

THE HIGH COURT

2003 11195 P

BETWEEN

JOSEPH MICHOVSKY

PLAINTIFF

AND

ALLIANZ IRELAND PLC

DEFENDANT

JUDGMENT of Mr. Justice Kearns delivered the 26th day of February, 2010

In these proceedings, which were commenced by plenary summons issued on the 7th October, 2003, the plaintiff, a German national and married man, born on 2nd August 1944, claims damages for breach of an insurance contract whereby the defendant agreed to indemnify the plaintiff in the event of destruction by fire of the plaintiff's dwelling at Glebe House, Drumlease, Dromahair, in the County of Leitrim. Drumlease Glebe House was destroyed by fire in the early hours of 13th August, 2002. The property consisted of a substantial Georgian manor house, an annexe thereto and a gatehouse at the end of a 1 km driveway. In addition the property comprised approximately nine statute acres. A photograph and sketches of the house and its rooms are attached to the end of this judgment.

The plaintiff, who is a self employed computer engineer, purchased the property in 1991 for the sum of €240,000. Keen to escape the pressures of his business activities in Germany, the plaintiff spent the following three years renovating the property. This involved putting on a new slate roof, fitting a new oil-fired central heating boiler in the basement, installing a new gas fired hot water heater, also in the basement area, and a new water system in which rainwater was collected, filtered, purified and used as the main water supply. The plaintiff did a lot of this work himself. In addition the plaintiff fitted new German style windows (designed to open three ways) and new interior doors throughout the house. The house itself contained eleven bedrooms, two kitchens, two lounges, a dining room, ten bathrooms, a leisure room and a substantial amount of storage and miscellaneous rooms. It has a large courtyard at the rear of the house and a number of out buildings.

The plaintiff moved to Ireland with his family, consisting of his wife and four children. Over the years that followed, his two older children eventually moved back to Germany. His two younger children attended primary school in Dromahair, but in or around 2001, the plaintiff decided the house had become too big for his family's requirements and he decided to sell it.

For this purposes, he retained a local estate agent, Mr. John Ryan, to advise him in relation to the sale of property. A promotional piece advertising the attractions of the property appeared in the property supplement of the Irish Independent on 13th July, 2001. That article indicated that the asking price for the property was £1m. In noting that the property was "smarter than the average semi, and bigger also, with a pool, and a library", the article continued:

"Close to Yeats country, Drumlease Glebe House reflects some of the best features of Anglo Irish period lifestyles. Located 2.4 miles from Dromahair village, Co. Leitrim, it is separated from Sligo town, 14 miles away, by a choice of lakeside drives along either the northern or southern shores of Lough Gill.

Built originally in 1834 of local limestone, it gets its name from the fact that it was a "glebe" or gift to the Bishops of Kilmore.

Up to nine years ago Drumlease has been operated as a country guest house when it built up a reputation for its cuisine and hospitality. As a result a very high standard of restoration and maintenance is reflected in its accommodation and décor. At ground floor level there are three reception rooms including a library as well as a pantry, kitchen, small storage room and w.c.

In all there are total of ten bedrooms although these are laid out in a way which could conjure up some fresh ideas for marketing the hospitality to the corporate/equestrienne/fishing community. At basement level there is an on suite bedroom, office, linen room, kitchen/dining area, wine cellar and laundry.

In the main house at first floor level there are four bedrooms, of which the master is on suite, as well as two bathrooms. In the stable wing off the main house at first floor level, is a suite with bedroom, living room and shower room. In the guest wing on the first floor is a self contained two bedroom unit with kitchen, sitting room, third bedroom and shower room.

Outside is a heated swimming pool, a courtyard and stables for twenty horses.

As well as trout fishing on the river Bonnet which runs along the bottom of the nine acre site the property, comes with six trout rods in Lough Melvin."

Despite these attractions, the property failed to sell in the year 2001.

The plaintiff was keen to move with his wife and youngest child, as he subsequently in fact did, to Italy where he hoped

to buy a smaller property. The plaintiff had already made arrangements for their daughter, Vivienne, who was then twelve years old, to commence school in Italy in September.

While there were definite plans to move permanently to Italy in September, 2002, the plaintiff retained vague hopes of buying at some stage a small property in Ireland which would be easier to manage than Drumlease. However the plaintiff took no steps to acquire any such property in Ireland. In the first part of 2002, a suitable property was identified in Italy and in July of that year the plaintiff arranged to ship out his German furniture to Italy. For the purpose of purchasing the property in Italy, the plaintiff raised a loan of €60,000 on the security of the gate house at the end of the driveway which was sold in that year for the sum of €110,000. Part of the sum borrowed from the bank was used to pay a deposit on the Italian property.

However, despite displays of interest from three or four potential purchasers in the first part of 2002, no definite offer to purchase Drumlease House at any particular price was forthcoming before the property was gutted and destroyed by a fire which occurred on the 13th August, 2002.

Prior to the occurrence of the fire, the plaintiff had gone with his wife and children to Germany to celebrate his birthday there on the 2nd August. They spent the time from 27th July until 7th August in Germany. On returning to Ireland, the older of the two younger children, Stephen, was staying in the gate lodge and the plaintiff and his wife and younger daughter moved into the annexe by the side of the house. The stated purpose for occupying the annexe rather than the main house was the desire on the part of the plaintiff and his wife to maintain the house in pristine condition fit for viewing. Apart from removing some laundry from three large suitcases of clothing brought back with them from Germany, the plaintiff and his wife left these suitcases fully packed in the games room of the annexe during the six day period leading up to the fire.

As previously mentioned, the plaintiff had in place a policy of insurance with the defendants which went back to the time of purchase of the property and which had been negotiated originally by the plaintiff's brokers with the defendant's predecessors, Church and General.

As detailed in the statement of claim, the policy provided that the defendant would give household cover in respect of the plaintiffs dwelling house to the extent of €870,846 and further indemnity in respect of destruction or damage to contents in the €88,430. Additional cover pursuant to the policy was provided in respect of the gate house and contents.

Arising from the fire, the plaintiff notified the defendant of what was described in the statement of claim as an "accidental fire" on the 14th August, 2002. Thereafter, the statement of claim continues, the plaintiff engaged building surveyors and engineers to assess the losses sustained by the plaintiff and in furtherance whereof Messrs. Haran & Associates, surveyors and engineers, assessed the plaintiff's total loss at €904,789.29 and these particulars were furnished to the defendant through its loss adjusters on 23rd January, 2003.

By its defence delivered on 2nd December, 2003 the defendant referred to a letter dated 21st October, 2003 whereby it had refused an indemnity under the policy and had repudiated same and all liability thereunder for the reasons set out a paragraphs 6 - 9 of the defence. Paragraph 6 of the defence states as follows:-

"the said fire was started deliberately by or on behalf of the plaintiff in that he or a person at his direction tampered with the oil-fired central heating system for the dwelling house in a manner calculated to cause and which in fact caused the fire."

A notice for particulars was furnished to the plaintiff's solicitors at the same time and by letter of reply dated 24th March, 2004, the plaintiff solicitor provided the following information to the defendant:-

"The Glebe house and gate house were placed on the market in spring, 2002. The price sought for the Glebe House was €1,269,738.00 (IR £1m) and the price sought for the gate house was €126,973.81 (IR £100,000). During the period which the premises were on the open market for sale, there was no variation in the price sought for either the Glebe House or gate house."

Asked when the fire first came to the attention of the plaintiff and the details of what steps the plaintiff took when alerted to the fire, the letter went on to state: -

"On the evening before the fire, the plaintiff and his family cooked their evening meal in the main kitchen and ate their dinner in the dining room of the main wing. The subsequently watched some television in the guest wing and then went to bed there at 11.00 p.m. They had made their sleeping arrangements in the guest wing of the main premises upon returning from their holiday in Germany so as to keep the main wing of the house presentable for prospective buyers viewing the premises. The plaintiff was awoken at about 3.00 a.m. the following morning by a large bang. He partially dressed and ran along the corridor towards the main wing of the premises. He did not get far because he was quickly faced by intense heat and thick smoke. He attempted to go further but began to lose his orientation and suffocate. He made his way to another room, opened the window and jumped outside. While inside, the plaintiff had been screaming to his wife and family that there was a fire. Upon getting outside through the window safely, it was very difficult to assess what was happening from the rear of the guest wing of the building."

The plaintiff's car keys were in his trousers and he got into his car parked at the side of the house. The plaintiff drove to the gate lodge where his son, Steve, was staying. The plaintiff own mobile telephone was still in the main house. On arrival at the gate lodge, there was no answer as his son had gone to Sligo for the night. The plaintiff then drove to the nearest neighbour's house but got no response. He then drove to Josephine Hamilton's house, a small distance in the direction of Dromahair. She had been their former care-taker and she responded to the plaintiff's shouts and immediately called the fire brigade. The plaintiff was accompanied by his wife and daughter. On returning with his wife, daughter and Josephine Hamilton to the plaintiff's dwelling house, the plaintiff drove around towards the front of the building and could discern thick smoke coming from the top windows of the house".

The fire brigade under the command of Station Officer O'Hara, arrived at Drumlease House at about 3.45 a.m. Blue flames were observed to be coming out of the lower left front of the house. The roof was already gone at this stage. He observed the plaintiff and approached him. The plaintiff was standing with his wife and the Hamiltons. He informed Officer O'Hara that he had heard an explosion and that everything went black. He brought Station Officer O'Hara to where the oil tank supplying diesel oil to the basement boiler room was located. Officer O'Hara noted the lever on the oil tank to be in the "on" position. He turned it off. Efforts to switch off the gas tank supply proved unsuccessful. Officer O'Hara needed a water supply but noted that the swimming pool was empty. He was aware that the Bonet river ran close by and sent some of his crew off to draw up a water supply from that source.

He observed that all the windows in the old house were in the open "tilt" position both at ground level and basement level. He also observed blue flames at the level of the basement boiler room window.

The plaintiff was extremely worried about his mobile phone and briefcase which he had not taken from the house. Officer O'Hara went with the plaintiff into the house to the games room and located these items and took them from the property. He noted there were a number of suitcases standing upright on the floor and a number of bags lying on a single bed in the same location as the briefcase.

Officer O'Hara also found three containers in a shed by the courtyard. One was a black one which had a smell of petrol and the top was hanging off. He also found a jerrycan with petrol in it at the same location.

He also saw an aluminium ladder in the grass outside the corner of the annex building furthest from the swimming pool. By 6.30 a.m. the fire crew had the fire under control. Officer O'Hara re-entered the property with Officer David Garvey. They were anxious to vent the property to clear smoke. He noted that all doors within the property were open. He also noted that there were blue flames still flickering on the floor of the basement area.

At some point in time, the plaintiff re-entered the property and re-emerged with the suitcases which Officer O'Hara had seen standing in the games room. Whilst in the house, Officer O'Hara noted that only one bedroom had a bed with bedclothes on it. That was the room in which the plaintiff and his wife had been sleeping. Their daughter's room, at the end of the annex at the point from Mrs. Michovsky and Vivienne emerged, had a bed which however had no pillow, duvet or blankets on it.

Officer O'Hara stated that the plaintiff was agitated and upset, but found it odd when the plaintiff produced two bottles of liquor, one of brandy, and offered refreshments to the fire crew before they had completed the extinguishment of the fire.

In the days and weeks which followed, an investigation was undertaken by both the Gardaí and by a specialist retained on behalf of the defendant. The plaintiff retained his own fire expert, Mr. C.D. Wareham of Messrs. Hawkins & Associates but only did so in February 2005.

EVIDENCE IN RELATION TO THE INVESTIGATION

Garda Kieran Treanor of Glenfarnie Garda Station was part of the investigation team. He visited the premises on the 14th August along with Garda Cassidy and Garda Kelly. They were clearing back debris in the basement area when Garda Kelly drew his attention to the fact that the isolation valve on the oil supply pipe to the boiler unit in the basement was detached and separated from it. The removal of this valve had the effect of permitting an unfettered flow of oil from the oil tank outside the house across the floor of the basement in the general vicinity of the boiler unit.

He described how various samples were taken by Garda Kelly from that area, from the lintels and frames in the doorways and from the stairs out of the basement upwards to first floor level. He confirmed that the scene had been secured and that only Garda personnel were allowed in. He described how on the following day they dragged the cooker away from the wall of the kitchen and took samples from the floor beneath the cooker. All of these samples were sent for forensic analysis. He also prepared a sketch of the basement area which was by now suspected to be the seat of the fire. There were three modes of accessing the boiler room in the basement, one from the kitchen area of the house via a staircase, one from the internal courtyard and one through a door at the rear of the house adjacent to the swimming pool. His sketch showed the boiler unit and the door which provided access to the boiler room from the back of the house on the pool side. This door he measured at three foot nine inches in height and three foot two inches wide. It was made of solid wooden construction with two windows and two bolts. The upper pane of glass in the door was completely absent and the pane in the lower panel was partially absent. He noted that the door in question was unbolted, notwithstanding the presence of an upper and lower bolt.

Garda Kelly was too ill to attend Court and his evidence was admitted by means of an agreed statement. In that statement he described discovering a gate valve with the head removed in the basement in the heating room area of the oil line leading to the burner. He called in some other personnel to examine this "unusual discovery". He then took samples, consisting of samples from the floor of the basement, a sample from the wall-plate leading out from the heating room towards the base of the staircase, a sample of debris from the door-jam leading to the kitchen, a sample of debris from the kitchen floor, the gate valve and some other material. On the following day some further samples were taken from under the stairs in the basement, together with a sample of burned material from under the cooker in the kitchen. He brought these to Garda Headquarters in the Phoenix Park and handed them over to forensic scientist Rose Campbell.

His statement also confirms that in the small single bedroom occupied by Vivienne, there were no bedclothes on the bed. Opposite the bedroom was the corridor where he observed marks or tracks left by objects similar to suitcases on the carpet. In his view the suitcases were there both during and after the fire.

Rose Campbell is a forensic scientist at the Forensic Science Laboratory. She gave evidence that she found partially evaporated petrol and diesel oil in the sample found in the debris from the floor of the basement in the heating room. Traces of hydrocarbon similar to paraffin oil were found in samples of debris taken from the kitchen floor and from a piece of wood from the first step of the staircase. Traces of partially evaporated diesel oil were found in part of a phone directory and a sample of debris taken from the staircase. Similar findings were made in respect of samples of burnt debris

and wood taken from the lintel leading to the heating room from the stairwell. Traces of evaporated diesel oil were also found in burnt debris and wood which constituted the sample from under the gas cooker in the kitchen area.

A sample of liquid taken from a jerry can was found to contain petrol.

Sergeant Sweeney gave evidence that he first became involved on the 19th August when he took a statement from the plaintiff. He ascertained that the plaintiff's son Stephen had stayed that night in Sligo with his girlfriend. He conducted a further interview with the plaintiff on 3rd December, by which time he had in his possession the report from Ms. Rose Campbell of the Forensic Laboratory. On that date he had gone to Drumlease House with the plaintiff. He examined the door between the boiler room and the pool area and felt that one of the bolts on the door had been open and another closed. He believed the top bolt had been open during the fire and the bottom one closed. He made this deduction from the smoke marks and absence thereof at the site of the bolt lock.

The technical evidence in the case was provided by Mr. Jonathan Thomas on behalf of the defendant and Mr. Chris Wareham on behalf of the plaintiff. Mr. Thomas is a consultant scientist and engineer with long experience of investigating fires and explosions. He went to the scene of the fire on 16th August 2002 where he met with the plaintiff. He noted that the fire had almost completely destroyed the first floor and roof of the main house. The first floor had collapsed downwards into the ground floor rooms. At ground floor level there was notably more fire damage in the two stairwells. The kitchen and pantry had been almost totally destroyed by fire. However, the basement had largely escaped direct fire damage, the exception to this being the room which housed the gas fired water heater and the oil fired central heating burner. At this point in time he had no knowledge of the presence of accelerants at the location of the fire, but nonetheless thought the fire may have been caused deliberately. He derived this view from the fact that the isolation valve to the boiler tank had been found in a disassembled state. In this state fuel oil would have flowed freely out of the opening of the valve. The physical state of the valve was such that this could not have occurred as a result of the fire. The thread of the valve was not mechanically damaged and had not melted.

In his opinion the pattern of fire damage strongly suggested that the fire commenced in the basement below the kitchen/pantry and spread upwards to the floors above via the stairwell. He met with the plaintiff onsite who confirmed that he had found no problems within the boiler room when he inspected a few days before the fire and nobody had worked on the oil system in the intervening period. He noted that the oil burner was in close proximity to the isolation valve and in certain circumstances could have ignited the escaping oil. However, as this was not operating at the particular time and was not particularly fire damaged, it was Mr. Thomas's view that the oil was ignited by an alternative means such as a piece of burning material.

When later furnished with the report from the Forensic Science Laboratory he formed the view that the presence of diesel oil in the kitchen at a location below the cooker was a very suspicious circumstance. He further confirmed that paraffin would, like petrol, act as an accelerant and believed accelerants had been used down the staircase between the ground floor and the basement. While some of the material may have been transferred on the soles of shoes post fire, this would not explain the residues found below the cooker in the kitchen.

It was his opinion, confirmed in evidence, that the setting of this fire was not typical of the actions associated with a casual intruder.

Firstly, Drumlease House was in a remote location and about one mile from the public roadway. Any intruder would have had to carry accelerants a long distance from the roadway to the house itself. While it had been suggested that an unknown intruder might have gained access to the boiler room through the door at the back of the house (poolside), this was not an obvious location at which an intruder would try to get into the house in hours of darkness, given that the doorway in question was below ground level and could not readily be accessed save by clambering down a steep embankment. It would have been necessary to break the upper pane of glass in that door to open the bolts which secured it. No broken glass was found at that particular entrance to the boiler room to suggest a forcible entry had been made. If the upper window of the window in the door had been broken, he would have expected evidence of smoke venting to appear on the outside walls or outside frame of the doorway, but none had been found. Nor was there any sign of heat damage to the foliage and bushes and brambles immediately outside the door. Furthermore, the section of glass which remained in the lower panel was indicative of a line or contour which he described as more typical of fire damage.

Mr. Thomas further stated that a tool would have been required to turn and disassemble the valve, something in the nature of a flathead spanner. An intruder would, in his opinion, have been far more likely to attempt to sever or pull out the flexible hose between the end of the pipe and the boiler unit.

Finally, the location of the oil tank was not obvious, being set away some distance from the house.

Mr. Chris Wareham first visited the scene in 2005 and conceded that he was considerably disadvantaged by the lateness of his examination. He pointed out that the oil tank holds about 1,400 litres and it was his view that if the safety valve was removed in the boiler room, the entire tank would empty in twelve-fifteen minutes. This had not happened and the oil tank was noted to be nearly full in the aftermath of the fire. He found some evidence of sooting on the window frames of the boiler room door (poolside) suggesting that the glass was broken or missing at the time of the fire. This would be consistent with a break-in by an intruder.

He did, however, unequivocally state that the fire had been started deliberately. He so concluded in 2006 and so informed the plaintiff's solicitor at that time.

In cross-examination he agreed that it would not have been easy for an intruder to locate the boiler room and to remove the isolation valve from the supply pipe. One would need to know where the valve was and need to know the layout. He also agreed that a tool like a spanner would be required to open the valve in question.

THE HEARING BEFORE THE COURT

Prior to the commencement of the case it was agreed between the parties that the Court should first determine the issue of liability and defer until a later stage any issue in relation to quantum of loss and damage. The hearing before the Court

commenced on 16th February, 2010 and lasted for four days. The plaintiff gave evidence, as did his wife Evelyn and daughter Vivienne. His son Stephen did not give evidence. Their evidence will be dealt with separately.

The Michovsky's housekeeper Josephine Hamilton, gave evidence of the events of the night in question, stating that she was awoken by the Michovskys on the night of 13th August, 2002. She recalled that Evelyn was wearing her nightdress and perhaps a black cardigan. The plaintiff was wearing what she thought was a navy blue tracksuit and had only one shoe on. Their daughter had no shoes on.

She stressed that there was no local ill will towards the Michovsky family, they had settled in well and the children had gone to local schools. She had always found him very straightforward and hard working and he always paid her housekeeping money when it was due.

John Ryan gave evidence that he was a local estate agent who had been approached by the plaintiff in 2001 with a view to putting the property on the market. He accepted that this approach must have come prior to the article which appeared in the Irish Independent Property Supplement in July 2001. However, real efforts to sell the property only got under way in the following year. While the initial guide price was £1m, that figure dropped to €1m in 2002. There was always a strategy that the house and gate house could be sold independently of each other. That in fact was what happened. An agreement for the sale of the gate house was made prior to the fire during the month of August, 2002.

Mr. Ryan confirmed that there were changes of tactics in efforts to sell the property and his firm took on a joint agency with Sherry Fitzgerald Draper in Sligo in 2002 in an effort to dispose of the property. There was quite a healthy level of interest in the property and in August 2002 there were three interested parties including the individual who subsequently purchased the property from the plaintiff in 2003. He accepted in cross-examination that the brochure produced by Sherry Fitzgerald Draper indicated that the asking price for the property (exclusive of gate house) was "€900,000 (or offers)". In 2002 the ultimate purchaser was talking of a purchase price in the region of €750,000. That person later bought the house in August 2003 in its damaged condition for the sum of €250,000. He agreed there was no firm offer for the house as at the time of the fire in August 2002.

He could not comment on the frequency or otherwise of persons calling to view the house in his absence or in the absence of Mr. Draper, the other estate agent charged with selling the property. As far as he was concerned it was viewing by appointment only. The plaintiff had not passed on to him the names or details of any viewers who may have inspected the property between 7th August and 12th August, 2002.

In the course of his evidence Sergeant Sweeney stated that there were no signs of a break in ever found at the Glebe House. Furthermore, having been stationed in the area for many years, he was able to state that incidents of arson were virtually unknown in the county area. There had at no time been any other suspect or other person under investigation in respect of the fire notwithstanding the view of the Gardaí that the fire had been started deliberately.

He accepted that the plaintiff had co-operated with the Gardaí in their inquiries in that he had met them when requested to do so and had furnished two statements in relation to the events surrounding the fire. As far as the Gardaí were concerned the plaintiff had no known enemies in the locality where he resided.

The case was opened by plaintiff's counsel to the Court without any concession that the fire in question had been started deliberately. This was so notwithstanding that Mr. Wareham, the plaintiff's own expert, had reported to the plaintiff's legal advisers as far back as 2006 his opinion that the fire had been caused deliberately. That concession, namely, that the fire was started deliberately, was only forthcoming from the plaintiff's advisors on the third day of the hearing before this court.

Accordingly, the only issue for determination by the Court is whether the fire which consumed Drumlease Glebe House was caused by an intruder or by the plaintiff or some person on his behalf.

RELEVANT LEGAL PRINCIPLES

It is accepted by both sides that the onus of proving fraud in this case rests on the defendant. It was also agreed that where proof of fraud is largely a matter of inference, such inference must not be drawn lightly or without due regard to all the circumstances, including the consequences of a finding of fraud (see *Derry v. Peek* [1889] 14 App. Cas. 337 and *Banco Ambrosiano s.p.a. v. Ansbacher & Co.* [1987] IRLM 669).

In *Superwood Holdings plc v. Sun Alliance and London Insurance plc* [1995] 3 I.R. 303 Denham J. dealt with the onus of proof which lies on a party who alleges fraud and cited with approval the dictum of Finlay C.J. in *Banco Ambrosiano spa v. Ansbacher & Co.* [1987] IRLM 669 where at p. 691 he stated:-

"...the onus is to prove the matters necessary to establish fraud as a matter of probability, and that where, as in the present case, such proof is largely a matter of inference, that the inference must not be 'drawn lightly or without due regard to all the relevant circumstances, including the consequences of a finding of fraud'.

Thus, the onus is on the defendants to prove the fraud on the balance of probabilities."

That the test remains one on the balance of probabilities (and not of any higher standard) was recently reconfirmed by the Supreme Court in *Lawlor v. Tribunal of Inquiry* [2009] 2 I.L.R.M. 400.

In the course of delivering the judgment of the court, Murray C.J. noted that the Supreme Court in *Banco Ambrosiano* was satisfied that an allegation of fraud did not require to be proved to the criminal standard where the proceedings take place other than in a criminal court. He adopted and approved the views expressed by Henchy J. in the *Banco Ambrosiano* case to the effect that it would be "an error" to introduce some intermediate standard of proof between that of civil liability and criminal liability, citing the following observations from the judgment of Henchy J at p. 701:-

"If, as has been suggested, the degree of proof of fraud in civil cases is higher than the balance of probabilities but not as high as to be (as is required in criminal cases) beyond reasonable doubt, it is difficult to see how that higher degree of proof is to be gauged or expressed. To require some such intermediately high degree of probability would, in my opinion, introduce a vague and uncertain element, just as if, for example, negligence were required to be proved in certain cases to the level of gross negligence."

Murray C.J. also referred to a further citation from Henchy J. in the same case where he stated (at p. 702):-

"Proof of fraud is frequently not so much a matter of establishing primary facts as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly or without due regard to all the relevant circumstances, including the consequences of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty. If the Court is satisfied, on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find."

In approving and adopting this approach Murray C.J. stated (at p. 414):-

"The findings made must clearly be proportionate to the evidence available. Any such findings of grave wrong doing should in principle be ground upon cogent evidence."

This statement reiterates views of a similar nature expressed by Hamilton C.J. in *Georgopoulos v. Beaumont Hospital Board* [1998] 3 I.R. 132 where the degree of probability required on the part of the party alleging fraud was referenced to a test of proportionality, Hamilton C.J. stating at pp 149-150:-

"As already pointed out in this judgment, the proceedings before the Defendant were in the nature of civil proceedings and did not involve any allegations of criminal offences. The standard of proving a case beyond reasonable doubt is confined to criminal trials and has no application to proceedings of a civil nature."

It is true that the complaints against the plaintiff involved charges of great seriousness and with serious implications for the plaintiff's reputation."

This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on 'the balance of probabilities' bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."

I am satisfied that these principles are the correct and relevant legal principles to be applied to the facts and circumstances of this case.

DECISION

I propose in formulating my decision on this case to refer extensively to the evidence given at the hearing by the plaintiff, his wife and daughter.

While ultimately it was common case that the fire at Drumlease Glebe House was caused deliberately, the plaintiff gave evidence largely along the lines of the account furnished in the Reply to Particulars detailed earlier in this judgment. He described as "evil" any suggestion that he himself had set the fire or caused someone on his behalf to do so.

There was no discovery sought in this case in relation to the plaintiff's financial records. Thus it may be said at the outset that there are no circumstances of severe financial hardship proven in this case which would point up an immediate need on the part of the plaintiff to raise cash in the form of an insurance payout. There was evidence given by the plaintiff that he had a number of properties in Germany which he sold to enable him purchase Drumlease Glebe House without raising a mortgage. He appears to have been in a financial position to retire from business at a relatively young age.

That said, the evidence undoubtedly establishes that there were circumstances of some urgency dictating that the Glebe House be sold without further delay, not least because of his settled plans to move to Italy the following month. Throughout 2001 and 2002, notwithstanding the best efforts of two estate agents, the plaintiff had not secured a single offer for the property, other than in respect of the gate house. Contrary to the information supplied in the Reply to Particulars, the plaintiff's asking price for the property (assuming the gate house can be left out of the equation) had dropped from €1,270,000 to €900,000, which is a drop in asking price which was quite significant. To that extent those particular circumstances may be seen as one block in the case which the defendant seeks to establish.

The plaintiff has imperfect English and gave his evidence with the assistance of an interpreter. He has lived with his wife and daughter in Italy since September 2002, only returning to Ireland to assist in inquiries into the fire and to give evidence in the hearing before this Court. I found his demeanour as a witness to be wary and defensive and untypical of a man who believed the police authorities of this jurisdiction had failed to apprehend an unknown intruder and arsonist. If the plaintiff in this case believed an intruder was responsible he certainly did not relentlessly pursue the Gardaí to bring such wrongdoer to justice. On the contrary, he seemed content to simply sit back, lodge his insurance claim and answer such questions as he was asked and no more. By way of example, when the plaintiff gave evidence that he had "multiple problems with the boiler prior to the fire" and was cross-examined as to why he had not mentioned this fact, if fact it was, to the Gardaí in either of his statements, his reply was: "because they didn't ask." When asked could he explain how diesel had been found under the gas cooker in the kitchen, he stated he had "no idea how it got there" and commenced laughing. He was also unable to explain his behaviour in offering alcoholic refreshment to the fire fighting team before the fire was actually brought under control. Again no coherent explanation was offered for this bizarre behaviour. When asked how he continued to maintain that the fire was "accidental" having regard to the finding of the disassembled isolation valve and the accelerants, he suggested that someone in the locality might have started the fire as a kind of "trick" on the plaintiff and his family. I found the plaintiff to be a somewhat odd and unconvincing witness.

I also found many aspects of his account of events puzzling in the extreme. For example, following his return to Drumlease Glebe House on 7th August, 2002, three suitcases, containing clothing for himself, his wife and daughter, were left unpacked in the games room, notwithstanding that the family did not intend to fly out to Italy until mid or late September. No reason was offered why the plaintiff, who at all times was at home, or his wife, who was not working outside the home, could not have unpacked these cases. Even if they wish to preserve the main house in a condition suitable for viewing, their personal clothing could certainly have been hung up in cupboards or dressers for the duration of the six or seven weeks they intended to remain in Drumlease. The failure to do so is behaviour which I find odd in the extreme. I cannot ignore the other possible explanation that on the night in question it was at all times intended that some clothing could be retrieved from the annexe section of the property into which the plaintiff, his wife and daughter had temporarily moved.

I find also strange the fact that the plaintiff kept a large bunch of keys in his trousers pocket on retiring to bed on the night in question, trousers which were not left on his side of the bed but in an open closet on his wife's side of the bed. They were not hung on a trousers hanger, nor were they suspended from a hook, but apparently placed over a clothes hanger by means of a belt loop at the back of the trousers. Having viewed photographs which show the proximity of the closet to where his wife was sleeping, I must say I found this somewhat puzzling, given that there was a bedside table on his side of the bed on which he could have placed the keys on retiring. Of course another possible scenario is that the keys were in his trousers because he required to get out of the house and utilise his car at some later stage in the evening. Was he ever in bed that evening or undressed? How was it that the clothing which Mrs Hamilton described him as wearing was quite different from what he himself described, namely trousers and sandals only?

While he claimed to have watched a film on television after dinner the night in question he could not remember anything about the film or programme which he had been watching or whether it was on Irish or German television. Again, as a matter of practical experience, most people can recall quite clearly what they were doing, engaging in or watching immediately before a highly traumatic event.

There was no evidence of a break in to the house on the night in question. Nothing was taken or removed from the property other than furniture removed by the plaintiff some weeks previously and the suitcases which he also removed on the night of the fire. If there was an intruder, he picked about the most difficult point at which to access the property, ignoring a staircase which led to the annexe and other more accessible points of entry. If he brought petrol and paraffin to the scene of the fire, he must have done so by carrying same over the lengthy distance from the gate house, incurring the risk that he would be seen by any occupant of the gate house, albeit that the plaintiff's son was out on the particular evening. An intruder would have had to have brought a torch, would have to have broken in to the boiler room, found the boiler unit supply line, availed of an instrument to loosen and detach the valve on the supply line. In these circumstances I have to further ask myself the question whether an intruder, who had spread accelerants around the boiler room, would then have left the basement area, mounted the staircase to the kitchen, pulled out a gas cooker from the wall and scattered diesel oil underneath the cooker?

What motive had the intruder, given that it was not burglary and given that the evidence was that the plaintiff's family had no enemies in the area and, further, that incidents of arson were virtually unknown in the county? If indeed there was an intruder who broke the upper pane of glass in the poolside door accessing the boiler room, why was there no broken glass and no sooting or smoke staining of the outside wall or the adjacent foliage?

Some emphasis was placed by counsel for the plaintiff on the fact that the oil tank in the grounds outside was found in the 'on' position by Station Officer O'Hara and turned off by him. The tank nonetheless was later found to be still largely full, notwithstanding that both expert witnesses agreed that the tank, with the isolation valve removed, would have emptied in 15 – 20 minutes. Counsel argued that, as Mr Michovsky had never left the company of the Hamiltons or his family on returning to the scene of the fire, this could only mean that an intruder had turned the oil supply off and on again. However, this theory poses more problems for the plaintiff than it solves. Quite apart from the fact that an explanation might be that some blockage of the oil supply might have occurred in the early stages of the fire, what motive or reason would an intruder have for first turning off the supply (which he had just liberated by removing the isolation valve in the boiler room) and later turning it back on again? The only reason for any such interference would be to convey the impression that the boiler unit itself had gone on fire accidentally and the only person with an interest in giving or creating that impression was the plaintiff. I am also satisfied that during the timeframe from the commencement of the fire until the arrival of the Fire Brigade an opportunity would, as a matter of probability, have arisen when the plaintiff could have effected such interference.

Mrs. Michovsky stated that following their return from Germany on 7th August, 2002 they moved straight into the annexe. She confirmed that the suitcases were left unpacked – only the laundry had been removed from them. She offered no explanation as to why she had not unpacked her own suitcase over a period of 6 days. Asked to explain why no bedclothes were found in her daughter's bedroom, she stated her belief that they were removed at a time when the family were allowed to go into the house. She said they took the bedclothes because they were still quite clean. Apart from herself and her daughter, nobody else seems to have seen this 'rescue' incursion for bedclothes into the burning house. As her daughter was dressed on leaving the house, what reason or need was there to go back for a pillow and bedclothes? What ever became of these items? No explanation was offered. While her daughter had got dressed before leaving the house via the window, she had herself had left wearing her nightdress. Later on she found a light jacket in her car.

No explanation offered as to why an aluminium ladder was conveniently located in the immediate vicinity of the window where mother and daughter exited the house. Any intruder intending to break in to the house might have been expected to avail of the fortuitous circumstance of finding a ladder adjacent to the house rather than opt for the most awkward point of entry via the boiler room door at the rear of the house. Presumably from an intruder's point of view it made no difference where he set the fire. One must also wonder how any supposed intruder got hold of the telephone directory which was found to contain traces of diesel and which was taken by Garda Kelly on 15th August, 2002 from the first step of the stairwell.

Mrs Michovsky also dismissed as "nonsense" any suggestion that her husband caused the fire, stating he had no reason to do so, that "all their hard blood was in that building". She also stated that her husband had never left her company during the course of that evening. In relation to evidence suggesting that accelerants may have been found on the staircase between the boiler room and upstairs, she stated that she may have used cleaning petrol to clean the carpet when Tom Taaffe had come in to repair the boiler unit two years previously. She knew nothing about the valve in the boiler room or the arrangements in that room. On the night of the fire she had undressed in another room (the games

room) where the suitcases were. She was unable to explain why she had not undressed in the bedroom.

Vivienne Michovsky also gave evidence. She recalled her mother waking her on the night in question telling her to put on her trainers and her pants quickly. She heard her father yelling somewhere in the background. They started to make their way out of the window and climbed down a ladder. Her mother followed her down the ladder. At some point she recalled going back into the house with her father and one of the firemen and going into her room and the adjacent bathroom to get her eye drops and an electric toothbrush. She also recalled taking the bedclothes from her bed but could not recall if it was at the time she got her eye drops or at some other time.

She flatly contradicted the evidence given by Officer O'Hara to the effect that there was no sign of the room having been slept in, that there was no pillow or bedclothes in the bedroom when he first went into it. In denying that suggestion under cross-examination her actual response was: "*Did O'Hara sleep with me on the bed that he knows that?*" I prefer and accept the evidence of Station Officer O'Hara as to the state and condition of Vivienne's bedroom, corroborated as it is by photographs taken in the aftermath of the fire, and thus the obvious possibility arises in my mind that Vivienne was not in her own room but rather was in the same bed and room as her mother that night while her father was elsewhere.

I found the evidence of both Mrs. Michovsky and Vivienne Michovsky defensive, incomplete and unhelpful. It appeared to me to be well rehearsed and Vivienne in particular quickly fell back on repeated statements that "*she could not remember*" when pressed on any point of detail. She singularly failed to explain why, how or in what circumstances she or anyone else retrieved the pillow and bedclothes from her bedroom, if retrieved they were, or what later became of those items. However, as her quoted reply in cross-examination indicates, she was not a witness who, at the age of 20 as she now is, was in any way incapable of giving an account of those events.

CONCLUSION

I am of the view that the defendant has succeeded in establishing, as a matter of probability, that this fire was instigated either by the plaintiff or by some person on his behalf. I cannot be certain beyond reasonable doubt in this regard, but I am satisfied, from the accumulation of all the matters to which I have adverted, that no other explanation is in any way likely.

The possibility of an accidental fire was comprehensively demolished by the discovery of the detached and disassembled valve head. It might well have been assumed by the person setting the fire that this valve would be destroyed or buried under rubble and that such evidence would never have come to light. Every door within the house and virtually every window also had been left open, a circumstance which greatly facilitated the spread of fire.

For the various reasons stated, the "intruder" theory seems to me to have no basis in likelihood – it is a remote possibility only.

I am satisfied, on a test of balance of probabilities and as a matter of inference from the entirety of the evidence, that the plaintiff did cause this fire, either on his own or in conjunction with some other person. It is an inference which I draw from all of the facts to which I have adverted in the course of this judgment. None of those facts, taken in isolation, would carry the defendant's case. However, when all are taken into account, the evidence as a whole is cogent and consistent only with the setting of this fire by an occupant of Drumlease Glebe House. I accept in all respects the evidence given by Mr Thomas, and in particular accept as cogent and reasonable his reasons for discounting the possibility that this fire was caused by some unknown intruder. I thus conclude that the defendant in this case has discharged the onus which the law imposes on a party alleging fraud.

I would therefore dismiss the claim.

Photograph 1. Glebe House.



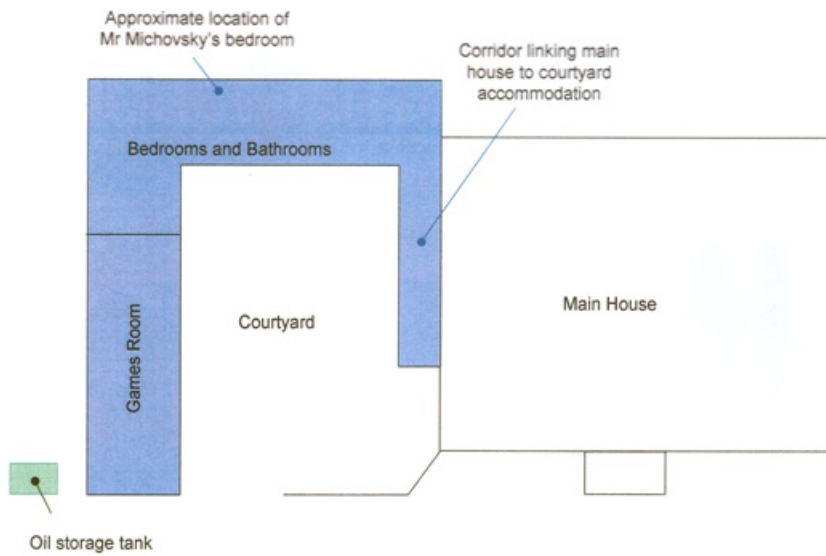


Figure 1. – Plan of the building layout at Glebe House.

Not to scale

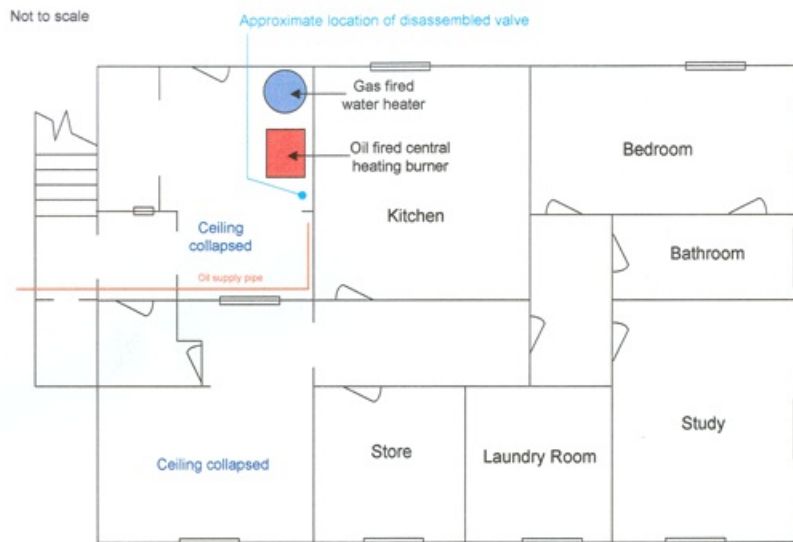


Figure 2. – Basement plan of the main house.

Not to scale



Figure 3. – Ground floor plan of the main house.

Not to scale

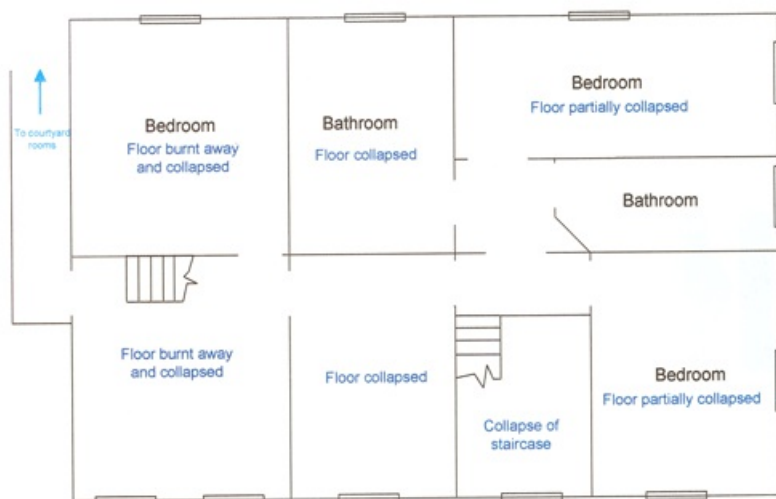


Figure 4. – First floor plan of the main house.

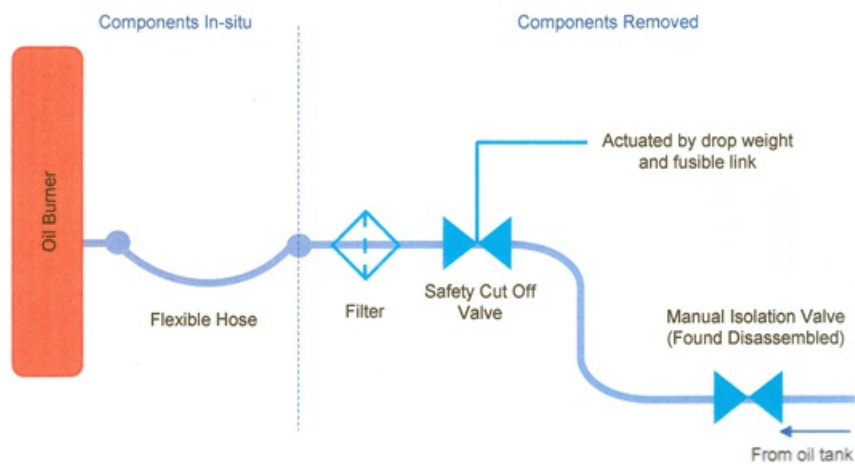


Figure 5. – Schematic of the section of pipework removed from the basement