



Neutral Citation Number: [2022] EWHC 562 (TCC)

Case No: HT-2020-000093

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 16/03/2022

Before:

ADRIAN WILLIAMSON QC (SITTING AS A DEPUTY JUDGE)

Between:

(1) JOHN HENRY SMITH
(trading as Chrisma Supplies, Trimic Foods and
JH Smith)
(2) MARGARET CATHERINE SMITH

Claimant

- and -

(1) JOHN HOWARD
(2) DAVID HOWARD

Defendant

Andrew Butler QC (instructed by **Sanders Witherspoon LLP**) for the **Claimant**
Nicholas Vineall QC (instructed by **Kennedys**) for the **Defendant**

Hearing dates: 7th, 8th, 10th February 2022

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 16th March 2022 at 10:30am”

Adrian Williamson QC sitting as a Deputy Judge:

1. In these proceedings, the Claimants (“Mr. and Mrs. Smith”) claims damages from the Defendants in respect of a serious fire which occurred at an industrial site (“the Site”) near Little Warley in Essex in the early hours of 20 November 2012.

2. By reason of an order made on 2 July 2021 Mr. Roger ter Haar Q.C. (sitting as a Deputy Judge of the High Court) the trial before me was concerned with liability and causation only. More particularly, the parties agreed a list of issues in the following terms:

- “1. Was it an express or implied term of Ds’ tenancy that Ds would not carelessly expose the Plot and the Buildings on it to the risk of fire and/or take reasonable steps to prevent that risk?**

- 2. Was it negligent for Mr. Bloomfield to leave a full IBC in the place where he did, namely in the access way to the Canteen?**

- 3. Did oil from the IBC filled by Mr. Bloomfield materially contribute to the spread of the fire?**

- 4. If it did, did that make any difference to the ultimate outcome?**

- 5. In so far as there was any risk as regards the place where the IBC was left, was that a risk to which Cs consented?**

- 6. Were Cs contributorily negligent by failing to take proper precautions against fire (as particularised in para. 28 of the Defence) at the end of the working day prior to the fire?”**

(In fact, by the end of the trial, it was common ground between the parties that I did not need to decide Issues 1, 5 and 6, and I shall say no more about these issues).

3. The trial took place in person on 7, 8 and 10 February 2022. I heard from two factual witnesses (Mr. Smith and Mr. Howard) and two experts (Mr. Rolfe and Mr. Moncrieff). Further material was submitted by way of Civil Evidence Act Notices. I should, at this point, record my gratitude for the very efficient way this case was prepared and conducted by the parties’ solicitors and counsel.

4. By way of background, it should be explained that the Site was used primarily for the processing of used cooking oil. At the western approach to the Site, there is a main house in which Mr. Smith lives with his wife. Towards the middle of the Site, and on the northern boundary, there are offices, and immediately to the east thereof, two diesel tanks and an area for empty and full Intermediate Bulk Containers (“IBCs”). Just to the south of the offices there is a boiler room, and behind and to the south of it, a portacabin/canteen. The boiler room and the portacabin/canteen are separated from the offices by a roadway. Just to the east of these buildings is a building for the storage and processing of waste oil known as the warming room. (In the above description I am referring to the Site as it was on the night of the fire).

5. The events preceding the fire are not in serious dispute. Mr. Bloomfield, whose evidence was admitted pursuant to Civil Evidence Act Notice, described in his witness statement what had occurred as follows:
 - “10. On 19th November 2012 (namely day before the fire) I had been to Kempton Race course to collect oil which was transferred into the IBC in the back of my van.**

 - 11. I recall it was a busy day on the roads and there was lots of traffic.**

 - 12. Whilst I was stuck in traffic I had a call from John Howard advising that he needed to leave early due to a family matter as someone was ill. I can’t recall the exact time of this call but I think it was around 2pm. He asked that I drop the IBC off on site and lock up when I left.**

 - 13. By the time I arrived at the Fryclean site I would estimate it was around 3.30pm to 4pm although I can’t now recall the exact time.**

 - 14. When I arrived, I recall the site was locked and there was no one on site. I unlocked the gate, reversed up alongside the boiler room being the usual drop-off area.**

 - 15. As there was no one on site to remove the IBC from the van with a forklift truck, I walked over to the IBC storage area and dragged an empty IBC over to the passenger side of the van in the drop off area.**

16. Having been back to site I would estimate that the edge of the IBC was around 4ft to 5ft in front of the boiler room.

17. I then pumped out the oil into the empty IBC as I needed the IBC in the van to be empty to enable me to collect oil the following day.

...”

6. The Claimants’ case (Particulars of Claim paragraphs 24.1 and 24.2) is that Mr. Bloomfield should not have left the IBC (“the Discarded IBC”) where he did, in close proximity to a building which contained heaters and electrical equipment and an adjacent timber structure.
7. Some authority was cited to me on the issue of negligence, but I do not think that it is necessary to extend this judgment by extensive citation of authority. Negligence is doing something which a prudent and reasonable man would not do: Blyth v Birmingham Waterworks (1856) 11 Ex. 781, 784. This is assessed objectively: Clerk and Lindsell on Torts 23rd Ed. para. 7-159. Failure to adhere to common practice may evidence negligence: *ibid* para. 7-194. Further, the prudent man is obliged to “*take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility*”: The Wagon Mound [1967] AC 617, 642.
8. Applying those principles, I have concluded that Mr. Bloomfield is to be regarded as negligent for leaving the Discarded IBC where he did. The key point is that the boiler room was obviously, and was known to be, a source of ignition, as were the kerosene tank and the heaters within the canteen: see Fire Risk Assessment dated January 2012, and cross-examination of Mr. Howard on Day 2 (87/19 to 90/10).
9. Moreover, IBCs are well known to be vulnerable to fire, as an HSE Report recognised in 2007, some years before the fire. Dr Moncrieff broadly accepted this in evidence on Day 3 (7/14-15/13).
10. Furthermore, what Mr. Bloomfield did departed from the common practice observed at the Site, a common practice which I would regard as objectively both prudent and reasonable. Mr. Howard, whom I found to be an impressive

and careful witness, and whose evidence I accept, explained as follows in cross-examination:

“... ”

If we look at page 83 at paragraph 34, Mr. Smith says this, bottom of the page:

“It was not usual practice to leave IBCs containing oil just anywhere on the site, they were either taken to the tipping room for emptying immediately after weighing or if they could not be weighed they would be stored in the IBC storage area opposite the tipping room. To my knowledge an IBC containing oil had never been left anywhere else”

That’s correct, isn’t it?

A. Yes.

Q. There are a number of reasons for this, let me suggest to you. One reason is the evidence Mr. Smith gave orally today, which was the possibility of a flow of oil from an IBC down towards the boilers and the canteen, that might have been a reason, might it not?

A. It might – yes.

Q. Mr. Smith also says that there was a danger presented by traffic, and I think he says in his statement it would be unthinkable for a vehicle to collide with a full IBC that had been left too close to the roadway. That might be another reason, correct?

A. Yes, very true.

Q. A third reason is simply that there’s an increased fire risk isn’t there if IBC are left full of oil outside the areas where they’re meant to be left, would you accept that?

A. Yes, I would, yes.

...”

(Day 2/91/19 to 92/21)

11. Furthermore, no sufficient reason has been advanced by the Defendants for Mr. Bloomfield doing what he did. Nor can it be said there was no reasonable alternative.

On the contrary, the Discarded IBC could have been left in a location less likely to become involved in a fire.

12. However, the main area of contention at the trial related to the issue of causation. The Claimants alleges that Mr. Bloomfield's placing of the Discarded IBC adjacent to the boiler room caused the fire to spread far more quickly than it would otherwise have done. The Defendants dispute this. This is, of course, a question of fact to be assessed in the light of all of the evidence.
13. In my view, the starting point for consideration of this issue is the evidence of Mr. Smith. In his witness statement and in his oral evidence before me, Mr. Smith gave a graphic account to the effect that the fire centred upon the boiler room and the canteen in the first instance, and that the Discarded IBC was centrally involved in this fire.
14. As against that, the Defendants submit that Mr. Smith's evidence cannot be accepted. They say that he did not begin to suggest a critical role for the Discarded IBC until well after 2013, when his insurance claim was settled on unsatisfactory (to him) terms by insurers. They remind me of the strictures as to the fallibility of evidence based on recollection set out by Leggatt, J., as he then was, in Gestmin v Credit Suisse [2020] [2013] EWHC 3560 (Comm) paras. 15-23.
15. As to the latter point, I fully accept that witness evidence, long after the event, may well be unreliable (albeit that it is not suggested that Mr. Smith was being dishonest). However, I do not find Gestmin to be of great assistance. In a document heavy commercial case, the oral evidence may add very little, but this is not such a case. I also bear in mind the limitations on the Gestmin approach set out by the Court of Appeal in Martin v Kogan [2020] EMLR paras. 86-105, to which Mr. Vineall Q.C. on behalf of the Defendants very properly drew to my attention.
16. Having seen Mr. Smith in the witness box for a substantial period of time, I have concluded that he was a careful and credible witness. Mr. Vineall very thoroughly took Mr. Smith through a series of accounts which Mr. Smith or his representatives had given of the fire in the weeks, months and years following

November 2012. In summary, the Defendants' case is that these accounts are inconsistent with the case now put forward. Crucially, they say, Mr. Smith did not pinpoint the allegedly central role of the Discarded IBC in these accounts, even after his insurance claim had been settled.

17. However, I have concluded that, although there are undoubtedly omissions and inconsistencies in the various accounts Mr. Smith has given, these are not such as to undermine his evidence as a whole.
18. Furthermore, I consider that his evidence is supported by a number of other factors in this case.
19. Firstly, there is before me a Fire Report prepared by Essex County Fire and Rescue. The very first entry in the log, at 05:27:41 on 20 November 2012 records that there had been a call for "bulk foam". This strongly suggests that substantial quantities of oil were already involved in the fire for, as Mr. Rolfe, Mr. Smith's expert, explained "*to put water on burning oil would be a detrimental effect*" (Day 2, 145/9-10). This is consistent with Mr. Smith's account, and it should be noted that the Fire Service formed this view immediately and before they had found out very much about the nature of the Site (see entry at 05:48:47 for more details of the Site).
20. Secondly, as is recorded in a Civil Evidence Act Notice, Divisional Fire Officer Samuels told the BBC that his officers at the Site had "*decided looking at the lay of the land and the way the fuel was running away from them ... [that they] did not have to evacuate anybody*". This too is consistent with Mr. Smith's account.
21. Thirdly, Mr. Rolfe carried out a series of calculations from which he concluded in his first report that:

"50. It is my opinion that had the 'relevant IBC' been stored in the designated storage area, at a safe distance from a structure, any resulting structure fire would not have caused the 'relevant IBC' to become involved in a fire. A fire in a structure would, in my opinion, have been limited to the structure its self [sic], with limited external spread. A fire in a structure would typically have been 'aggressively

attacked’ by the initial fire crews, leading to its early extinguishment.

51. The involvement of the ‘relevant IBC’ in early stages of the fire in my opinion caused 1000 l of waste cooking oil to leak on to the floor of the yard. The sloping bund area, to the south by the canteen, could only take a maximum volume of 421 l; the remainder of the 1000 l (approximately 580 l) flowed along the yard to the east. The waste oil, once ignited, spread the fire along the yard to the east (direction of slope). ...”

22. I found Mr. Rolfe, although a less polished expert witness than Dr. Moncrieff who gave evidence for the Defendants, to be a careful and suitably cautious expert. These calculations were the subject of detailed cross-examination, but this did not, in my view, undermine Mr. Rolfe’s assessment. Moreover, as Mr. Butler Q.C. pointed out on behalf of Mr. Smith, Dr. Moncrieff did not put forward any rival calculations of his own.
23. Fourthly, Mr. Rolfe gave what was to my mind persuasive evidence that the warming room would have had substantial fire protection by reason of its construction. In the Note of Meeting between the experts dated 15 June 2021, Mr. Rolfe was of the view that the fire damage would possibly have been exactly the same, whether or not the Discarded IBC was positioned as it was, but wished to know more about the construction of the warming room before committing himself. In his supplementary report of 22 October 2021, Mr. Rolfe provided a sketch of the construction of the warming room, from which he concluded that the warming room was so constructed as to provide substantial protection against fire. I accept this conclusion.
24. Finally, I agree with the point made by Mr. Butler that Dr. Moncrieff, although a very experienced expert, had allowed himself to become too firmly attached from too early a stage to a thesis that this claim should, in effect, fail on causation grounds. Mr. Rolfe, although a less urbane expert witness, is the more persuasive, in my view, because his opinions have developed incrementally over time in the light of the material before him.

25. For these reasons, I accept the factual evidence of Mr. Smith and the expert opinion of Mr. Rolfe. I think that Mr. Rolfe was right to conclude in his supplementary report that:

- “63) A fire in the portacabin and boiler room would, in my opinion, have been limited to the structure itself, with limited external spread. Such a fire would typically have been aggressively 'attacked' by the initial fire crews, leading to its early extinguishment.**
- 64) The involvement of the 'relevant IBC' in early stages of the fire in my opinion caused 1000lts of waste cooking oil to leak on to the floor of the yard. The sloping bund area, to the south by the canteen, could only take a maximum volume of 421lts. When the capacity of the sloping ground had been exceeded, approximately 580lts of cooking oil would have flowed eastwards along the yard hemmed in by the plinth running along the east west axis. The oil carrying burning debris, when ignited would have spread the fire to the east.**
- 65) The 'relevant IBC' had a significant impact on the spread of the fire, and that had it not been for its presence, the fire would have been contained by the fire service and limited to the porta-cabin and the boiler room with minimal damage to the warming room or the remainder of the site.”**

26. I would, therefore, answer Questions 2, 3 and 4 in each case “Yes”. It is not necessary to answer questions 1, 5 and 6.

27. Counsel are invited to agree an order giving effect to my findings. Any consequential matters which cannot be agreed will be the subject of a further hearing.