

**THE HIGH COURT****2002 15756 P****BETWEEN****BALLYBODEN LIMITED TRADING AS GLENSIDE BACON COMPANY****PLAINTIFF****AND****W. A. & J. A. CHAMBERS TRADING AS CHAMBERS REFRIGERATION SERVICES****DEFENDANT****JUDGMENT of Mr. Justice Birmingham delivered on the 2nd day of April, 2009**

1. The plaintiff company (Glenside) carries on a meat processing business at Glenties in Donegal. The defendant, (Chambers) is involved in the commercial refrigeration business. The plaintiff and the defendant would appear to have had a long standing commercial relationship.
2. In 1995 the plaintiff moved to what was described as a state of the art premises and the necessary refrigeration units associated with this move were supplied and installed by the defendant.
3. On the 16th May, 1997, a fire broke out at the premises of Glenside which caused damage to the premises, disrupted the business of the plaintiff and has given rise to significant though as yet unquantified losses. The question of quantum has been the subject of discussion between the parties and it was mutually agreed to leave over that issue until the liability issue was resolved.
4. The site of the fire was in what is described as the "plant room" which is attached to the factory though at quite a distance from the main entrance to the plant. This case is about determining the cause of the fire as a matter of probability. The plaintiff and its advisers say that the fire as a matter of probability was caused by an electrical fault in the refrigeration "pack" located in the plant room, which had been provided, installed and indeed maintained by the defendant. The defendant and its advisers say that there is no evidence that the fire was caused by an electrical fault linked to the refrigeration pack. They say that an electrical fault can be excluded or certainly has to be seen as very unlikely and less likely than a number of other possible causes.
5. Three possible causes for the fire have been mentioned. These are, in no particular order, a fire caused by an electrical fault, a fire caused by human error, such as the discarding of a lighted cigarette and a chemical fire. So far as the third of these, a chemical fire is concerned this was mentioned because of the presence of what has been described as a dosing pump but it did not receive any very detailed consideration during the course of the hearing and was really only mentioned in passing by the experts called on behalf of the defendant as a possibility which had not been fully considered in the aftermath of the fire and therefore had not been entirely excluded.
6. In contrast the second possibility, human error has been the subject of intense debate. The defence delivered specifically pleads that the fire was caused by the use by staff of the plaintiff of the plant room as a place to smoke. Used cigarettes, it is said, when thrown on the floor ignited detrius and thereby caused the fire.
7. It appears this plea has its origin in an inspection of the plant room by Mr. Joseph O'Neill, consulting engineer who investigated the accident at the behest of the defendant. When he carried out an inspection on 10th March, 2003, almost six years after the fire he noted the presence in the plant room of a number of discarded cigarette butts and spent matches and photographed these.
8. On behalf of the plaintiff the suggestion that the plant room served as an unofficial smoking area is strenuously disputed. The factory had a basic canteen provided with ashtrays and it is pointed out that the plant room would be a singularly unattractive location for a cigarette break as it is a particularly noisy environment. Mr. Raymond Molloy, production manager of the plaintiff stated that he had never seen anyone smoking in the plant room.
9. In considering the arguments about unofficial smoking it is important to bear in mind that at the time of the fire and indeed at the time of Mr. O'Neill's inspection the current smoking regulations prohibiting smoking in the workplace had not come into force. So, as a smoking area the plant room was neither more or less attractive in 2003 than it had been in 1997.
10. The argument is made on behalf of the plaintiff that the time at which the fire broke out means that it is highly unlikely for a cigarette to be involved. Experience suggests that fires caused by discarded cigarettes start within a time window of half an hour to a couple of hours.
11. Here, the fire was discovered less than half an hour after the working day started. The last known visitor to the premises was at 10:00pm the previous evening, a member of the hygiene shift. The pre-fire period and pre-working day period is, it is suggested, an unlikely time for a cigarette break.
12. Insofar as the fact that discarded cigarettes were visible in 2003 the possibility is floated that these may be attributable to Chambers personnel who would have occasion, unlike Glenside personnel to spend time working there as distinct from merely visiting the area for inspection purposes.
13. For my part, while I cannot exclude the possibility that a carelessly discarded cigarette was the cause I do not regard

that as a probability. I am sceptical about the suggestion that the plant room served as an unofficial smoking room at the time of the fire.

14. I turn then to the possibility of an electrical fault. At the outset it should be noted that there are a number of possible causes of an electrical fire which require consideration. When these possible causes or locations are considered a number can be readily excluded and in most cases were actually excluded by the experts for both sides.

15. So, with the exception of the dosing pump and the refrigeration unit no other equipment had been electrically energised during the fire. On this basis it was possible to exclude strip-lighting, the air-compressor and so on. So far as the dosing pump is concerned there is a clear division of expert opinion as Mr. Bailey, who gave evidence on behalf of the plaintiff, is of the view that it can be excluded as a possible source pointing to photo H in the bundle of photos taken by him to support that view. While Mr. O'Neill on the other hand, is equally firm in his view that the pump cannot be excluded.

16. I turn then to the refrigeration unit, which in one sense was always the most obvious cause, if only because it was the most substantial and most complex electrical appliance in the area. However, it must be immediately said that if the refrigeration unit was an obvious suspect then, within that unit by far the most probable source was the control panel. However, here there is agreement between the experts that the control panel can positively be excluded.

17. With the control panel excluded, attention focuses on the remainder of the refrigeration unit. While Mr. O'Neill is satisfied that no fire took place in the remainder of the refrigeration unit, Mr. Bailey, while not in a position to isolate a specific source regards this as the most probable cause.

18. In coming to this view Mr. Bailey to a significant extent operates on the basis of a process of elimination. He rejects the notion of a fire caused by a careless smoker, saying that the timetable does not fit and then excludes, to his own satisfaction, all other possible sources of an electrical fire.

19. His suspicions in relation to the refrigeration area are heightened by what he believes to be evidence of poor quality workmanship. In that regard apart from some physical findings he points to the fact that Chambers had been on site on several occasions during the preceding months rectifying faults. This suggestion is rejected by Mr. Chambers, who describes himself as having been a partner in the business, who says that such difficulties as there were are attributable to normal wear and tear and to teething troubles. Without parsing and analysing the language used by him too closely, one has to observe there is a certain inconsistency between teething on the one hand and wear and tear on the other. I do believe that Mr. Chambers is unduly sanguine in relation to the difficulties that arose. A twelve month warranty period applied, so all of the call-outs that have been the subject of discussion took place after the end of the warranty period but before the fire. References on the invoices to valves burnt out, to a trip switch for a compressor burnt out and to overloading are somewhat disconcerting. However, it is conceded, none of the areas where questionable workmanship is arguably visible in the photos is the cause of the fire.

20. Despite the best efforts of all involved, nobody has been able to identify a specific cause or indeed a specific location. The case for the plaintiff is based on an examination of the scene carried out by Mr. David Bailey, Consulting Engineer, partner in the firm of Burgoyne and Partners, Consulting Scientist and Engineers, United Kingdom. At the outset it may be said, that his task in investigating the fire was not made any easier by the fact that when he came to the site on the 20th and 21st of May, 1997, significant remedial work had by then been carried out. Accordingly, he never had an opportunity to inspect the fire scene in an uninterfered with state, or as he puts it, to inspect a pristine fire. However, whatever difficulties faced him paled in comparison with the situation facing the defendant's experts. The first investigation on behalf of the defendant which was certainly not an in depth one, was on the 29th May, 1997, and was carried out by an electrician and it was only in 2003 that a consulting engineer was invited to apply his mind to the issue.

21. A fair summary of the evidence offered by Mr. Bailey was that he considered the possible causes and for one reason or another was in a position to exclude them or to regard them as highly improbable and so, as it were, by a process of elimination decided that the likely cause was an electrical fault in the refrigeration unit. This process of elimination approach has been roundly criticised by the defendant and it has been suggested to a number of the plaintiff's witnesses with some vigour that there is no evidence to support their contention. For my part I regard this approach of considering the possibilities and excluding those that are highly unlikely with a view to identifying what is probable as a perfectly legitimate way in which to approach the exercise.

22. The plant room where the fire occurred was dominated by an electrically powered refrigeration unit or "pack". The main components of the plant which is on a frame consisted of three compressors. There is also a control panel and an amount of cabling and piping. There were electric cooling fans on the roof of the plant room.

23. Of note is that there was an amount of other electrical equipment in the room, including two power washers, an air compressor, a dosing pump and fluorescent lighting. In a situation where it is not possible to establish definitively a specific cause or indeed specific location for the fire, the fact that there is such an amount of other equipment is an obvious complicating factor.

24. On the morning of the fire, work started on the premises as usual at 9.00 am. In accordance with normal practice the factory had been opened up some 45 minutes earlier by Mr. Ronnie Key. Relatively soon after the working day commenced the fire was discovered and the fire brigade summoned. On the basis of the fire brigade documentation the times most relevant would appear to be these, the time of discovery 9.26, time of arrival of fire brigade 9.35, fire under control 10.35. However, in relation to that last time it may be noted that the fire report form also records that the incident was under control on arrival. These times have a relevance to the cigarette theory. Following the outbreak of the fire the immediate priority for the plaintiff's was to continue operating or to get back into operation as quickly as possible. Soon after the discovery of the fire, contact was made with Chambers and at least three Chambers personnel attended during the course of the day.

25. Chambers worked throughout the weekend carrying out essential remedial work and had the plant up and running again by the following Monday. Thereafter Glenside's insurers engaged the services of Mr. Bailey, whose brief was to investigate the cause of the fire. He arrived in Glenties on the 20th day of May, 2007. Having, as I have indicated excluded other possible causes to his own satisfaction, he concluded that it was "very probable" that the fire was initiated by the refrigeration plant and that the causal defect "could have been an electrical fault" (Emphasis added).

26. I am in no doubt that to use the language of Mr. Bailey, an electrical fault remains a credible ignition source for the fire. The question is whether it goes further and whether it can be said that as a matter of probability the fire was caused by an electrical fault in the refrigeration unit which was attributable to negligence and/or breach of contract on the part of the defendant. It will be appreciated that probability in this context means not simply that the electrical fault is more likely than any other single possible cause but that it is more likely than not that it was caused in the way suggested.

28. I have already stated that the electrical fault theory is a live and credible one. It follows in saying that, I am accepting that the plaintiff has gone a significant distance to place in the improbable category, a number of other possible causes. Having listened carefully to the evidence and in particular the expert evidence called by both sides, I can say without hesitation that no alternative theory has been advanced, which I would regard as more probable.

29. However, that is not enough. To use a sporting analogy it is not sufficient that the plaintiff's theory should as favourite have the shortest odds but that this theory must be odds on.

30. There are a number of aspects of the evidence which caused me to question the plaintiff's theory and to have real doubts that the fire was located in the refrigeration unit. In considering where the probabilities lie, the fact that the control panel, which would have been the obvious location for a refrigeration fire can be eliminated as a factor is of significance. With it excluded, so far as the remainder of the pack is concerned, while it is not free of combustible materials, there is relatively little such material present. It is, therefore, a less obvious fire site.

31. The fact that no specific location on or within the pack can be pointed to is of some significance. The pack is covered by a pretty much uniform coat of soot with no one area marked out as having undergone a different experience.

32. The indications of high heat level in the left corner of the room and that the overhead wires in that location were destroyed, is also of some significance. While this factor cannot be said to be determinative in excluding the fridge unit, which is after all very close, it nonetheless is a factor which requires to be weighed in the balance.

33. An issue that has been in controversy is the nature of the liquid which appears to have fuelled the fire but which it is accepted, was not itself the cause of the fire. Mr. Bailey was of the view that this was likely oil, coming from the compressors within the refrigeration unit, while Mr. O'Neill concluded that the most likely source of the liquid was the diesel or kerosene from the power washing plant. In that regard the evidence of Mr. Kieran Doherty, a defendant employee who was on the scene very quickly after the fire started, is of some significance. He spoke of noting a very distinct smell of heating oil and also referred to the fact there was still liquid in the compressors to spill, following his arrival. His evidence in relation to the smell of diesel or heating oil is also supported by Mr. Chambers and by Mr. William Horton, who carried out the first inspection on behalf of the defendant. I attach some significance to this. I do so, notwithstanding that I bear in mind the cautions by Mr. Bailey about the fact that after any fire, there will be a cocktail of smells present and it would be very difficult to isolate one particular smell.

34. All in all the cause of this fire remains unsolved. Various theories have been advanced, each of which to a greater or lesser extent receives support from aspect of the evidence, but each of which is, at least to some extent undermined by other aspects of the evidence.

35. The theory contended for by the plaintiff is clearly a credible one. It is quite possible this fire was caused by an electrical fault in an area of the fridge, other than the control panel. However, there are other possible causes such as human error and also I would feel the dosing pump. I am left in the situation that I just do not know what caused this fire and indeed I don't think anyone else knows either, though everyone has their own theory.

36. It seems to me that to choose one theory over the other on the state of the evidence is to speculate, to have a punt. While quite impressed by the evidence of Mr. Bailey and the manner in which he drew his conclusions, I am left in a situation where I cannot say that it was more probable that not, that the fire was caused by a defect in the fridge for which the defendant would bear responsibility and therefore having regard to the burden of proof, the plaintiff's claim fails.