[2016] IEHC 72

THE HIGH COURT

[2010 No. 8374P]

KELLY BUILDERS (ROSEMOUNT) LIMITED

Plaintiff

AND

HCC UNDERWRITING AGENCY LIMITED

Defendant

Judgment of Ms. Justice Murphy delivered the 1st day of February, 2016

1. The plaintiff in these proceedings seeks an order for specific performance of a contract of insurance entered into between the plaintiff and the defendant; a declaration that the plaintiff is entitled to an indemnity from the defendant pursuant to the provisions of that contract in respect of all liability for loss and damage sustained to the premises known as National University of Ireland, Maynooth, County Kildare as a result of a fire which took place on 28th November, 2010; an indemnity in respect of the plaintiff's liability for loss and damage sustained to National University of Ireland, Maynooth as a result of said fire and; further, or in the alternative, damages for breach of contract.

Background

2. The plaintiff company, Kelly Builders (Rosemount) Limited is a limited liability company engaged in the business of building contracting. The defendant company, HCC Underwriting Agency Limited is a limited liability company incorporated in the UK, engaged in the provision of insurance services. The plaintiff and defendant were parties to a contract of insurance bearing Policy Number B200/OMP600136 which related to the plaintiff, and its employees or agents, engaged in carrying out work as building contractors in various locations. The events giving rise to this claim arose as a result of a fire which broke out on the campus of NUI Maynooth on 28th November, 2010 while a sub-contractor of the plaintiff company, Mr. Brian Feeney, was carrying out hot works to repair a flat roof on the premises which involved the use of burning, welding and cutting materials.

3. The policy entered into between the plaintiff and the defendant was subject to a number of conditions precedent including burning, welding and cutting conditions. At issue in these proceedings is the plaintiff's compliance with condition 7(a) which reads as follows:

> *"7. The following must be kept available for immediate use near the scene of operations:*
>
> *(a) suitable and fully charged fire extinguishers…"*

The Argument on Procedure

4. At the outset of the proceedings, the Court heard legal argument from both parties in respect of the running order of the proceedings and the issue of the onus of proof.

5. The plaintiff submitted that the conditions precedent of the policy should be strictly construed and that the onus of proving the breach of a condition precedent is on the insurer who seeks to avail of the alleged breach of condition to withhold cover. The plaintiff then submitted that the practical result of that position is that once it is established that there was a policy in existence, that a fire occurred, that a claim was made and that such claim was declined, the onus of proof rests on the defendant such that the defendant should be required to present its case first. The plaintiff noted in this respect that significant admissions are made in the Defence including the existence of a policy, the occurrence of the fire, the submission of a claim and the existence of the relevant condition precedent. It noted that the core of the defendant's case, as laid out at paragraph 23 of the Defence is that "*the defendant was fully entitled to decline cover on the grounds that the Plaintiff had failed to comply with the Policy Endorsement and in particular para. 7 of same. If, which is denied, there were two fire extinguishers present, neither of them were fully charged and/or suitable".* The plaintiff submits therefore that on the pleadings in this case, the fact of the policy, fire, claim and declinature are not in issue and the core issue is whether the defendant insurance company is entitled to avail of an alleged breach of condition to avoid indemnifying the plaintiff in respect of its liability to NUI Maynooth.

6. The plaintiff relied on paragraph 5-31 of Buckley, *Insurance Law*, 3rd Ed., (Dublin, 2014) in support of its contention that although it is the plaintiff who seeks specific performance of the insurance policy, the onus of proof is on the defendant to prove a breach of any conditions of that policy. It would appear that the law in this regard is as stated in MacGillivray, *Insurance Law*, 12th Ed., (London, 2012) at paragraph 10-089:

> *"It is for the insurer who alleged that the assured's breach of warranty or condition provides him with a defence to a claim to prove that there has actually been a breach. This had been accepted at least since Parke B.'s judgment in Barrett v. Jermy (1849) 3 Ex, 535 at 542. It is open to the parties to insert express words to shift the burden of proof, but clear words would need to alter what has been an established principle of insurance law for over a century."*

7. The plaintiff noted a number of judgments referred to by the authors in support of the position outlined above including *Stebbings v. Liverpool and London and Globe Insurance Company Limited* [1917] 2 K.B. 433 and *Sofi v. Prudential Assurance Company* [1993] 2 Lloyd's Reports 559. The plaintiff also points to the following remarks of Lord Goddard CJ in *Bond Air Services Limited v. Hill* [1955] 2 Q.B. 417 at 427:

> *"It is axiomatic in insurance law that, as it is always for an insurer to prove an exception, so it is for him to prove the breach of a condition which would relieve him of his liability for a particular loss".*

Lord Goddard CJ went on to state at 428:

> *"I think, for a century and probably much longer, [it] has always been regarded as a fundamental principle of insurance law, that it is for the insurers who wish to rely on a condition to prove it."*

8. The plaintiff also drew the Court's attention to the case of Simons v. Gale [1957] 2 Lloyd's Reports 485 in which Walsh J in the Supreme Court of New South Wales referred to the *dicta* of Lord Goddard CJ in *Bond Air Services* and stated as follows at p. 491:

> *"This 'fundamental principle' seems to be stated by his Lordship in the sentence last quoted as being applicable to all cases of breach of condition. But the earlier passages I have quoted from his reasons suggests that it may not apply in relation to a breach of a condition precedent to the formation of the policy and that it may be limited to cases of breach of a condition which would relieve the insurer from liability".*

9. Finally, the plaintiff relied on *Cornhill Insurance plc v. D.E. Stamp Felt Roofing Contractors Limited* [2002] EWCA Civ. 395. In that case, a subcontractor was sued for causing damage to a school extension when a fire broke out following the use of a propane gas blowtorch. The insurance policy in question contained extensive provisions in relation to fire precautions that had to be taken, but the condition was prefaced by the following statement:

> *"It is a condition precedent to any liability that the insured shall have arranged for the following precautions to be taken whenever carrying out any work involving the application of heat".*

10. In its decision, the Court of Appeal noted that the terminology used drew a distinction between making arrangements for precautions to be taken and promising that such arrangements would actually be complied with. The Court held that as the insured had made the necessary arrangements by setting up a safety system, there was no breach of the provisions of the condition even though the insured's employees had failed to adhere to the arrangements. Longmore LJ made the following comments in relation to the findings of the trial judge concerning the onus of proof, at paragraph 37:

> *"For my part I can see no fault in the judge's reasoning on this aspect of the case. She records that Mr. Stamp's evidence as to his practice was unchallenged. She records there was some evidence of examination of the work area, and that there was some evidence that Mr. Stamp had considered fire hazards in addition to construction details. This is a condition which is very much to the advantage of insurers. If insurers wish to take advantage of any particular set of facts, they have to prove that they come within it. The judge was not satisfied that they had discharged that burden of proof. Even though Mr. Stamp in his evidence said that he had no relevant recollection of what he had done at the time, it does not seem to me that the judge can be criticised for saying that there was some evidence and that, on balance, the insurers have not discharged the burden upon them".*

11. The plaintiff acknowledged that *Cornhill* was a case in which the plaintiff insurance company sought a declaration that they were not liable under the insurance policy and as such, did not involve a reversal of the normal running order. However the plaintiff submitted that in fact, it is the process which occurred in *Cornhill* that should occur generally, given that the onus is on the insurer to justify its refusal to indemnify such that any dispute arising should result in the insurer being required to establish its right to decline. Therefore, the plaintiff submits that since, as a matter of law, the onus is on the insurer to demonstrate non-compliance, it follows, as a matter of logic, that the defendant should make its case first.

12. Counsel for the defendant accepted that the onus rested on the defendant insurance company in relation to the issue of non compliance. However, she objected to the proposed reversal of the running order of the case and noted that the law opened by the plaintiff solely related to the issue of the onus of proof. She also noted that she could find no English or Irish authority in which this course had been undertaken.

13. The defendant submitted that if the Court were to accede to the plaintiff's application, the plaintiff would effectively have rebuttal witnesses. It submitted that while there is a shifting burden of proof within the proceedings the claim still remains that of the plaintiff. The defendant also noted that there were particular issues in this case, most notably, what it classified as "*prior inconsistent statements*" of a critical witness, Mr. Brian Feeney. The defendant noted that if Mr. Feeney were to be treated as a defence witness, which it submitted was the import of the plaintiff's suggestion, this would give rise to very great difficulty insofar as the defendant's ability to cross-examine was concerned. The defendant submitted that in light of the complex nature of the issues involved in the case it would be neither helpful, appropriate nor permissible at law to allow the case to proceed in an order wholly different to the normal order dictated by a party's identification as plaintiff in the proceedings. The defendant argued that while the plaintiff is entitled to rest its case on the basis that the relevant matters were admitted in defence and to argue that it is for the defendant thereafter to demonstrate that the relevant exception applied, the plaintiff could not thereafter proceed to call witnesses. The defendant reiterated that the plaintiff's suggestion represented an entire reversal of the normal order in circumstances where it is the plaintiff who is seeking indemnity.

14. The defendant pointed to certain authorities in support of its submission. In the first instance, counsel for the defendant drew the Court's attention to paragraph 3-67 of McGrath, *Evidence*, 2nd Ed., (Dublin, 2014) which reads as follows:

> *"In both civil and criminal proceedings, the general principle is that a party should adduce all the evidence on which he or she intends to rely before the close of his or her case. To this general rule, there are two well-established exceptions: (a) rebuttal evidence can be called in respect of matters arising ex improviso; and (b) evidence of a formal and uncontentious nature can be adduced where it was not called due to inadvertence or oversight. In addition, a trial judge has a broad discretion to admit such evidence whenever the interests of justice or fair procedures so require".*

The defendant notes that this is clearly not a case where matters have arisen *ex improviso* since the defendant's position is clearly set out in its Defence nor is it the case in which evidence of a formal or uncontentious matter requires adducement at a later stage due to oversight. The defendant submits that if one tests the plaintiff's proposal it would appear nonsensical that the plaintiff would be entitled to call evidence as to damage after the defendant's evidence. The defendant submits that it is for the plaintiff to prove liability and damage subject to the shifting burden in relation to non-compliance. Thus it is the defendant's position that the correct approach at law is that the evidence should run in the normal course since the Court is well capable of accepting the evidence in full knowledge of the nature and existence of the shifting onus and of making its decision on all of the evidence on that basis.

15. The defendant then drew the Court's attention to the case of *Jordan v. Minister for Children and Youth Affairs & Ors.* [2014] IEHC 327, a decision of McDermott J in relation to an application seeking to set aside the outcome of a referendum on the Thirty First Amendment of the Constitution in circumstances where there had been a breach of the principles established in the Supreme Court in *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10. The defendant noted that one of the issues advanced was whether the burden of proof which rested on the petitioner to establish that the respondent had acted unconstitutionally, and that as a result the referendum as a whole had been materially affected by the misconduct, should be shifted to the respondent on the basis that otherwise an excessively onerous burden would be placed on a petitioner who does not benefit from an equality of arms when pursuing a referendum petition. The defendant further noted that although there was a great deal of discussion and consideration in that case in relation to the burden of proof, the onus of proof, impossibility of proof and the shifting of the burden in certain circumstances as acknowledged by Hardiman J. in *Hanrahan v. Merck Sharp & Dohme* [1988] ILRM 629, it was never suggested that there would be a shift in terms of which party adduced the evidence. The defendant, while it acknowledged that this was not a perfect authority, submitted that it was illustrative.

16. Finally, the defendant outlined certain practical difficulties which would follow if the Court were to accede to the plaintiff's suggestion given the late raising of the issue on the part of the plaintiff.

17. Counsel for the plaintiff, in reply, acknowledged that there were certain factual matters alleged or denied in the pleadings but submitted that the crucial issue in the case concerned the compliance or non-compliance with the condition precedent outlined in condition 7(a). He reiterated that it is accepted by all parties that the onus in that regard rests fairly and squarely on the shoulders of the defendant. On that basis, he contended that the defendant should go first.

18. The plaintiff submitted that the absence of authority for its proposition made no difference and drew analogy with a case in which a will is contested whereby it is for the executors to prove due execution and thereafter the onus shifts to those challenging the will to establish whatever infirmity is alleged and, on that issue, the challenging party appears first. He also noted that in cases of adverse possession, if paper title is admitted, the defendant is required to make his case first.

19. The Court was persuaded, on the basis of the submissions of both parties, that the central issue in the case is whether or not the defendant insurance company is entitled to avail of an alleged breach of condition 7(a) which would entitle it to decline cover under the policy. The Court acknowledged the defendant's acceptance that, as a matter of law, in seeking to avail of an exclusion clause, the onus is on the insurance company to prove on the balance of probabilities that it is not liable to cover the event in respect of which indemnity is sought. It seemed to the Court in those circumstances that the case was similar to the situation that might apply in a will case or in a case of adverse possession, in that the only issue between the parties, in essence, is whether or not the insurance company is entitled to avail of the conditions precedent to decline cover. The Court considered that it was for the insurance company to establish its entitlement to decline cover and was therefore persuaded that it was for the insurance company to make its case that it was entitled to avail of the exception under the policy. On reflection, the Court considers that its ruling in this regard may have been unwise. After all, any party seeking specific performance of a contract must, as a minimum, show that it has complied with the contract so as to entitle it to the benefit of that contract. Just as in a will suit the proponents of the will must prove due execution, in an action for specific performance the plaintiff must establish its compliance with the contract. Ultimately, on the evidence adduced, the plaintiff's case in this regard is that the evidence of Mr. Feeney that he had a full ABC fire extinguisher in which the pin was intact and the nozzle clipped on met that requirement. In any event, that said, the Court is satisfied that its direction that the plaintiff should tender all relevant witnesses for cross-examination by the defendant, obviated any potential unfairness arising from its ruling such that all relevant evidence is before the Court so as to allow it to determine the issue that it is required to determine.

The Evidence

20. Mr. Brian Feeney, who worked as a sub-contractor of the plaintiff at the time of the events giving rise to these proceedings, gave evidence that he has carried out work with the plaintiffs on a contract basis since 1995. He stated that he was engaged by Kelly Builders in October 2008 to line the gully of a roof at NUI Maynooth with torch on felt. According to Mr. Feeney's evidence, on the morning of 26th November, 2008, two days before the fire, he commenced maintenance and repair work on a roof at NUI Maynooth. Before doing so, he received an ABC fire extinguisher from the plaintiff as would have been his usual practice when working with the plaintiff.

21. According to the National Standards Authority of Ireland's Standard Specification (The use, siting, inspection and maintenance of portable fire extinguishers) Declaration, 2002 or the IS 291:2002, which was the applicable standard at the time of the events in question, an ABC powder extinguisher is suitable for use on Class A, Class B and Class C fires. Class A fires are those involving solid materials in which combustion normally takes place with the formation of glowing embers, Class B fires are those involving liquids or liquefiable solids and Class C fires are those involving gases. Mr. Brennan, the defendant's fire expert, explained that an ABC extinguisher works by causing a crust to form over the burning material which prevents the release of the flammable gases that feed the fire. It also attacks the molecular structure of the flame which produces the radiated energy back on to the burning surface. An ABC extinguisher is a stored pressure extinguisher, that is an extinguisher in which an expellant gas is present along with the extinguishing agent or powder. Pressure is stored within the body of the extinguisher and, on the activation of the operating mechanism, this pressure expels the extinguishing agent. An ABC extinguisher is fitted with a tell-tale gauge which indicates whether the extinguisher is sufficiently pressurised. When an extinguisher is sufficiently pressurised the indicator on a tell-tale gauge should be in the green zone. An ABC extinguisher is also fitted with a seal and pin. The presence of an unbroken seal indicates that the extinguisher has not been interfered with. The discharge hose should also be firmly affixed to the body of the extinguisher to prevent it from coming loose.

22. The IS 291:2002 specifies that an ABC extinguisher should be subject to an examination, as set out in those standards, on an annual basis. That examination involves ascertaining that the seal is intact, that the pressure gauge, or tell-tale gauge, lies within the operating range, that the extinguisher's weight is in line with the supplier's/manufacturer's data, that the body of the extinguisher does not show any signs of corrosion or damage, that the discharge hose shows no sign of deterioration and that no traces of powder are present in the discharge nozzle or discharge hose. The IS 291:2002 further provides that:

> *"A record of the maintenance shall be inscribed on the service label attached to the extinguisher and in the maintenance/service register and the date and signature of the operator added. Also, particulars of any replacements made, together with any lack of compliance with the EN 3, which was noted, shall be entered in the maintenance/service register and on the service label".*

23. Mr. Feeney gave evidence that he did not check for the service certificate on the extinguisher because he was confident the plaintiff would have ensured it was in order. He stated that no one drew his attention to such a certificate. Neither did he check the tell-tale gauge on the extinguisher, which indicates whether or not the extinguisher is pressurised. He stated that his normal practice was to check that the pin of the extinguisher was in position, that the nozzle was clipped to the side, that the hose was in position and that the extinguisher was a complete unit. He would also check the weight of the extinguisher and would know whether it was full or empty on that basis. Mr. Feeney confirmed he had never received training in the use of fire extinguishers but that he would have picked up knowledge of how to use a fire extinguisher over his lifetime.

24. The work being carried out by Mr. Feeney, which involved applying bitumen felt to the roof using a gas torch, required a hot works permit from the college authorities. Such a permit was required on a daily basis and Mr. Feeney gave evidence that either he or the plaintiff's foreman would obtain this permit from Mr. Brendan Ashe, the Health & Safety Officer in NUI Maynooth, each morning. The hot works permit contained a "*fire watch*" requirement, that is a person to accompany the individual carrying out the works who would have no function beyond watching for the propagation of a fire. A similar requirement of a "*working buddy for fire*" was contained in the controlled measures identified to combat risks identified in the risk assessment carried out in relation to the work. On the morning of 26th November, 2008 Mr. Feeney, according to his own evidence, obtained a hot works permit. The plaintiff appears to have implemented the fire watch or work buddy requirement in that Mr. Feeney stated that in carrying out his work he was accompanied by Larry Byrne, a general operative with the plaintiff. According to Mr. Feeney, Mr. Byrne would hand him tools, watch him do work and gather up waste materials.

25. On the morning of 28th November, 2008, Mr. Feeney returned to NUI Maynooth to continue carrying out roof repairs. Mr. Feeney brought his tools to the roof along with the ABC fire extinguisher which had been provided to him by the plaintiff. He gave evidence that he placed the extinguisher no more than nine feet away from where he was working. He does not recall obtaining or having a hot works permit on that date. Mr. Feeney commenced work on the roof using the gas torch at approximately 10.40 am. He acknowledged that this was earlier than the period stated in the original hot works permit, which was 11 am to 4 pm. He also acknowledged that Mr. Byrne was not present at the time he started the work as he had gone to get materials for Mr. Feeney. Mr. Feeney stated in his evidence that he started the work in Mr. Byrne's absence as he believed he would return momentarily and that the risk of fire was not, in his view, as great at the beginning of the day.

26. According to Mr. Feeney's evidence having heated the relevant area of the roof to dry it out and having heated the felt to make it pliable, he was in the process of applying felt to the roof when he smelled smoke. He stated that he looked around and noticed a small amount of smoke coming from underneath the slates of the roof that sloped upwards away from the area in which he was working. Mr. Feeney then turned off the gas torch to quench the flame as well as turning the gas off at the source. He moved the gas torch away, removed his protective gloves and proceeded to rip off an area of slating and felt on the roof so that he could see the extent of the fire in the attic underneath. On doing so, he observed a small fire to his left, another seat of fire to his right approximately 2.5 m up the roof and another small fire on the concrete floor of the attic. In his evidence to the Court, Mr. Feeney states that he pulled his fleece over his head and almost certainly smothered the small fire on his left. While he was doing so the melting bitumen from the roof felt stuck to his hands, burning them. Mr. Feeney stated that he then got the ABC fire extinguisher, which was beside him, pulled out the pin, got the hose in his hand, activated the trigger mechanism on the fire extinguisher and released the discharge hose. However, the extinguisher did not work. Mr. Feeney informed the Court that he pressed the extinguisher approximately four or five times and spent about twenty to thirty seconds attempting to discharge it in vain. Mr. Feeney explained the absence of bitumen on the fire extinguisher by explaining that the bitumen had stuck to the tips of his fingers and he had used the palms of his hands to operate the extinguisher and would not have used the tips of his finger on the extinguisher at any point.

27. On realising that the fire extinguisher was not working, Mr. Feeney gave evidence that he pulled back from the opening, put down the fire extinguisher and went for his mobile phone. However he stated that he could not use the phone because of the bitumen which had stuck to his fingers and the backs of his hands so he walked to the edge of the roof whereupon he observed a group of people standing in an adjacent courtyard. He shouted to them that the roof was on fire, asked them to call the fire brigade and requested an extinguisher. He stated that an extinguisher was passed up within a minute whereupon he ran back to the opening, pulled out the pin and put the nozzle in the attic space. He could not recall whether the extinguisher had a seal but stated that he put so much force on the seal while trying to pull it out that he probably broke the seal if there was one. He held the nozzle as far into the space as he could reach without entering and carried out the same procedure as before but again the extinguisher did not work. Mr. Feeney did not notice anything unusual regarding the attachment or weight of the CO2 extinguisher but stated that he was not really looking at the ins and outs of such extinguisher at the time.

28. According to Mr. Feeney's evidence, he realised at this stage that there was no point requesting another fire extinguisher as the smoke was too dense and the fire was creeping towards the top of the roof where it would have been out of his reach. Therefore Mr. Feeney decided to leave the area, bringing with him the gas torch and bottle.

29. One of the first people Mr. Feeney spoke with on coming down from the roof was Mr. Brendan Ashe, the Health and Safety Officer. He also spoke with Mr. Anthony Smyth, a contracts manager and quantity surveyor with the plaintiff building company, who, on noticing that Mr. Feeney had burns on his hands insisted he have the injury examined. Mr. Feeney attended an ambulance present on the college campus for an open day. He was informed that it would be necessary for him to attend A&E.

30. Sergeant John Keane subsequently attended the scene, on the same date, along with Garda Jason Hughes and Garda Kieran Dempsey of the Scenes of Crime Unit who conducted a full technical and forensic examination of the scene and recovered two fire extinguishers from the damaged roof area. According to the evidence of Garda Hughes he was present when Garda Dempsey took possession of two fire extinguishers from the scene and assisted in transporting the two fire extinguishers to Naas Garda Station where they were stored in the Scenes of Crime Lock Up. Garda Hughes gave further evidence that he was present at a later date when the extinguishers were handed to Sergeant Keane by Garda Kieran Dempsey at Maynooth Garda Station. He stated that while the extinguishers were in the possession of the Scenes of Crime Unit there was no interference with them. Sergeant Keane gave evidence that the extinguishers were kept in the locked property store at Maynooth Garda Station at all times until they were released to the plaintiffs and NUI Maynooth 4th September, 2009, with the exception of the examination carried out by the defendant's expert on 24th April, 2009.

31. Mr. Feeney was later driven to Naas General Hospital where the Gardaí came to interview him. However he was in the process of having bandages applied to his injured hands and they were therefore unable to do so.

32. The plaintiff subsequently notified its insurance broker O'Driscoll O'Neill of the incident. O'Driscoll O'Neill notified the claim to the defendant and its agent Garwyn Liability Adjusters. Mr. Michael Cullen, a loss adjuster with Garwyn, gave evidence that he received a call on 29th November, 2008, informing him that there had been a fire in NUI Maynooth and that Garwyn had been appointed on behalf of the defendant. He was asked to contact Mr. Anthony Smyth, contracts manager with the plaintiff, in order to make arrangements to attend the scene of the fire the following week. Mr. Cullen subsequently contacted a Mr. Brendan Hall, a forensic fire investigator. Mr. Hall gave evidence that his brief was to investigate the fire incident and report any matter that was pertinent to the development of the fire.

33. On 1st December, 2008, Mr. Cullen and Mr. Hall met with Mr. Anthony Smyth of the plaintiff company at Maynooth Campus. Mr. Cullen gave evidence that he enquired at this point as to whether Mr. Feeney was available but was informed that he was in a bad state of shock and had burned his hands and would therefore not be available for several days.

34. Mr. Hall gave evidence that Mr. Brendan Ashe was also present. While awaiting the arrival of the loss adjusters acting on behalf of the NUI Maynooth's insurers, Mr. Hall and Mr. Cullen observed the general area. Mr. Cullen gave evidence that he had no reason to believe that liability would not attach to the defendant insurers as he had been informed by Mr. Smyth that fire extinguishers were in place. At 1 pm the loss adjuster acting on behalf of NUI Maynooth arrived and he, Mr. Hall and Mr. Cullen proceeded to the roof and evaluated the area. According to Mr. Hall, they engaged in measuring, examining and photographing the scene and Mr. Hall stated that at this time he became aware that the pitched roof was in fact leading into a plant room. Following examination, it was agreed by all that the works carried out by Mr. Feeney had been the cause of the fire.

35. Mr. Hall, in his evidence to the Court, stated that given the location in which the work was taking place and the type of work involved, the appropriate precautionary or safety measures would involve having two individuals on fire watch, one on the outside of the roof and one on the inside. The person involved in the fire watch activity would have no function beyond watching for the

propagation of a fire. In addition, it would be necessary for the fire watch activity to remain in place for a minimum of one hour after the completion of the work or for up to three hours depending on the type of work. Mr. Hall disagreed with Mr. Feeney's assessment that there was less risk of fire at the beginning of the day since materials could have blown on to the roof or into the roof area which were at risk of accidental ignition. Mr. Hall further believed that the hot works permit for the works should have had reference to someone being inside the roof. In addition, Mr. Hall gave evidence that the idea of the fire watch is that one has two fire extinguishers to hand, the person on fire watch having one at the ready and the person carrying out the works having immediate access to the other so that if something did develop they could both address the issue. He stated that from his understanding there had not been compliance with the hot works permit; that the works should not have commenced until the fire watch person was in place and that there should have been two fire extinguishers adjacent to where the works were taking place.

36. On 4th December, 2008, Mr. Feeney met with Mr. Smyth at the plaintiff's site office at the Presentation College in Maynooth to give him a statement relating to the events surrounding the fire. Mr. Feeney stated that Mr. Smyth informed him that he just wanted to get the basic points about the fire, that they did not go into a huge level of detail and that he gave Mr. Smyth the sequence of events as near as he could recall them. He told Mr. Smyth that when he noticed smoke coming from the slated roof he broke into the roof space and saw the fire. He continued as follows:

> *"I then went for the fire extinguisher I had with me. I pulled out the pin and tried the extinguisher to discover it would not work.*
>
> *I then went back out on the roof to get my mobile phone to call the fire brigade. I noticed a number of people standing at the back of the building. I shouted to them to call the fire brigade. A second fire extinguisher was handed up to me. I tried this extinguisher and it would not work.*
>
> *I then grabbed my fleece, [stretched] in the opening, and tried to beat out the flames on the left-hand side.*
>
> *I realised that the fire was out of my control and that I was in danger."*

37. Mr. Feeney also gave evidence that he was quite shocked at this point in time, was questioning his responsibility for the fire and found going back to describe the event quite difficult. He stated that the statement he provided to Mr. Smyth, who he had met many times before, was quite informal with Mr. Smyth asking him questions while recording his statement and Mr. Feeney providing further detail as necessary. He acknowledged that he may have omitted certain details and may not have been as precise as he should have been but maintained that he would have mentioned trying to use the extinguishers and the fact that they did not work. While he acknowledged that he may have informed Mr. Smyth that he attempted to use the fire extinguishers before informing him that he used his fleece to quench the flames on his left hand side, Mr. Feeney reiterated that the meeting was quite an informal one, and that he is certain he quenched the flames with his fleece before using the fire extinguishers. Mr. Feeney highlighted that he did specify this in his interview at the Glenroyal Hotel the following day.

38. At some time around this point, although the exact date is unclear, Mr. Smyth and Mr. Feeney travelled to Maynooth Garda Station where Mr. Feeney was informed that a statement would have to be taken from him under caution. It was explained to Mr. Feeney that he could seek legal advice and take time to consider the matter if he wished to do so. On receiving this information Mr. Feeney decided that he wished to take some time to further reflect on the events and to return to provide a statement at a later point.

39. Also on 4th December, 2008, Mr. Cullen of Garwyn's Loss Adjusters prepared a report in which he stated that the cause of the fire was the torch-on felt works which were being carried out on the roof. In the process of those works the timber beneath the torch on felt at the junction of the pitched roof had caught fire. The report continued that the fire had travelled up the bitumen sarking felt and then, because of the design of the building, which was built before the regulations requiring compartmentation in buildings, the fire travelled further along the roof right through the open plant door. At p. 12 of his report Mr. Cullen stated:

> *"There were two fire extinguishers located on the flat roof adjacent to where Mr. Feeney was working and it is unclear whether or not he attempted ignition (sic) using these extinguishers."*

Mr. Cullen gave evidence that this report was a preliminary one based on his conversations with Mr. Smyth and on the forensic investigation of 1st December. At this time it was his opinion that liability would take effect. He advised a reserve of €3 million on a precautionary basis.

40. On 5th December, 2008 a meeting took place at the Glenroyal Hotel in Maynooth attended by Mr. Feeney and Mr. Anthony Smyth on behalf of the plaintiffs and by Mr. Michael Cullen and Mr. Brendan Hall on behalf of the defendants. The meeting was also attended by Mr. Tony Day, from O'Driscoll O'Neill insurance brokers to the plaintiff. During this meeting an interview was conducted with Mr. Feeney by Mr. Cullen.

41. Prior to the meeting, according to the evidence of Mr. Cullen, he and Mr. Hall returned to NUI Maynooth where they had arranged access to the plant room other than through the opening that had been created by the fire in the roof. This allowed Mr. Hall to look at the propagation of the fire and the manner in which it had spread and he concluded that the lack of firebreak in the wall had allowed the fire to continue beyond it.

42. On arriving at the Glenroyal, one of the parties had been delayed and so the other four had a brief general discussion while awaiting his arrival. That discussion, according to Mr. Cullen's evidence, did not relate to the events of 28th November. Once all parties were present an informal discussion with Mr. Feeney relating to the fire began and both Mr. Hall and Mr. Day appear to have taken notes of the informal discussion along with Mr. Cullen. Mr. Feeney gave evidence that he did not notice anyone taking notes at the informal discussion but he acknowledged that it was possible that notes were taken. Mr. Hall's notes of the informal discussion record:

> *"Fire extinguishers behind Bryan on the flat roof. He grabbed his fleece and attempted to extinguish the fire on his left hand side. Returned to the flat roof, got the fire extinguisher, went to return to the attic but realised that the fire was too dense. Grabbed his mobile phone to phone the fire brigade. Saw people in the yard and called to them to phone the fire brigade. Someone handed up a second extinguisher from the ground. Shouted that it was no good, the fire was gone too far. Pondered for a few minutes if there was anything further he could do. Decided against it."*

Mr. Cullen's notes in this regard record the following:

"Brian tried to quench the flames to his left using his fleece jacket. This took maybe a minute. I then crawled back on the roof. Went for fire extinguisher one metre. Ran back but smoke too dense. Rang for mobile to call fire brigade but saw people in courtyard below. Shouted ring fire brigade as hands were burned. Somebody handed up a fire extinguisher from ground. I said it's gone too far. Ran back to opening but smoke too dense. I considered going up higher on pitched roof but saw futility of that. Next I took the gas bottle and torch off the roof."

Mr. Feeney takes issues with certain aspects of those descriptions and particularly the fact that they do not mention him using a fire extinguisher. Mr. Feeney noted that it would not make sense for him to ask for a second fire extinguisher had he not attempted to use the first. He also stated that he believed the extinguisher would have been about three metres away from him, rather than one. Mr. Feeney gave evidence that references to the fire being "*gone too far*" probably refer to his realisation that there was nothing further he could do after the second CO2 extinguisher failed to work. According to Mr. Cullen's evidence, the implication in this regard was that there was no point in Mr. Feeney using the extinguisher which had been handed up to him. Mr. Cullen stated that at no point in the informal discussion did Mr. Feeney tell him that the extinguishers did not work and that there was absolutely no question about the integrity of the fire extinguishers on the basis that Mr. Feeney said he grabbed the fire extinguisher but on returning the smoke was too dense, therefore the inference was clear that there was no point in him even trying to operate them. Mr. Cullen gave evidence that as he understood it Mr. Feeney said he had two extinguishers with him, the second being at the foot of the ladder.

43. Mr. Hall gave evidence that he understood from Mr. Feeney's statement that the extinguisher was not used and that the density of the smoke coming out of the only vent point on the roof was such that it would have been suicidal for Mr. Feeney to attempt to go back in because the fire was going well beyond the point of the open vent and was travelling along the felt up to the right, up the roof and to the left. Mr. Hall informed the Court that he understood that Mr. Feeney did not take up the second fire extinguisher which had been handed up but instead decided there was nothing else he could do and, quite sensibly, decided to remove the gas bottle from the roof. Mr. Hall further stated that Mr. Feeney never expressly indicated that he had or had not used the fire extinguisher. He acknowledged that in making notes of the informal discussion he focussed on the points that were of particular interest to him, especially the matter of fire watch. However he rejected the contention of the plaintiff's counsel that whether Mr. Feeney had or had not used the fire extinguisher was not material from a forensic point of view. Mr. Hall responded to that contention by stating that the issue of the use of fire extinguishers was relevant in terms of dealing with protocol issues which should have been in place but acknowledged that once the point was reached where Mr. Feeney entered the roof void, observed what he did and took the action that he did, it was too late and the use of fire extinguishers would have been pointless at that stage.

44. Following the informal discussion Mr. Cullen took a formal statement from Mr. Feeney while Mr. Hall, Mr. Smyth and Mr. Day discussed other matters at another table. Mr. Feeney gave evidence that he was asked by Mr. Cullen to give a detailed description of what took place and that he went through the complete scenario as best he could. He stated that he did mention the fire extinguishers in giving the statement and to the best of his knowledge, he informed Mr. Cullen that he had tried to beat the flames out with his fleece, had tried to use one extinguisher which did not work and then used a second extinguisher which also did not work. He stated that he cannot recall Mr. Cullen asking him questions in relation to the performance or operation of the fire extinguisher but stated that he would have divulged this information without question. Mr. Feeney confirmed in his evidence that Mr. Cullen read the statement back to him and that he recalled initialling the bottom of every page and signing the last page of the statement. He further confirmed that he did not notice that the statement did not refer to him attempting to use the extinguishers but maintained that he was 100% sure he did mention it. He stated that he was still quite traumatised at the time of the taking of the statement.

45. According to Mr. Cullen's evidence, Mr. Feeney informed him that on seeing smoke he immediately broke open an entry point at the end of the valley and stripped back some of the slates. On looking in, he saw dense smoke. Mr. Cullen stated that Mr. Feeney then informed him that he crawled about one metre into the roof space and saw flames above him, to his right and to his left. He informed Mr. Cullen that he immediately tried to extinguish the flames to his left with his fleece jacket and that he believed he had done so. When he got back he saw that the smoke was too dense and it was not safe to go back in. He shouted to the people in the courtyard to ring the fire brigade and went for his own mobile phone however he had burned his hands so it was more efficient to have the people below call the fire brigade. He then took the gas bottle and torch and left the roof.

46. Mr. Cullen explained that, in his view, it was clear from Mr. Feeney's statement to the effect that the smoke was too dense when he returned and there was no point going back, that there was no point in Mr. Feeney trying to use the extinguisher. Thus in Mr. Cullen's view, there was no point in asking Mr. Feeney any further questions about the fire extinguisher. Counsel for the plaintiff questioned Mr. Cullen as to why he only recorded one fire extinguisher in the written statement despite referring to two extinguishers in his notes. Mr. Cullen responded that he did so as that there was no indication of Mr. Feeney trying to use the second extinguisher because it was clear from the first inference that if there was no point trying to use the first extinguisher there was no point trying to use the second.

47. According to Mr. Cullen's evidence, when he finished taking the statement he asked Mr. Feeney if there was anything he wanted to add. Mr. Feeney responded that there was not. Mr. Cullen then invited Mr. Day, of the plaintiff's broker, to join them. He then read the statement back to Mr. Feeney, who initialled the bottom of each page as they progressed. On reaching the end of the statement Mr. Cullen asked Mr. Feeney to sign and date it which he did and asked Mr. Day to sign the statement which he did.

48. Mr. Feeney gave evidence that he did not receive a copy of the statement in the aftermath of the meeting. While he confirmed that he did not miss the absence of the reference to the fire extinguishers when the statement was read back to him, he stated that he would probably have realised the omission had he looked at a written copy. Mr. Feeney acknowledged that he did receive copies of the Glenroyal statement and the statement he had given to Mr. Smyth, some years later and at this stage he realised that there were discrepancies in the Glenroyal statement. He believed that he informed Mr. Smyth of this. He stated that the copy he received of the statement provided to Mr. Smyth was marked "*note used, draft only*" and that therefore he did not get back in touch with Mr. Smyth to correct any discrepancies contained therein. He was not aware at this point that the Glenroyal statement was the one which had been sent to the Gardaí.

49. On 8th December, 2008, according to Mr. Cullen, he sent a fax to his secretary asking her to type up the Glenroyal statement, to send a copy to O'Driscoll O'Neill as well as one to Mr. Smyth and to ask Mr. Smyth to have Mr. Feeney read that statement, amend it as appropriate and sign and return the typed copy. Mr. Cullen stated that a signed version of the typed statement was never returned. He confirmed that no statement was sent directly to Mr. Feeney as the arrangement was that the statement would be sent to the insurance brokers who would send it to the plaintiff, Kelly Builders who would have it signed by Mr. Feeney. It is Mr. Cullen's position that the typed statement was sent because he instructed his secretary to do so and his instructions are invariably followed. Mr. Cullen also sent an email to Mr. Peter Haran of Garwyn on 8th December, 2008 informing him that the statement had been sent to his secretary to be typed. The email also referred to Mr. Cullen's discussions with Mr. Hall concerning health and safety matters and Mr. Hall's desire to investigate whether the health and safety measures in operation were defective. However, according to Mr.

Cullen's evidence, this avenue went dormant at that stage and there were no further instructions from the defendant received in that regard. Mr. Cullen stated in evidence that his statement in that email which reads: "*I think we would have to have a go at a defence*" related to the possibility that there were sufficient grounds upon which to implicate NUI Maynooth in terms of liability for the fire and therefore the reference to a defence referred to defending the defendant insurer's culpability so that they would not be solely at risk.

50. On 10th December, 2008, Mr. Smyth sent a copy of a statement expressed to have been "*given by Brian Feeney to our insurance company*" to Kieran Johnson of BCM Hanly Wallace seeking an opinion as to whether this could be given to the Gardaí as a statement under caution. On 11th December, 2008, Mr. Feeney presented a prepared statement to Gardaí at Maynooth Garda Station. Mr. Feeney gave evidence that he had not consulted with the plaintiff's legal team but that the statement had come from the legal team. He stated that he did not read the statement at any stage before signing it because he presumed it was the statement he had given to Mr. Smyth. Sergeant John Keane provided evidence to the Court however that the statement was read over to Mr. Feeney before he signed it. When counsel for the defendant pointed out to Mr. Feeney that the statement provided to the Gardaí did not refer to the use of fire extinguishers he responded that it appeared to him to be a copy of the Glenroyal statement and contained the same omissions.

51. On 22nd December, 2008, Mr. Hall prepared a report for Garwyn's which he sent to Mr. Cullen. Mr. Hall concluded that:

> *"The fire was caused by an inappropriate working method coupled with the failure to identify the risks involved at the stage where a method statement was prepared before the hot work permit was issued. The fact that the required observer was not in attendance at the time of the accident is also significant."*

In his evidence to the Court, Mr. Hall explained that his reference to "*inappropriate working method"* included the fact that there was no fire stopping material in place and no measure taken to prevent the heat or the flame from reaching the felt membrane. He noted that there was a requirement in the hot works permit that a fire blanket be used and stated that had one been in situ in the area underneath the roof it would have protected the felt to a degree, albeit perhaps not entirely. Mr. Hall informed the Court that he very much doubted whether Mr. Feeney did, as he suggested, notice the wisp of smoke as soon as it started. Mr. Hall explained that when one is using a blow torch or cutting equipment one's peripheral vision is not going to pick up activity happening outside the area of works because of the intensity of the light emanating from the equipment. Mr. Hall explained that the area in which the felt ignited would not have been visible to Mr. Feeney while he was engaged in applying heat to the gully and that this was one of the reasons it was absolutely essential that a person be on fire watch duty. According to the evidence of Mr. Hall, by the time Mr. Feeney would have noticed the smoke it would have broken through the felt membrane and started to come out beneath the roof tiles. He stated that when Mr. Feeney broke into the roof the fire was well and truly alight and he was never going to rescue it because once the felt membrane took hold, unless there was somebody inside or outside to catch it immediately, it was gone. Mr. Hall informed the Court that it would have been preferable for somebody to have been inside the roof but considered that, in the alternative, if there had been a fire barrier, fire curtain, rug or dampner on the inside there was a reasonable chance of catching the fire on the outside. He stated that if he had been an engineer at the construction stage he would have insisted on someone being within the roof space with a fire extinguisher and a fire blanket in place and on someone else standing beside Mr. Feeney on the roof with two fire extinguishers. Finally, Mr. Hall confirmed that the conclusion of his report makes no reference to fire extinguishers as these were not the focus of his investigation because they were not there when he had visited the site and there was no evidence of them having been discharged.

52. In and around March 2009, according to the evidence of Mr. Cullen, he received a phone call from the managing director of Garwyns bringing policy condition 7(a) to his attention. Condition 7(a) reads as follows:

> *"7. The following must be kept available for immediate use near the scene of operations:*
>
> *(a) suitable and fully charged fire extinguishers…".*

Mr. Cullen stated that he never saw a written request from the insurers for an investigation into policy condition 7(a) but that he would not necessarily have seen such written instruction had it been issued. Mr. Cullen stated that the possibility that the extinguishers were not fully charged had not occurred to him up to that point. Having received this instruction Garwyn's contacted the Gardaí to enquire as to whether they had the extinguishers. Mr. Cullen, in his evidence, stated that he did not make contact with Mr. Feeney because he had taken a statement from Mr. Feeney and as far as Mr. Cullen was concerned, Mr. Feeney had given him all the information that he needed as it was clear to Mr. Cullen from meeting with Mr. Feeney that he had not used the fire extinguisher because he could not.

53. Roger Martin, the lead investigator working under Mr. Cullen, subsequently received confirmation from Sergeant Keane that the extinguishers were in his control at Maynooth Garda Station. According to Mr. Cullen's evidence, at this stage there was some indication that the fire extinguishers may not have operated but the Gardaí did not pursue this or test the extinguishers because there had been no injuries and they considered the matter to be a civil one. Mr. Cullen stated that at this stage Garwyn's became concerned as to whether the extinguishers had operated and whether they were fit for purpose and that it was at this point that the issue of declinature arose.

54. In March 2009, Mr. Cullen engaged Len Brennan of LNB to ascertain what type of fire extinguishers had been in place and whether they had been fully charged. Mr. Brennan is a former officer of the Dublin Fire Brigade who now runs a consultancy business providing fire safety management and compliance services and who, according to his own evidence, is trained in the service and maintenance of extinguishers. Mr. Cullen gave evidence that his sole brief to Mr. Brennan was to ascertain, if possible, whether the fire extinguishers had been used or not prior to being taken away from the site. To the best of his recollection Mr. Brennan responded that he could do so. Mr. Brennan gave evidence that he was engaged by telephone and that as far as he recalled the brief he was given was that the extinguishers were being kept in Maynooth Garda Station and that Garwyn's wanted a view on their condition. Mr. Brennan considered this to be a novel instruction but stated that he would have been involved in making judgments about the failure or otherwise of extinguishers on a day to day basis and so he did not query it. Mr. Brennan subsequently contacted Maynooth Garda Station to ascertain when Sergeant Keane would be available and decided to present himself at the station to meet with him on 24th April, 2009. According to his evidence he subsequently communicated this to Garwyn's. According to Mr. Cullen's evidence, he contacted Maynooth Garda Station approximately a week before the 24th April, 2009 to request inspection facilities for the fire extinguishers.

55. On 24th April, 2009, Mr. Brennan conducted an examination of the fire extinguishers which were being held at Maynooth Garda Station. This inspection was carried out under the supervision of Sergeant John Keane who informed Mr. Cullen and Mr. Brennan that they could carry out a visual inspection only. According to Mr. Brennan's evidence, although he had made no formal arrangement to meet Mr. Cullen on site, Mr. Cullen arrived at the station at around the same time. Mr. Cullen gave evidence that while driving to the Garda Station he received an irate phone call from a solicitor at BCM Hanly Wallace, then solicitors for the plaintiff, objecting to his

entitlement to examine the extinguishers.

56. Mr. Brennan stated that he first examined the ABC extinguisher. He hefted the extinguisher and found it to be full. He stated that he took off the hose which did not require tools, as would usually have been the case, as the hose was loose. Mr. Brennan satisfied himself that there was no dry powder in the hose. Mr. Brennan acknowledged, in his evidence, that he did not expressly mention removing the hose in his report but considered that it was implicit that he had done so on the basis of his findings. He rejected the contention put forward by the plaintiff's counsel that the most obvious explanation for the conflict between his findings and that of the plaintiff's expert in that regard is that he did not in fact inspect the hose because he was satisfied that the extinguisher had not been engaged having not found a firm coating of powder in the nozzle. Mr. Brennan subsequently prepared a report of his findings. In relation to the ABC extinguisher, he recorded as follows:

> *"I found the extinguisher to have lost pressure, i.e. not capable of expelling the extinguishing agent, which remained in the cylinder and the telltale gauge showed no pressure. There was no safety pin in place and the discharge hose was not properly secured to the extinguisher … The extinguisher in my view was not capable of being discharged nor had it been discharged in recent times. If it had been, I would have expected to find a residue of extinguishing agent in the discharge hose and none was present."*

According to the evidence of Mr. Brennan ABC extinguishers are susceptible to pressure loss through knocks, mechanical impact or rapid rises and falls in pressure. Mr. Brennan also gave evidence that he found no service label on the ABC extinguisher at the time of his examination.

57. Mr. Brennan then examined the CO2 extinguisher which he found to be of sound mechanical condition with the exception of the discharge horn which was not properly fitted. Mr. Brennan considered that this would present a potential hazard to the operator of the extinguisher and those in close proximity. He further found as follows, as noted in his report:

> *"The extinguisher was found to be totally discharged. There was no safety pin in place … In its present condition this extinguisher is not capable of being used. It is not possible to say in what circumstances the extinguishers (sic) was discharged."*

58. On 8th July, 2009 the plaintiffs engaged Mr. Joseph O'Neill, consultant forensic engineer and briefed him in relation to the fire. On 9th July, 2009, according to the evidence of Mr. O'Neill, he carried out an inspection of the scene at NUI Maynooth although extensive repair work had been done by this time.

59. On 13th July, 2009, the defendant's solicitors issued a notice of declinature citing an alleged breach of condition 7(a) of the Burning Welding and Cutting conditions of the insurance policy. This letter stated as follows:

> *"Our client has conducted investigations in to the circumstances of the fire, which occurred at the site of the repair works on 28 November 2008 and, in particular, our client has obtained a report from fire risk consultants. It is noted that the fire started as a result of ignition from the gas powered torch to 'torchon' felt which was being used by Mr. Feeney for the purposes of the roof repairs. The fire spread rapidly to the top of the roof, assisted by the presence of large areas of sarking felt and timber rafters.*
>
> *Breach of Condition 7(a)*
>
> *Our client's investigations conclude that two fire extinguishers were brought to the immediate work area by Mr. Feeney – a 6kg ABC extinguisher and a 2kg CO2 extinguisher. The fire risk consultant's report concludes that both extinguishers were totally discharged of pressure and were, therefore not capable of expelling the extinguishing agent.*
>
> *On both extinguishers the safety pin was not in place and the discharge hoses were found to be not secured properly to the extinguisher. Furthermore, in the case of the 2kg CO2 fire extinguisher, this was not suitable for use on 'Class A' fires involving solid materials. Rather, this extinguisher was only suitable for use on fires involving liquids, which was clearly not appropriate for the roof environment in which Mr. Feeney was working.*
>
> *The report concludes that neither extinguisher was capable of being discharged in the event of a fire."*

60. On 15th July, 2009, Mr. O'Neill prepared a report based on the information he had obtained from his original inspection and whatever information he had up to that point which, in his own words, was "*quite limited*". The usefulness of such a report is questionable. At this point, he had not yet had an opportunity to speak with Mr. Feeney, however he had been provided with a copy of the Glenroyal statement by Mr. Smyth, the plaintiff's contracts manager who had also outlined the background relating to the incident to him. According to Mr. O'Neill's evidence, he understood from what he had been told at this point, that Mr. Feeney had brought two fire extinguishers to the roof. Mr. O'Neill's report stated that *"the information which I have been given is that such fire extinguisher was in place at this particular location, but that the opportunity to use it never arose".* In his evidence, Mr. O'Neill explained that the information he referred to was the Glenroyal statement he had been given by Mr. Smyth. He stated that since there was no account of the extinguisher being used in the statement, he inferred that it had not been used. Again, he concluded on the information he had been given that "*when he returned with the fire extinguisher the fire had taken hold to such an extent that he could not enter the roof space to fight the fire. As a consequence he did not attempt to fight the fire and shouted to people below to call the fire brigade".*

61. The findings of Mr. O'Neill's report are to a certain extent similar to those views expressed by Mr. Hall in his evidence to the Court. Mr. O'Neill was of the view that "*the information which is available indicates that this fire took hold very quickly and by the time it was discovered it was not possible for the workmen on-site to put it out."* In his evidence to the Court, Mr. O'Neill stated that one of the biggest problems involved in work of the type being carried out by Mr. Feeney is that the actual fire is not visible at the beginning and by the time it becomes visible it is effectively too late. However Mr. O'Neill was also of the view that it is very demanding to expect a large number of fire watch personnel in addition to the one who is doing the work. In his view, a man inside the roof with a fire extinguisher may have been able to do something about fighting the fire but if the fire was as widespread as it seemed to have been from the descriptions received, a fire extinguisher would not have been sufficient since, if there was a fire to the left, in front and to the right as Mr. Feeney stated, it would have been an awful lot of work for one extinguisher. However, it appears to the Court that this viewpoint fails to address Mr. Hall's suggestion that an individual on fire watch would have caught the fire at an earlier stage. Either way, both experts agree that by the time the fire was noticed it was too advanced to be controlled by fire extinguishers.

62. At some point in the summer of 2009 Mr. Feeney met with Mr. O'Neill to discuss the fire with him. Mr. Feeney gave evidence that he could not remember much about the meeting with Mr. O'Neill but that he would have told Mr. O'Neill what happened to the best of his knowledge. Having viewed Mr. O'Neill's report of the meeting, dated 22nd November, 2010, Mr. Feeney agreed that it seemed to be an accurate record of his statement to Mr. O'Neill. That report records that Mr. Feeney took off his fleece jacket to quench the flames and then makes reference to extinguishers. Mr. Feeney acknowledged in his evidence that this was not the same as the sequence of events recorded in the statement he provided to Mr. Smyth but again confirmed to the Court that he was adamant he used the fleece before the extinguishers and he is certain of this because he knows he had burned his hands when he went for the extinguisher. He confirmed that he would have told Mr. O'Neill that nothing came out of the CO2 extinguisher, as Mr. O'Neill later informed the plaintiff's solicitor in a letter of 22nd March, 2013. Mr. Feeney informed the Court that if Mr. O'Neill asked him about the extinguishers he would have given the same account as he had given previously.

63. On 27th August, 2009, according to the evidence of Mr. O'Neill, he visited Maynooth Garda Station with Mr. Smyth. Sergeant Keane showed them the ABC and CO2 extinguishers and permitted them to carry out a visual inspection but nothing else. Mr. O'Neill noted that the hose of the ABC extinguisher was unclipped and the pressure gauge was in the red zone. He also noted that there was no tab present on the pin as it appeared to have been broken off. Mr. O'Neill informed the Court that he would have expected to see the tab if the pin had not been pulled. However, during the course of his cross-examination Mr. O'Neill appeared to exhibit a degree of confusion as regards the identification of the pin. Mr. O'Neill photographed the extinguishers during the course of this examination and those photographs were shown to the Court.

64. On 4th September, 2009 the ABC extinguisher, which was the property of the plaintiff, was released into the custody of Mr. O'Neill by the Gardaí. On the same day, Mr. O'Neill brought the extinguisher to Engineering Inspection Specialists ("EIS") who conducted a technical and radiographic inspection. In his evidence before the Court Mr. O'Neill stated that he did not recharge the extinguisher at any stage following its retrieval from Maynooth Garda Station nor do anything to it. He stated that he regarded his position as a custodian of evidence which other people had a right to inspect and that the reason he chose the X-ray method was so that he could examine what was inside the extinguisher without doing any damage to the evidence as he was anticipating a disassembly with all parties present.

65. Mr. Paul Dunne, an industrial radiographer, gave evidence to the Court that on 4th September, 2009, Mr. O'Neill brought an extinguisher to him for examination. He stated that he received no specific instruction from Mr. O'Neill other than to examine the extinguisher and see if he could find anything. Mr. Dunne and his colleague had a fire extinguisher on the office wall which they considered to be identical to the one provided by Mr. O'Neill given that they had the same markings and manufacturers. Before carrying out X-rays on both extinguishers, Mr. Dunne and his colleague examined them visually and weighed them in order to make sure they were the same weight so that they could calculate the appropriate exposure. Having found the weight of both extinguishers to be identical, the same exposure was applied to both. According to Mr. Dunne's evidence, his colleague Mr. O'Donnell X-rayed the extinguishers under his supervision. According to Mr. Dunne, significant differences were noted between the two. The plaintiff's ABC extinguisher was identified in Mr. Dunne's report as Incident Extinguisher No. 1 while the extinguisher taken from Mr. Dunne's office wall was identified as Sister Extinguisher EIS.

66. On or about the 24th September, 2009, Mr. Dunne provided Mr. O'Neill with a report of his findings. This report was originally accompanied by freehand drawings completed by Mr. Dunne. Mr. O'Neill was later supplied with photographs. In his evidence to the Court, Mr. Dunne referred to a set of three X-ray photographs at Figure No. 1 in the booklet of Mr. O'Neill's photographs which was provided to the Court. He highlighted the fact that the photograph of the Incident Extinguisher in the middle is greyer than the black photographs on either side which represent the Sister Extinguisher EIS. Mr. Dunne gave evidence that those three photographs show a distinct difference between the Incident Extinguisher and the Sister Extinguisher EIS and demonstrate that there had been some sort of activation of the Incident Extinguisher in the sense that the gas was gone and the extinguisher was full of powder. Mr. Dunne further stated that a radiographic examination of the Sister Extinguisher EIS showed that there was no evidence of any powder in the hose section. Mr. Dunne stated that a visual examination of the Sister extinguisher also showed no powder in the hose. However, when the hose was removed from the Incident Extinguisher there were traces of powder staining on one end of the hose. Radiographically, however, there was no evidence of powder in the hose of either extinguisher. Mr. Dunne stated that no removal of the hose of the extinguisher took place until Mr. O'Neill was present and he did not recall who removed the hose or how it was done. He accepted the contention of counsel for the defendant that his report appears to suggest that the examination of the hose simply involved looking at the neck of the extinguisher. However he stated that he did examine the hose visually for all traces of powder and pointed to the finding in his report that all surfaces were affected and stained by a fine deposit of white powder. Mr. Dunne also confirmed in his evidence that he has no expertise in fire extinguishers and that he had never examined one before this point.

67. Mr. Brennan, in his evidence, took issue with the fact that technical specifications relating to the fire extinguisher had not been sought from the manufacturer for the purposes of the testing carried out by Mr. Dunne. He also stated that he would not attach too much importance to the finding of Mr. Dunne that the central tube was void of powder residue in the EIS Sister Extinguisher and cloudy with evidence of powder in the Incident Extinguisher. He stated that if someone were to install a 6kg ABC extinguisher and leave it in place for twelve months an engineer who came back to service it would not expect to see the extinguishing agent had moved up and about the discharge tube. On the other hand, according to Mr. Brennan, if the extinguisher had been moved from place to place, was reported to have been involved in a firefighting incident, was brought to a Garda Station and had been subject to various examinations, one would expect to find the movement of dry powder within the cylinder and filling the void of the cylinder that now had no expellent gas. Mr. Brennan accepted that although he did not find powder in the valve at the point at which the hose joins the fire extinguisher, he would accept Mr. Dunne's finding of dry powder in that location. However, Mr. Brennan explained Mr. Dunne's finding by stating that in a situation where an extinguisher is depressurised, the gas charge is not present and therefore the dry powder is not subject to any force within the cylinder and can make its way up the siphon tube and into the head assembly. Therefore, in the transportation and movement of the extinguisher, including the fact that it was most likely turned by Mr. Dunne during the examination, the powder would have been moving throughout the extinguisher. Mr. Brennan stated that this would in fact confirm his conclusion that none of the discharge mechanisms in the extinguisher were actually blocked given that the powder was able to move through to the discharge port.

68. Mr. O'Neill gave evidence that upon retrieving the extinguisher from Mr. Dunne's office he stored it in an evidence store at his office where it has remained ever since.

69. On 29th October, 2009, Mr. O'Neill sent a letter to the managing director of the plaintiff which outlined the results of the X-ray examination of the ABC extinguisher. This letter outlined that "*the X Rays of the fire extinguisher which was involved in this incident showed that the top of the powder layer within it was diffuse and ill defined*". During the course of his evidence to the Court, Mr. Brennan provided his comments on Mr. O'Neill's findings in this regard and noted that this finding would seem to confirm his conclusion that the extinguisher had lost pressure as it would indicate to him that there was no gas pressure in the extinguisher maintaining the powder in a particular place within the extinguisher. In relation to Mr. O'Neill's statement that "*the X-ray shows that the central tube*

in the extinguisher contained some radio-dense material", Mr. Brennan considered that if the radiodense material was a reference to dry powder then this would not have been unusual as the assembly of an extinguisher involves putting the siphon tube, or central tube, down through the powder. Mr. O'Neill however, in his evidence, stated that this method of assembly would not account for the radiodense material shown in the siphon on the X-rays because the when the cylinder is pressurised with nitrogen the powder at the siphon tube will be compressed by the trapped gas in the tube. He also pointed out that the tube of the non-used extinguisher in fact was free from powder.

70. Mr. O'Neill's letter further stated:

> *"On a subsequent visit to the premises of EIS Limited I examined the incident fire extinguisher. I unscrewed the flexible rubber hose and I looked into it at both ends. I observed a small deposit of white powdery material on the walls of the upper end of the tube. There was no deposit visible near the lower end or outlet."*

In this regard, Mr. Brennan noted that he saw no powder material in the course of his examination of the ABC extinguisher and stated that if a dry powder extinguisher had been discharged there would be ample evidence and no question about it as there would be substantial deposits in all parts of the discharge mechanism. Mr. O'Neill's letter went on to conclude, inter alia:

> *"The examination of the fire extinguisher that was involved in this incident shows that it had been subject to a single unsuccessful attempt at activation. In order to activate the fire extinguisher the pin must be pulled out. Then the trigger must be pulled. This opens the valve which should allow the contents to discharge."*

Mr. Brennan, in his evidence to the Court, questioned how the conclusion had been reached that the extinguisher had been subject to a single unsuccessful activation attempt. Mr. Brennan was not of the opinion that the existence of the dry powder residue was consistent with a failed attempt to activate the extinguisher and considered that it probably resulted from the extinguishing agent being free within the mechanism of the extinguisher because the extinguisher was depressurised and the powder was therefore not subject to the force of any gas charge. Mr. Brennan stated that in his knowledge and experience an extinguisher either worked or didn't work and was a very simple mechanism in which the gas will expel the powder or it won't. Although he accepted that he is not an expert on the failure of fire extinguishers Mr. Brennan also stated that he had never encountered such an expert and that the reason he himself has little experience in examining failed fire extinguishers is that they seldom fail. He reiterated that he had often come across fire extinguishers which had lost pressure but never a fire extinguisher that failed.

71. Mr. O'Neill in his evidence stated that he had previously encountered a certified cylinder which did not work. There had been no powder in the bottom end, only in the valve and at the top end. On handling the hose, Mr. O'Neill observed a small piece of blue plastic film fall from the interior of the tube. When asked to respond to Mr. Brennan's hypothesis that the powder in the tube could be explained by the fact that the extinguisher had been moved around, Mr. O'Neill stated that the valve would stop powder from getting past it when the lever is under the influence of its spring such that it would not allow powder to drift up.

72. Mr. Brennan also took issue with the final finding in Mr. O'Neill's conclusion in his letter of 29th October, 2009, which stated that "*the label indicates that the extinguisher was serviced in March 2008*". Mr. Brennan noted that the ABC powder extinguisher had no service label on it at the time of his examination. Mr. O'Neill acknowledged this mistake in his evidence and stated that the confusion in this regard resulted from his miscaptioning of the photographs.

73. On 25th February, 2010, according to Mr. O'Neill's evidence, he carried out a visual inspection of the CO2 fire extinguisher which was the property of NUI Maynooth. During this inspection the ABC fire extinguisher was examined by Mr. John Hayes of Magnus Coffey & Associates, who was acting on behalf of the University. Mr. O'Neill believes this took place at the office of Mr. Brendan Ashe in NUI Maynooth.

74. On 11th March, 2010, Mr. O'Neill wrote to the plaintiff enclosing a "*Review of Document*" in which he provided his comments on the alleged breach of condition 7(a) in the defendant's letter of declinature. On that basis the plaintiff's solicitor sent a letter to the defendants on 19th March, 2010 which stated as follows:

> *"You stated that your Fire Risk Consultant's Report concludes that (a) both the 6kg ABC fire extinguisher and the 2kg CO2 fire extinguisher were totally discharged of pressure and were therefore not capable of expelling the extinguishing agent. You state that (b) on both extinguishers the safety pin was not in place and the discharge hoses were found not to be secured properly to the extinguisher. For these reasons you have declined an indemnity to our client under its insurance policy.*
>
> *[…]*
>
> *With respect, your client's reasons for declinature are clearly based on a misunderstanding of how a fire extinguisher works. With regard to (a) above, as our client's fire expert has pointed out both of the extinguishers had been activated by Brian Feeney on 28 November 2008. Once a fire extinguisher has been activated, the pressure of gas will fall over time. Due to significant delay on your client's part, these fire extinguishers were not examined by your client's loss adjuster until a considerable time period had elapsed. It was therefore to be expected that the extinguishers would not be pressurised at the time of inspection and no adverse conclusions should have been drawn against our client as a result of this finding.*
>
> *Furthermore with regard to (b) above, in order to activate any fire extinguisher, the safety pin must be removed and the discharge horn or horn (in the case of a CO2 extinguisher) must be used. It was therefore to be expected on inspection that the safety pins would not be in place and that the discharge horn or horn would have been removed and this reason for declining an indemnity to our client simply does not stand up to scrutiny.*
>
> *You also stated in your letter of 13 July 2009 that the 2kg CO2 extinguisher was not suitable for use on a class A fire involving solid materials and was only suitable for use on fires involving liquids, which was not appropriate for the roof environment in which Mr. Feeney was working. In our fire expert's opinion, the material that caught fire initially was bitumen (a component of felt), which is a liquefiable solid that melts while burning and for which the CO2 extinguisher was wholly appropriate."*

75. On 29th March, 2010, Mr. Brennan wrote to Roger Martin of Garwyn, outlining his response to Mr. O'Neill's review of 11th March and the letter of the plaintiff's solicitors dated 19th March, 2010. His response was as follows:

"A stored pressure type of extinguisher can lose its pressure for a number of reasons, which then renders the extinguisher incapable of discharging the extinguishing agent therein i.e. ABC dry powder in this case. I formed the opinion that the extinguisher in question was not used and not capable of being used, to suppress a fire because of a lack of stored pressure. I based this opinion on the fact that there was no evidence of dry powder residue in the discharge hose, therefore indicating that the extinguisher had not been discharged. Another point which has to be considered is that the discharge hose on this extinguisher had not been properly fitted and was therefore, loose. There was no service record displayed on the extinguisher, as required by Standards. Had the extinguisher been serviced by a competent person, I would suggest that the above mentioned defects would have been rectified.

Comment re safety pins.

I have no way of knowing when and in what circumstances the safety pins were removed from the extinguishers, I could only report on the fact that these pins were not in place.

Ref. discharge horn on CO2 extinguisher.

I refer to my previous report in stating that the discharge horn was not securely fitted to the extinguisher and that it would present a potential hazard to the operator of the extinguisher or to those in close proximity. It would also reduce the effectiveness of the extinguisher in extinguishing a fire.

Suitability of CO2 agent.

I understand that the extinguisher was said to have been used on what was a Class A fire, which was sarking felt. CO2 can be used on fires involving electricity, and on confined liquids or liquefiable solid fuel fires. It is important for all concerned to understand that a CO2 extinguishing agent extinguishes fires by displacing the oxygen in the atmosphere surrounding the fire, it will not extinguish the fire by cooling therefore allowing for the possibility of reignition. It would be difficult to extinguish a fire, in the open air, where an abundant re-supply of oxygen is available."

76. In evidence, Mr. O'Neill stated that although the fire occurred in open air, having viewed Youtube videos of the fire, he was of the opinion that there would have only been a gradual wind drift.

77. On 21st April, 2010, the defendant's solicitor sent a further letter to the plaintiff refusing indemnity on the basis of the initial grounds of declinature contained in the letter of 13th July, 2010. The defendant also took issue at this point with the initial statement provided by Mr. Feeney.

78. According to the evidence of Mr. Hall, on or about 20th June, 2010, he received a telephone call from Roger Martin of Garwyn's in which they discussed the statements taken from Mr. Feeney. He confirmed that the following statement, taken from Mr. Martin's file note of the conversation dated 20th June, 2010 reflects what he would have told Mr. Martin and how he feels about the Glenroyal discussion now:

"Obviously at this stage Brendan Hall cannot give a detailed account of exactly what was said during the interview, but he is quite certain that nothing he or Michael Cullen took in terms of approach would have prevented or compromised Mr. Feeney's mentioning of the use of fire extinguishers."

Mr. Hall explained that in informing Mr. Martin that *"he felt that all statements were to some degree taken on a question and answer basis"* he meant, not that the session was a question and answer session per se but that there were questions asked arising from Mr. Feeney's statement and both he and Mr. Cullen intervened at certain points to ask for elaboration. Mr. Hall also confirmed that he informed Mr. Martin, as reflected in the file note, that he felt *"we should engage a further expert to advise on the overall approach to fire precautions and safety at the college because he is of the view that the arrangements fail to meet regulations, although this is not his area of specialisation".* Mr. Martin's file note of 20th June, 2010 further noted:

"While this is always a possibility, we have in fact already based repudiation of liability under the terms of the policy on specific points and cannot start adding further aspects now the decision has been challenged. This will do nothing for our credibility."

Mr. Hall informed the Court however that the above statement of Mr. Martin is simply a note to the file which was not discussed with him and that Mr. Martin did not discuss a potential repudiation of the policy with him.

79. On 29th June, 2010, the plaintiff wrote to the defendant's solicitor setting out their position in full and enclosing a full copy of the report of Mr. O'Neill. On 8th July, 2010 the defendant's solicitors wrote to the plaintiff to confirm the defendant's declinature and refusal to indemnify.

80. On 22nd November, 2010, Mr. O'Neill prepared a further report entitled "*Forensic Report*". In this report Mr. O'Neill found as follows:

"The information which I have been provided with is that when the tradesman smelt smoke, he opened up the roof and attempted to beat out the fire which he saw. When he returned with a fire extinguisher the fire had taken hold to such an extent that he could not enter the roof space to fight the fire. He could only fight it from the outside. He pulled the pin and operated the dry powder extinguisher but nothing emerged.

He shouted to the people nearby on the ground to call the Fire Brigade and they handed him another fire extinguisher, this one was a CO2 fire extinguisher. He pulled the pin and operated this extinguisher but nothing came out.

Detailed examination of the first extinguisher showed that it had not been discharged by anybody. It was exactly full weight. Mr. Feeney tried to discharge it. The powder had moved to the entry of the discharge hose. There was enough pressure in the cylinder to move the powder up the central tube and past the valve. X-rays showed that the central tube was full of dried powder.

There are several reasons why the powder may stop moving out of an extinguisher. These include unsuitable powder consistency, a piece of foreign matter, lack of pressure. Dry powder is a suitable extinguishant type for this type of fire. Detailed examination of the second extinguisher showed that it was empty. It was most probably empty when it was

handed to Mr. Feeney because he reported that nothing came out of it. Carbon dioxide gas (CO2) is a suitable extinguishant for this type of fire. Burning bitumen is a flaming liquid.

The physical evidence is consistent with Mr. Feeney's account."

81. Mr. Brennan, in his evidence, responded to the above report, firstly by stating that the presence of powder in the central tube would be expected due to the manner in which fire extinguishers are assembled. He further suggested that Mr. O'Neill's contention in relation to the unsuitable powder consistency was not credible as the system of filling the extinguishers is a closed one. He further stated that there is no possibility of any foreign matter entering the extinguisher and he has never experienced such a happening before. According to Mr. Brennan's evidence, the most likely explanation as to why a stored pressure extinguisher would fail to work is the absence of the expellent gas i.e. a loss of pressure. He gave evidence that, based on his information and experience, extinguishers normally lose pressure through mechanical damaging and improper handling and it is never about the failure of any of the extinguisher components.

82. Mr. O'Neill in his evidence expanded on the conclusions contained in his report dated 22nd November, 2010. He confirmed that his finding was that his investigations indicated that the powder extinguisher had been successfully activated because all of the powder had moved but something had stopped it in the valve position. He noted that there are several possibilities for this including the presence of a foreign object or that the powder formed an agglomerate or clump which jams the valve. Mr. O'Neill gave evidence that such clumping is a very common problem. However although Mr. O'Neill suggested that this phenomenon was the subject of numerous reports and commented on in published literature on fire extinguishers which was readily available nowadays, the only concrete evidence he provided to the Court in this regard was a reference to a website of a German manufacturer which sold an additive aimed at avoiding the phenomenon. According to Mr. O'Neill, the final possibility is that the person actuating the extinguisher on releasing the lever would cause the powder to stop because the valve is closed but gas would gradually seep out afterwards causing the cylinder to lose its pressure.

83. Mr. Brennan responded to Mr. O'Neill's assertion that powder extinguishers could suffer from clumping by stating that his understanding is that the composition of the ABC powder in the particular extinguisher at issue would involve a coating with a specific chemical to ensure its flow. In response to Mr. O'Neill's assertion that there are specialist companies who manufacture additives to include in dry powder extinguishers to prevent clumping Mr. Brennan indicated his belief that Mr. O'Neill was referring to the coating placed on the dry powder to prevent it from coagulating. He gave evidence that this was not a pressing problem and he had never heard of it occurring. In addition, Mr. Brennan stated that he has dealt with the company that supplied the extinguisher in question for twenty five years and that they never had a problem in this regard.

84. On being asked by the Court whether his hypotheses were ascertainable, Mr. O'Neill responded that the cause of failure could have been verified by a dissection of the device which would have had to be done carefully, under controlled conditions with all parties present.

85. On 12th November, 2012, Mr. O'Neill prepared a further report entitled "*Review of Document"* in which he responded to queries raised by the plaintiff's solicitor in a letter of 19th October, 2012. The following excerpts are of relevance:

"(a) Can it be concluded from examination and report that the 6kg ABC dry powder extinguisher was fully charged at the time of the fire on 28th November 2008?

Yes it can. The weight of the extinguisher was exactly the same as a sister extinguisher which had never been used. The full charge was present. It had not been discharged as confirmed by visual examination showing that no powder had passed through the end of the flexible discharge pipe. Physical examination showed that an attempt had been made to use the extinguisher and the powder had moved but it jammed in or about the valve and a trace entered the flexible hose. Radiography showed that the powder had moved up and filled the central tube.

(b) Is what happened not more consistent with the said extinguisher not being fully charged?

As stated above, the full charge was present, but it is true to say that the commonest reason for an extinguisher not working is because it had been discharged. It is not reasonable to make a contrary presumption in the face of physical evidence that disproves the presumption. I have in fact encountered a case previously in which a newly supplied unused dry powder fire extinguisher failed to discharge".

In commenting on the above statements, Mr. Brennan informed the Court that he believed that Mr. O'Neill had essentially come to the same conclusion as him which was that the extinguishing agent was present but the expellant charge was not. He stated that it is quite possible that the charge on an extinguisher would fail and this is one of the reasons manufacturers only guarantee their extinguishers for twelve months.

86. On 22nd March, 2013, Mr. O'Neill outlined a change of opinion regarding the CO2 extinguisher, which had been handed by a bystander to Mr. Feeney, in a letter to the plaintiffs solicitors in which he responded to a letter of the defendant's counsel of 27th February, 2013:

"I had stated as follows in my report of 22nd of November 2010: 'Detailed examination of the second extinguisher showed that it was empty. It was most probably empty when it was handed to Mr. Feeney because he reported that nothing came of it. Carbon Dioxide gas (CO2) is a suitable extinguishant for this type of fire'.

These comments were made in light of what the eyewitness, Mr. Feeney, had said. In the absence of other information the comments appeared to be reasonable at that time. But I have definitely changed my mind on that matter in light of new information and I do not merely incline towards the point of view which I now have on this particular subject. The CO2 extinguisher had been recently checked and found to be in order and it was located in a staff area where students do not go. There has been no instance of wrongful discharge of a fire extinguisher in any such area of the college. The CO2 extinguisher was fully charged. Mr. Feeney thought nothing had come out because CO2 leaves no residue. The main significance of the 0.21 kg left in the extinguisher is that it indicated the valve was still holding pressure at the date of inspection and therefore it was not leaking."

87. Mr. O'Neill gave evidence that his change of mind was based entirely on information received from Mr. Ashe in February 2010 to the effect that the CO2 fire extinguisher used was stored in a kitchen delivery area to which students did not have access. However Mr. Ashe, in his evidence to the Court, indicated that he had no recollection of providing Mr. O'Neill with this information and that the

CO2 extinguisher was most likely taken from a public area to which students had full access. According to the evidence provided to the Court by Mr. Brennan and not controverted, the first thing anyone using a functional CO2 extinguisher will experience is a very loud noise. There is no evidence before the Court of such a loud noise occurring when Mr. Feeney attempted to use the extinguisher.

88. On 10th February, 2015, Mr. O'Neill took close-up photographs of the top of the cylinder at the end of the hose of the ABC extinguisher, which showed a deposit of powder inside the valve and at the tip of the outlet hose. When shown these pictures, Mr. Brennan was not of the view that the presence of powder was evidence of a failed activation attempt of the extinguisher and stated that given the gap in time between the fire and the date of the taking of the photographs a lot of things could have happened to the fire extinguisher which might explain the presence of the powder. He rejected the contention of counsel for the plaintiff that a possible explanation for the difference between his findings and the photographs taken by Mr. O'Neill is that he was mistaken in his conclusion that there was no powder in the locations in which powder is visible in the photographs of Mr. O'Neill. He stated that the powder would have been fairly visible to him and he would have had no motivation to say it was not present if it had been. Mr. O'Neill in his evidence to the Court clarified that the tube appeared to him to look the same as it did on his examination in September 2009. Mr. Brennan however did not accept that assertion.

Finding on Facts

89. The defendant submits that Mr. Feeney's evidence that he tried and failed to use the fire extinguishers ought not to be believed having regard to his credibility and to the totality of the evidence. The defendant submits that the fact that Mr. Feeney admitted that the plaintiff is a very significant source of work for him; that he gave three conflicting statements regarding the use of the extinguishers which are not wholly consistent with his oral evidence; that his account of the process by which a hot works permit is obtained is contradicted by the account of Mr. Ashe; that Mr. Feeney signed a copy of the Glenroyal statement and gave it to the Gardaí under caution notwithstanding his evidence as to its alleged inaccuracies and that Mr. Feeney said he was able to use the extinguishers without any difficulty despite the burns on the tips of his fingers and back of his hands, which prevented him from using his phone, undermine the credibility of Mr. Feeney's evidence insofar as it relates to the use of the fire extinguishers. The defendant also points to the fact that the plaintiff's expert, Mr. O'Neill, in his report of 20th November, 2009 did not amend his description of the background to the fire and stated *"the information which I have been given is that such fire extinguishing equipment was in place at this particular location, but that the opportunity to use it never arose"*. At this stage Mr. O'Neill had already met and interviewed Mr. Feeney, on 27th July, 2009 during which interview Mr. Feeney, according to his evidence, indicated to Mr. O'Neill that he had attempted to use both fire extinguishers. The defendant further points to the fact that when, ultimately, in his report of 22nd November, 2010, Mr. O'Neill changed his narrative of events to indicate that Mr. Feeney had in fact tried to use two fire extinguishers, no acknowledgment of this very significant change relative to his previous reports was made.

90. The plaintiff, in response, submits that Mr. Feeney's evidence was not ultimately challenged. It submits that Mr. Feeney's business relationship with the plaintiff does not go to his credibility and that his statements are not in fact inconsistent, either with one another or with his oral evidence. The plaintiff contends that Mr. Feeney volunteered to Mr. Smyth on 4th December, 2008 that he had used both extinguishers and further contends that he was not asked about the fire extinguishers during the giving of his statement at the Glenroyal where Mr. Cullen and Mr. Hall inferred from the fact that Mr. Feeney did not volunteer that Mr. Feeney had tried to use the fire extinguishers, that he had not. The plaintiff further submits that the presence or absence or compliance or non-compliance with the requirements of a hot work permit are irrelevant to the issue before the Court and that the defendant's assertion as to the interaction between Mr. Feeney and the Gardaí is not a fair account of what happened. Finally, the plaintiff contends that the defendant's suggestion that Mr. Feeney had burns on the tips of his fingers is unsupported by the evidence, which was that he had burns on the backs of his hands and bitumen on the tips and that the defendant's minute analysis in a courtroom setting long after the event as to what might or might not have happened at the scene of a serious roof fire is not realistic.

91. Mr. Feeney struck the Court as a credible witness who at all times attempted to recollect and recount the events of 28th November, 2010 to the best of his ability. Any inconsistencies which arose in the course of his recounting of such events could, in the Court's view be explained by the shock and confusion which must necessarily attend the aftermath of an event of such nature. The Court further notes that it is a common and indeed human occurrence that details and chronology do not always remain identical in each account of an event. In that regard, the Court notes that it is accepted by both Mr. Cullen and Mr. Hall that they merely inferred from Mr. Feeney's account that he made no attempt to use the fire extinguishers. Mr. Hall further stated that Mr. Feeney never expressly indicated that he had or had not used the fire extinguisher. Thus it can be taken that no specific questions were asked of Mr. Feeney, at the meeting in the Glenroyal Hotel, in relation to his use or non-use of the fire extinguishers. Had he been asked, the Court is of the view that his account would be similar to that given by him in the course of these proceedings. On that basis, the Court accepts Mr. Feeney's sworn evidence that he did attempt to use the extinguishers. Responsibility for the inconsistencies adverted to by the defendant in Mr. O'Neill's reports should not, in the Court's view, be laid at the door of Mr. Feeney.

92. The Court is satisfied on the evidence that the following occurred. On the morning of 26th November, 2008, Mr. Feeney commenced work as a subcontractor for the plaintiff at NUI Maynooth. Prior to commencing the works Mr. Feeney received an ABC powder extinguisher from the plaintiffs. He did not check the tell-tale gauge of the extinguisher nor did he check for a service label. Mr. Feeney also obtained a Hot Works Permit from the Health & Safety Officer in NUI Maynooth, Brendan Ashe, before commencing works on 26th November, 2008. This permit was more exacting than the requirements of the policy with the defendants in that *inter alia* it required a fire watch to be in place throughout the completion of the works. On the morning of 28th November, 2008, Mr. Feeney, without being in possession of a Hot Works Permit for that day, commenced work on the roof at approximately 10:40 am. He had with him on the roof, an ABC dry powder fire extinguisher, supplied to him by the plaintiff, in which the pin was intact and the nozzle was clipped on. He used his blowtorch to dry the area upon which he was about to commence working and then began preparing pieces of felt to seal a gully in the roof area. While doing so, he smelled smoke and on turning around observed smoke coming from underneath the slates of the roof that sloped away from the area in which he was working. He removed his protective gloves and began removing slates to try to locate the seat of the fire. Having done so he observed a small fire on his left hand side, a larger fire which had progressed 2.5 m up the roof beams of the sloped roof and a small fire on the concrete floor which probably resulted from burnt materials dropping from the roof. He removed his fleece and attempted to quench the small fire on the left hand side and he may have been successful in doing so. He went back to get the fire extinguisher to deal with the larger fire. Having pulled the pin and directed the nozzle and attempted to activate the fire extinguisher, it didn't work. At this point, Mr. Feeney had already sustained significant injury to his hand from burning bitumen. He ran to the edge of the roof and called on people below to call the fire brigade. He was handed a CO2 fire extinguisher by someone down below. He returned to the fire and attempted to deploy the CO2 extinguisher but this too did not work.

93. It appears to be common case between the parties that by the time Mr. Feeney located the seats of the fire, it was incapable of being controlled by fire extinguishers. On realising he could do nothing further, Mr. Feeney left the roof area bringing with him the gas torch and canister but leaving behind the fire extinguisher which he had brought with him and which had been supplied by the plaintiff as well as the CO2 fire extinguisher which had been handed to him by a member of the public. Following the attendance of the fire brigade and the extinguishing of the fire, the fire extinguishers were retrieved by members of the Gardaí. These are the facts to which

the law must be applied.

Issues to be Decided
94. On the evidence adduced and the submissions made the following issues require to be determined:

(a) Relevance of the presence, condition and suitability of the fire extinguishers;

(b) Onus of proof;

(c) Interpretation of condition 7(a);

(d) Whether the ABC fire extinguisher was "*suitable, fully charged and available for immediate use*".

A. Relevance of the Presence, Condition and Suitability of the fire extinguishers
95. The first issue raised by the plaintiff is the irrelevance of the presence, condition and suitability of fire extinguishers. The plaintiff submits that by the time Mr. Feeney discovered the fire, no fire extinguisher would have been of any assistance to him. Indeed, this view would appear to have been expressed by both Mr. Hall and Mr. O'Neill in their evidence to the Court. The plaintiff therefore submits that it is unreasonable for the defendant, having accepted the insurance premium, to refuse to indemnify by reference to the presence or absence or condition of fire extinguishers which would have made no difference to the loss. The defendant does not accept this to be the case but submits that even if it were, the case of *Cornhill Insurance plc v. D.E. Stamp Felt Roofing Contractors Limited* [2002] EWCA Civ. 395 is authority for the proposition that non-compliance with a condition precedent, such as the one at issue in the current proceedings, on the part of the insured absolves the insurer of liability even if the non-compliance does not in any way cause the loss.

Decision of the Court
96. The Court notes the following remark of Longmore LJ in *Cornhill Insurance plc v. D.E. Stamp Felt Roofing Contractors Limited* at paragraph 19:

> *"In construing the policy, one has to bear in mind that condition 3 is a condition precedent to liability. If it is not complied with, insurers can escape liability even if the failure to comply with the condition does not in any way cause the loss."*

97. While at first glance it might seem unfair that an insurer could avoid liability for non-compliance with a condition which was irrelevant to the damage which actually resulted, the Court acknowledges that the proposition set out by Longmore LJ in *Cornhill* is an eminently logical one. A condition precedent is one which must be complied with before the contractual obligation to indemnify takes effect. Thus, whether the compliance or non compliance leads to or affects in any way the event which gives rise to the requirement for indemnity is irrelevant. The Court has not been pointed to any relevant authority in this jurisdiction which would suggest otherwise and, on that basis, considers it appropriate to adopt the rationale of Longmore LJ in *Cornhill Insurance plc v. D.E. Stamp Felt Roofing Contractors Limited*.

B. Onus of Proof
98. The next issue the Court is required to determine is whether, on the basis of the evidence as outlined above, it can be said that the plaintiffs complied with condition 7(a) by having "*suitable and fully charged fire extinguishers*" which were "*available for use near the scene of operations*". It would appear that the law in this regard is as stated in MacGillivray, *Insurance Law,* 12th Ed., (London, 2012) at paragraph 10-089:

> *"It is for the insurer who alleged that the assured's breach of warranty or condition provides him with a defence to a claim to prove that there has actually been a breach. This had been accepted at least since Parke B.'s judgment in Barrett v. Jermy (1849) 3 Ex, 535 at 542. It is open to the parties to insert express words to shift the burden of proof, but clear words would need to alter what has been an established principle of insurance law for over a century."*

99. However the parties appear to differ as to the effect of such a principle. The plaintiff submits that the practical effect of the onus of proof is that the insurer must establish, as a matter of probability, that there was in fact a breach of condition and it is not enough to create a doubt.

100. The defendants cite McGrath, Evidence, 2nd Ed., (Dublin, 2014) at p. 73:

> *"The general rule in civil cases is that the party that bears the legal burden in respect of an issue will bear the evidential burden in respect of that issue. The standard which has to be met is to make out a prima facie case. A party will have made out a prima facie case when, on the evidence given, it would be open to the tribunal of fact, if no other evidence was given, or if it accepted that evidence even though contradicted in its material facts, to enter a verdict for that party".*

The defendant argues that it has made out substantially more than a *prima facie* case that, on the basis of the failure of either fire extinguisher to discharge, neither was fully charged nor suitable for the purpose for which it was intended. It is the defendant's position that in doing so it has discharged the burden of establishing its entitlement to decline cover.

101. The plaintiff, on the other hand, argues that the onus of proof rests squarely on the defendant's shoulders to establish, by its own credible evidence, that the plaintiff did not comply with the material terms of the condition in issue on the day of the fire. The plaintiff contends that Mr. O'Neill's evidence that the most likely cause of the failure of the extinguishers was clumping or the presence of a foreign body, is uncontroverted evidence and that the defendant, with the onus of proof, could have readily determined the cause of the failure of the ABC extinguisher by dissection but never tried to carry out such exercise. The defendant responds that it is the plaintiff who has failed to properly address the operation of the burden of proof and, as indicated by Clarke J. in *Koger Inc. v. O'Donnell* [2013] IESC 28 once the defendant established a prima face case that the condition was breached the burden of proof reverted to the plaintiff to establish that it did not breach the condition.

Decision of the Court
102. The evidence of the plaintiff is that its subcontractor Mr. Feeney had with him on the roof a suitable, fully charged ABC dry powder fire extinguisher sufficient to comply with the pre-condition set out at section 7(a) of the Policy of Insurance. That being the

evidence, the onus of proof rests squarely on the defendant to prove, on the balance of probabilities, that the said fire extinguisher was neither sufficient, suitable nor fully charged and as such did not comply with the requirements of condition 7(a). As noted in the excerpt of McGrath at paragraph 91, above, this is achieved if the defendants *prima facie* case is sufficient to persuade the Court to enter a verdict in their favour insofar as the issue of non-compliance is concerned, and the evidence provided by the plaintiff in response is not sufficient to rebut the defendant's case. Indeed, this is clearly outlined in the judgment of Clarke J. in *Koger Inc v. O'Donnell* at paragraphs 6.4 and 6.5 and his remarks, though uttered in the context of a copyright dispute, are equally applicable in this case:

> *"It must also be recalled that the basic building blocks of a claim for breach of copyright normally involve a plaintiff in persuading the court that the combination of whatever opportunity the defendant might have had to access to the allegedly copied material, coupled with whatever similarities could be identified between the material in which the copyright subsists and the allegedly infringing material, gives rise to an inference of copying…It is undoubtedly true that there is authority for the proposition that the burden of proof may shift…*
>
> *However, it is clear that the burden of proof which shifts in those circumstances is simply an evidential burden of proof. In many cases, and a case such as this is one, to say that the evidential burden shifts is no more than to express the common sense proposition that the party on whom the initial legal burden of proof rests has produced sufficient evidence so that, in the absence of any, or any further, evidence on the part of its opponent, it will succeed. The opponent then has, in practice, a burden, for if no further evidence is adduced that party will lose. The position in copyright reflects that common sense proposition. If there is sufficient evidence of both similarities and opportunity to copy then that, of itself, can be enough to allow the plaintiff to win. If the plaintiff puts enough evidence before the court in those regards then it will, as a matter of practicality, call for some explanation from the defendant to show that any similarities relied on can be otherwise explained by, for example, being derived from information in the public domain in which copyright did not subsist at all, or from materials in which, whether subject to copyright or otherwise, a third party held any intellectual property rights. However, one matter which any plaintiff, at the close of the presentation of its evidence in a copyright case, must assess is whether it is felt that it has placed sufficient credible evidence before the Court to meet the requirement of establishing sufficient similarities and opportunity to copy. Unless there is an application for a non-suit, a plaintiff will not know the definitive answer to that question and will have to make a judgment as to where its case stands."*

103. Therefore, the basis upon which the Court will proceed to analyse the arguments of both parties is whether the defence has adduced sufficient evidence of non-compliance such as shifts the evidential burden to the plaintiff to show it has in fact complied. However, before it does so, the Court is required to determine the issue of the interpretation of condition 7(a) itself.

C. Interpretation of Condition 7(a)

104. Both parties appear to agree that the law in relation to the interpretation and construction of exempting provisions, is that such provisions, in the case of ambiguity, should be subject to the contra preferentum rule, as set out by Geoghegan J. in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 IR 274:

> *"If the exempting provision is ambiguous and capable of more than one interpretation then the Courts will read the clause against the party seeking to rely on it".*

105. However the defendant contends that condition 7(a) contains no ambiguity such as would justify the application of the *contra preferentum* rule. Therefore the defendant submits that the correct approach to interpretation in this case is as set out by Gilligan J. in *Cyril Reaney & Ors. v. Interlink Ireland Limited t/a DPD* [2012] IEHC 606:

> *"Interpretation is the ascertainment of the meaning which the documents would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were at the time of the contract… The background was famously referred to by Lord Wilberforce as the "matrix of fact" but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned [i.e. the previous negotiations of the parties and their declarations of subjective intent], it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."*

106. It is the defendant's case that the meaning of condition 7(a) can be readily deduced based on the ordinary meaning of the words and taking into account the relevant factual matrix which is that the condition related to work involving a blow torch and the inherent risks involved in that work. The plaintiff points to the case of *George Hunt Cranes Limited v. Scottish Boiler and General Insurance Company Limited* [2001] EWCA 1964 which it considers to be authority for the proposition that where a condition is clearly expressed to be a condition precedent it will be construed as such by the Court subject to the caveat that the obligations contained therein will be construed as narrowly as possible and subjected to close textual analysis.

107. Thus the plaintiff argues that the meaning of condition 7(a) is a matter for the Court rather than for fire experts and that the words are to be strictly construed in the matrix of an insurance policy rather than the matrix of a fire such that the requirements cannot be coloured by the views of the parties or their experts as to what might have been appropriate or sensible or by the terms of the hot works permit to which the insurance company was neither privy nor party. The Court agrees that the conditions of the 'Hot Work Permit' while relevant to the cause of the fire which actually occurred, have no relevance to the construction of the condition precedent in this particular contract.

108. The Court is thus required to determine the meaning of the requirement for "*suitable and fully charged fire extinguishers*" in accordance with the rules of interpretation and construction it deems appropriate in the context of the current case. Firstly, the Court, must consider whether it can be said, as contended by the plaintiff, that the requirement for suitable fire extinguishers can be met by a single extinguisher. The Court will then address the issue of the interpretation of the word "*suitable"*.

Whether the requirement for suitable fire extinguishers can be met by a single extinguisher

109. The plaintiff submits that a requirement for "*fire extinguishers*" can be met by having one extinguisher only. It points to the fact that a prohibition against dogs will be infringed by a single animal and that permission for guide dogs will generally contemplate one only. The plaintiff also points to Article 34.1 of the Constitution as an example that a plural word may contemplate a singular. The defendant on the other hand argues that the ordinary meaning of the words excludes the interpretation argued for by the plaintiff and since the policy refers to fire extinguishers it is evident that more than one is required. The defendant cites the case of *Tormey v. Ireland* (Unreported, High Court, Costello J., 10th May 1984) in which Costello J. considered that the use of the word "*Courts*" in Article 34.4 of the Constitution indicated that more than one court was contemplated and the Canadian case of *R v. J(C.D)* 2005

ABCA 293 in which the Court of Appeal of Alberta felt "*findings of guilt*" under s. 39(1)(c) of the Youth Criminal Justice Act necessitated two, and likely more, findings of guilt. The defendant does not dispute that a prohibition against dogs will be infringed by the presence of a single dog since this is caught by the ordinary meaning of the term when used in a prohibition of this type. The defendant also disagreed with the plaintiff's contention that permission for guide dogs usually contemplates one only and states that in such circumstance the ordinary meaning of the words would permit the presence of one or more guide dogs. The defendant further contends that condition 7(a), in contrast to the plaintiff's examples, imposed as a mandatory requirement that there be "*fire extinguishers*". It submits that the wording of the condition can be contrasted with the wording of the condition of the "*Burning, Welding and Cutting Conditions*" relating to the burning of debris which required "*a suitable and fully charged fire extinguisher to be kept available at the scene of operations for immediate use*". As such, the defendant argues that in reading the "*Burning, Welding and Cutting Conditions*" as a whole it is obvious that the condition could not be met by the presence of a single fire extinguisher since if this were the case, the condition would have expressly said so.

110. Mr. Brennan in his evidence to the Court stated that he would expect two fire extinguishers to be present, at either side of the hot work. Mr. Hall stated that he would require three fire extinguishers for work of the type being carried out by Mr. Feeney, one accessible to Mr. Feeney and two others for each of the two fire watch personnel he would require.

111. However, Mr. Brennan accepted in his evidence that a dry powder extinguisher on its own and fully functioning would have met the requirement for suitable fire extinguishers at the scene of the fire although he does state that ideally a person engaging in such works would have more than one extinguisher as a precaution in case one was damaged or failed to work and that he would advise someone carrying out such works to have two extinguishers present.

112. Mr. O'Neill, the plaintiff's fire expert, was also of the opinion that the relevant Irish Standards IS 291:2002 refer to the capability of an extinguisher to deal with a fire such that if the capability is greater, there is less need for extra fire extinguishers. He was of the view that "*if you have one of double the rating then its as good as two of half of it*". The plaintiff submits that having complied with IS 291/2002, the defendant should not be entitled to fall back on alleged non-compliance with the hot works permit in circumstances where the defendant's expert, Mr. Brennan, conceded that the IS is the "*gold standard*" of compliance.

113. However the defendant contends that the plaintiff's arguments in this regard are manifestly unsustainable in light of the clear wording of condition 7(a).

Decision of the Court
114. In considering the "*matrix of fact*" in the current case, the Court notes that contracts of insurance are lengthy and detailed documents designed to cover a multiplicity of eventualities. As such, the Court considers that the requirement for "*suitable and fully charged fire extinguishers*" is one which provides for the possibility that certain work might involve diverse risks which could perhaps not be met by a single fire extinguisher or indeed a single type of fire extinguisher. Other work, on the other hand, might only require one. On the evidence of Mr. Brennan, a single ABC extinguisher would have been suitable to extinguish the fire in question, had it been discovered in time. In light of that evidence, the Court is satisfied that the provision is one which could be interpreted so that the plural term encompasses the singular such that the requirement for "*suitable and fully charged fire extinguishers*" could be met, in this particular case, by the presence of one suitable and fully charged ABC extinguisher. The Court accepts that the provision is open to interpretation but adopts, in line with the decision of Geoghegan J. in *Analog Devices*, a reading of the wording against the defendant, who is seeking to rely on it. Having so found, the Court does not need to consider further the question of the presence or suitability of the CO2 extinguisher which was handed to Mr. Feeney by a member of the public at the time of the outbreak of the fire.

115. Therefore, the Court will now proceed to examine whether it can be said that the ABC powder extinguisher actually provided was "*suitable, fully charged and available for immediate use"*.

D. Whether the ABC powder extinguisher was "suitable, fully charged and available for immediate use"

Submissions of the Parties

Whether the extinguisher was available for immediate use
116. It is not contested that the ABC fire extinguisher was "*available for immediate use near the scene of operations*". In addition the defendant does not contest that the dry powder fire extinguisher is a suitable extinguisher if it is fully charged and otherwise fit for service.

Was the ABC powder extinguisher suitable?
117. The defendant contends that suitability, as well as relating, at a minimum, to the question of whether the extinguishing material is appropriate for the expected risk, also relates to whether or not the extinguishers were suitable for immediate use having regard to their condition. The plaintiff disputes this however and submits that suitability must be judged by reference to the place and conditions in which the work is to be undertaken rather than the fire, contending that the yardstick of suitability cannot be the fire when it was discovered by Mr. Feeney. The plaintiff also disputes the defendant's contention that suitability may also relate to whether or not the extinguishers were suitable for immediate use having regard to their condition and contends that the requirement as to the condition of the fire extinguishers is expressed by the words "*fully charged*". The defendant, in response, contended that it is clear from the evidence before the Court that in considering whether or not a fire extinguisher will be suitable for any potential fire threat, consideration must be given to both the circumstances in which it was will be used and the type of fire in question. It further noted its proposition which it stated was simply that a fire extinguisher is not suitable if it has some defect which means that it is not capable of immediate use such as if its discharge hose was not properly attached, as Mr. Brennan found to be the case during his examination of the ABC powder extinguisher. Therefore the defendant submits that if the Court concludes that the discharge hose was not properly attached to the ABC fire extinguisher at the time of the fire then the ABC fire extinguisher should not be regarded as suitable.

Decision of the Court
118. On the evidence, an ABC dry powder extinguisher in proper condition was suitable for the task in hand. The evidence of Mr. Feeney is that on receipt of the fire extinguisher the pin was in place and the nozzle was clipped on. The fact that when examined, months later, the nozzle was loose, appears to the Court irrelevant in circumstances where the Court has no evidence as to what may have happened to the fire extinguisher during the course of the fire fighting and the immediate aftermath thereof. Further, while the Court has evidence that the fire extinguisher was taken into custody by the Gardaí sometime on the day of the fire, the Court has no evidence as to the condition of the fire extinguishers at the time they were taken into custody. Therefore the Court is satisfied that the type of fire extinguisher, being a 6kg ABC dry powder extinguisher, was a "*suitable*" type of extinguisher and on the evidence of Mr. Feeney, having its pin in place and its nozzle clipped on, was apparently suitable for use.

Was the extinguisher fully charged?
119. The final question for the Court to determine in relation to the ABC extinguisher is whether that extinguisher was fully charged. It has been accepted by the experts on both sides that fully charged means an extinguisher has a full complement of (a) extinguishing agent and (b) expellant. The parties however disagree as to the manner in which the presence of a full charge is ascertained. The plaintiff submits that the presence of the pin in the extinguisher is the key indicator as to whether an extinguisher is fully charged. The defendant however submits that the presence of a pin is not necessarily conclusive proof that a fire extinguisher is fully charged since extinguishers can be discharged and have their pins replaced and since stored pressure extinguishers can readily lose pressure due to "*mechanical knocks*" which could occur notwithstanding that both the safety pin and plastic safety seal remain in place. The defendant therefore submits that in the case of an ABC fire extinguisher, it is the tell-tale gauge which indicates whether or not it is fully charged. Both parties appear to have relied on the evidence of Mr. Brennan, to support their submissions in this regard.

120. Mr. Brennan, when asked by the Court, gave evidence that the pin and seal being in place on an extinguisher is indicative of an extinguisher being full. However he stated that in the case of a stored pressure extinguisher such as an ABC fire extinguisher the "*dumb dumb proof indicator*" as he called it, that the extinguisher is charged and ready for use is the tell-tale pressure gauge, as lead seals on the extinguisher are often not applied on powder extinguishers or often fall off.

121. The Court also notes that the checklist provided to the Court by Mr. Brennan, which was accepted as being sensible steps by counsel for the plaintiff, includes a requirement to check the tell-tale gauge in the case of stored pressure extinguishers. It is also a requirement of the IS 291/2002 at paragraph 10.2.1 that those engaged in the inspection of powder fire extinguishers observe the pressure gauge indicator or reading "*to see if it lies within the operating range marked on the extinguisher label*". Therefore, it appears to the Court that the indicator in relation to whether an ABC extinguisher is fully charged is the tell-tale gauge, which according to the evidence of Mr. Brennan, indicated that the extinguisher had lost pressure at the time of his inspection on 24th April, 2009. This was also the finding of Mr. O'Neill in his later inspection of 27th August, 2009. However, the Court notes that these inspections took place in April and August 2009, some five and nine months, respectively, after the occurrence of the fire, and that on the basis of Mr. Feeney's evidence that he did not check the tell-tale gauge, there is no definite evidence before the Court as to the condition of the extinguisher, as indicated by the tell-tale gauge, on the date of the fire itself. The defendant submits however that the condition of the extinguisher can be inferred for the reasons set out below. There is also the Court notes, uncontroverted evidence before the Court that the extinguisher was found to be without a required service label, at the time of the inspections of Mr. Brennan and Mr. O'Neill. Mr. Feeney gave evidence that he did not check the presence of a service label on receipt of the fire extinguisher.

122. In this regard the plaintiff contends that the only probative evidence as to the condition of the extinguishers at the scene of the fire on 28th November, 2008 is to be gleaned from the evidence of Mr. Feeney and notes that Mr. Brennan, in his evidence, conceded as follows:

> *"What I can say is that the condition in which I examined the extinguishers they were not capable of operating. Whether that was the same condition when Mr. Feeney lifted them or was said to have attempted to use them, I don't know. But if they were in this condition when Mr. Feeney attempted to use them, no, they wouldn't work".*

The plaintiff contends that the high point of the defendant's case is that if the extinguishers did not operate correctly it can only have been because they were not fully charged. However, it submits that Mr. Brennan clearly conceded that there are other possible explanations as to why the extinguishers did not operate including the lack of training and experience of Mr. Feeney who remains the only witness with direct evidence of the condition of the fire extinguisher and upon whose evidence the defendant must heavily rely in order to discharge the burden of proof.

123. The defendant on the other hand submits that there are in fact three categories of evidence as to the condition of the fire extinguishers at the scene of the fire. The first of these, according to the defendant, is evidence as regards the steps taken in advance of the fire to ensure that the fire extinguishers were in an appropriate condition. The defendant notes in this regard that no such evidence was provided by the plaintiff. The second is the evidence of Mr. Feeney as to the condition of the fire extinguishers at the scene of the fire and the third is the evidence arising from the inspection of the fire extinguishers after the event. The defendant submits that the full absurdity of the plaintiff's assertion that the only probative evidence as to the condition of the fire extinguishers at the scene of the fire is evidence which Mr. Feeney can give himself becomes clear in the plaintiff's assertion that "*if, for the sake of argument, Mr. Feeney's evidence was unreliable, then there would be no evidence of what happened at the scene of the fire and so no evidence of non-compliance with condition 7*". The defendant submits that by this logic, it is entirely reliant on Mr. Feeney's evidence in order to make its case and there is no requirement for the plaintiff to establish that it satisfied the condition. In such circumstances it would appear that nothing short of acceptance by Mr. Feeney that the condition was not met would suffice in order for the defendant to make out its case and equally any evidence as to the condition of the fire extinguishers would be wholly irrelevant. The defendant submits that this could not be correct and that the Court should have regard to all of the available evidence in respect of the condition of the fire extinguishers.

124. The defendant's case in this regard is twofold. It submits that if Mr. Feeney did not use the fire extinguisher, and it is the defendant's case that he did not, then the condition at the time of inspection by Mr. Brennan gives rise to an overwhelming inference that the extinguisher was not fully charged at the time of the fire. On the other hand, if the Court finds, as it does, that Mr. Feeney did attempt to use either or both extinguishers, the defendant submits that the fact that neither worked gives rise to an irresistible inference that neither was fully charged and suitable for the use to which it was intended to be put.

125. The defendant argues that if Mr. Feeney did attempt to use the ABC powder extinguisher then the fact that it did not work gives rise to the irresistible inference that it was not fully charged or suitable for the use to which it was intended to be put. The defendant contends that operator error can be excluded as a reason for such failure on the basis that Mr. Feeney gave evidence that he had knowledge in the use of fire extinguishers, that he tried the extinguishers a number of times and that he was satisfied he had done everything he ought to have done to operate them. The defendant further notes that no evidence was adduced by the plaintiff in relation to any checks carried out on the extinguisher by the plaintiff prior to its supply to Mr. Feeney. In particular, there was no evidence that the extinguisher had been serviced within a year of the fire; there was no evidence that the pressure gauge had been checked and thus there can be no presumption that the extinguisher was suitable and fully charged on the morning of the fire.

126. The defendant submits that the most likely explanation for a stored pressure extinguisher not functioning, as indicated by its expert witness, Mr. Brennan, is that its expellant gas is absent. Mr. Brennan gave evidence that fire extinguishers can readily lose pressure through mechanical knocks and that in his experience, as confirmed by the manufacturer of the extinguisher, the failure of an extinguisher to function has never arisen from the failure of an extinguisher component.

127. The plaintiff argues that it does not need to rely upon any presumption to the effect that the ABC extinguisher was fully charged

but that if it did that presumption would arise from the presence of the pin in the extinguisher. The plaintiff also notes that Mr. Feeney gave clear evidence of repeated attempts to activate the ABC extinguisher via the trigger mechanism. The plaintiff argues that this, along with Mr. Feeney's repeated references to making four or five attempts over possibly twenty seconds, is indicative of ignorance on the part of Mr. Feeney that such extinguishers do not always immediately activate and that they can take up to four seconds to commence operation. The plaintiff notes that Mr. Brennan conceded in his evidence that it is reasonable that an inexperienced operative could believe that a functioning ABC extinguisher had failed because of the time an extinguisher can take to discharge in accordance with manufacturing tolerances. The plaintiff submits that this is important because it explains the belief on the part of Mr. Feeney that the ABC extinguisher did not work, as well as explaining as the condition of the extinguisher on 24th April, 2009. The Court notes in this regard however that Mr. Brennan also indicated in his evidence that the manufacturing tolerance would be a design parameter similar to those used in alarm activation systems, that one could expect a pretty instant response from an extinguisher and that the model of extinguisher involved here would not have taken four seconds to operate. A similar point is also put forward by the defendant who also submits that it would be entirely unfair if the defendant was now expected to contend with such a theory when it was never put to the essential witness to whom it should have been put particularly in circumstances where such theory contradicts Mr. Feeney's own evidence as to his competence in the use of fire extinguishers.

128. The plaintiff relies on the evidence of its expert, Mr. O'Neill, to explain the condition of the extinguisher. The plaintiff notes that while Mr. O'Neill agreed with Mr. Brennan that depressurisation is the most likely cause of an ABC extinguisher not working and that the extinguisher had lost pressure he concluded that this loss of pressure had resulted from the activation of the extinguisher, which had allowed the gas in the extinguisher to discharge over time, without resulting in the expulsion of the extinguishant.

129. Mr. O'Neill supported his theory by arguing that Mr. Brennan's contention that the extinguisher did not operate because it was not charged would not explain the apparent movement of the powder within the extinguisher as seen in the X-rays produced by EIS Limited. Mr. O'Neill posited a number of scenarios which could account for the motion of the dry powder as shown in the X-rays. The plaintiff contends that those suggestions explain the condition of the ABC extinguisher when seen by Mr. Brennan on 24th April, 2009 and when seen by Mr. O'Neill on 4th September, 2009. The first was Mr. O'Neill's suggestion that the failure of the extinguisher to operate was possibly due to the presence of a foreign body. Mr. O'Neill gave evidence that he had personal experience of one instance in which a fire extinguisher failed to function due to the presence of a foreign body which he had observed in the course of his examination. The defendant, in this regard, notes that Mr. O'Neill did not indicate that he had observed any such foreign body and that Mr. Dunne, from EIS Limited, indicated that no such foreign body was visible to him during his inspection of the extinguisher. The plaintiff responds by submitting that the fact that the X-ray did not show the presence of a foreign body does not exclude that possibility and that what it does exclude is the rather unlikely possibility of a foreign body of the same density as the casing being present in the extinguisher.

130. Mr. O'Neill also suggested that the failure of the extinguisher to operate might be explained by clumping or a related process whereby powder forms a bridge stopping the flow of powder out of the extinguisher. However, the defendant contends that Mr. O'Neill's evidence in respect of clumping should be rejected by the Court in circumstances where he indicated that he had reviewed and was aware of scientific literature and reports supporting his contention which were readily available and yet was unable to produce or even specifically refer to any such literature or reports when expressly invited by the Court to do so.

131. The plaintiff contends in response that the evidence produced by Mr. O'Neill to the effect that the website of the chemical company Merck indicated the availability of a product called Aerosil to address the problem of clumping must be at least as persuasive as academic laboratory research. The defendant submits that such a suggestion is manifestly unsustainable, noting that the Court was not afforded an opportunity to see the web page in question and that the mere fact that a website indicates the availability of a product to deal with clumping can in no way be compared to scientific evidence based on research or scientific literature which a court can review, consider and weigh in the context of other evidence. The defendant further submits that the availability of a product to deal with clumping cannot lead a court to conclude that the problem of clumping remains a real issue in circumstances where it appears the problem has been addressed by manufacturers.

132. The defendant further contends in this regard that Mr. Brennan, who gave evidence that clumping was not a phenomenon which he had come across at any stage in his career, also considered that the movement of the powder through the extinguisher as shown in the X-rays commissioned by Mr. O'Neill could be explained by the fact that the extinguisher was depressurised meaning that the powder was not subject to the force of the expellant gas and was therefore free to move around the extinguisher while the extinguisher itself was being moved in the course of transport and examination following the fire. Mr. Brennan was also of the view that such motion would also account for the dry powder which Mr. O'Neill indicated that he had seen in the tip of the valve and outlet hose which Mr. Brennan had not seen during his inspection.

133. The plaintiff contends however that Mr. O'Neill disposed of Mr. Brennan's passive movement of powder theory by reference to the fact that the valve of the extinguisher would stop the powder from moving past it onto the tip of the valve and the outlet hose. The plaintiff further contends that this was more or less accepted by Mr. Brennan who twice suggested that it might be accounted for by someone having recharged the extinguisher. Finally, the plaintiff submits that Mr. O'Neill gave clear, uncontroverted evidence that low pressure in the ABC extinguisher would not have been capable of effecting the movement of the powder within the extinguisher as revealed on the X-ray and stated that:

> *"If the pressure was low in my opinion it would not be able to mobilise the entire charge … Equally when the charge is moving it has momentum and it requires something concrete to stop it because under Newton's laws it should continue to move because it is moving. So if it stopped moving something had to stop it".*

134. The defendant in this regard notes that Mr. O'Neill's evidence came after Mr. Brennan's and Mr. Brennan did not therefore have an opportunity to respond to this apparent criticism of his view but that when Mr. Brennan in his own evidence considered Mr. O'Neill's theory, as alluded to in Mr. O'Neill's reports, that the powder had moved but was jammed in the valve, Mr. Brennan was clear in his view that this was extremely unlikely and "*in fact is probably more towards the impossible than unlikely".*

Decision of the Court

135. It has been accepted by the experts on both sides that "*fully charged*" in the context of a fire extinguisher means that the extinguisher has a full complement of (a) extinguishing agent, in this case dry powder, and (b) expellant gas, which causes the powder to be discharged when the fire extinguisher is activated. In this case there is no dispute that the fire extinguisher complied with condition (a) above, the issue is whether, at the time of the fire, it complied with condition (b). There is equally no dispute that when examined by various experts, months after the event, the fire extinguisher was depressurised and had no expellant gas. Furthermore, there was no safety pin in place and the discharge hose was not properly secured to the extinguisher. This however is not of particular assistance to the Court in deciding the condition of the extinguisher at the time of the fire. It is entirely possible, for example, that the fire extinguisher, which was left at the scene of the fire by Mr. Feeney was knocked about in the course of fighting

the fire by the fire services. While the Court accepts that the fire extinguisher was taken into custody on the day of the fire by members of the Gardai and was not interfered with by them, the Court has no evidence from that source as to the precise condition of the fire extinguisher when taken into custody nor has the Court any evidence as to the manner in which they were stored prior to examination by the experts. The Court must therefore look to the evidence which it has of what occurred at the scene in order to determine this issue. The Court has already held, as a matter of fact, that Mr. Feeney, the plaintiff's subcontractor attempted to discharge the fire extinguisher at the scene of the fire. When he did so, the fire extinguisher did not work. Why did it not work? The Court accepts the evidence of Mr. Len Brennan that the most likely cause of its failure to activate was the loss of expellant gas i.e. a loss of pressure. He gave evidence that based on his information and experience extinguishers normally lose pressure through mechanical damaging and improper handling and not due to failure of any of the extinguisher components. This is particularly so in the case of fire extinguishers which do not remain in a fixed position but are moved from site to site as needed. He explained that loss of pressure usually occurs through knocks, mechanical impact or rapid rises and falls in pressure. In such circumstances, the charge on an extinguisher can fail and this is one of the reasons manufacturers only guarantee their extinguishers for twelve months. Mr. O'Neill also accepted, in his report of 22nd November, 2010, that loss of pressure was a possible explanation as to why the extinguisher had failed to operate but advanced other possibilities as well.

136. On the basis of Mr. Brennan's evidence, the Court accepts that the defendant has *prima facie* discharged the onus of proof of establishing that the fire extinguisher in this particular case was not fully charged. On the totality of the evidence, the Court has no evidence which would rebut or displace that finding. In particular, there is no evidence adduced by or on behalf of the plaintiff of the history of this particular fire extinguisher, its service and maintenance history nor whether it had been checked prior to its supply to Mr. Feeney on 26th November, 2008. It appears to the Court telling, in this respect, that there was no service certificate present on the extinguisher at the time of inspection by the various experts and Mr. Feeney was unable to give evidence as to presence of such a certificate when he received the fire extinguisher from the plaintiff. In fact, his evidence was that he merely checked the pin placement and the position of the nozzle and did not check the tell-tale pressure gauge or the service certificate as he trusted the plaintiffs to supply him with a proper fire extinguisher.

137. It is true that Mr. O'Neill on behalf of the plaintiffs has advanced certain hypotheses as to possible reasons, other than a loss of expellant gas, for the failure of the fire extinguisher to work, including unsuitable powder consistency or clumping, the presence of a piece of foreign matter, and improper activation by Mr. Feeney. These hypotheses were not underpinned by any evidence to show that this in fact as a matter of probability, is what occurred.

138. The Court is satisfied that the evidence proffered by the defendant as to the failure of the ABC extinguisher, amounts to a *prima facie* case that, on the balance of probabilities, the extinguisher was not fully charged. The Court is further satisfied that the evidence offered by the plaintiff does not rebut the evidence put forward by the defendant. The Court prefers the evidence of Mr. Brennan to that of Mr. O'Neill. Mr. Brennan is a former fire officer with twenty seven years of experience with the Dublin Fire Brigade. He has spent twenty six years running fire safety consultancy service which deals with fire safety management and compliance issues. He has also completed training with the London Fire Extinguisher Association. Mr. O'Neill is undoubtedly an individual of vast qualifications and experience, being a chartered engineer, a Fellow of the Institute of Engineers of Ireland, a registered toxicologist and an experienced forensic investigator. However, he appeared to the Court to exhibit a degree of confusion during the course of his evidence in relation to the structure of an extinguisher and, further having asserted the prevalence of the phenomenon of clumping, he was unable to provide evidence of this to the Court despite being offered an opportunity to do so. Unlike Mr. Brennan's consistent explanation, Mr. O'Neill has provided a series of varying explanations in his reports which do not completely tally with the evidence. In particular his evidence, upon which he concluded that the CO2 extinguisher was fully charged, was flatly contradicted by the evidence of Mr. Ashe, the Health and Safety Officer of NUI Maynooth.

139. For the foregoing reasons, the Court is satisfied that the plaintiff did not comply with condition 7(a) by having "*suitable and fully charged fire extinguishers*" which were "*available for use near the scene of operations*" in that the fire extinguisher supplied to Mr Feeney by the plaintiff was not *fully charged.* For that reason, notwithstanding the fact that the presence of a fully charged fire extinguisher would have made no difference to the outcome of the fire which actually occurred, the Court finds itself compelled to dismiss the plaintiffs claim for specific performance of the contract of insurance and its claim for all other ancillary reliefs.