SUPREME COURT OF QUEENSLAND

CITATION:	*Hamcor Pty Ltd & Anor v State of Queensland* [2015] QCA 183
PARTIES:	**HAMCOR PTY LIMITED** ACN 010 141 429 (first appellant) **DONALD CHARLES HAYWARD & JAMES PETER COLLINS AS EXECUTORS OF THE ESTATE OF TERRENCE ARTHUR ARMSTRONG (DECEASED)** (second appellant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 10135 of 2014 SC No 5764 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 224
DELIVERED ON:	2 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2015
JUDGES:	Gotterson JA and Atkinson and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Appellants to pay the respondent's costs of the appeal on the standard basis.** **3. No order as to costs with respect to the Notice of Contention.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – OTHER MATTERS – where property was destroyed by fire – where the Queensland Fire and Rescue Service ("QFRS") had been called to the fire – where in the course of combating the fire, QFRS personnel applied massive quantities of water on and around the fire – where the water mixed with factory chemicals, producing a large volume of contaminated fluid known as "fire-water" – where much of the fire-water flowed onto

adjacent bushland or into a local creek via stormwater drains – where however, some of the fire-water remained on the property where it soaked into soil and large concrete construction slabs, or ran into storage dams – where as a result, part of the property was classified as Contaminated Land pursuant to Chapter 7 Part 8 of the *Environmental Protection Act* 1994 (Qld) ("EP Act") – where proceedings were commenced against the State of Queensland for alleged breaches of duty of care in negligence on the part of the QFRS in fighting the fire – where the loss occasioned by the breaches was one that, it was claimed, arose from a statutory liability imposed by s 391 of the EP Act to remediate the Contaminated Land – where the cost of remediation was accepted to be more than $9 million, many times the value of the freehold land prior to the fire – where the State of Queensland succeeded in its reliance upon s 129(1) of the *Fire and Rescue Service Act* 1990 (Qld) ("FRS Act") – where the learned primary judge held that what the QFRS had done in applying water to the fire was expressly authorised by s 53(1) of the FRS Act – where it was therefore something done pursuant to that Act and hence was protected by the immunity conferred by the first limb to s 129(1) – where the appellants contend that the learned primary judge erred in holding that, in the circumstances in which it applied water to the fire, the QFRS was acting pursuant to the FRS Act and was therefore entitled to an immunity under s 129(1) – where the appellants contend that upon the proper construction of that provision, the QFRS was acting for the purposes of the Act and was only entitled to immunity where it acted bona fide and without negligence – where the appellants seek orders that the appeal be allowed; that judgment be entered for them against the State of Queensland in the sum of $12,384,000 together with interest calculated at the rate of 10 per cent per annum between the date of loss and the date of judgment; and that the State of Queensland pay their costs of the trial and the appeal on the standard basis – where the respondent contends that the decision below ought to be confirmed on the additional basis that, as her Honour should have found, s 36 CL Act applied to the proceedings – whether the QFRS was acting pursuant to the FRS Act and was therefore entitled to an immunity under s 129(1)

Acts Interpretation Act 1954 (Qld), s 32D(1)
Civil Liability Act 2003 (Qld), s 36, s 36(2)
Environmental Protection Act 1994 (Qld), s 391
Fire and Rescue Service Act 1990 (Qld), s 8B, s 53, s 53(1), s 53(2), s 53(20(h)), ss 129-154, s 129, s 129(1), s 129(3), s 129(4)
Fire Brigades Act 1909-1956 (NSW), s 46
Plant Protection Act 1989 (Qld), s 2, s 3, s 4(1), s 4 (2), s 11, s 13, s 13(2), s 14, s 14(3), s 16, s 19, s 28(1), s 28(1)(a), s 28(1)(b)
Public Safety Business Agency Act 2014 (Qld), s 100

Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales [2010] NSWCA 328, cited
Board of Fire Commissioners (NSW) v Ardouin (1961) 109 CLR 105; [1961] HCA 71, cited
Colbran v State of Queensland [2007] 2 Qd R 235; [2006] QCA 565, cited
Flegg v Crime and Misconduct Commission [2014] QCA 42, cited
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, cited
Holgate-Mohammed v Duke [1984] AC 437, cited
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, cited
Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources (2005) 138 LGERA 11; [2005] NSWCA 10, cited
Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd (2009) 77 NSWLR 360; [2009] NSWCA 263, cited

COUNSEL: P W Telford for the appellants
M Hinson QC, with D O'Brien QC, for the respondent

SOLICITORS: Everingham Lawyers for the appellants
G R Cooper, Crown Solicitor for the respondent

[1] **GOTTERSON JA:** Hamcor Pty Ltd was the trustee of the Hayward Family Trust. The late Mr Terrence Arthur Armstrong was a director of a company, Binary Industries Pty Ltd ("Binary"). By 25 August 2005, Hamcor, in its capacity as trustee, and Mr Armstrong were the owners as tenants in common of freehold land situated at 42-46 Magnesium Crescent, Narangba, and industrial buildings erected on it ("the property"). Binary was the lessee and occupier of the property where it carried on business as a manufacturer of chemicals.

[2] On 25 August 2005, the buildings on the property which housed Binary's factory and warehouse were destroyed by fire. The Queensland Fire and Rescue Service ("QFRS") had been called to the fire. In the course of combating it, QFRS personnel applied massive quantities of water on and around the fire.

[3] The water mixed with factory chemicals, producing a large volume of contaminated fluid known as "fire-water". Much of the fire-water flowed onto adjacent bushland or into a local creek via stormwater drains. However, some of it remained on the property where it soaked into soil and large concrete construction slabs, or ran into storage dams. As a result, part of the property was classified as Contaminated Land pursuant to Chapter 7 Part 8 of the *Environmental Protection Act* 1994 (Qld) ("EP Act").

[4] On 1 July 2011, Hamcor, as First Plaintiff, and Mr Armstrong,[1] as Second Plaintiff, commenced proceedings against the State of Queensland for alleged breaches of duty

[1] Mr Armstrong died during the currency of the proceedings. Hs executors, Donald Charles Hayward and James Peter Collins were substituted as Second Plaintiffs by order made on 1 October 2014: AB2421-2422.

of care in negligence on the part of the QFRS in fighting the fire. The loss occasioned by the breaches was one that, it was claimed, arose from a statutory liability imposed on the plaintiffs by s 391 of the EP Act to remediate the Contaminated Land. The cost of remediation was accepted to be more than $9 million, many times the value of the freehold land prior to the fire.

[5] In the same proceedings, the plaintiffs also sued an insurance broker and its authorised representative. The pleading alleged failures to advise that the plaintiffs ought to have been named as insureds or interested parties under a liability insurance policy placed by the broker for Binary, or that an industrial special risks policy ought to have been taken out by the plaintiffs. Binary's insurer declined liability to indemnify in respect of the remediation costs on the footing that it was the plaintiffs, and not Binary, who were statutorily liable to effect the remediation.

[6] The proceedings were tried over 16 days in October and November 2013. Extensive written submissions were exchanged over the ensuing months, the last of them on 19 June 2014. Judgment was given on 1 October 2014. The respective claims against the State of Queensland and the insurance broker entities were dismissed.[2] The plaintiffs were ordered to pay the State of Queensland's costs on the standard basis.[3] The learned primary judge was of the view that evidential shortcomings in the plaintiffs' case precluded an assessment of damages by her.[4]

[7] On 27 October 2014, the plaintiffs, as First and Second Appellants, respectively filed a notice of appeal.[5] This appeal challenged only the dismissal of the case against the State of Queensland which is the sole respondent to it. At the hearing of the appeal, leave was granted to the appellants to file and rely upon an amended notice of appeal.[6] The respondent filed a Notice of Contention on 10 November 2014.[7]

The issues at first instance

[8] The learned primary judge summarised the claim against the State of Queensland as follows:

> "… The claim is a common law negligence action. The basis for the claim can be shortly, and probably not simplistically, stated as being that it was negligent to attempt to extinguish this fire with water: chemical fires cannot be extinguished with water. It was said by the plaintiffs that the proper approach to the fire on this site was to simply let it burn itself out whilst being vigilant to extinguish any spread of the fire outside the site. It is pleaded, that without the vast quantities of water applied in an attempt to extinguish the fire, the cost of remediation of the land would have been far less than it is. So it can be seen that the case involves significant points as to causation of loss, as well as breach, and the existence of a duty on the part of the QFRS. …"[8]

[9] The defence put in issue the existence of a common law duty of care, breach of duty, causation and quantification of loss. It raised a plea of contributory negligence. In

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2 AB2572.
3 AB2423.
4 Reasons [249]-[267].
5 AB2427-2430.
6 AB2431-2434.
7 AB2435-2436.
8 At [3].

addition, the defence pleaded that, in the event that a duty of care as alleged was owed by it, s 36 of the *Civil Liability Act* 2003 (Qld) ("CL Act") applied so as to modify the standard of care applicable;[9] and that, in any event, the conduct of QFRS attracted the statutory immunity from liability conferred by s 129(1) of the *Fire and Rescue Service Act* 1990 (Qld) ("FRS Act").[10]

The decision at first instance

[10] The learned primary judge resolved the issue of the existence of a common law duty of care in favour of the plaintiffs. She reached the following conclusion on the issue:

> "In my view once the QFRS attended the plaintiffs' land and began exercising its statutory powers to protect against fire and hazardous materials emergency there was sufficient closeness and directness in the relationship between it and the plaintiffs, as owners of the property which was on fire and which was the source of, and vulnerable to, the hazardous materials in question, to establish a common law duty owed by the QFRS to the plaintiffs to take reasonable care to protect the plaintiffs' property in exercising its powers to combat the fire and emergency."[11]

[11] The plaintiffs also succeeded on the issue of breach of duty. Her Honour's conclusions on it are evident from the following two paragraphs in her reasons:

> "In my view the QFRS breached its duty to the plaintiffs in applying large amounts of water to areas of the plaintiffs' land other than the LPG cylinders and solvent tank, and other than the firewall and drums under, and in front of, the awning."[12]
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> …
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> It may be that the QFRS's applying water may have cooled parts of the fire, but there was no evidence that it was strategically applied to do so, nor that this was a reasonable fire-fighting objective. Not only was there no reason to apply water, except to the four identified areas (above), it was reasonably foreseeable that applying volumes of water to the plaintiffs' land would create commensurate volumes of contaminated fire-water. At all material times the QFRS understood that this fire-water posed an environmental hazard. There was a reasonable fire-fighting strategy available: to let the fire burn itself out while applying water to the four identified areas where that application could serve a logical purpose. There is no evidence that these relevant facts were considered as they ought to have been during the course of the fire. For these reasons it seems to me that it was not reasonable for the QFRS to apply water to the site other than to the four areas I have identified, and that it was only reasonable for it to apply water to them during the time at which they were at risk."[13]

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9 AB2244-2269; Amended Defence of First Defendant paragraph 28A.

10 *Ibid* paragraphs 34-36.

11 At [174]. At [131], her Honour found that the contaminated fire-water was hazardous material as defined in the FRS Act and that its release during the events of 25 August 2005 and in the subsequent days was a hazardous materials emergency as there defined. This finding is not challenged on appeal.

12 At [182].

13 At [189].

[12] The learned primary judge found that s 36 CL Act had no application to the proceeding on the footing that that provision is applicable only to claims based on breach of statutory duty and is inapplicable to claims based on a breach of common law duty of care.[14] Her Honour did, however, consider whether there would have been a breach of duty had s 36 applied to the duty of care. She concluded against such a breach.[15]

[13] The State of Queensland succeeded in its reliance upon s 129(1) of the FRS Act. The learned primary judge held that what it had done in applying water to the fire was expressly authorised by s 53(1) of the FRS Act. It was therefore something done pursuant to that Act and hence was protected by the immunity conferred by the first limb to s 129(1).[16]

[14] Her Honour noted that, at trial, the parties had agreed a dollar value for the items of loss claimed by the plaintiffs. The items claimed matched what the plaintiffs were required to do or had carried out in order to comply with directions given by the Environmental Protection Agency and orders of the Planning and Environment Court relevant to them. In her Honour's view, the range of items claimed extended beyond those that might have been recoverable had a breach of duty been established. Having regard to the evidential shortfalls which she identified, the learned primary judge considered that she was unable to make findings as to causation of loss on which she could assess damages.[17]

[15] As to the contributory negligence claim, her Honour concluded that, even if she had made a liability finding in the plaintiffs' favour, the evidence would not justify a finding of contributory negligence against them.[18]

The grounds of appeal and the contention

[16] The following grounds of appeal are set out in the amended notice of appeal:

> "1. The learned primary judge erred in holding that, in the circumstances in which it applied water to the Fire, the QFRS was acting pursuant to the *Fire and Rescue Service Act 1990 (Qld)* and was therefore entitled to an immunity under s.129(1) of the Act, when upon the proper construction of that provision, the QFRS was acting for the purposes of the Act and was only entitled to immunity where it acted bona fide and without negligence. Having found at Reasons [182] that the QFRS had breached its duty to the Appellants, and was therefore negligent within the meaning of the section, the learned primary judge erred in concluding at Reasons [233] that the QFRS was nevertheless entitled to an immunity under s.129(1) of the Act.
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> 1A The learned primary judge erred in failing to find at Reasons [211] and [232] that the act or omissions of the QFRS in fighting the Fire were "unreasonable" within the meaning of s.36(2) of the *Civil Liability Act 2003 (Qld).*
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> 1B Having found at Reasons [182] that the QFRS had breached its duty to the Appellants and having erred in failing to make the

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14 At [197].
15 At [211].
16 At [230].
17 At [235]; [249]-[267].
18 At [273].

finding referred to in the preceding subparagraph (sic), the learned primary judge failed to properly construe ss.53 and 129(1) of the *Fire and Rescue Service Act 1990 (Qld)*, and thereby erred.

2. In circumstances where it had been admitted on the pleadings that water runoff from that used to fight the Fire had contaminated the Land and had entered the environment surrounding the Premises, the Appellants and the Respondent had reached agreement as to the quantum of the Appellants' claims (Reasons [162]) and further, where having found at Reasons [182] that the QFRS had breached its duty to the Appellants, the learned primary judge erred in holding at Reasons [235] that the Appellants had not established their loss."[19]

[17] Consistently with these grounds, the appellants seek orders that the appeal be allowed; that judgment be entered for them against the State of Queensland in the sum of $12,384,000 together with interest calculated at the rate of 10 per cent per annum between the date of loss and the date of judgment; and that the State of Queensland pay their costs of the trial and the appeal on the standard basis.[20]

[18] The State of Queensland contends that the decision below ought to be confirmed on the additional basis that, as her Honour should have found, s 36 CL Act applied to the proceedings.[21]

[19] It is appropriate to consider Ground 1 first. Grounds 1A and 1B, which are interlinked, also bear upon the availability of the s 129(1) immunity to the State of Queensland. It is convenient to consider these two grounds together to the extent that they relate to the immunity.

Ground 1 – s 129(1) FRS Act

[20] **Statutory context**: Part 11 of the FRS Act (ss 129 to 154 inclusive) contained general provisions.[22] Section 129 was headed "Protection for acts done pursuant to Act". It provided as follows:

"(1) No matter or thing done or omitted to be done by any person pursuant to this Act or bona fide and without negligence for the purposes of this Act subjects that person to any liability.

(2) A person (and any assistant) who discharges a function or exercises a power under this Act in order to avert or reduce actual danger to any person or property or to the environment may use force to a person that is reasonable in the circumstances and that does not cause and is not likely to cause death or grievous bodily harm and is not liable to be charged with any offence in respect of the use of that force.

(3) Where any question arises as to whether a person's liability for any act or omission, the subject of any proceedings, is negatived under subsection (1) and the person claims to have acted pursuant

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19 AB2432-2433.

20 AB2433.

21 AB2435.

22 Part 11 as enacted at all material times for this proceeding, was replaced by a Part 11 in different terms by s 100 of the *Public Safety Business Agency Act* 2014 which commenced on 21 May 2014. The FRS Act was renamed the *Fire and Emergency Services Act* 1990. That Act does not contain a re-enactment of s 129.

to or for the purposes of this Act, the burden of proof of negligence and the absence of good faith lies upon the person alleging to the contrary.

(4) If a person against whom proceedings are taken in any court for an act or omission alleges that the act was done or omission made for the purposes of this Act, the court may, on application, order a stay of proceedings if satisfied—

(a) that there is no reasonable ground for alleging either negligence or want of good faith; or

(b) that the proceedings are frivolous or vexatious.

(5) This section does not take away any defence a person has independently of this section."

[21] Before the learned primary judge, both parties submitted that there were two limbs to the statutory immunity from liability conferred by s 129(1). The first limb was in respect of any matter or thing done or omitted to be done by a person **pursuant to** the FRS Act. The second limb was in respect of any matter or thing done by any person bona fide and without negligence **for the purposes of** the FRS Act. Significantly, the requirements for immunity of good faith and absence of negligence applied to the second limb only.

[22] This appeal was argued on the footing that the interpretation which both parties had submitted below, is correct. That there were two independent limbs to s 129(1) finds strong support in the use of the disjunctive "or" between the phrases "pursuant to" and "for the purposes of".

[23] It may be observed that later provisions in s 129 exhibited some ambivalence on the point in that, on the one hand, s 129(3) spoke of the burden of proof of negligence and the absence of good faith as if they were attributes of acting both "pursuant to" and "for the purposes of" the FRS Act; whereas, on the other hand, s 129(4) spoke as if they were attributes of acting for the purposes of the FRS Act only. In the result, any argument based on s 129(3) against two independent limbs to s 129(1), is counteracted by s 129(4). Overall, the other four subsections in s 129 did not disclose a legislative intention, that in the context of s 129(1), the word "or" was not to have its usual disjunctive connotation.

[24] There was an admission on the pleadings of the first defendant that the QFRS was part of the State of Queensland.[23] At trial, the parties disputed whether the State of Queensland was a person for the purposes of s 129(1). In reliance upon s 32D(1) of the *Acts Interpretation Act* 1954 (Qld) and the definition of "corporation" in the First Schedule thereto, the learned primary judge concluded that the State of Queensland was such a person.[24] This conclusion is not challenged on appeal.

[25] Argument on this issue before the learned primary judge was also referenced to certain other provisions of the FRS Act. Those provisions were ss 8B and 53. At the relevant time, they provided as follows:

"**8B Functions of service**

The functions of the service are—

(a) to protect persons, property and the environment from fire and hazardous materials emergencies; and

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23 Fifth Further Amended Statement of Claim paragraph 1(d)(ii): AB2272; Amended Defence of the First Defendant paragraph 1: AB2247.

24 At [224].

(b) to protect persons trapped in a vehicle or building or otherwise endangered, to the extent that the service's personnel and equipment can reasonably be deployed or used for the purpose; and

(c) to provide an advisory service, and undertake other measures, to promote—

(i) fire prevention and fire control; and

(ii) safety and other procedures if a fire or hazardous materials emergency happens; and

(d) to cooperate with any entity that provides an emergency service; and

(e) to perform other functions given to the service under this Act or another Act; and

(f) to perform functions incidental to its other functions; and

(g) to identify and market products and services incidental to its functions.

…

53 Powers of authorised officer in dangerous situations

(1) An authorised fire officer may take any reasonable measure—

(a) to protect persons, property or the environment from danger or potential danger caused by a fire or a hazardous materials emergency; or

(b) to protect persons trapped in any vehicle or building or otherwise endangered.

(2) Without limiting the measures that may be taken for a purpose described in subsection (1), an authorised fire officer may for that purpose do any of the following—

(a) enter any premises, vehicle or vessel;

(b) open any receptacle, using such force as is reasonably necessary;

(c) bring any apparatus or equipment onto premises;

(d) destroy, damage, remove or otherwise deal with any vegetation or any other material or substance, flammable or not flammable;

(e) destroy (wholly or in part) or damage any premises, vehicle or receptacle;

(f) shore up any building;

(g) close any road or access, whether public or private;

(h) shut off the supply of water from any main, pipe or other source to obtain a greater pressure or supply or take water from any source whether natural or artificial;

(i) cause to be shut off or disconnected the supply of gas, electricity or any other source of energy to any premises or area;

(j) require any person who, in the opinion of the authorised fire officer, is—

(i) the occupier of premises, being the site of or near to the site of the danger; or

(ii) in charge of anything that is the source of the danger or likely (in the opinion of the officer) to increase the danger;

to take any reasonable measure for the purpose of assisting the officer to deal with the danger or answer any question or provide any information for that purpose;

(k) require any person not to enter or remain within a specified area around the site of the danger;

(l) remove from any place a person who fails to comply with an order given pursuant to paragraph (k) and use such force as is reasonably necessary for that purpose;

(m) if unable to identify the person entitled to possession of property found at or near the site of the danger, take possession of the property and retain it for safe custody.

(3) The owner of any building shored up pursuant to an exercise of the power conferred by subsection (2)(f) must pay to the chief executive upon demand all reasonable expenses thereby incurred and those expenses may be recovered in a court of competent jurisdiction as a debt due to the State.

(4) A local government, other authority or a person supplying water or any source of energy is not liable for any interruption of supply caused by the exercise of the power conferred by subsection (2)(h) or (i).”

[26] **Conclusions at first instance**: The appellants had submitted at trial that the first limb of s 129(1) was inapplicable because the acts and omissions on which they, as plaintiffs, had relied as evidencing in breach of duty for which the State of Queensland was liable, were not done pursuant to the FRS Act. It was submitted that they were done for the purposes of that Act only. In dealing with this submission, which was renewed on appeal, her Honour reasoned:

> “[229] Section 53 of the *FRS Act*, see [128] above, provides that an authorised fire officer may take any reasonable measure to protect persons, property or the environment from fire or a hazardous materials emergency. Subsection (2) begins, “Without limiting the measures that may be taken for such a purpose ... ” and then lists various activities. Applying water is not an activity listed. The activities listed are of a more general than specific nature, no doubt because the legislature did not wish to limit the powers of the QFRS by trying to foresee what it might need to do in the many and varied circumstances which might confront it.
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> [230] Given the inclusory words at the beginning of s 53(2) I do not see that applying water in an attempt to extinguish a fire needs to be expressly listed as an activity in s 53(2) in order for that activity to be something which, when done by the QFRS, is done pursuant to the *FRS Act* within the meaning of s 129(1) of the *FRS Act.* I would not like to say that a citizen who applied water bona fide in an attempt to extinguish fire on property

> which they did not own would be acting illegally or tortiously. Each case would no doubt turn on its own facts. The application of water by the QFRS in this case was something for which it needed the authority of s 53(1) of the *FRS Act.* Water was applied in enormous volumes and at a spectacular rate because the QFRS was able to access the fire hydrants and water mains in a way which no ordinary citizen could do. In applying water as it did, the QFRS was using its special statutory powers to deal with an emergency. This application of water was something which of its nature involved large-scale interference with property of others. In my view, the application of water by the QFRS was something done pursuant to the *FRS Act* within the meaning of s 129(1) of that Act."[25]

[27] Finally, the learned primary judge considered a submission for the appellants based upon the expression "any reasonable measure" in s 53(1) of the FRS Act. Her Honour summarised the submission and reasoned that it should be rejected in the following way:

> "[231] Lastly, as to s 129(1), it was submitted by the plaintiffs that the introductory words to s 53, that is, authority to take "any reasonable measure", meant that if it were found that the application of water by the QFRS was in breach of a common law tortious duty there could be no protection within the first limb of s 129(1), for the *QFRS* only had power to act reasonably pursuant to the Act. I reject this interpretation: it would leave the first limb of s 129(1) with a very much reduced application (it is possible it might still apply to a case of trespass or other non-intentional tort). Further, interpreting the words in s 53(1) in this way would mean that there would be no purpose in having two separate limbs to s 129(1), for negligent acts would never be protected, whether they were pursuant to the Act or for the purposes of the Act.
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> [232] My view is that the words empowering the QFRS to take any reasonable measure at s 53(1) of the *FRS Act* are to be interpreted having regard to the authority to act of the executive arm of government. The executive has authority to act so long as it does not act unreasonably in the *Wednesbury* sense - see *Holgate-Mohammed v Duke.*[26] To adapt the words used by Campbell JA, in *Refrigerated Roadways*[27] (above) at [343] ff, the plaintiffs' argument involves conflating two different senses of the word "reasonable". As Campbell JA says at [344], a question about whether a statutory authority has acted in a way which is not a reasonable exercise of power is answered by a reference to the proper scope of the statutory power and any consideration of reasonableness is in that administrative law context. Questions of reasonableness involved in deciding whether or not there has been a breach of a duly of care are quite different to this. …"[28]

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25 AB2539.

26 [1984] AC 437, 443.

27 *Roads and Traffic Authority of New South Wales v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360.

28 In the course of considering s 36 CL Act, her Honour had expressed the view that the application of water by QFRS to this fire could not be regarded as unreasonable in the *Wednesbury* sense: at [211].

[28] **Appellants' submissions**: This ground of appeal is focused upon the conclusion that in the circumstances in which it applied water to the fire, the QFRS was acting pursuant to the FRS Act. It contends that this conclusion is wrong. Furthermore, it supplements the contention with derivative contentions, namely, that the conclusion that should have been reached is that QFRS was acting for the purposes of the Act only; and that, in light of the conclusions reached that QFRS had breached its duty of care and had therefore been negligent, the learned primary judge ought to have arrived at the ultimate conclusion that immunity under s 129(1) was not available to QFRS.

[29] In advancing argument on this ground of appeal, the appellants note that her Honour accepted that the application of water to the appellants' property to fight the fire was something for which the QFRS required authority under the FRS Act.[29] They suggest that her Honour "acknowledged that no provision of the FRS Act directly or expressly required or authorised the application of water to a fire (far less a chemical fire)", citing paragraph [229] in the reasons. They argue that, at that point, a finding should have been made that the application of water was not done "pursuant to" the Act and that therefore the immunity under the first limb to s 129(1) could not apply.[30]

[30] As may be inferred from the immediately preceding paragraph, the appellants propose a test for ascertaining whether particular conduct is performed pursuant to a statute. The test is that conduct is pursuant to a statute if, and only if, the statute directly or expressly authorises it. An alternative formulation of the test given by the appellants is that the statute specifically authorise the conduct.[31]

[31] The appellants submit that such a test was recognised and applied by this Court in *Colbran v State of Queensland*.[32] It is one which they argue, is in conformity with the maxim that statutory immunity provisions are to be construed jealously, for which they cite an observation of Kitto J in *Board of Fire Commissioners (NSW) v Ardouin*.[33]

[32] **Respondent's submissions**: The respondent disparages the test proposed by the appellants. It submits that the correct test is one which contrasts conduct which is authorised by the statute in question to be lawfully done against conduct which is authorised by the general law, unsupplemented by the statute in question, to be lawfully done. The test asks whether the relevant conduct is of the first category or of the second category. If it is authorised by the statute (and in the first category), then it is done pursuant to the statute. No further qualification of direct, express or specific authorisation is involved.[34]

[33] **Discussion**: Analysis of the appellants' submissions requires consideration of both the decision in *Colbran* and her Honour's reasonsing.

[34] In *Colbran*, officers of the Department of Primary Industries ("DPI") sprayed the plaintiffs' coffee trees with chemicals during the implementation of a Papaya Fruit Fly eradication program. The plaintiffs alleged that the spraying was done negligently, causing extensive and long-lasting damage to the coffee trees. The officers entered the plaintiffs' land and sprayed the trees under a consensual arrangement negotiated with the plaintiffs. The State sought to rely upon an immunity provision in s 28(1) of

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29 At [230].
30 Written submissions paragraph 15.
31 *Ibid* paragraph 16.
32 [2006] QCA 565; [2007] 2 Qd R 235.
33 (1961) 109 CLR 105 at 116.
34 Written submissions paragraph 11.

the *Plant Protection Act* 1989 (Qld) ("PP Act") which exempts from liability at law "an inspector or any other person acting in aid of an inspector on account of any act or thing –

> "(a) done or omitted to be done pursuant to this Act; or
>
> (b) done or omitted to be done bona fide for the purposes of this Act and without negligence".

[35] Jerrard JA summarised relevant aspects of the statutory framework of which s 28(1) forms part as follows:

> "[23] The main objectives of the Act, declared in s 2, include to prevent, control or remove pest infestation of plants in Queensland. Section 4(1) provides that if the Governor in Council is satisfied that an organism, virus, etc., (an "undeclared pest") is harmful to the growth or quality of crop plants (defined in s 3 as plants intentionally grown for consumption as food or for resale), then the Governor in Council may, by regulation, prescribe the undeclared pest to be a pest for the purposes of the Act. Section 4(2) gives the like power to the Minister, where circumstances require that urgent action be taken.
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> [24] …
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> [25] Section 13 empowers an inspector to give directions to the owner of land for the purposes of controlling or removing a pest existing in or upon it, or for preventing the spread of any existing pest to any land. Those directions can include requiring the owner to take measures including quarantining all or any part of the land, destroying pests on it or on any plants, and treating as directed any part of the land or any plant or appliance. The Act does not define how to "treat" plants, but it would include spraying. Section 13(2) empowers an inspector, for the purpose of controlling or removing existing pests or an existing pest infestation of any appliance, plant, harvested crop, produce, container or other thing, to give directions to the owner of those, including directions to destroy or treat the appliances, the plants, or quarantine them. Section 14 empowers the Chief Executive to give directions to the owner of land ordering the destruction of crops growing on land that is not infested with pests, if the Chief Executive considers that necessary to do in order to prevent pest infestation. Section 14(3) gives the owner of such a crop who receives such directions a right of compensation.
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> [26] Section 16 provides that where any person to whom directions have been given pursuant to the Act by the Chief Executive or an inspector, to carry out any destruction or treatment or other act, fails to comply with the directions, then an inspector may take all measures the inspector considers necessary or convenient to carry out the destruction, treatment or act in question. Section 19 gives inspectors power to enter places to ascertain whether the provisions of the Act have been complied with, to search, to stop and detain vehicles, to seize things, and the like.
>
> [27] …"

[36] His Honour noted[35] that the PP Act makes very limited provision for the role of inspectors, other than that of giving the described directions under ss 11 and 13, and in exercising the powers given by ss 16 and 19. Relevantly, section 13 empowers an inspector to give directions to an owner requiring the owner to treat plants. If an owner fails to comply with the directions, then s 16 empowers the inspector to carry out the treatment. The list of actions authorised by s 19 does not include spraying.

[37] The issue for the Court was whether spraying carried out under the consensual arrangement was done pursuant to the PP Act. In addressing that issue, Jerrard JA expressed the following view:

> "[46] With respect to those submissions, the decisions cited earlier reveal that the ordinary meaning of a statutory provision giving public officers immunity for acts done or omitted to be done "pursuant to" the statute, is that it describes acts or omissions which affect the rights and interests of others, done under or pursuant to an authority given by the statute; those being acts or omissions directly or expressly required or authorised by the Act. The expression does not describe acts or omissions which happen in the course of a consensual dealing and which therefore require no special or statutory authority. That construction accords too with the approach the High Court has taken in administrative law, in construing decisions made "under an enactment". In *Griffith University v Tang* (2005) 221 CLR 99, the joint judgment held[36] that such a decision must be expressly or impliedly authorised or required by the enactment, and also itself confer, alter, or otherwise affect legal rights and obligations."

[38] Williams JA reconciled the two limbs to s 28(1) on the basis that the first limb, s 28(1)(a) is to be taken to be referring to acts requiring specific authorisation pursuant to the PP Act.[37] His Honour evidently was of the view, as were the other members of the Court, that the spraying derived its legal authority from the consensual arrangement made between the DPI and the plaintiffs. It did not depend for such authority upon the PP Act; hence, it was not done pursuant to that Act.

[39] The third member of the Court, Philippides J, agreed with the reasons of Jerrard JA. Her Honour referred to the observations of Kitto J in *Ardouin* in the following terms:

> "[55] The following statements from Kitto J's judgment in *Ardouin* (at 117) made with reference to the immunity provision there under consideration, s 46 of the *Fire Brigades Act* 1909-1956 (NSW), are also apposite in construing s 28(1) and apt to describe the distinction between s 28(1)(a) and s 28(1)(b):
>
> '… the immunity attaches in respect only of damage resulting from an act which, if it had not been negligent, would have been the very thing, or an integral part of or step in the very thing, which the provisions of the Act … gave power in the circumstances to do, as distinguished from an act which was merely incidental to, or done by the way in the course of, the exercise of a power.'

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35 At [28].
36 At 130, [89].
37 At [12].

> [56] Kitto J concluded that the protection of the provision in question in *Ardouin* was only intended to extend to the doing of acts or things "actually within the direct authorisation" of the relevant Act. Likewise Taylor J (at 124) considered that the expression "powers conferred by this Act" appropriate "only to specify what may be described as the extraordinary powers conferred upon the Board in order that it may properly and effectively fulfil its functions."…"

[40] The legislative framework under the PP Act differs markedly from that of the FRS Act in a respect which is highly significant for present purposes. The difference can be observed in s 53 FRS Act. This section has a key role to play in conferring powers on authorised fire officers. The conferment of such powers is necessary for the discharge by QFRS of its statutory functions under s 8B of the Act.

[41] The PP Act has no provision which is relevantly similar to s 53. There is no provision of broad ambit, as s 53(1) is, which empowers an inspector to **take any reasonable measure** to attain stated objectives. Furthermore, s 19 of the PP Act which may be compared with s 53(2) in that it lists specific actions which may be taken by an inspector, is not expressed to be without limitation upon a broad power comparable with that found in s 53(1).

[42] The appellants' submissions attribute to her Honour an acknowledgement that no provision of the FRS Act directly or expressly required or authorised the application of water to a fire. A perusal of the paragraph in the reasons cited for that acknowledgement[38] reveals that the attribution is erroneous. Her Honour did observe that applying water to a fire is not an activity listed in s 53(2). As well, she noted, first, that s 53(1) empowers an authorised fire officer to take any reasonable measure to protect persons, property or the environment from fire or a hazardous materials emergency and, then, that the list of authorised action in s 53(2) is without limitation upon the measures that may be taken under s 53(1). However, she did not describe the application of water to a fire as an act that was not directly or expressly required or authorised by the FRS Act.

[43] Her Honour was clearly of the view that the application of water to extinguish a fire is a reasonable measure to protect persons, property or the environment from danger or potential danger caused by it, and, as such, is authorised by s 53(1).[39] That view finds clear support not only in common experience but also in s 53(2)(h) which authorises certain acts directed towards increasing water pressure. It follows that the absence of specific reference to that measure in the list in s 53(2) is beside the point, reliance upon that provision being unnecessary for its legal authorisation.

[44] The appellants' misattribution of an acknowledgement in these terms to her Honour is compounded by a misunderstanding of *Colbran* implicit in their submissions. That decision does not establish a principle of statutory interpretation that in order for an act to be done pursuant to a statute, it must be listed in the statute as one that is authorised to be done. The absence of an authorisation of spraying from the list in s 19 of the PP Act was of relevant significance in that case because neither that section, nor any other provision in that Act, authorised, in broad terms, the taking of any reasonable measure to control pests. An authorisation in such terms would have been apt to include spraying.

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38 At [229].

39 At [230].

[45] Conformably with the opinions expressed in *Colbran*, I accept that, as a principle of statutory interpretation, a statutory immunity for acts done pursuant to a statute is to be construed as extending only to acts directly authorised by the statute. However, I would reject, as a companion proposition, that in order to be directly authorised by a statute, an act must be specifically listed in it as authorised by it. In my opinion, an act will be directly authorised by a statute if it falls within a broad description of acts authorised by the statute. Such an authorisation may be in terms which permit the taking of "any reasonable measure".

[46] For these reasons, I do not accept the submission underlying this ground of appeal that the application of water to a fire by QFRS personnel for any of the purposes listed in s 53(1) is not an act done pursuant to the FRS Act. In my view, where it is a reasonable measure undertaken for any of those purposes, the application of water to a fire is done pursuant to that Act.

Grounds 1A and 1B – unreasonable measure

[47] The learned primary judge gave to the word "reasonable" in the expression "any reasonable measure" in s 53(1) a connotation of "not unreasonable in the *Wednesbury* sense".[40] So construed, a measure is reasonable if it is not unreasonable in that sense. The appellants do not challenge that meaning in this appeal.[41] They do not submit, as they did at trial, for a connotation of "non-negligent".

[48] Adopting that test, her Honour expressly relied upon her anterior conclusion with respect to s 36 CLA that the QFRS had not acted unreasonably in the *Wednesbury* sense. Her rejection of the appellants' "unreasonable measure" argument in the s 129(1) context, concluded:

> "As I have already explained, the application of water by the QFRS cannot be regarded as unreasonable in the *Wednesbury* sense".[42]

[49] What her Honour had found with respect to *Wednesbury* unreasonableness in the s 36 context can readily be gleaned from the following two paragraphs in her reasons:

> "[210] Unreasonableness in the *Wednesbury* sense must be such that it invalidates the exercise of power and this, in my view, is linked to the conceptual emphasis in the passage cited from Giles JA:[43] the words of s 36 require an act so unreasonable that no authority 'could properly' consider it to be a reasonable exercise of its power. In my view these words require the kind of unreasonableness which invalidates, or makes improper, the act or omission as an exercise of statutory power. The effect of the section is therefore in my view to make it extraordinarily difficult for a plaintiff to prove breach. (footnote omitted).
>
> [211] Whatever my criticisms of the QFRS in its fighting of the subject fire, they do not amount to something which would amount to a breach within the meaning of s 36(2) of the *CLA*, were it applicable. Apart from Area Director James, there were several

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40 At [232].
41 Tr1-11 ll5-11.
42 At [232].
43 *Allianz Australia Insurance Ltd v Roads and Traffic Authority of New South Wales* [2010] NSWCA 328 at [87].

> senior and experienced officers present at material times during this fire. Had the breaches complained of by the plaintiffs been of the magnitude required by s 36(2) it is inconceivable that no officer would have adverted to them and stopped them. Likewise, while Mr Glover retracted his opinions in support of the use of water after the experts conferred, the fact that he could have formed them originally (and in response to Mr Manser, not while actually fighting a fire) tells against breaches of the type described by s 36(2) of the *CLA*."

[50] In advancing Ground 1B, the appellants contend that her Honour ought to have found that the conduct of the QFRS was unreasonable in the *Wednesbury* sense. Why such a finding should have been made is raised by Ground 1A. It contends for error on her Honour's part in finding that had s 36 CLR applied, the modified *Wednesbury*-style duty of care that would have applied under it, would not have been breached.

[51] The appellants challenge is focused upon two aspects to paragraph [211] in the reasons and, more generally, upon an alleged absence of reasoning explaining her Honour's conclusion against *Wednesbury* unreasonableness. As to paragraph [211], the appellants question her Honour's reliance upon the non-intervention by senior and experienced officers present and upon the fact that the expert called by the State of Queensland, Mr Glover, initially expressed an opinion which was favourable towards the measures which were in fact taken, as supportive of her conclusion.

[52] As to the first aspect, the appellants find fault with the reasoning of the learned primary judge on the footing that she had already found that the QFRS officers who attended the fire had failed to act reasonably. In light of that finding, it was incongruous for her Honour to have relied on the fact that they conducted themselves in that way as demonstrating "*ipso facto*" that what was done was not unreasonable in the *Wednesbury* sense. The appellants submit that whilst it is, in theory, possible that conduct may be negligent, yet not "manifestly unreasonable" in the *Wednesbury* sense, her Honour failed to give reasons why the negligent conduct of the QFRS officers here was not, at the same time, unreasonable in the *Wednesbury* sense.[44]

[53] I am unable to accept these criticisms as valid ones. In the first place, her Honour did not make generalised findings to the effect that the QFRS officers failed to act reasonably in discharging the functions, powers and responsibilities of the QFRS. There was a finding of a breach of duty to take reasonable care in protecting the appellants' property.[45] Secondly, the breach of duty of care as found was in no sense probative of unreasonableness in the *Wednesbury* sense. The former is made within the framework of the common law principles of negligence; the latter is guided by public law considerations which constrain the exercise of the statutory powers. They are markedly different concepts. Thirdly, and it follows from the second, it is not a matter of mere theoretical possibility that conduct is negligent, yet not unreasonable in the *Wednesbury* sense. The appellants' submission implies, wrongly in my view, that they are at least substantially co-extensive. Fourthly, I do not understand her Honour to have reasoned by deduction that the non-intervention by the senior officers incontrovertibly ruled out unreasonableness in the *Wednesbury* sense. She relied upon it, together with other factors, as establishing that it was not unreasonable in that sense.

[54] Turning to the second aspect, the appellants question her Honour's reliance upon the retraction by Mr Glover of an opinion expressed by him in his report dated 28 August

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44 Written submissions paragraph 23.

45 At [174] and [127].

2013 that the fire should have been contained as quickly as practicable and not allowed to burn out.[46] The retraction occurred after a conclave of experts in which he and the two experts called by the appellants, Dr McCracken and Mr Manser conferred. It is made in the joint report of the fire experts dated 30 September 2013.[47]

[55] In their written submissions,[48] the appellants cite the following statements in the joint report:

(i) "In our opinion the defensive approach to be preferred, would have been to protect exposures beyond the allotment and allow the fire to burn out."[49]

(ii) "In our opinion for the reasons described in paragraphs 123 through to 129 of Mr Manser's report, when fighting chemical fires, an evaluation of relevant risks to human and to the biophysical environment of letting the fire burn or fighting the fire with water should be made. In general it appears to be better to let the fire burn where there is no risk of the fire spreading to other allotments. In our opinion a let burn strategy would have been the appropriate strategy because the aerial attack was ineffective and as the fire in the northern building started to reduce in intensity so would the southern building within a few hours."[50]

[56] The appellants also referred to a two-page Measurement of Success Matrix appended to the joint report. The matrix is a comparison in tabular form of the strategy adopted by QFRS with an alternative "let burn" strategy, across the parameters of the community, emergency services personnel, property and the biophysical environment.[51] They submit that the matrix supports the conclusion that the QFRS strategy produced a greater likelihood of adverse impact for those parameters than the alternative would have produced.

[57] The significance which the appellants attach to the joint report is two-fold. On one level, they contend that it diminished the relevance of the opinion originally held by Mr Glover. At a higher level, they submit that the extracts from the joint report referenced by them justify a conclusion that the QFRS conduct was unreasonable in the *Wednesbury* sense. In developing that submission, the appellants adopt as a touchstone, the formulation of *Wednesbury* unreasonableness endorsed in *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources*[52] of "whether the decision is illogical, irrational or lacking a basis in findings or inferences of fact supported on logical grounds". This formulation accords with the description of a *Wednesbury* unreasonable decision as "a decision which lacks an evident and intelligible justification" recently propounded in the majority judgment of Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li*.[53]

[58] The appellants' ultimate submission on the issue is that the approach of the QFRS in applying volumes of water to the appellants' property in circumstances in which it understood that the fire-water posed an environmental hazard and that there was an alternative, reasonable fire-fighting strategy available, "was not supported by expert evidence and was manifestly unreasonable."[54]

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46 Trial Bundle Vol 3 at paragraph 31; AB1243.
47 Trial Bundle Vol 3 at paragraph 24; AB1404.
48 Paragraph 25.
49 At paragraph 21; AB1403.
50 At paragraph 23; *Ibid*.
51 AB1417-1418.
52 [2005] NSWCA 10; (2005) 138 LGERA 11 per Spigelman CJ at [129] (Beazley and Tobias JJA concurring).
53 [2013] HCA 18; (2013) 249 CLR 332 at [76], cited in *Flegg v Crime and Misconduct Commission* [2014] QCA 42 at [15].
54 Written submission paragraph 28.

[59] I am unpersuaded that the material from the joint report referenced by the appellants justifies a conclusion of manifest unreasonableness. It establishes that there was an alternative strategy available which would have been preferable in terms of impact in important respects. As a strategy that was "to be preferred" and "in general appears to be better", it was one that should have been discussed at the time.

[60] However, it does not at all follow from this that the strategy adopted by QFRS was illogical, irrational or lacking in intelligible justification. It would indeed be difficult to reach such a conclusion given her Honour's unchallenged findings that the application of large volumes of water was appropriate at four installations or facilities,[55] findings which were supported by Mr Manser's evidence that he had no criticism of the strategy adopted in that respect.[56] Moreover, the rating by the experts of the alternative as one to be preferred rather forcefully implies that the other, the one adopted by QFRS, was open and was not to be excluded from consideration as illogical and lacking any plausible justification.

[61] In my view, her Honour was correct not to find that the QFRS conduct was unreasonable in the *Wednesbury* sense. Further, she sufficiently stated her reasons for not so finding.

[62] For completeness, I note that the appellants refer to the acceptance by Mr Glover in cross-examination of the proposition that "no properly trained firefighter would apply water to the fire".[57] A perusal of the transcript reveals that the acceptance was made in the course of discussion of the sequencing of response actions. It was not a condemnation of the application of water to the fire.[58]

Section 129(1) FRS Act – conclusion

[63] For these reasons, I am of the view that the appellants have not demonstrated error on the part of the learned trial judge in concluding that the State of Queensland is entitled to rely upon the statutory immunity in s 129(1) FRS Act as a complete answer to their claim. On that basis, the judgment at first instance must be affirmed and the appeal dismissed.

Ground 2 and the contention

[64] In light of the availability to the State of Queensland of the statutory immunity as a complete answer to the appellants' claim and of the consequence that that has for the fate of this appeal, it is unnecessary for this Court to determine either Ground 2 or the issue raised by the Notice of Contention.

Orders

[65] I would propose the following orders:

1. Appeal dismissed.
2. Appellants to pay the respondent's costs of the appeal on the standard basis.
3. No order as to costs with respect to the Notice of Contention.

[66] **ATKINSON J:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[67] **MULLINS J:** I agree with Gotterson JA.

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55 At [182].
56 AB157; Tr3-36 ll28-37.
57 AB281; Tr5-36 l35 – AB282; Tr5-37 l20.
58 As counsel for the appellants accepted: Tr1-15 ll19-41.