding that the blockage caused by the appellants "materially hampers the Service" and pushes the smoke into the stairs.

82 At para. 12 the SM states:

> "As to the permanently open grilles allowing smoke into lobbies on higher floors, it must be borne in mind that the lobbies are only 2.5 meters across and thus, however full of smoke they could get, within

> acceptable standards in terms of fire safety for people to travel through on their way to the safety of smoke free ventilated stairs."

I struggle to understand the above statement, but as I see it, the SM may be saying that because of the size of the lobbies, no matter how full of smoke they were to get, it would still be within an acceptable standard for people to travel through to the safety of smoke-free ventilated stairs. The difficulty with that conclusion is that it does not accord with the evidence of Mr. Brown. There is therefore no basis for the SM to have concluded that in those circumstances the stairs would be safe, ventilated and smoke free. Interestingly at para. 13 the SM appears to contradict himself in relation to the statement made at para. 12 with regard to the smoke situation on the stairs. He says, speaking of the appellants, that:

> "their actions do not just restrict the flow of smoke it actually stops it completely allowing smoke to escape only via the stairs thus going against the fire safety design of the building and creating a worse situation than currently exists."

83 At para. 13 the SM further states:

> "By blocking the flow of smoke up the shafts the Appellants replicate and exacerbate what they argue is wrong with the shafts. The Appellants cannot mask the effect of their actions by shadowing other hazards not of their making any more than those responsible for those other hazards can hide behind the Appellants."

In the first place the view that the appellants blocked the flow of smoke by "replicating" the existing problem in the shaft is not one which can be sustained by the evidence. Secondly, it seems to me that if the SM was approaching the issue as a balancing exercise, it was not a question of ascertaining whether the appellants were masking their actions by highlighting other hazards, and balancing which was the more serious one, but rather determining the effect of the encroachments on the functionality of the shaft; if the encroachment makes the situation materially worse it is a fire hazard (regardless of the presence of other hazards), if it does not then it is not a fire hazard.

84 The SM also states at para. 13 that:

> "By unblocking the shafts the flow of air is restored and safety is improved . . . The more unblocked the shafts are the better the flow of air is and the safer the buildings are."

It is not clear to me whether the reference to unblocking the shafts refers to a total sanitization of the shafts of all blockages or simply the removal of the encroachments. If it is the former, the object of the exercise is not for the court to determine how to render the shafts fit for purpose; if it is the latter, the evidence is clear in its conclusion that the removal of the

encroachments alone will not render the shafts fit for purpose, nor will it materially improve the conditions of fire safety.

85 As can be appreciated from para. 25 *ante*, the SM went to some considerable lengths to assess whether the shafts were built as smoke ventilation shafts and he set out six reasons why he concluded that they were; these are drawn from the opinion of Mr. Brown. I do not consider the question as to whether the shafts were intended to be built as smoke ventilation shafts to be a material factor of concern, given that it is the condition they were in at the relevant time which is determinative of their function. That said, what is concerning is that having concluded (at para. 5 of the judgment) that the shafts were built as smoke shafts, "I find they are smoke ventilation shafts," SM then moves on (at para. 6 of the judgment) to consider the submissions of the appellants as to why the shafts could not have been designed/built as smoke shafts. This can only indicate that the SM made the finding before taking proper account of the submissions of the appellants.

Conclusion

86 By way of summary, I am of the view for the reasons given that the SM:

(i) failed to address the manner in which Mr. Brown was instructed or the impact this was bound to have had on his status as an unbiased, competent and reliable expert;

(ii) failed to address the issues regarding the contents and non-adherence to the CPR guidelines of the three Brown reports;

(iii) failed to address the challenges raised by the appellants with regard to the reliability of Mr. Brown as an expert witness;

(iv) failed to mention those parts of the evidence of Mr. Brown which in fact supported the case for the appellants in a material way;

(v) failed to address properly why he preferred the evidence of Mr. Brown over that of Mr. Todd and failed to address why he rejected Mr. Todd's evidence;

(vi) failed to give any or any adequate consideration to the crucial aspects of the joint statement which in fact supported the view that no fire hazard had been created;

(vii) having correctly identified the statutory test, failed to apply it to the evidence;

(viii) made findings which were unsupported by the evidence;

(ix) made findings or reached conclusions before taking account of submissions;

(x) failed to properly reference the source of his findings; and

(xi) failed to take proper account of the submissions of the appellants.

87 Consequent upon that, it necessarily follows that the decision of the SM falls to be quashed. The issue then arises as to whether this court should remit the matter back to the Magistrates' Court, or whether it should substitute the decision of the SM with a finding that the appellants had not created a fire hazard. In my judgment I am in no doubt that on the evidence before him no reasonable SM properly directing himself could reach the decision that the encroachments created a fire hazard as defined in the Act. In the circumstances, I allow the appeals and find that within the meaning of the Act the appellants did not create a fire hazard.

88 In the course of my judgment I have dealt with the questions posed by the SM in the case stated, save question 3, to which I have made some reference already. The point is this, at the stage of determining whether a fire hazard had been created, it was not the task of the SM to find a design solution to the improperly functioning shafts, as I have said, the issue before him was much narrower. Given my ruling I do not need to consider paras. 15 *et sequentia* of the judgment, these discuss whether in light of the SM's ruling, the encroachments should be removed or whether they should be allowed to remain. It follows from that, that similarly I do not need to deal with the second set of questions posed by the SM in the case stated, as these would only fall to be considered in the event that I agreed with the SM's decision that a fire hazard has been created.

Final comments

89 At the time the notices were issued, not in dispute that the shafts were not fit for purpose as smoke ventilation shafts. They were of irregular sizes, airbricks were placed in the shafts either for decorative reasons or to stop the ingress of birds, the shafts contained cabling and electrical boards and fuse boxes belonging to individual flats, they contained debris and building materials left in the shafts by the contractors (which post issue of the notices appears to have been cleared), they contained crisscrossed beams covered in concrete, in respect of which the builders had then roughly cut out holes of irregular sizes, this resulted in the number and size of openings varying on different floors and they contained permanently open vents. It was against this background that the encroachments were erected.

90 Applying the law as I must, I have ruled that the encroachments do not constitute a fire hazard within the meaning of the Act. That does not mean that they are lawful, or that steps should not be taken to ensure that the buildings conform to acceptable fire safety standards. Although the shafts were not fit for purpose at the time the encroachments were erected, the appellants could not have known this, for all they knew these could have been perfectly functioning smoke shafts necessary for the protection

of life and property in the event of fire. To have embarked upon these encroachments in a self-entitled manner, without seeking permission, and without conducting investigation, can only be described as highly irresponsible actions, actions which had the potential of endangering the lives of building occupiers and rescue services in the event of fire. It may be that the actions of the appellants contravene their underlease and it may be that the management company may wish to take the necessary steps to rectify this, indeed they may be duty bound to do so. In any event the management company should carefully consider any duty they may have to ensure that by whatever means practicable, there is a proper and effective fire safety system in place for Montagu Gardens, we only have to remember the horror of Grenfell Towers to realize the importance of fire safety in residential blocks.

Appeals dismissed.
