

Property Insurance Update



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Not so elementary my dear
Watson1

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The recent case of *Fosse Motor Engineers Limited and Others v Conde Nast and National Magazine Distributors Limited (Comag) and Another*¹ held that the Court should not play Sherlock Holmes when determining causation.



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In this case, RPC acted for Comag, the successful first defendant. The claim arose following a fire which broke out on 16 December 2002, at warehouse premises owned by Fosse. The intensity of the blaze was such that anything other than defensive fire fighting was not possible. It also resulted in the warehouse and all contents owned by Fosse and their customers, which included Comag, being lost in the fire.

smoked inside the warehouse and carelessly discarded a cigarette which, to explain the outbreak of fire at approximately 19.05, must have occurred at approximately 18.20 – 18.25.

In the alternative, Fosse argued that the fire was caused by an intruder who obtained access to the warehouse at approximately 18.25, through a door which the agency workers had left open when they went outside to smoke.

evidence from the agency workers that they had not smoked in the warehouse on the night of the fire or at any other time. The allegation of vicarious liability was also denied by Comag. Phoenix took no part in the action.

In its defence, Comag advanced other possible causes to explain the outbreak of fire, all of which were alleged to be equally consistent, or alternatively more consistent, explanations for the conflagration.

The judge commented that the case has some features of a “whodunit” and certainly what “done it”

Causation

Fosse alleged that the fire was caused by agency workers, employed by the second defendant, a recruitment agency, Phoenix Industrial Recruitment Limited (Phoenix) and seconded to Comag.

It was alleged that negligently, and in breach of the rules of the warehouse, the agency workers

Fosse alleged that, as well as Phoenix being liable, Comag was vicariously liable for the actions of the agency workers.

Comag defended the claim arguing that there was no evidence, other than purely circumstantial evidence to suggest that the agency workers had smoked in the warehouse. In fact, Comag had obtained positive

These causes were as follows:

1. an intruder gaining entry before or after 18.00
2. someone who had been a lawful visitor before 18.00 including someone, whether an employee of Fosse or some other person, who had been in the warehouse before approximately 18.00 but who did not leave or
3. an electrical fault.

Forensic experts for Fosse and Comag were unable to agree on the most likely explanation for the outbreak of fire and the issue

before the Judge was whether the available evidence enabled him to find, on the balance of probabilities, what had caused the fire and, therefore, whether or not Comag was liable.

The decision of the court

The judge identified that it was incumbent upon Fosse to prove, on the balance of probabilities, that the fire was caused in the manner which they had alleged. When considering the relevant case law², the judge confirmed that what the court was not entitled to do was to identify the possible explanations for the outbreak of fire, rank them in percentage terms as possibilities and then select the possibility with the highest percentage as the probable cause. Such an approach would only be legitimate if the highest ranked cause was the one which, on all the evidence, the court was satisfied was the probable cause of the incident or loss in question.

Considering the case of *Rhesa Shipping Co v Edmunds*³, the judge identified that it was not open to the court to adopt the approach of Sherlock Holmes, eliminating the impossible causes, with whatever cause remaining, no matter how improbable, explaining the cause of the fire.

Having considered all of the witness and expert evidence the judge was not persuaded that the fire was caused by one of the agency workers carelessly discarding a cigarette. In fact, he found that "on a balance of probabilities I am satisfied that the fire was not caused by a discarded cigarette discarded after 6 p.m or at all." Fosse's primary case therefore failed.

On the basis of the available evidence, the court was also able to exclude, on the balance of probabilities, the fire being caused as a result of malfunctioning electrical equipment or as a result of an intruder gaining access to the warehouse after 18.00. As a

result of the latter finding, Fosse's secondary case also failed. What the evidence did not enable the court to do was to distinguish in terms of likelihood between the fire being caused by an intruder who gained access before 18.00 and a carelessly discarded cigarette, discarded by someone who was not an employee or secondee of the first defendant.

The judge held that he was drawn to the conclusion that "whilst the cause of the fire was not attributable to the agency workers, it is not possible on the balance of probabilities to determine that the fire was caused by either of the two remaining feasible causes." As he said: "The outcome or explanation is anything but "elementary". However, I am in no doubt that Fosse has failed to prove its case on a balance of probabilities".

Vicarious liability

In view of the judge's finding on causation, it was not strictly necessary for the court to address the issue of vicarious liability in detail. However, Akenhead J took the opportunity to summarise his findings on the two sub-issues under this heading.

First, on the issue of the identity of the relevant employer for vicarious liability purposes, he found that although the agency workers had been employed by Phoenix, they were also to be treated as employed by Comag as they had been working under the direction of and for the benefit of Comag.

Second, if the fire had been caused by a cigarette discarded by one of the agency workers, the judge found that such an act would have been outside the course of their employment in view of the strict no smoking policy in force in the warehouse and vicarious liability would not apply. However, had the fire been caused by an intruder entering the warehouse whilst the agency workers were on a smoking break, this would not have been the case.

Conclusion

The claims of Fosse and the other claimants were therefore dismissed and judgment was given in favour of Comag.

This case reinforces that, in order to be successful, a claimant needs to be able to persuade a court that its explanation for the cause of damage is more probable than not, ie there is a greater than 50% chance that its explanation as to the cause of damage is the correct explanation.

The decision also confirms that the court, when faced with competing improbable scenarios as to the cause of damage, cannot simply find in favour of the least improbable cause. The court has to find causation on the balance of probabilities and this can only be achieved where the supporting evidence is sufficient to support conclusively one possibility over other competing possibilities. Where this is not possible on the evidence or the possibilities are all improbable, the court should find, as here, that the claimant has failed to discharge its burden of proof.

Causation in this case, as in many fire claims, turned on the credibility of lay witnesses. Such cases require a careful analysis of not only the factual evidence but also the expert evidence advanced by both parties.

Reynolds Porter Chamberlain LLP represented the First Defendant, Conde Nast and National Magazine Distributors Limited.

¹ [2008] EWHC 2037 (TCC)

² *Rhesa Shipping Co SA v Edmunds* (The Popi M) [1985] 1WLR 948
La Compania Martiartu v Royal Exchange Assurance Corporation [1923] 1 K.B. 6540
Ide v ATB Sales Ltd [2008] EWCA Civ 424
Datec Electronic Holdings Ltd v United Parcels Service Limited [2007] 1WLR 1325

Kiani v Land Rover Limited [2006] EWCA Civ 880

³ The Popi M -see 2 above

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