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| PARTIES: | KEITH TREVOR LOCK trading as MEGA MOVIES and ASCOM ELECTRONICS<br><br>AND:<br><br>URSULA JUDITH HINDMARSH<br><br>v<br><br>TERRITORY INSURANCE OFFICE |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | 39 of 1992 |
| DELIVERED: | 26 February 1997 |
| HEARING DATES: | 18-21, 24, 26-27 April 1995 |
| JUDGMENT OF: | Kearney J |

**REPRESENTATION:**

*Counsel:*

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| Plaintiffs: | J.E. Reeves |
| Defendant: | L.G. Foster S.C. with him J.V. Nicholas |

*Solicitors:*

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| First plaintiff: | McBride & Stirk |
| Second plaintiff: | Caroline Scicluna & Associates |
| Defendant: | Martin & Partners |

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| Judgment category classification: | B |
| Judgment ID Number: | kea97007 |
| Number of pages: | 80 |

kea97007

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 39 of 1992

BETWEEN:

**KEITH TREVOR LOCK trading as MEGA MOVIES and ASCOM ELECTRONICS**
First Plaintiff

AND:

**URSULA JUDITH HINDMARSH**
Second Plaintiff

AND:

**TERRITORY INSURANCE OFFICE**
Defendant

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 26 February 1997)

**The plaintiffs' claim**

By their Amended Statement of Claim filed on 18 April 1995 the plaintiffs claim that in consideration of premiums they paid to the defendant, it insured them by insurance policy AS5018222 of 16 February 1989 against certain loss or damage by fire for 12 months. This indemnity was to the amount of $1,000,000 for loss or damage by fire to the contents of 2 businesses, Mega Movies and Ascom Electronics, conducted at

premises at the corner of Railway and Gregory Terraces in Alice Springs, and $400,000 for resulting loss of gross profits of the businesses. The plaintiffs claim that -

> "4. During the currency of the policy, namely on the 6th of December, 1989, the contents of the businesses were destroyed and/or damaged by fire.
> 5. As a result of the said fire the Plaintiffs suffered loss.
>
> 6. *In breach of the policy the Defendant has failed or refused to indemnify the Plaintiffs for the abovementioned loss.* Particulars of the loss have already been provided by the Plaintiffs to the Defendant." (emphasis added)

For this alleged breach, the plaintiffs claim damages, interest and costs.

**The defendant's defence to the claim**

By its Defence the defendant admits that it issued the policy in respect of the 2 businesses and the premises; and that it thereby provided the plaintiffs with insurance cover for the period 9 April 1989 - 16 February 1990 in accordance with the terms of the policy for the "contents of every description" up to the amount of $1,000,000, and for "loss of gross profits" to $400,000. The defendant further admits that a fire occurred at the premises on 6 December 1989. It does not admit par5 and it denies par6 of the Amended Statement of Claim, above. The defendant then spells out its defence to the plaintiffs' claim, in pars7 and 8:

7. "In answer to the whole of the Statement of Claim, the defendant admits that it has refused to indemnify the plaintiffs under the policy but says that it is not obliged so to do for the following reasons, namely:

(a) it was a condition of the policy that any loss or damage to or destruction of any insured property should be fortuitous but, in the events which have happened, the defendant says that *the claimed loss, damage or destruction was not fortuitous*;

(b) it was a further condition of the policy that *the plaintiffs should take all reasonable precautions to prevent loss of, destruction of or damage to the insured property but*, in the events which have happened, the defendant says that *the plaintiffs failed to comply with the said condition and breached it*: and

(c) in the events which have happened, *the plaintiffs have made a fraudulent claim under the policy*.

…

8. In further answer to the whole of the Statement of Claim, the defendant says that *the fire was deliberately lit by the plaintiffs, or either of them, and that accordingly, the plaintiffs committed arson and are thereby prevented from recovering under the policy*.

PARTICULARS OF ARSON

As to the allegation that the fire was deliberately lit by the plaintiffs, or by one or other of them, the following particulars are furnished:

(i) the fire was initiated by means of a soldering station placed on top of the electric guillotine located in the storage area of the premises situated behind the video tape display area and in front of the workshop area.

(ii) Accelerant in the form of "blanket wash" was probably employed in setting the fire.

(iii) The soldering station was placed upon the said electric guillotine and organised to initiate the fire at some time during the period between about mid-morning on 5 December 1989 and about 6.00 am on 6 December 1989.

(iv) The soldering station was so placed and organised by [the first plaintiff], or alternatively, by [the second plaintiff].

(v) It is not alleged that the plaintiffs acted in concert with each other.

(vi) It is alleged that only the plaintiffs had the opportunity to set the fire. It is further alleged that each of them had a motive to do so. In the case of [the first plaintiff], the motive was financial in the respects outlined in paragraph (vii) below, and also in order to deny [the second plaintiff's] claim to a share of the business or businesses conducted at the premises or to hinder or frustrate her efforts to pursue that claim. The fire also provided to [the first plaintiff] an opportunity to move the video hire business from the premises at Cnr. Gregory and Railway Terraces, Alice Springs, which premises were leased to [the second plaintiff] alone, to other premises controlled by him and in which [the second plaintiff] had no interest. It also allowed him to assert to his bank, Westpac Banking Corporation, and to other creditors of the business, that the financial and accounting records of the businesses had been totally destroyed in the fire, although, in truth, they had not. In the case of [the second plaintiff], the motive was financial as outlined in paragraph (vii) below.

(vii) Each of the plaintiffs stood to benefit from the fire in that, at all material times, including in particular in the months of September, October, November and December of 1989, each of them was under extreme financial pressure and unable to pay his or her debts as they fell due as evidenced by:

(a) The plaintiffs were unable to pay creditors, including vital suppliers, when their debts fell due for payment or at all, and those creditors were pressing for payment;

(b) The plaintiffs were unable to realise sufficient assets to meet creditors' demands or to satisfy the reasonable requirements of their banker, Westpac Banking Corporation ("The Bank");

(c) Various cheques drawn by the plaintiffs were returned by the Bank;

(d) The Bank was controlling drawings on the plaintiffs' trading accounts by returning cheques;

(e) The Bank was pressing the plaintiffs for up-to-date financial statements relating to the plaintiffs' business or businesses which the plaintiffs were unwilling and/or unable to provide." (emphasis added)

It can be seen from this Defence that the defendant admits certain basic parts of the plaintiffs' claim - the existence of the policy of insurance at all relevant times, and the fire on 6 December 1989 - but relies on certain alleged facts as warranting its refusal to indemnify the plaintiffs under their policy, on the basis that the plaintiffs were thereby in breach of certain conditions thereof. Its primary allegation is that the first plaintiff deliberately set the fire of 6 December, which caused the damage. In the trial before me all questions of the quantum of any loss were deferred. The sole issue originally was whether the defendant was liable to indemnify the plaintiffs, or either of them, under the policy for their loss; later the issue was further narrowed, by consent.

**The premises and the fire; a general description**

The plaintiffs conducted two businesses at commercial premises at the corner of Gregory and Railway Terraces, leased to the second plaintiff; see photo 1, Exhibit D19. At about 6.15 am on 6 December 1989 a fire was discovered burning in the back section of the premises. It was promptly fought by the fire brigade, and brought under control within an hour or two. There was smoke damage to the front section of the premises, but no fire damage; the degree of fire damage to the back section varied.

Exhibit D1 is a layout plan and a 3D-drawing of the premises. The first of the businesses, Mega Movies, hired out videos; it did so in a large open area in the front section of the premises; see photos 6-11, Exhibit D11. There were some 49 shelves displaying video movies. The public entered this area from Gregory Terrace (photo 5, Exhibit D11 and photos 2 and 5, Exhibit D15), selected their videos, and took them to the counter to hire them out.

The back section of the premises comprised in part a workshop in which the other business, the repair of electrical appliances, was carried on under the business name 'Ascom Electronics'. This workshop area was right at the back of the premises; here the repair work was carried out. See Exhibits D4 and D5, and photos 34-37 in Exhibit D11. Also within the back section, between the workshop area and the large open front video section, was a storage area, in which there were, inter alia, various items of equipment as shown on the diagram Annexure "A". Also within the storage area were stacks of paper and other items; they cluttered up the area, so that it was not easy to move around.

A wide shelf, called a 'mezzanine', went around the walls of the workshop area and the storage area, about 8 feet above the floor. There were some bits and pieces of old electrical equipment on the part of this shelf which was in the workshop area; see Exhibit D4 and photo 18 in Exhibit D15. On the part of it in the storage area there were historical files

and records, relating to the first plaintiff's earlier business activities; see photos 23-25 in Exhibit D15.

There was a door from the open front section of the premises, the video hire area, which provided access to the back section comprising the storage area and the workshop area; this door was normally locked late at night, when the video hire business closed up for the day. See photos 48 and 50 in Exhibit D15.

There was an office and counter in the video hire area, and a second office in the front section between that area and the storage area, where accounting work was carried out.

**The case the defendant sought to make out**

The defendant contended first that the fire commenced on top of the electric guillotine located as shown in Annexure "A", and Exhibit D1, and photo 22 Exhibit D11, about half-way along in the storage area, and thence burned out into that area, and into the workshop area. Second, it contended that the fire was *deliberately* started by means of a soldering station (described on p8) placed on top of the electric guillotine, probably by the first plaintiff but possibly by the second plaintiff; the arsonist probably used as an accelerant a solvent "Blanket Wash" in a drum found in that area after the fire. See particulars in 8 (i) - (iv) of the Defence, at p3; and photos 22, 23 and 24, Exhibit D11.

The defendant contended that the soldering station would not ordinarily have been on the guillotine, because it was one of two soldering stations ordinarily kept on the work-bench in the workshop area at the back (see photos 34-37, Exhibit D11), used there by the technicians who carried out the electrical repair work. In the experience of those technicians, the storage area was never used as a place to carry out any electrical repairs.

The soldering station in question comprised a plastic box containing a transformer, and a dial to set the temperature at the tip of the soldering iron. On top there is a bracket on which an ordinary soldering iron sits in a coil, on a low-voltage lead from the base. The remains of a plastic box in which a transformer was located was found next to the guillotine, after the fire. The defendant contended that that was *not* a place where such an item would be expected to be found - because it was *not* a place where a soldering station would be used for work purposes, and there was no other reason for it to be there. The electric guillotine had never been used, within the memory of a number of employees.

The defendant contended that at the time of the fire the first plaintiff wanted to sort out a property dispute which he then had with the second plaintiff; see p9. Further, both plaintiffs had a financial *motive* to set the fire; see particulars 8(vi) and (vii) of the Defence at pp4-5. This was because both businesses were then in financial trouble, and had been for many months. Suppliers of videos, vital to the continued success of the video hiring business, were not being paid; ultimately, some of them

instituted legal process to recover what was due to them. The plaintiffs' banker, Westpac, had been pressing them to reduce the businesses' overdraft; the plaintiffs made promises, statements and representations to Westpac over a period of months, as to the ways in which they would reduce the overdraft. None were fulfilled, to any substantial degree. The first plaintiff had left the Yeperenye Centre owing his landlord some $130,000 in unpaid rent. He had been sued by the Commissioner of Taxation for unpaid group tax, outstanding since 1988.

The way in which the plaintiffs acquired fresh video stock for Mega Movies changed in the last few months of 1989. Instead of obtaining new video releases from distributors as they issued, they obtained them some weeks afterwards, second-hand, after their major competitors already had them. The Ascom Electronics business had been run down to virtually nothing by the date of the fire. The reasons the plaintiffs ran their businesses in this way were not clear to the defendant.

From April 1989 until the end of that year, the two plaintiffs were arguing between themselves about dividing their property, following the break-up of their personal relationship; in particular, their dispute centred on which of them was to run the 2 businesses. On Sunday 3 December the first plaintiff entered hospital, concerned that he had had a heart attack; he remained there until the morning of Tuesday 5 December. While he was in hospital, the second plaintiff at about 12.30am on Tuesday 5 December attended at the subject premises in Gregory Terrace, with a locksmith,

Mr Ride, who on her instructions changed the lock to the outer doors of the premises in Gregory Terrace, and the lock to the internal access door from the front section to the back section. He did not change the lock on the roller door in the workshop area, giving access to a rear laneway, because it was locked by the padlocks, only from the inside.

The fact that the second plaintiff had caused the locks to be changed was brought very quickly to the attention of a person I will call Ms H who was at that time the first plaintiff's de facto, living with him at his home at No.3 Winnecke Street, Alice Springs. Ms H was working in the business at the time, and had taken over some of the accounting duties. The defendant says she became very agitated when she learned of the change of locks because she could see her and the first plaintiff's position deteriorating vis-a-vis the second plaintiff, since the second plaintiff was the lessee of the premises and had apparently now taken control of them.

At about 5am on Tuesday 5 December Ms H went round to see a Mr Barratt, the senior technician employed by the first plaintiff in the Ascom Electronics business since June 1989. He was living in a large storage area in an industrial unit owned by one of the first plaintiff's companies. According to the defendant, Ms H told Mr Barratt that the first plaintiff was in hospital, and the second plaintiff had changed the locks; she instructed him to go to work at his normal time that morning, 7.30am, behave as if he did not know the locks had been changed, and take away from the back workshop area the first plaintiff's tool box and a valuable

piece of testing equipment used in the Ascom Electronics business, called an 'IFR'.

Mr Barratt went to work at about his appointed time, 7.30am. The second plaintiff was in the premises. She unlocked the doors, and allowed him in. He went out to the back section, took the two items mentioned by Ms H, opened the roller doors at the back, and put the items in his car which he had parked out the back. Shortly afterwards he left the premises and went around to No.3 Winnecke Street. He arrived there at about the same time as the second plaintiff; he saw her trying to get into the house. He understood that Ms H was in the house. Eventually, the second plaintiff left. He later handed over to Ms H the two items she had asked him to obtain. He went back to the business premises, a bit later in the day.

Meanwhile, the first plaintiff, presumably having learned about some of the events of the day, had checked himself out of hospital. A Mr Wolstencroft drove him home. On the way, at about midmorning on Tuesday 5 December, with his hospital band still on his wrist, he called in to see a Mr Kilgariff, a real estate agent. The first plaintiff was highly agitated and said to Mr Kilgariff words to the effect: "I need to find some new premises before something bad happens". Mr Kilgariff gave him a lead as to the location of possible alternative business premises.

By the time the first plaintiff left hospital the second plaintiff had made available to employees at Mega Movies one of each of the keys to the new

locks for the front door and the internal door. Mr Ride said he had given her two keys for each of those locks.

The defendant contends that the second plaintiff thereby retained one set of keys and gave the other set to the first plaintiff, through intermediaries at the premises. It contends that the *only* people who had keys to the premises as at the date of the fire, 6 December, were the first and second plaintiffs, because of the then very recent change of locks. The defendant contends that the premises were not broken into, and the fire was set as an "inside job".

Later in the morning of Tuesday 5 December the first plaintiff went to the business premises with Ms H; they talked to the staff about what had happened. The first plaintiff came back to the premises later that day. He was at the premises on three further occasions during the course of the evening of Tuesday 5 December.

These attendances came about because a Mr Lowe, who was working on the 8am-12 midnight shift in the video hire business as the sole retail attendant, had to go away twice to attend to a malfunctioning automatic teller machine, that being part of his normal (day) job; see p26. The first plaintiff came to the premises to 'look after the shop' on both occasions Mr Lowe was away, between 9.00pm and 11.00pm on Tuesday 5 December. In between those two attendances the first plaintiff went home; he returned to the premises for a third time that evening at about 11.55pm to lock up the

premises, since Mr Lowe did not have one of the new keys. He locked up the premises with Mr Lowe and left, taking the evening's takings with him. Ordinarily these takings were put away in a special place in the premises, and dealt with the next day. The first plaintiff left the premises at about the same time as Mr Lowe.

The premises were left secured. The internal door to the back section was shut; it can only be opened from the front section by a key; see photo 50 in Exhibit D15. The defendant assumes that the first plaintiff went home. It noted the time which then elapsed between midnight on Tuesday 5 December when the first plaintiff and Mr Lowe left the premises, and when the fire was first noticed at about 6.13am on Wednesday 6 December; it contends that these hours of the night, and their possession of the keys, provided the plaintiffs with the *opportunity* to set the fire.

The newly-fitted locks were deadlocks; in addition there was an existing padlock on the front door of the premises, which the second plaintiff had not replaced. See photos 4 and 5, Exhibit D11 and Figures 16 and 17, Exhibit D19. When the firemen sought entry on the morning of 6 December to fight the fire, they found that the shaft of this padlock had been severed but so arranged that this was not immediately apparent. They had set about cutting the padlock with bolt cutters, to effect entry, and in the course of doing that realized that the shaft had already been severed. That severing was the only indication of a forcible entry to the premises.

The defendant's contention was that there was no other sign of forcible entry, and only 2 persons had keys to the new locks to the exterior front door and the internal access door to the back section. The defendant also contended that there could be no real dispute that the fire started in the location and by the means for which it contended (p7), in the sense that a soldering station was somehow involved in the setting of the fire.

It can be seen that the defendant relies on a *deliberate* incendiary act by the plaintiffs (or one of them) who had both *motive* and *opportunity* to do so. It is clear that arson is an affirmative defence to an action on a fire policy. The insurer bears the burden of establishing that defence. Hence the defendant presented its case first.

**The evidence adduced by the defendant**

The defendant called 13 witnesses and tendered in evidence a considerable volume of written material. I deal first with the evidence of its witnesses.

*(1) Mr Kilgariff*

Mr David Kilgariff, a real estate agent, testified that at about 11am or 12noon on Tuesday 5 December 1989 the first plaintiff came to his office, wearing shorts and a T-shirt, a hospital name tag on his wrist; he was a bit short of breath and distressed. Mr Kilgariff testified that they spoke for a minute or two, and that the first plaintiff, having explained that things were "not too good" between himself and the second plaintiff, asked Mr Kilgariff

to find him “some alternative accommodation for my business before something bad happens”. Mr Kilgariff said he informed him of vacant business premises nearby in Railway Terrace, which were available for lease. Mr Kilgariff was cross-examined about various conversations he had had with various people, but was unable to recall them. I found Mr Kilgariff an honest witness.

*(2) Mr Barratt*

Mr Barratt’s evidence was that he was employed as a technician by Ascom Electronics from June to December 1989. A Mr Ryan was also employed by Ascom Electronics during that period, as an apprentice technician. Their work was essentially the repairing of electronic and electrical appliances and equipment. They carried out that work on the bench at the rear of the premises, his work place being towards the right hand side of the bench along the rear wall while Mr Ryan’s work place was on the left hand end of the bench. The bench ran along the southern wall under the mezzanine, from the roller door almost to the western wall of the premises; see photos 34-37, Exhibit D11. There was a second work bench on the eastern wall, near the roller door; this was used for bending and drilling metal.

Mr Barratt said that for about 50% of his time he carried out repair work away from the premises. He did not carry out repair work at any place within the premises, other than at his work bench; nor had he seen Mr Ryan do so.

He testified that two replacement soldering stations had been bought in October 1989; he used one (Exhibit D12), keeping it at his work station on the bench (see photo 37, Exhibit D11), while Mr Ryan used the other, also at his work station. He was very positive that both soldering stations were at their respective work places on the bench, at the close of business on Monday 4 December 1989. Of the 2 replaced soldering irons, he said that one had been thrown away and the other retained; it was kept either on the second work bench, or on the safe indicated in Exhibit D1. He said that he had never seen any of the 3 soldering irons thus available, in the storage area.

He considered Exhibit D1 was an accurate depiction of the premises; he described in detail the layout and contents of the front section of the premises and of the storage and workshop areas in the back section, as at 6 December 1989, by reference to that plan. He said that the keyhole in the wooden interior access door was on the side facing the front section; see photo 50, Exhibit D15. The roller door at the back was locked on the inside after work each day, by 2 padlocked bars. There were windows on the southern wall of the back section, along the height of the ‘mezzanine’ shelving. He said that there were bars across some of them and wire across the rest; compare photo 14, Exhibit D15, from which it is clear there was steel mesh. He said that the steel shelving with a steel back which separated the storage area from the workshop area was about 8 feet high - the shelving

faced the workshop area, its steel back the storage area; see photos 20 Exhibit D15, and Fig3 Exhibit D19.

He said that the job records of Ascom Electronics were kept on paper, and not on computer; he explained how they were generated and kept, with completed jobsheets being kept at the Ascom Electronics counter in the front section.

He described the essential piece of equipment normally kept in the workshop area and called an 'IFR', and its use. He said that it was always kept there except when it was taken out on jobs, and that it had never been taken home by the first plaintiff.

He detailed his normal daily routine of opening up the premises, as the first employee to start work each morning, normally at 7.30am. He would unlock the front door, enter and turn on various power switches not taped down on the power board shown in the photos in Exhibit D3, unlock the interior access door, and commence work in the workshop area. He had the 4 keys necessary.

He testified in chief that the repair work dropped off "noticeably" in the last month or so of 1989, with "essentially very little work within the workshop", although there was outside work. However, in cross-examination, faced with his answer on 25 May 1990 to Q116 by a Mr Ellis, an investigator employed by the defendant, he agreed that he had said that in

that period they were “all quite well occupied, so business was doing rather well”. He agreed that this assessment was more likely to be accurate, since it was made only 7 months or so after he fire, but explained that he made it bearing in mind the number of people working in the workshop at the time; that number was then reduced, since Mr Ryan was away. Compare Mrs Little’s view at p29, and Mrs Schmidt’s at p31. Mr Barratt agreed that he had also said on 25 May 1990 that the first plaintiff had lent a hand at that time, working at the work bench. He testified that he had only seen the first plaintiff do repair work on one occasion, and that was in the workshop area; he had never known of anyone doing any repair work in the storage area. In cross-examination he agreed that at the coronial inquest in 1991 into the fire he had said that he was “not conscious” of whether or not the electric guillotine was being worked on, in the weeks before the fire. He was not conscious of any drums of fluids being in any particular positions around the workshop or storage areas, in that period. He said that the first plaintiff was working on the offset printer (shown in Exhibit D1 and Annexure “A”), located under the mezzanine shelf near the western wall in the storage area, within a few weeks before the fire; this was 1-2 metres away from the guillotine, as located in photo 37 in Exhibit D6.

He gave his account of the events of 5 December 1989 - being awakened at about 5am by a “very tearful” Ms H, who told him that the first plaintiff was in hospital, and the second plaintiff “had changed the locks on the premises and was going to take the place over”. She asked him to get the IFR and the first plaintiff’s toolbox and bring them to No.3 Winnecke

Street “because perhaps [the second plaintiff] might get this equipment and try to sell it”, and instructed him “to try and act as normal as possible” when he went to work. He found when he went to work at about 7.20 am on 5 February that his key did not fit the front door lock. However, the first plaintiff was already there, let him in, and allowed him to go through to the back section; she unlocked the interior access door to that section.

His evidence was that he considered that the 2 soldering stations (p15) were in their normal places on the work bench at the time - “everything appeared to be in its place”. In cross-examination he agreed that he had told Mr Ellis on 25 May 1990 (about 7 months after the fire) in answer to questions nos.131-2, that Mr Ryan’s soldering iron was missing from his work bench the day *before* the fire - that is, it was missing when Mr Barratt was briefly in the workshop area on the morning of 5 December 1989. However, at the coronial enquiry into the fire on 9 December 1991 he resiled from that; see Exhibit D7, coronial transcript pp285-6, where he explained that he had been confused as to dates, and that the soldering station was *not* missing from Mr Ryan’s work bench on 5 December, but *was* missing on 6 December. I accept his testimony before me on the point; see above.

He said that he did not look into the storage area at that time (5 December). He unlocked the 2 padlocks on the roller door, put the 2 items requested by Ms H and his own box of spare parts into his car outside, re-entered, and relocked the roller door with the padlocks. He observed that

there had been difficulty for some time in the business acquiring spare parts, which was why he had his own supply.

He described a "heated" discussion which he then heard taking place in the front section between the second plaintiff and Ms H. He then left the premises; it was about 7.45am. He said that he drove around aimlessly for about an hour and then went to No.3 Winnecke Street, arriving between 9am and 9.30am. The first plaintiff had arrived shortly before him, and was seeking entry; he obtained the keys to a van at No.3 from her. He then drove off in the van, in a "very agitated state", talked to a friend for 1 -1½ hours, and then drove back to No.3, arriving at about 10.30-10.45am. There he spoke to Ms H. Shortly afterwards the first plaintiff arrived; he agreed that this could have been at 11-11.30am. He could not recall what they then said to each other. He took the first plaintiff's tool box and the IFR into No.3, at the request of one of the plaintiffs.

He then returned to the business premises. He did not go out to the back section. Ms Schmidt (see p30) was present together with a person he knew as 'Raelene'. Later the first plaintiff arrived. Mr Barratt left later, and did not return to work that day.

He arrived at work at about 7.20am next day, 6 December 1989, to find the premises on fire. He met the first plaintiff and Ms H outside and described the first plaintiff as "certainly distraught" at the time. They were allowed to enter the premises at 7.45am. They proceeded to assess the

damage. He described the storage area as then “one very unholy black mess”; it was cordoned off, to prevent access. The workshop area was not cordoned off. He spent about 15 mins there.

He noted that the rear windows were shattered, with glass on the floor. See photo 14 Exhibit D15, and firefighter Clark’s evidence at p39.
Mr Barratt, coincidentally, has some qualification in fire technology, and experience with fires. He said in cross-examination that he had considered the way in which the window glass was shattered might indicate that the windows had been deliberately broken, not by the fire. In cross-examination and re-examination he was taken to an earlier opinion he had expressed to Mr Holloway on 25 January 1990, some 7 weeks after the fire, that the fire had been deliberately lit, was hottest above the printing press against the western wall in the storage area, but had possibly ignited closer to the shelving wall between the storage area and the workshop area, with accelerants used. I reject his opinions where they conflict with the opinions of the expert Mr Cox. I note from photos 12 and 14 in Exhibit D15 that the steel mesh across all of the 3 rear windows in Exhibit D1 was unbroken after the fire.

Exhibits D4 and D5 show the workshop area as he saw it on 6 December, including the location of his soldering station. He could not say if he had ever before seen the drum shown on the photos in Exhibit D6.

On a later occasion, over some 3 days, he sifted through the items in the workshop area, itemizing recognizable items and making lists of them. He found his own "rather charred" soldering station (Exhibit D12) on his work bench; see photo 37, Exhibit D11. He said that Mr Ryan's soldering station was not on the work bench, while the third soldering station (the older one) was either on the safe or on the other bench near the roller doors. He said that he found no bits of soldering stations in the workshop area or in the storage area. He said that later the first plaintiff re-established the video hire business in the premises which Mr Kilgariff had earlier indicated.

I found Mr Barratt to be a careful and reliable witness, but his qualifications as an expert on fires were meagre compared with Mr Cox.

*(3) Mrs Gates*

Mrs Gates testified that she had worked on and off over several years for Mega Movies, and for an earlier video hire business "Budget Video" conducted by the first plaintiff,. She explained the routine of locking up the premises at the end of the 8pm - midnight shift: counting and putting away the cash received, switching off certain power switches at the power board, and locking and checking the door. See also Mr Lowe's account at p26. I do not consider that Mrs Gates had a very clear recollection of what was where, in the premises, but she said that the north west corner of the storage area (position number 9 in Exhibit D1) was the first plaintiff's "office" or "corner", where he "used to be frequently working".

She knew of the dispute between the plaintiffs in the month before the fire. She was aware that new video releases were not being promptly received for several months prior to the fire, and that this was different from the previous practice when "we used to get a lot of new releases in".

*(4) Mr Ryan*

Mr Ryan, now a qualified radio/TV technician, had served a continuous apprenticeship with the first plaintiff from September 1986 to 1989. Between 1986 and 1989 Ascom Electronics conducted its business from several different premises, but eventually from the premises at the corner of Gregory and Railway Terraces. Mr Ryan confirmed the layout there was as shown on Exhibit D1 and that his own work area was at the left side of the work bench at the rear, nearest the roller door. See photo 34, Exhibit D11. He kept his soldering station on that bench beside him, on his right. He was not aware whether a new soldering station had been bought for Mr Barratt's use, but one had been bought by Ascom Electronics some months before the fire for his own use. He was going to purchase it from the business, paying for it by regular weekly payments.

He had left Alice Springs to attend trade school in Darwin about 3 weeks before the fire; he did not return to Alice Springs until about 1½ weeks after the fire occurred. He did not recall where his soldering station was at the time he left for Darwin.

He testified that within the storage area there were 2 photocopiers, one against the western wall; an offset printer next to it; a manual guillotine against the steel Brownbuilt shelving which separated the workshop and storage areas; pallets of paper between this shelving and internal offices used for accounts work; old video equipment; and computers in this office area. He thought that the electric guillotine was "near the offset printer", and "next to the [manual guillotine]", but he could not "exactly remember" its location. Compare Mrs Schmidt's description at pp31-32, and the layout in Exhibit D1 (the correctness of which he affirmed, above), and Annexure "A".

He said that he had never seen anybody using the electric guillotine. He had not spoken to the first plaintiff about it. He recalled some paper and some inks being stacked on it, at one stage. He could not remember whether part of the top of the electric guillotine was ever used as a work bench. On that aspect, Exhibit D8 is a 9-page transcript of an interview which he had with Mr Ellis on 24 May 1990, some 5½ months after the fire. Mr Reeves of counsel for the plaintiffs relied on one of those pages, 282, as containing a prior inconsistent statement by Mr Ryan, to the effect that the electric guillotine *had* been used as a work bench. However, understood in their context, I do not consider that Mr Ryan's answers on 24 May 1990 constitute a ground for disbelieving his testimony in court - that he recalls some paper and inks being stacked on the electric guillotine at one stage, but could not remember whether it had ever been used as a work bench. I also note his statement in Exhibit D8 that the electric guillotine had never been

used, because, as he believed from what the first plaintiff had told him, the blades had been "buggered" by misuse.

He was aware of a dispute between the plaintiffs, before the fire. He believed that the businesses were facing financial problems in the months before the fire.

I found Mr Ryan to be an honest witness, whose recall was not very good.

*(5) Mr Knott*

Mr Knott was apprenticed to the first plaintiff in the Ascom Electronics business, from about October 1987. He left in June or July 1989, some 6 months before the fire, and had not returned. He said that the 2 businesses had moved to the subject premises at the corner of Gregory and Railway Terraces, early in 1989. He had worked in the workshop area, at the work bench "under the mezzanine along the back walls"; see photo 18 in Exhibit D15, and photos 34-37 in Exhibit D11.

He said that in what has been called the 'storage area', "the accounts and stuff were done". It was "where the office was … also storage of units being repaired … a few desks where some of the ladies worked and there was just some kind of general storage there as well." He located these "desks" along the north wall "under the mezzanine"; he also identified by reference to Exhibit D1 where the "account lady" sat, "facing the

workshop." He remembered the electric guillotine, and had never seen it used; he located it as "really in the middle of that storage area". He could not remember if it had had things stacked on it. He never carried out any customer repairs in the storage area, or saw anybody else do so.

I found no reason not to accept Mr Knott's evidence.

*(6) Mr Lowe*

Mr Lowe, a bank officer, worked casual night shifts in the plaintiffs' Mega Movies business at the premises, for about 3 nights a week for some 6-8 months until the fire on 6 December 1989. He affirmed that the answers in a statement Exhibit D9 he had made on 12 January 1990, some 5 weeks after the fire, were correct. In it he referred to Mega Movies' trade having slackened off in the last couple of months before the fire. His testimony was that business was "consistently quiet" in that period. In his statement he said that the business was not acquiring new video releases until about 2 weeks after their release date, and some of these came from other video shops, and not direct from the distributors. He testified that that practice occurred in the industry; he was aware of the main video suppliers. He affirmed in his statement that the first plaintiff came back 3 times on the night of 5 December 1989, for the reasons for which the defendant contended (p12); he did not know until the first plaintiff returned the third time, at about 11.55pm, and told him, that the locks had been changed. At closing time he had "done the balance [of the cash] and shut down the computers", except one. He shut down the switches "that I had been shown"

on the switchboard. He said that those which were not to be shut down "were either taped or marked in some other way". He testified that he thought about "4 to 6" were taped, so that they were permanently in the "on" position, while some others were marked "do not turn off"; see Exhibit D3, photo 4. He said in his statement that on 5 December 1989:

> "We [that is, he and the first plaintiff] both left by the front door [at about midnight] and I recall seeing [the first plaintiff] get into his car and drive away."

He testified that the first plaintiff had locked the front door, and put a padlock on it; he did not know whether this was the same padlock which he himself normally put on the door when he left. He said in his statement that the first plaintiff had not gone "into the Ascom area while I was there with him" that night. He did not know whether the internal access door was locked, when he left. He testified as to the usual routine adopted when closing up at midnight, as follows:

> "First we would lock the front door to prevent any further customers coming in. Next we would balance up the tills by getting the print-out tape of the takings from the night. We would take the cash from the cash register with the cash register print-out, into the lunch room. We would use the cash balance sheet then to balance up the takings for the night and see that they agreed with the cash register receipts. The cash, the print-out and the cash balance sheet would then be put in an envelope. You would write on the front of it the date and the shift. For example, '8.00 to 12.00' is what I would write. That envelope would then be sealed. You would go around into the Ascom area; put that into a filing cabinet; shut the cabinet. There was a key with it that you would lock the cabinet with. And from memory, the key was placed either on the cabinet or somewhere nearby. You would then leave that area; go back into the video store and pull the connecting door shut behind you. You would then collect your personal effects; go to the switchboard; turn off the set sequence of switches and then leave.

> As you went out the front door did you lock it?---Yes, you would lock the front door.
>
> By what means?---Two means. You would lock the front door with the lock fixed to the door; and then you would padlock a latch that was fixed to the front door also." [See photos 4 and 5 in Exhibit D11]

He testified that on the night of 5 December he had not gone out to the back section and the first plaintiff had taken the takings home with him. He did not recall whether the internal access door was open or shut. He was not conscious of any fire burning when he left the premises at about 12.30am on 6 December.

He said that an external door which gave access to the front section from Railway Terrace was never used, and always remained locked; see photo 3, Exhibit D15. The video hire business always closed at midnight. He described the furniture and equipment used therein.

He said that both competitors of Mega Movies in Alice Springs in the video hire business, Murray Neck Video and Plains Video, "appeared to be busier than what we were". He agreed in cross-examination that the 'pilot's strike' of 1989 had had a drastic impact on the tourist industry in Alice Springs from about August 1989, and that the town generally then experienced economic depression. He said that the hire of videos usually slumped in any event in the October/November period.

I found Mr Lowe an impressive witness, careful, accurate and with apparent good recall.

*(7) Mrs Little*

Mrs Little had been employed by Ascom Electronics in 1989 for about 6 months, up to the fire on 6 December. She worked from 8.30am to 5.30pm, Mondays to Fridays, mainly in the front section behind the video display. She worked solely for Ascom Electronics as its receptionist, booking repair work in and out, ordering any necessary parts, and typing. She explained the procedures and the documentation used.

At one stage, she recalled, for about 3 weeks up to the time of the fire, a supplier or suppliers of spare parts had required payment for them before it or they would send the parts ordered; she considered that Ascom Electronics was then having some financial troubles. She said that at one stage, probably in the week before the fire, she was instructed to turn away customers because there were "many jobs that we were taking in, that just weren't able to be done." Ms Little's explanation was that at the time Mr Barratt "was the only one in the workshop"; she agreed in cross-examination that in her view he "wasn't pulling his weight at the time." Compare his account at p17 and Mrs Schmidt's account at p31. She agreed that the business was "quite busy in late '89".

She went out to the back section regularly, about twice a day. She said that there were "filing cabinets and things" in the storage area.

She said that it was common knowledge amongst the staff that the first and second plaintiffs were in dispute.

She thought that no-one, including the first plaintiff, did any work in the back section on 5 December 1989, the day before the fire. She said that the second plaintiff came in on that day and left a bunch of keys on the counter; she assumed that they were the keys to the premises.

*(8) Mrs Schmidt*

Mrs Schmidt first commenced to work for the first plaintiff in 1985; thereafter she worked for him from time to time in various video hire businesses he conducted in different premises in Alice Springs until he eventually came to the premises at the corner of Gregory and Railway Terraces. Her work eventually changed from hiring out the videos, to working in the office; first, she was handling only the overdue accounts. This was some 12-18 months before the fire, and not in the subject premises.

Shortly after the move to the subject premises, she started to handle all the accounts for both businesses; her tasks involved opening accounts, drawing cheques to pay creditors and wages, recording incoming monies, debtors, and doing bank reconciliations. About 3 months before the fire Ms H commenced work in the accounts area; within a week she was opening the mail, handling the accounts and writing out the cheques. Mrs Schmidt produced debtors' trial balances along the lines of Exhibit D10 (a document which she did not prepare) from the time she started the accounts work.

She testified that "we were having trouble paying the full amount [due to creditors under their terms of payment] at the end of each month." This financial situation worsened over the course of 1989, and by the time Ms H came to work the witness agreed that there were "accounts [due] which were … well outside the limits of the creditors' requirements [for payment]." She said "our overdraft was to the limit, and we still had accounts owing over that" from the video distributors - "I think nearly all of them were owed". There were similar problems in paying for items bought by Ascom Electronics, to carry out its repair work. She said "we owed on electricity [for both businesses and No.3 Winnecke Street]; we owed on the phone [for both businesses and No.3 Winnecke Street]; we owed on the repeater [rental]; group tax [about 2 or 3 months behind]". She gave a rough assessment of some of the debts involved, totalling about $7,700 - $8,800. She said that over a period of some 6 months leading up to the fire the businesses had difficulty in meeting their wages bill "nearly every week". In the 2-3 months leading up to the fire she said:

> "… we weren't able to buy new videos [for the video hire business]. We had to wait until the new ones had been out for a while, and then buy them second-hand at a cheaper price."

She said that in the few weeks before the fire the Ascom Electronics employees were not allowed to accept any new repair work, because only Mr Barratt was carrying out repairs and she was told by one of the plaintiffs that Ascom Electronics "had too much work going, and [Mr Barratt] wouldn't be able to handle it if we took any more." However, her own opinion was that at that time Ascom Electronics was not "quite busy",

Mr Barratt was not 'pulling his weight', and there was no reason "why work should be knocked back."

She said that originally her work place was in the back section, saying:

> "[The first and second plaintiffs'] office was directly behind the wall … with the video shop. And my office was a little bit further towards the Ascom side of it."

She indicated that her office was close to, and south of, position No.3 on Exhibit D1. She said that during her time working in the back section the first plaintiff had carried out some printing work there.

She described what was in the storage area when she worked in the back section, viz:

> "There was a lot of shelves there and the shelves [along the eastern wall, and at right angles to the back of the steel Brownbuilt shelving - see Exhibit D1, photos 42 and 49 in Exhibit D15, and photo 21 in Exhibit D11 dividing the storage area from the workshop area] had videos on them; some were no good; some were waiting for a cover, that might be good ones; the cover had been lost on them There was a lot of paper out there [on the floor in the centre of the storage area]. There was photocopying machines out there. There was a guillotine - hand guillotine out there. There was a printer out there and then further back was the workshop with the Ascom part of it with all the tools and …"

As to the mezzanine shelf, she said it went:

> "Right around the walls, that was where all the records were kept of the business, all the old records of previous years."

She did not recall if there was an electric guillotine in the storage area.

Compare Mr Ryan's description at p23.

About a month before the fire, 2 adjoining offices and a reception desk for Ascom Electronics were set up in the front section; she occupied one of those offices, and Ms H the other. These 2 offices are shown at position No.2 on Exhibit D1. She described the equipment which was in her new office - a computer, filing cabinet, desk, printout records, timesheets, invoices and statements of accounts owing or paid. The overdue accounts of Mega Movies were kept in her office by another person Ms O'Donoghue, who sat at another a desk. She said that in Ms H's office there were chequebooks, a filing cabinet, desk and possibly a computer and a telephone. As part of her work she did a computer "back up" each night; the back up disks were kept in her office. After the fire on 6 December, she found that none of the items in her office had been damaged.

She said that on the night of Monday 4 December 1989 she had received a telephone call from a Mr Smart telling her that:

> "… a lady had come into the shop. He didn't know who she was; and then [the second plaintiff] grabbed the phone and said, "It's all right, it's only me, I'm changing the locks on the shop."
>
> And is that all you can remember about that conversation?---I tried to - well I told her, "Don't be so bloody stupid".
>
> Yes?---I mean that's the exact words.
>
> Yes?---And I tried to - and then she - I'm not sure exactly what else was said but I tried to sort of talk her out of it, but she cut me short and hung up.
>
> Right, and did you try to call her back?---From memory, yes. I couldn't get an answer; got the engaged signal.
>
> And do you remember what time that was?---I think it was about

10.30."

She said that she then went to No.3 Winnecke Street and told Ms H what was happening. She knew at the time that the first plaintiff was in hospital. She went to work on Tuesday 5 December 1989, but found it "very difficult" to work that day.

She was aware in the months before the fire that the plaintiffs had separated, and were in quite bitter dispute, with heated arguments between them in public becoming more frequent in the weeks leading up to the fire.

I found Mrs Schimdt a reliable witness, particularly on the accounts side.

*(9) Mr Commons*

In December 1989 Mr Commons was employed by the defendant as an assessor. He attended at the premises at about 7.30am on 6 December 1989, to view the fire damage. He could see that the fire at the rear had by then been extinguished; Police and fire officers were present at the time.

He was allowed to enter the premises at 9am. He inspected the front section for 5-10 minutes, noting:

> "In that area there was minimal damage to the building structure as such. Extensive smoke damage to the ceiling areas."

There was no fire damage in the front section.

He then entered the back section through the interior access door, which was open; 2 temporary lighting units had been set up in the back section. He remained out there from about 9.15am until about 2pm that day, with one or two breaks. He said that he could not immediately see much of the damage in the storage area because:

> "… it was very, very dark and the … two [temporary] lights … in the premises were pointing away from that immediate wall on your right-hand side - more to the centre".

He saw a Police forensic photographer, Senior Constable Clifford (p40), taking photographs; he took many, himself. He said:

> … we were looking … to quantify the extent of the damage and, if possible, an origin of the fire.
>
> …
>
> …primarily the opportunity was given to us to photograph and visually look at estimating a total claim - for the extent of the damage, for a total claim estimate for the company."

Exhibit D11 comprises some 40 photographs, taken by the witness, in and about the premises, most on 6 December 1989 soon after entering, and some on 11 December. He had not examined the underside of the roof above the storage area. Photo 22 in Exhibit D11 shows a guillotine in the storage area, with a drum on top of it being held by Mr Clark (p38). The other objects on top of the guillotine were, he considered:

> "virtually undefinable … we did ascertain a lid to the drum [see photo 23 Exhibit D11 and photos 32, 33 Exhibit D6] … the rest of the items [that] were totally destroyed."

He said that when Mr Clark was scraping the floor within a metre of the guillotine he appeared at one time to be affected by a strong smell - “his eyes were wet and watering”. He agreed that a strong smell of burning plastic was present; I consider that this was the likely cause. No sign of flammable fluid was located. He identified an object shown in photo 32, Exhibit D6, hanging down beside the guillotine, as “part of a … soldering iron”. I note that no one present on 6 December 1989 attributed any significance to this, at that time.

On a further inspection lasting about 3-4 hours, before Christmas 1989 - about 21 or 22 December - when accompanying Mr Cox (p41), the witness said that he removed 3 or 4 screws which he then found lying loose on the guillotine, and some wiring. He also removed the soldering station and coil from the right hand side of the work bench in the work shop area; see photo 37 in Exhibit D11. This soldering iron is Exhibit D12. He gave these objects to Mr Cox. He agreed that by this time, some 15-16 days after the fire, there had been “a substantial clean up” of the storage area, with the result that it was “quite different” in appearance to what he had seen on 6 December. He said that although by this time he was satisfied that the *point of ignition* of the fire centred on the guillotine area and the drum, he and Mr Cox were now searching for the *cause* of the fire.

I found Mr Commons an honest and careful witness.

*(10) Mr Clark*

Mr Clark is an experienced fire fighter; he was the officer in charge of the Fire Station in Alice Springs in December 1989. His occurrence book, Exhibit D13, shows that his Station was notified of the fire at 6.13am on 6 December by Police. He described how the fire was fought, and identified the fire fighters who were present when he arrived at the scene within a few minutes. He then noted that the padlock on the front door had already been cut, unknown to the firefighters; the door was still locked. He and another firefighter entered by breaking the right hand lower glass panel in the front door; see photo 5 in Exhibit D11. They could not force the interior access door, so they went back out and obtained a set of keys from the first plaintiff who was outside. They then opened the interior door with a key, found the fire, and "started to put water on it straight away". Some 5 minutes had elapsed by then since their initial entry into the premises. He described what he saw when he first entered the back section:

> "The fire was on the right-hand side and about the centre of … what we found out later was a store or office area. Most of the fire was concentrated in one particular area. We put spray, concentrated sprays onto that, not jets, to absorb as much heat as we could, and knocked it down fairly quickly.
>
> And where was it concentrated?--- … to our right-hand side as we walked in the door and about the centre of that area, office area."

They had the fire under control within 5 minutes, aiming the spray from "just inside the doorway".

They cut the padlocks - he thought there were 2 of them - on the roller door, to open it for ventilation "to get some heat and smoke out". They also

broke 2 or 3 windows in the workshop area, for the same purpose; see photo 14 in Exhibit D15.

Later, on the same day, 6 December, he went back to the back section to investigate, with several other fire fighters; the Police also came. As to the area where he had found the fire to be fiercest he said:

> "There was a fair bit of destruction there; pallets with paper stacked on them; what appeared to be a bench almost completely consumed by the flames *which gave me an indication that possibly that was where it may have started*. We looked at the other areas away from …that particular area I was just speaking of, and the damage was slightly less, which gave us an indication that the fire had come from where we first suspected."
> (emphasis added)

He said that the "bench almost completely consumed by the flames" was not the electric guillotine shown in photo 32 in Exhibit D6, but the charred timber beside it more clearly shown in photo 37.

He said that there was a 20-litre drum on the guillotine, as shown in photo 32 in Exhibit D6. He was sure that when they first saw the drum, it was in the position shown in photo 33 in Exhibit D6; I accept his important evidence on that point. The drum was moved "once we started our investigation". He is seen holding up the drum, in photos 35 and 36 in Exhibit D6. He said that they found the lid of the drum "just in front of the drum and on top of the guillotine", and that apart from holding up the drum the other objects in the guillotine had not been touched. I also accept him

on that point; see photo 33 in Exhibit D6. They had concluded that the fire had started around that area because:

> "… it was the area of most damage, quite a considerable amount of burning and the fact that the fire diminished as it went away from that area - the damage diminished."

In cross-examination he was not shaken in his opinion that this was the point of origin of the fire.

They scraped the debris down to the floor level, but found no burn patterns on the floor. See, for example, photo 37 in Exhibit D6, bottom right, and photo 31 in Exhibit D15. There were "heaps of odours and smells". He said that he was informed by the first plaintiff:

> "That [the drum] had contained a solvent and that probably … approximately 5 litres may be in the drum. It was used to wash the printer's ink from the rollers on the printing presses. And the lid [of the drum]- we asked about the lid, and he said it would have been on [the drum] because if it is not, the contents would have evaporated."

This appears to be a statement by the first plaintiff that in the normal course the drum would have had its lid screwed on, to prevent its contents evaporating. I accept that the drum had the solvent "Blanket Wash" in it; and I note those words appear on the drum in photo 34 in Exhibit D6. Mr Clark considered that the lid of the drum had probably been removed from it before the fire because otherwise the drum would be expected "to have been completely distorted due to heat", whereas that was not the case - see photos 32-36 in Exhibit D6.

His report, Exhibit D14, was prepared 7-14 days after the fire. In it he noted, inter alia that when the fire fighters arrived at 6.13am:

> "Flames were coming through the windows in the back wall and the building appeared to be well alight."

A hose had been directed into the fire through the rear window. He said that all the doors were locked.

I found Mr Clark, an experienced firefighter, an impressive and thoroughly dependable witness, and I accept his evidence without qualification. I also accept his conclusion (p38) as to where the fire started. It started at a height below the mezzanine shelf. It is clear from his evidence that apart from the cut padlock on the front door, all external doors to the premises and the internal access door were securely locked.

*(11) Senior Constable Clifford*

This witness was attached to the Police Crime Scene Examination Unit at Alice Springs. He arrived at the premises at about 6.35am on 6 December 1989. Exhibit D17 contains his statutory declaration of 20 December 1989 indicating what he did on 6 December. He took a series of photographs (now comprised in Exhibits D4-6 and D15). Some were taken outside the premises; others, about an hour later, inside the premises, when the fire had been extinguished. Exhibit D16 explains what each photograph refers to. The witness assisted afterwards in shovelling and raking an area within the storage area; further, he collected debris from the floor around the guillotine and from around the drum on the guillotine, and fluid from inside the drum.

He could not smell "anything" from this fluid; there was not much of it in the drum. He sent off the materials he collected, for forensic examination; he considered that he would have made this collection by about 10am on 6 December.

The Police Forensic Science section examined the materials sent to it by Senior Constable Clifford. In his statutory declaration of 28 March 1990, Exhibit D22, Sergeant Thompson from that section said that he did not detect any fire accelerant in any of the materials provided, though in his opinion that fact did not mean that an accelerant had not been used. I see no reason why I should not take that opinion into account. I consider that it is clear enough that any "Blanket Wash" in the drum had been burned off in the fire, and the fluid found in it afterwards was water from the firemen's hoses.

Senior Constable Clifford agreed in cross-examination that he had not photographed the interior of the roof above the south west corner of the storage area, or above the guillotine; nor had he photographed the electric cabling in that area.

*(12) Mr Cox*

Mr Cox is a forensic consultant. He investigated the fire over 2 days, 21 and 22 December 1989, and on 11 March 1995 prepared a report on his investigations, Exhibit D19. This expresses his opinions, conclusions and observations. Exhibit D19 is in evidence, in part only, as noted in the

margins of various paragraphs. For example, the second sentence in par1.2 is marked "objected to, not pressed"; this means that Mr Foster of senior counsel for the defendant did not seek to have that sentence read into evidence. Ultimately, however, there was no dispute about the admissibility of certain other parts to which objections are noted on Exhibit D19; the weight thereof is a different question.

Mr Cox identified the materials he had taken away, described in Exhibit D19, by reference to Exhibit numbers before the Coroner. They are in envelopes in the box, Exhibit D23. He explained terms which he used in his report - for example, "the reference soldering station" in par2.2 is Exhibit D12.

He agreed that there had been "a substantial clean up" in the storage and workshop areas, before he attended there on 21 and 22 December; photo 4 Exhibit P3 shows the guillotine and the area around it, as he saw it on 21 December. He had believed at that time that the storage area had remained cordoned off by the Police. He explained how he went about his examination, viz:

> "I believe that I would have spent in my initial examination of the scene in the order of half an hour examining the total building. I then would have spent in the order of half an hour to an hour confirming the area of ignition and thereafter I might have spent one or two hours, possibly more, examining the debris and collecting my samples from the area of ignition. In the process of that overall work, I also examined the security of the premises, which was outside the cordoned area. I examined the switchboard, which again was outside the cordoned area. So I eventually focused on the area which was cordoned off, namely the guillotine area; but I certainly didn't exclude an examination of other sections of the building.

> Well, now, would you agree with me that the focus of your attention was in the area of the storage area?---It became that, after my initial work, yes."

He agreed that at the time he had thought that the top of the electric guillotine "had not been substantially altered since the fire", but had since discovered that "there was some disturbance of the debris on the top of the guillotine." I note that it is clear by comparing photos 32-35 in Exhibit D6, taken by Senior Constable Clifford on 6 December 1989, with the later photo at Fig.7 of Exhibit D19, that various changes had occurred in the interval - the drum is in a different position, the cable does not run over the side of the guillotine bench, the white and black mass just outside the right hand corner of the guillotine does not appear in Fig.7, the conductors which run across in front of the drum are not in the same position, the length of metal which rests on the top of the guillotine and goes upwards to the left does not appear, the black material to the left of the frame in which the drum rests does not appear in Fig.7 in the same quantity, and the lid of the drum appears to be in a different position. The witness did not recall whether when he arrived at the scene the drum was in the location shown in Fig.7; "it may have been sitting nearby". He thought that either he or Mr Commons had picked up the drum and placed it in the position shown in Fig.7. Mr Cox agreed that the position of the drum as shown in Fig.7 was in approximately the same position as shown in photo 31 in Exhibit D15.

Mr Cox had not checked the powerboard shown in the photos in Exhibit D3; he said that there had been no point in doing so since -

"the switchboard had been interfered with since the fire in what I

believe to [have been] an effort to restore power to part of the premises. So the evidence there was lost."

In cross-examination he was taken to a layout sketch he had prepared on 21 December 1989, Exhibit D20, from information provided to him that day by the first plaintiff; this sketch appears (in the main) in schematic form, at Fig.4 in Exhibit D19, reproduced as Annexure "A" to this judgment.

According to the witness, in his notes at the time which constitute Exhibit P2, he was informed by the first plaintiff that the power to this area was 'on', and the status of the various appliances in Annexure "A" was that the offset press and headliner were switched 'off', the platemaker was plugged in but the first plaintiff was unsure whether it was switched 'on' or 'off', the fuser was plugged in and was turned 'off' and 'on' by a timer, the photocopier was probably switched 'off', and the electric guillotine was 'on', there being no 'on/off' switch on it; it required two buttons to be pressed to operate it. However, Mr Cox said that he considered that this information about the guillotine was not accurate; he discovered the remains of the soldering station plug on the conductors which he noted were still plugged into the remains of the sockets of the sole extension lead from the power board, while the guillotine plug was *not* plugged in.

Mr Cox said in Exhibit 20 that he was informed by the first plaintiff that -

(a) "'Blanket Wash'; a solvent, was contained in a steel 20 litre drum which had a plastic top and a steel screw cap, always kept on;

(b) The floor in the region of the electric guillotine had been clear of paper and other refuse;

(c) The lights in the area were always on, for security purposes;

(d) Apart from the 'Blanket Wash' the only other flammable liquids in this area were the printing chemicals. These were located in the layout plan in Exhibit D20, on the 'shelves' indicated in Annexure "A".

(e) All power to the appliances on p42 was supplied by two 6-way outlets, located beneath the fuser bench; they in turn were supplied from one general power outlet.

Mr Cox made some notes on 21 December 1989 (see Exhibit P2) of what the first plaintiff told him that day when he asked the first plaintiff when he was last working in the storage area. See transcript pp360-3, where the contents of the note were admitted in evidence in the course of cross-examination. They read:

> "Forgotten [when last working there]. [Went to] hospital Sunday [3 December]. [So] logically [working there]. Thurs. or Friday before [30 November or 1 December]. [The] guillotine was giving problems, was going to solder up wires. Not reliable when pressed button. Got gear there to do it. Called away. Screwdriver, soldering iron. Presume soldering iron plugged in."

In the note, he also recorded that the first plaintiff told him "[he was] an electronics engineer".

In par3.3 of his report, Exhibit D19, Mr Cox stated:

> "It was also apparent [from his preliminary examination] that the fire had developed from a single point of ignition in the [south western corner of the storage] area - - - and spread outwards, at a high level, under the influence of the expanding hot gas layer. It had not proceeded beyond the second stage of combustion, as evidenced by the

substantial smoke generation and the absence of low level damage beyond the area of ignition. There was no evidence of a second point of simultaneous ignition located elsewhere in the premises, nor was there any evidence of fire spread at a low level or in an otherwise unusual manner."

When tracing the point of ignition, he said at pars4.1 and 4.2 of Exhibit D19:

"4.1 - - - *The roof cladding, beams and purlins were most severely damaged above the electric guillotine*, with consistent sequential twisting indicating fire spread from this area. Had the primary fire plume developed elsewhere, I would have expected an alternative response by the beams and purlins.

4.2 The aluminium-based roof insulation and its supporting net was also most severely damaged above the electric guillotine. Again, this was consistent with the primary fire plume being located here as, under normal compartment fire conditions with a uniform fire load, *the most severe fire damage generally occurs above the primary fire plume*." (emphasis added)

He had taken no photographs focussed on the roof cladding, beams or purlins above the storage area generally, or above the electric guillotine in particular, although a little is seen of the former in the top right of the photographs in Fig.5. He was cross-examined at some length as to whether the severe damage to the roof he mentioned, was to that part of the roof 'above the electric guillotine', as mentioned in par4.2, or more generally to the roof above the storage area. He adhered to what he had said in par4.1, stating that the "most severe testing" of the beams was in that location, as was the "most severe damage" to the cladding. He explained:

" … The damage is apparent by the buckling of the roof and the loss of the protective [anti]corrosion layer, the zinc-rich layer, and ensuing corrosion and the presence of scaling."

He said that this damage was “more severe” above the guillotine than in other parts of the roof above the storage area, and he had determined this by his own visual examination. I accept his evidence on this point.

He said that the “wooden bench” beside the guillotine, of which only some charred parts remained, had been “more severely damaged” than the guillotine - in fact, completely burnt.

In pars4.3 and 4.4 of his report he referred to further indicators of the point of ignition, viz:

> “4.3 There was a *distinct V pattern of damage to surrounding stock and items of equipment,* based on the electric guillotine. Such a pattern is normally generated by radiant heat from the primary fire plume and, with fires which have not proceeded beyond the flashover stage, *also serves to identify the point of ignition. This machine was the most completely damaged item of equipment in this area*; those surrounding it were damaged at a higher level and with marked asymmetry. Similarly, the damage to the stored paper, shelving and partitioning was greatest adjacent to the guillotine, occurring at a high level and with marked asymmetry as one proceeded from this area.
>
> 4.4. A more formal study was undertaken in the area of the guillotine to confirm the point of ignition, by determining local fire propagation directions from the asymmetrical charring, deformation and other like heat damage. The results of this study are shown as a series of arrows, representing local propagation directions, on [Annexure “A”]. When examined in total, they support the previous finding of fire spread from the vicinity of the electric guillotine.” (emphasis added)

It is clear that Mr Cox was continually testing his hypothesis that the fire commenced on, and spread from, the electric guillotine. He was cross-

examined to the effect that he had been told by the first plaintiff that the electric guillotine was 'on', as opposed to being 'plugged in'; in the sense in which those words were used - that he had been told that the electricity supply conductors were 'live' to the electric guillotine which had no 'on/off' switch - I consider that that is a distinction without a difference.

He said at pars4.7 and 4.8 of Exhibit D19:

"4.7 The electric guillotine was normally supplied [with power from the outlet board] via an extension cord which passed across the floor, beneath the machine. *At the time of the fire, a soldering station was found to be plugged into this cord, with the guillotine isolated* [from power]. The inlet conductors to the soldering iron were short circuited a distance of 17 to 25 centimetres from the plug which, with the soldering station, had originally been placed on the guillotine. The magnitude of the short circuit was adequate to have tripped the relevant circuit breaker, thereby isolating power to the surrounding items of equipment.

4.8 The fact that no further short circuiting was discovered went to confirming that the fire initially developed from the immediate vicinity of the soldering station which was located on top of the electric guillotine. Had ignition occurred elsewhere, I would have expected the power circuit to respond at an alternative location."
(emphasis added)

As to par4.8, he said that he had checked the cabling to "the surrounding items of equipment" in Annexure "A" - though he had not made a note that he had done so - and had thereby found the "no further short circuiting" to which he referred. I accept his evidence on the point.

He said that the first plaintiff had been present at the time of his inspection and had indicated that, as the first plaintiff recalled it, the drum

had "had been placed on a stack of paper adjacent to the guillotine, as shown on Fig.8 in Exhibit D19". This stack had largely burned away. Mr Cox considered however that -

> "5.3 It would have been impossible for the drum to have moved from the nominated position to [the position where it was found on top of the guillotine] during the fire, because of the gap which existed between the [stack of] paper and the guillotine, and its height, relative to the guillotine."

In cross-examination he said that the height of the stack of paper indicated by the first plaintiff was about one foot higher than the guillotine, and about two feet away from it. I accept his opinion in par5.3.

He concluded that the fact that no trace of a common hydrocarbon liquid was found from an analysis of the debris collected -

> "supported the conclusion that the contents of the drum had not spilled prior to or during the fire, but had burned in the drum whilst it was upright and after it had toppled."

He considered that this conclusion did *not* mean that the contents of the drum were definitely not used as an accelerant, because such a conclusion "was contrary to the physical evidence of accelerated damage to the paper below the suggested position of the tap" on the drum; that is, it was contrary to other evidence indicating that some of the contents of the drum "had flowed from the tap and burned on the paper". He said, however, "that there was no evidence of widespread use of accelerants" - in the sense of the contents of the drum being "spread around the guillotine and beyond", to

make the fire spread. He agreed that his ultimate conclusion was that he was unable to say that an accelerant had been used in the fire.

He conducted experiments using a soldering iron and found it "would not initiate flaming combustion" of paper; however, over a long period of time, and on the basis of an analysis in Exhibit D21, he considered that it would be possible for the glowing combustion of paper (which could be achieved) "to transform to flaming combustion under the correct conditions of air flow and heat retention" by the process of self-heating; see par15 of Exhibit D19. I consider this has no bearing, in the present case.

In pars7.1 and 7.2 in Exhibit D19 he said:

"7.1 The remnants of the soldering station which was recovered from the point of ignition are shown in Figure 12. These were compared with a second station which was located elsewhere on the premises and found to be identical in all respects. This station was identified as a Micron Temperature Selectable Temperature Controlled Professional Soldering Station CAT.T2440.

7.2 An examination of the remnants revealed the following relevant pieces of evidence.

- The incoming flex [from the extension lead from the outlet board] was wrapped around the soldering station and retaining coil for the soldering tip.

- The flex conductors had short circuited against the retaining coil for the soldering tip, as shown in Figure 13.

- The temperature selector switch was set to the second highest position being 410° C; the reference unit [referred to in par7.1] was set to the lowest setting of 320° C.

- The remains of the soldering iron tip were not recovered from

the debris.

- A bronze-like residue was found to be adhering to the conductors for the tip, as shown in Figure 14.

- A coil of electrical conductor, having both ends wetted with solder, was located next to the soldering station, as shown in Figure 15.

- Three screws of similar appearance to those used to secure the back part of the base for the reference soldering station were located on the guillotine.

- The plastic body of the soldering station had melted onto the floor below the guillotine, between the guillotine and the stack of paper."

In cross-examination he agreed that not all "the remnants of the soldering station" were shown in Fig12. He said that his statement in par7.2 that "the incoming flex was wrapped around the soldering station and retaining coil" was from his own direct observations on 21 and 22 December. He later qualified this to say that he only saw the flex wrapped around the retaining coil, and not the soldering station. He pointed to Exhibit P5 as a 'blowup' of part of the photograph in Fig12. As to the flex being "wrapped around the … retaining coil", he agreed that Exhibit P5 showed the flex "entangled" only with the U-shaped section at the end of the coil, which he said was normally contained within the plastic body of the soldering station. This "incoming flex" to which he referred, was the 240 volt cable from the power source to the soldering station. The remains of the "plastic body of the soldering station" recovered from the floor are shown in Exhibit P4.

His conclusion was that there was an "arcing back on the coil itself" which indicated "where the cable was in contact with the coil at the time of

the fire" - causing a short circuiting "further back along the coil". He indicated that the marks of short circuiting on the coil shown at two places in Fig.13 showed that the flex touched the coil at those two places, 17 and 25cms away from the pin; he concluded that the flex was likely to have been wrapped around the coil, though not necessarily so. By consent, part of his testimony before the Coroner on 11 December 1991 was in evidence as Exhibit P8; in it he stated that he had examined the circuit board within the remnants of the soldering station, and had found no evidence of it having been modified.

He expressed his conclusion on the *cause* of the ignition in pars11.1-11.3 of Exhibit D19, viz:

> "11.1 On the evidence observed, it was concluded that the fire developed from the immediate vicinity of the soldering station. There was evidence that the drum of Blanket Wash was not in its designated pre-fire position at the time of the fire and that the lid may have been removed or loosened.
>
> 11.2 The presence of three screws with the same dimensions as the two screws used to secure the base of the reference soldering station, remote from the melted remains of the soldering station case, suggested that the station may have been modified prior to the fire. This suggestion was supported by the absence of the soldering tip from the debris coupled with the presence of the bronze-like residue adhering to the conductors for the tip, there being no components of the tip in the reference unit which could have given rise to this residue.
>
> 11.3 The above evidence would therefore support conclusion that the soldering station may have been used as an ignition source for a deliberate fire."

He agreed that there was no evidence of the use of a timing device in connection with the fire.

The debris he found in the tray in which the drum was found (see photo 33 in Exhibit D6) consisted of burned paper, which included bankcard vouchers.

He expressed his final conclusions at par19 of Exhibit 19, viz:

"19.1 On the basis of the above examination and test work, it was concluded that the fire developed from a single point of ignition which was located in the rear section of the premises occupied by Ascom Electronics.

19.2 The fire developed on the top of an electric guillotine, amid scrap paper which had been stored on the guillotine.

19.3 Ignition occurred in the immediate vicinity of a soldering station which had been supplied with power at the time. There was some evidence to suggest that the soldering station may have been modified prior to the fire.

19.4 There was evidence to suggest some pre-fire interference with a steel drum containing Blanket Wash solvent which was located next to the point of ignition. However, no evidence of this solvent was found in the debris that was recovered from the area of ignition.

19.5 There was no evidence found to indicate that the security of the premises had been breached prior to the fire although a padlock on the front door to the Mega-Movies section had been cut prior to the fire. This door was also secured by a deadlock which remained locked at the time of the fire."

I have spent considerable time on Mr Cox's evidence because I found him a careful, cautious, painstaking and impressive witness. I accept his methodology, his reasoning, and his conclusions in par19 above.

*(12) Mr Lee*

Mr Lee, a consulting forensic electrical engineer and an expert in lighting, wrote a report about the fire on 19 April 1995; parts of it are in evidence as Exhibit D26. The first part of the report deals in general with how fluorescent lights can cause fires; the second, with how a soldering iron can do so. In summary, in Exhibit D26 he concluded:

> "It is most unlikely that a fluorescent light fitting was involved as the source of ignition for the fire.
>
> It is most likely that the soldering iron was involved as the source of ignition.
>
> The soldering iron can operate well in excess of its normal temperatures.
>
> The soldering iron can initiate a fire."

Mr Lee conducted an experiment in Court with a disassembled soldering station, fairly similar to Exhibits P1 and D12. He adjusted the trim potentiometers up to their limits, so that the point of the soldering iron was heated to a higher temperature than would have been expected by observing the setting. It eventually glowed a dark cherry red. He agreed in cross-examination that there would only be a "low probability" that the flammable combustion of paper would thereby be achieved. I accept his

estimate. To achieve flaming ignition required something else - for example, the use of matchheads.

In cross-examination he agreed that if the fluorescent lights in the back section ran east-west, as Mr Barratt had said, and not north-south as Mr Cox had opined, his expressed view that there were no light fittings in the south-west of the storage area which could have caused the fire, was not tenable; and that a fluorescent light fitting in that position, if it failed, *could* have caused the fire.

*(13) Mr Ride*

Mr Ride is a locksmith. He said that he had been asked by the second plaintiff to change the locks; this was between 7 and 9pm one evening, a day or two before the fire on 6 December 1989. Exhibit D27, an Ascom Electronics purchase order for the work, is dated 4 December 1989. He changed the lock on the front door and on the internal access door, and thought that he had given the second plaintiff two keys for each lock.

Those were the defendant's witnesses. I turn to Exhibit D28, the bulk of the defendant's documentary evidence.

**Various documents; objections to their admissibility**

Exhibit D28 comprises 12 sets of documents, Parts A-L, tendered by the defendant under the *Evidence (Business Records) Interim Arrangements Act* (herein "the Act").

Parts A and B were not objected to. Part A comprised the plaintiffs' completed Business Insurance Proposal form dated 24 April 1989, seeking insurance from the defendant from 28 February 1989 to 28 February 1990, to cover damage to the buildings on the premises, their contents and other losses; and a claim form signed by the first plaintiff dated 6 December 1989. Part B is a Notice to Admit statements in ten Statutory Declarations by firefighters that they had not cut the padlock on the front door when they attended the premises on 6 December 1989. The plaintiffs admit that the neither the firefighters nor the Police present at the scene cut the padlock.

Part C comprises Westpac bank diary entries. Mr Reeves did not require any formal proof of their admissibility under s5 of the Act. I note that s5(2) is of very wide ambit, and renders a statement of fact or opinion in a document admissible in civil proceedings as evidence of that fact or opinion, if evidence of the fact or opinion is admissible in the proceeding, the document forms part of a record of a business, and the other requirements of s5(1) of the Act are met. However, Mr Reeves objected to the admission into evidence of the documents in Part C on the basis they would be of little or no assistance; this objection appears to be based on ss6(1) or 16(1)(a) of the Act, which respectively provide that the Court may reject (or later exclude) evidence tendered under the Act if it considers "any other document related to the statement [should] be produced" or that "the weight of the evidence is too slight to justify its admission". Mr Reeves submitted first that the documents in question contained notations which

were not easy to understand; and second, that because not all of the Bank documents were included the picture which the documents presented was not complete. He noted that if they were admitted the plaintiffs would be in the position of not having persons to cross-examine, to test the issues raised by the documents and to determine what they meant. He referred, for example, to the last document dated before the fire - the document at p57A dated 13 November 1989. The documents extend from 11 March 1988 to 30 June 1990. Mr Reeves submitted that documents created after the fire on 6 December 1989 were not relevant; if they were relevant, to see the complete picture of which they formed part necessitated the cross-examination of a Bank Officer, to show how the position stood at trial.

Parts D, E and F are various Westpac bank statements of account of Ascom Electronics and Video Libraries of Australia, relating to bank accounts 121942, 931347 and 120202. Part D is one statement of account no. 121942, Ascom Electronics' term loan account; as at 6 September 1989 it was in debit at $129,031.68. Part E comprises 65 consecutive statements of account no. 931347, Video Libraries of Australia trading account, from 6 September 1989 to 22 June 1990. Part F comprises statements of account of Ascom Electronics trading account 120202, from 6 September 1989 to 23 February 1990. Mr Reeves had no objection to the receipt into evidence of Parts D, E and F.

Part G was said by Mr Foster to comprise evidence of 'bounced' cheques of Ascom Electronics and Video Libraries of Australia. Four

cheques are set out; the defendant did not rely on two of them. Three of them are in the year 1987 and the other is dated 7 September 1989. Mr Reeves' objection was that they did not disclose the full picture; for example, there was nothing to show what happened when the cheques were returned.

Part H is a term agreement dated 8 February 1989 for a loan of $135,000 by Westpac to the first plaintiff; repayments were to be made at the rate of $2430 per month from 6 April 1989. Part H also includes some fairly unfathomable notes said to have been made by the first plaintiff's accountant, Mr Braddock; a statement by the State Bank of South Australia in relation to a company Bizclass Pty Ltd of 3 Winnecke Avenue Alice Springs, relating to its bank account from 20 December 1989 to 12 February 1990; what appears to be possibly a page from a book of account in 1989/1990 relating to Ascom Electronics; and a letter from a Mr A. Harry dated 19 October 1990 to the first plaintiff, giving the tax file number of Lock Electronics Pty Ltd.

Mr Reeves objected to the admissibility of what I have described as the 'fairly unfathomable notes', and the possible page from an account book. I do not consider that those documents - set out at pp156, 158 and 159, together with an unsigned note at p160 - meet the requirements of s5(1) of the Act, and I exclude them.

Part I is a bundle of documents, with a summary thereof at p162. They comprise the first plaintiff's trading, profit and loss statements for the years 30 June 1987 to 30 June 1990, when trading as "Ascom & Video Libraries", as per his income tax returns for those years. He describes himself therein, inter alia, as an "electronics engineer". These documents showed sales and gross profits peaking in the year ending 30 June 1987 at $1,402,654 and $767,756, respectively, and declining to a low of $406,905 and $72,976 respectively, in the year ending 30 June 1990. The businesses moved from a net profit of $12,840 in the year ending 30 June 1987 to a net loss of $282,150 in the year ending 30 June 1990. Mr Reeves had no objection to this material being admitted.

Part J comprises documents discovered by the plaintiffs; their admissibility was not objected to. They consist of correspondence between the plaintiffs or their solicitors between 22 June 1989 and 30 March 1990, dealing with the dispute between them. Mr Reeves objected to p211, a note dated 18 September 1987 (or possibly 18 September 1989) purporting to be to one "Barry" from the second plaintiff. He also objected to document 211E, a Court restraining order dated 7 December 1989 purporting to be made under s100AB of the *Justices Act*, but presumably in fact made under s4(1) and 1(A) of the *Domestic Violence Act*. It is directed to the first plaintiff, flowing from an application by the second plaintiff. Mr Reeves submitted that it was of no utility, and was not a document which fell within the Act.

Part K purports to be evidence of various legal proceedings instituted against the plaintiffs by unpaid creditors, together with some correspondence between them and the first plaintiff, after the fire. The Court proceedings are as follows: Writ proceedings in this Court instituted by the Deputy Commissioner of Taxation against the first plaintiff in December 1988, for group tax instalment deductions totalling $18,491.79 made in the months of September and October 1988, said not to have been accounted for, and a discontinuance of those proceedings on 23 June 1994; a Statement of Liquidated Claim in the Local Court (Civil Claims) in Sydney on 25 October 1989, claiming $3295.55 for goods sold and delivered in June and July 1989; a Default Summons issued out of the Magistrates Court in Melbourne, claiming $5305.06 for goods sold and delivered May - July 1989; a Special Summons of 12 February 1990, claiming $2496.87 for the balance due and owing for goods sold and delivered June - August 1989, together with a Summons on an Unsatisfied Judgment therein of 10 April 1990, issued out of the Local Court at Alice Springs on 29 October 1990 for $2758.87; a further Special Summons of 12 April 1990, claiming $1437.08 for advertising services provided April - June 1989, and a Summons on an Unsatisfied Judgment therein of 18 June 1990, issued out of the Local Court of Alice Springs on 12 November 1990 for $1594.08; a Special Summons of 20 April 1990, claiming $615.21 for goods sold and delivered to 26 April 1989, issued out of the Local Court in Alice Springs; and a Writ issued out of this Court on 11 April 1991 by Yeperenye Pty Ltd, claiming $130,249.61 for rent and rates etcetera allegedly due under a 3 year lease of a Shop 39 terminating 20 October 1990, for the period March 1989-October 1990, the

first plaintiff having vacated the shop in March 1989, with the note of a consent judgment against the defendant in those proceedings in the sum of $150,000, and a formal judgment of 1 October 1993 against the first plaintiff in that sum, with a stay of execution of that judgment as per certain terms of settlement. There were also 2 letters from the first plaintiff; the first dealt with the Special Summons of 20 April 1990, and made an offer to pay the debt on terms; the second dealt with some other legal proceedings instituted by Nashua Pty Ltd, and also offered to pay on terms.

For similar reasons to his objection to the Court restraining order in Part J, Mr Reeves objected to the documents in Part Kconsisting of summonses and writs against one or more of the plaintiffs. He submitted that those documents were not within the provisions of the Act; more importantly, there was in each case no information provided to the Court other than that a claim had been made; and third, except for one claim, all of those writs etcetera had issued *after* the fire of 6 December 1989.

Part L was said by Mr Foster to consist of documents which relate to the first plaintiff's post-fire new business entity Lock Electronics Pty Ltd, set up a week after the fire to run the business of Mega Movies in the new premises mentioned by Mr Kilgariff; Mr Foster said that this entity was controlled by the first plaintiff, his brother, and Ms H. He submitted that "this is a company set up to exclude [the second plaintiff] from the business, within 2 weeks of the fire."

The documents in Part L comprise the 1990 income tax return of Lock Electronics Pty Ltd, in which the first plaintiff is named as its Public Officer. It shows an income of $66,340, expenses of $90,757 including depreciation expenses of $34,762, current liabilities of $115,236, and depreciable assets purchased at $114,000. The depreciation schedule shows $33,841 as depreciation on the "Tape Library", which is shown to have cost $104,000 on 14 December 1989. Part L also contains some information from the ASC database concerning the company Lock Electronics Pty Ltd as at 11 April 1995: the first plaintiff and Ms H are shown as directors, and a Mr Horace Lock and Allcom Pty Ltd as shareholders.

It also contains the unaudited Accounts and Financial Statements of Lock Electronics Pty Ltd from its acquisition on 14 December 1989, to 30 June 1990. This company was formerly known as Bizclass Pty Ltd. It incurred a loss of $24,417.95 to 30 June 1990. The major liability is shown as "Directors Loans $115,236.02".

It also contains letters of 4 July 1990, 16 March 1994, and 6 April 1994 and what appears to be an unsigned lease from L J Hooker Alice Springs to the first plaintiff relating to the occupation of premises at No.2 Gregory Terrace by Lock Electronics Pty Ltd for 2 years from 1 March 1994.

Mr Reeves submitted that Mr Foster's description of Lock Electronics Pty Ltd as having been set up so as to exclude the second plaintiff, was an

illegitimate inference from these documents. Read in conjunction with the rest of the evidence, I do not think it is.

Apart from the documents comprising Exhibit D28, Exhibit D31 is Senior Sergeant Dwyer's statutory declaration of 14 December 1989. He was one of the first persons at the scene of the fire, on 6 December 1989. He described the padlock on the front doors as having been cut, and "hanging in the staple"; however the doors in question were still "rigidly secure", with one door being "pinned top and bottom" and the other "locked into it with a deadlock."

Mr Foster submitted that all of the documents in Exhibit D28 were admissible under the Act. He relied on the definition of "qualified person" and "derived" in ss4 and 5(1) of the Act, and submitted that all of the documents contained statements of facts or opinion - largely facts - evidence of which was admissible in this litigation. He submitted that the statements in the document constituted records of businesses made for the purposes of the businesses, by their servants or agents, and derived from information in statements made by qualified persons for the purposes of the businesses. They were admissible under s5(2) of the Act. The matter of their weight was to be dealt with under s9 and, he submitted, it was to the matter of weight, if anything, that Mr Reeves' submissions went. He submitted that the documents should be admitted, subject to the later determination of questions of their relevance and weight; I accepted that submission and received the documents as Exhibit D28, on the basis that to determine

objections based on relevance they needed first to be examined. Apart from objections specifically dealt with, I reject Mr Reeves' various objections to the reception into evidence of the materials in Exhibit D28.

**Some miscellaneous matters in the defendant's case**

The defendant did not accept that the plaintiffs had made proper discovery of all relevant documents in their custody or control. Mr Foster instanced: the lease of the premises; a letter of 14 September 1989 from Mr Harry, the then solicitor for the first plaintiff, to Messrs Turner & Deane, the then solicitors for the second plaintiff, enclosing a draft agreement, this is referred to in the letter of 22 September 1989 in Part J of Exhibit D28; and Ascom Electronics' debtors' trial balance said to have been "run through the computer on or about 29 January 1990", and which had been the subject of his call for production at trial at transcript p207A. Mr Reeves responded that the plaintiffs had produced all of the documents within their control, noting as a complicating factor that they had changed their respective solicitors meanwhile. I consider that that cannot be taken further.

Exhibits D29 and D30 comprise a handwritten note of 22 March 1989 by the plaintiffs' insurance broker Bain Clarkson Pty Ltd to the defendant which details at pp3 and 4 the declared value for the purposes of the insurance policy Exhibit D2, of the various items of equipment on the premises.

Exhibit D32 comprises certain parts of pp4-7 of a statutory declaration by the witness Mr Barratt made on 25 January 1990; I excluded at trial the portion on p6 which was objected to, because I did not consider Mr Barratt's speculation as to the identity of the arsonist was inextricably bound up with his opinion that the fire had been deliberately lit.

**The plaintiffs' evidence**

Apart from the various Exhibits they tendered in evidence, the plaintiffs did not go into evidence.

**The defendant's submissions**

Mr Foster first submitted that the trial on liability gave rise to 2 issues. First there was the issue of arson. Second there was the issue of the proper construction to be placed on the insurance policy - whether it was a joint or a composite insurance policy. I accept that if it is found that one of the plaintiffs set the fire, and it was a joint policy, the plaintiffs' claims would be dismissed. Aliter, if it was a composite policy. However, ultimately, both counsel agreed that the present state of the evidence did not permit the second issue, the question of the construction of the insurance policy, to be decided, and its resolution should be deferred. Counsel agreed that a finding of civil arson by one of the plaintiffs should not carry with it a formal judgment for the defendant against either plaintiff. Rather, on any such finding being made, the question of the appropriate order which should flow therefrom should also be deferred. I accede to counsels' joint request and turn to the resolution of the issue of civil arson.

Mr Foster submitted that on the issue of arson the standard of proof which the defendant must discharge is as indicated in *Briginshaw v Briginshaw* (1938) 60 CLR 336. What is involved here is the proof of an allegation of a crime, in civil proceedings. The defendant does not have to prove beyond reasonable doubt that one of the plaintiffs deliberately set the fire; that was the standard required when the issue first arose 170 years ago in England, in *Thurtell v Beaumont* (1823) 1 Bing. 339, 130 E.R. 136. I accept that in Australia the civil standard of proof on the balance of probabilities applies on this issue, but the *gravity* of the issue has to be borne in mind in applying that standard. As Latham CJ said in *Briginshaw v Briginshaw* (supra) at pp343-4:

> "*… there are differences in degree of certainty*, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty. No court should act upon mere suspicion, surmise or guesswork in any case. In a civil case, fair inference may justify a finding upon the basis of preponderance of probability. *The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue* - see *Wills' Circumstantial Evidence* (1902) 5th ed., p.267, note *n*: "Men will pronounce without hesitation that a person owes another a hundred pounds on evidence on which they certainly would not hang him, and yet all the rules of law applying to one case apply to the other and the processes are the same"". (emphasis added)

Rich J pointed out at p350:

> "… the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. *The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has*

*reached both a correct and just conclusion*." (emphasis added)

Dixon J summed it up at pp362-3:

> "*The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description*, or the gravity of the consequences flowing from a particular finding *are considerations which must affect* the answer to the question *whether the issue has been proved to the reasonable satisfaction* of the tribunal. In such matters "*reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences*, Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.
>
> …
>
> *… the nature of the issue necessarily affects the process by which reasonable satisfaction is attained*." (emphasis added)

See also *Helton v Allen* (1940) 63 CLR 691 at 701-2 per Starke J; and at 711 where Dixon, Evatt and McTiernan JJ expressed the proper approach succinctly:

> "… the learned judge quite correctly said that *when a crime is charged in a civil trial it must be proved strictly* because the degree of proof required in a civil trial depends upon the magnitude of the thing that is in issue and when a crime is in issue you will not lightly find that a crime has been committed, and *according as the crime is grave you shall require a greater strictness of proof. And he properly referred to the presumption of innocence*." (emphasis added)

See also *Rejfek v McElroy* (1965) 112 CLR 517 at 521-2, to the same effect; and the summary in *Thompson v G.I.O. (NSW)* (unreported, Supreme Court (NSW) (Rolfe J)) at pp15-21.

Mr Foster submitted that in this case the plaintiffs could have given an explanation of various relevant facts, but had chosen not to do so. He submitted that their refusal to testify should be borne in mind, when the question is whether inferences should be drawn, or facts be found.

Mr Foster laid stress on the absence of any forcible entry, when this circumstance is considered in light of the very recent change of locks and keys on the night of Monday 4 December. He submitted that only one of the plaintiffs, or someone to whom they gave a set of the new keys, could have entered the premises in the early hours of 6 December. I note that there is a possibility that someone had a key to the locked exterior doors to Railway Terrace, and had entered and exited from the front section that way. However, there would still remain the question of the locked interior access door to the back section, with its new lock and key.

Mr Nicholas of junior counsel for the defendant stressed Mr Lowe's evidence (p26) that the first plaintiff had put a padlock on the front door when the 2 of them left at midnight on 5 December. He submitted that the inference to be drawn was that the padlock was cut sometime between 12.30am and 6.00am on 6 December.

Mr Nicholas also referred to various aspects of the evidence: the removal of certain equipment from the premises on 5 December; the first plaintiff's conversation with Mr Kilgariff later that day; the absence of any evidence of his whereabouts between 12.30am and 6.00am on 6 December when the fire, on the evidence, was likely to have been set; the first

plaintiff's letter to the second plaintiff dated 6 December 1989 in Part J of Exhibit D28 in reply to her letter of 4 December - the significance being its date and that it does not refer to the fire and therefore the defendant suggests that it was written on 6 December *before* the fire, that being indicative of the first plaintiff being up and about on 6 December and then threatening to move the business away from the premises; the earlier correspondence between the plaintiffs in Part J of Exhibit D28 as indicative of the first plaintiff being motivated by spite; the evidence as to the financial problems of the business, particularly by Mrs Schmidt; the evidence of the trading losses of the first plaintiff's businesses, shown by the documents in Part I of Exhibit D28, and by increased Bank borrowings to meet these losses, with increasing interest bills; the documents in Exhibit D28 which indicate a transfer of the assets to Lock Electronics Pty Ltd on 14 December 1989, which could lead to an inference that he set the fire so as to rid himself of the problem which the second plaintiff then presented to him; and the documents in Parts C and D of Exhibit D28 as indicative of constant financial pressure on the businesses.

**The plaintiffs' submissions**

Mr Reeves submits that there is no evidence that the fire was deliberately lit, and therefore questions of motive and opportunity are irrelevant and there is nothing to call for an explanation by the plaintiffs. He submits that the defendant's case is about guesses, and is based on suspicion, speculation and surmise, and no more. The evidence of motive and opportunity and the alleged failure to explain were all equivocal at best,

and did not constitute the clear and cogent evidence needed to link the plaintiffs with the fire.

His prime submission was that the fire had not been deliberately lit. The investigators had not been very competent, and their evidence was incomplete. He referred to the 4 theories which had emerged in the defendant's evidence to support a case of civil arson: Mr Barratt's; Mr Clark's; Mr Lee's; and Mr Cox's. He referred to the "massive problem" for the defendant in that neither Mr Lee nor Mr Cox, in their experiments, could bring the paper fuel for a fire to flaming combustion by the use of a soldering iron. He analyzed and attacked the evidence of these 4 witnesses, in detail, particularly that of Mr Cox.

As to Mr Cox's evidence, Mr Reeves submitted that there had been a "substantial" alteration of the scene by the time Mr Cox examined it on 21 December 1989; that the focus of his investigation was the top of the guillotine, to the exclusion of everything else; that his report was not balanced; that he had made some very obvious "mistakes", which should make the Court "very cautious" about accepting his evidence; that his investigation of the fire was not detailed and in-depth; that he had said in par19.2 in Exhibit D19 that the fire had started on top of the electric guillotine, whereas Mr Barratt had said that the area of most damage was in the area of the printing press on the western wall, and Mr Clark had placed the area of most damage as the bench next to the guillotine; and that the soldering iron could not have caused the fire, hanging as it was over the side

of the guillotine. Mr Reeves went into all these matters, in considerable detail. Despite his persuasive advocacy, I do not consider that the quality of Mr Cox's evidence is affected thereby; I expressed my opinion at p53.

Mr Reeves also dealt in detail with the question of accelerants, the evidence of its user, and the position of the drum and its lid. He pointed to the evidence that the contents of the drum had boiled while within it; the possibility of an innocent explanation for the lid being off the drum; the possibility of an innocent explanation for how the drum came to be found on top of the guillotine - by the papers on which it rested having slipped forwards; and the lack of evidence that the contents of the drum were used as an accelerant, that being a view with which Mr Cox had agreed. I have considered these matters and I adopt what Mr Cox has to say about accelerants at p49.

Mr Reeves submitted that since Mr Cox had not been asked whether non-detection of an accelerant after a fire bore on the question whether or not it could have been there initially, I should infer that the defendant would not have been assisted by any answer Mr Cox gave to such a question. He relied in that regard on *Commercial Union Assurance Coy. of Australia Ltd v Ferrcom Pty Ltd* (1990-91) 21 NSWLR 389 at 418-9; in my opinion, the circumstances of this case are not such that that inference should be drawn. I do not consider that it is a natural inference that the defendant feared to ask such a question. The fact is that there is a lack of evidence that the

contents of the drum were used as an accelerant, in the usual sense of spreading the contents around to accelerate the spread of the fire.

Mr Reeves also dealt in detail with the evidence concerning the soldering iron. The defendant's case (p52) was that the soldering iron may have been altered in some way to make it an ignition device. He submitted that it could not point to evidence that that had occurred. That is correct. He submitted that several aspects of the evidence relevant to the use of the soldering iron should be examined and he proceeded to deal in detail with the evidence relating to the 'blob', arcing, the screws found, the 'trim pot' and the 'triac'. He submitted that the evidence relating to these matters was not such as could give rise to an inference; the defendant's suggestions that there could have been alterations to the soldering iron to make it an ignition device were no more than mere conjectures.

Mr Reeves attacked Mr Cox's evidence as a "hotch potch", lacking a theory, and as put forward in "the same tentative confusing way". I reject this submission; I consider Mr Cox to be a careful, cautious and accurate witness.

Mr Reeves submitted that it was likely that the soldering iron, unmodified, was in fact the source of the fire, which had somehow come about, but by accident.

He pointed to the unlikelihood of the first plaintiff 'putting himself in' as regards the electric guillotine. He referred to the evidence of Mr Ryan as supporting the possibility that the first plaintiff might have been using a soldering iron on the electric guillotine at the time. He characterized as reasonable the explanation given by the first plaintiff to Mr Ryan for taking the IFR equipment away on 5 December.

As to whether the first plaintiff's account to Mr Cox (p45) was a lie, Mr Reeves referred to the concept of consciousness of guilt and to *Edwards v The Queen* (1993) 178 CLR 193. That does not seem to have a bearing on the matter. I consider that what the first plaintiff is there alleged to have said is contrary to sworn testimony which I accept.

Mr Reeves also dealt with the question of the paper fuel, and the failure of the experts to achieve flaming combustion by use of a soldering iron, modified or otherwise. He said that the suggestion that it could be achieved by the use of matches was nothing more than guesswork.

Mr Reeves, rightly, submitted that the plaintiffs did not have to prove that the fire was not deliberately lit; it is for the defendant to prove that it was. He referred to other possible sources of the ignition - malfunction of the soldering iron, failure of a fluorescent light, and arcing of electrical equipment.

On the question of the sufficiency of circumstantial evidence he referred to *Protean (Holdings) Ltd (Receivers and Managers Appointed) v American Home Assurance Co.* [1985] VR 187 at 198-9, with which I respectfully agree.

Mr Reeves then analyzed in detail the evidence relating to motive of the plaintiffs, and replied to Mr Nicholas' submissions (p67-68) as to the significance of the documents in Exhibit D28.

**Conclusions**

Here the defendant alleges arson by the plaintiffs, a grave crime. I consider that clear or cogent or strict proof of this allegation - though not proof beyond reasonable doubt - is required, before it can be found to be established to the reasonable satisfaction of the Court. I consider that this requirement applies when considering the relevant issues: whether or not the fire was deliberately lit; whether or not the plaintiffs or either of them had the opportunity to light it; whether they or either of them had a motive to do so; and whether they or either of them in fact did so.

I bear in mind that the defendant's case of civil arson rests on evidence of a circumstantial nature, as such cases usually do. This means that the analysis of the circumstantial evidence is very important. As to the approach to drawing of inferences from such evidence I apply *Luxton v Vines* (1952) 85 CLR 352 at 358 and *Holloway v McFeeters* (1956) 94 CLR 471 at 480.

I note that much of the history of the fire is not in dispute. It is clear that it was first seen at about 6.13am on 6 December 1989. There is no evidence as to how long it may have been going for, but it was not noticeable to Mr Lowe when he left about midnight on 5 December. It was quickly fought, the firefighters gaining access to the premises by smashing a glass panel in the front door, and unlocking the interior access door, using for that purpose a key obtained at the time from the first plaintiff who was outside. I consider it started some time after Mr Lowe left.

It is clear, in my opinion, that the seat of the fire was in the storage area, specifically the top of the guillotine and the bench beside it which was destroyed in the fire. I am also satisfied that this was the only seat of the fire. Apart from the many rolls of paper nearby there was some paper in a tray on the guillotine, which appeared to have included some bankcard vouchers.

It is clear from the photographs taken on 6 December 1989, particularly photo 32 in Exhibit D6, that a soldering iron and coil were hanging off the side of the guillotine bench immediately after the fire.

Apart from the cut padlock on the front door, it is clear there was no sign of any attempt at a forcible entry of the premises. I am satisfied that all of the external doors were locked, as was the internal access door to the back section, when the fire was discovered. I consider, in all the circumstances, that Mr Foster's submission (p67) must be accepted - that

only the plaintiffs, or one of them, could have entered the premises in the early hours of 6 December.

I am satisfied that the windows in the locked back section were broken by the fire, or by the firemen fighting it. It is clear that the premises were not entered through any windows.

This meant that either the fire started by accident, or it was deliberately set by one or other of the plaintiffs. Mr Foster has submitted that it had been deliberately set, and probably by the first plaintiff.

As to how the fire came about, I found the evidence of Mr Cox and Mr Lee persuasive; I am satisfied that the soldering station, the remains of which were found beside the guillotine, was the source of the fire. I do not consider that the fluorescent lights were the source - there is a complete lack of any physical evidence to support any such hypothesis. In any event, I accept Mr Lee's conclusion that it would be "most unlikely" that any fluorescent light fitting was a source of the fire.

The question is whether the fire was deliberately lit using the soldering station, or whether it came about by accident.

It is a clear inference from the testimony of Mr Lee and Mr Cox, and the statistical material, that for a fire to be caused accidentally in these circumstances by a soldering station being left 'on', would be very unlikely.

I accept the evidence of various witnesses - Messrs Barratt, Ryan and Knott - that they had never seen the electric guillotine being used as such. There is no evidence suggesting that it was being used at about the time of the fire. I think it is clear from Mr Cox's evidence that it was not plugged in at the time of the fire, but the soldering station was; there is no testimony which contradicts his account.

Various witnesses - Messrs Barratt, Ryan and Knott - said that they never saw any repair work being carried out on the guillotine bench, or carried out work there themselves. It is clear that from time to time the first plaintiff used the printing press in the storage area to carry out printing work.

I consider that no satisfactory reason exists for a soldering station to have been where the remnants of one were found, hanging off the guillotine bench. Clearly those remnants were not those of the station used by Mr Barratt, Exhibit D12 or Exhibit P1. It is not very clear which soldering station it was. Mr Foster referred to the somewhat puzzling circumstances in which the soldering station now Exhibit P1 came to be produced by the first plaintiff's barrister at the coronial enquiry, where it was Exhibit 33. There was clearly a soldering station involved in the fire at the guillotine, and the only evidence to show why it was there, and of a fire occurring by accident, is the out-of-Court statement made by the first plaintiff to Mr Cox on 21 December 1989, at p45. As to the credibility of this account, there is Mr Ryan's account in Exhibit D8 of the blades of the guillotine being

"buggered"; Mr Ryan's evidence on the point was not challenged. In so far as the first plaintiff's account at p45 does not accord with the sworn testimony, I do not accept it.

I consider that the nature of the evidence adduced by the defendant was such as to establish evidentiary facts leading to strong inferences being drawn adverse to the first plaintiff, but not to the second plaintiff. I reject Mr Reeves' submission that the defendant's case remained in the realm of surmise and conjecture, as regards the fire being deliberately lit. In that regard I consider that the defendant has established a case that called for an answer by the first plaintiff who had knowledge solely within his possession which would assist in getting at the truth. I reject the submission that there was no need in the circumstances for the first plaintiff to give an explanation.

The significance of the first plaintiff's failure to make answer in these circumstances is discussed in *Weissensteiner v The Queen* (1993) 117 ALR 545 at 550-553 and is illustrated in *NRMA Insurance Ltd v Elchaar & Anor.* (1993) 7 ANZ Insurance Cases 61-169. The circumstantial evidence relating to the issue of arson, linking the first plaintiff with the setting of the fire on the guillotine, is such that the first plaintiff's silence is eloquent support of an inference adverse to him open to be drawn from the evidentiary facts established by that evidence.

Looking at the whole of the circumstantial evidence in this case, I consider that a very clear inference arises that the first plaintiff had both the motive and the opportunity to set the fire, by using a soldering iron in some fashion. Further, I consider that on the balance of probabilities it would be open to be inferred on the evidence as it stands that he deliberately set the fire. See, inter alia, the matters referred to by Mr Nicholas at p67-68. In that connection, the failure of the first plaintiff to testify attracts the application of the rule in *Jones v Dunkel* (1959) 101 CLR 298. The evidence adduced by the defendant (which bore the burden of proof on the issue of civil arson) was such as to require an answer by the first plaintiff. His failure to testify remains unexplained, and constitutes a significant additional circumstance in the case. It is open to infer from that circumstance that the evidence he could have given would not have assisted his case. Whether such an inference *should* be drawn depends on the circumstances of the particular case. In this case it was within the first plaintiff's power to testify about the account which Mr Cox says (p45) the first plaintiff gave him on 21 December as to when he was last working in the storage area, and to have elucidated that significant matter, about which he clearly had knowledge. The inference I draw in the circumstances is that the first plaintiff did not testify because he feared to do so, knowing that the explanation which he then gave to Mr Cox was false, and that his testimony would not have assisted his case because it would not have withstood scrutiny. The drawing of that inference is of very considerable significance to the question whether he deliberately set the fire; it is an inference which strengthens the inference otherwise open to be drawn from the

circumstantial evidence I mentioned earlier. Taken together, I consider that it is to be strongly inferred that the first plaintiff set the fire and that the strength of that inference is such as to amount to cogent or convincing proof that he did so, in the sense mentioned in *Briginshaw v Briginshaw* (supra).

In drawing these inferences I have borne in mind that the defendant's allegation is that the plaintiffs have committed a very serious crime, that the commission of such a crime may be considered to be inherently improbable, the plaintiffs being presumed to be innocent thereof. The result is that the defendant is put to 'exactness of proof' on the issue of civil arson; to that end I have carefully weighed the testimony and written evidence, and closely examined the facts proved, on the basis of which I have drawn the above inference.

I record that I am not satisfied that the second plaintiff played any part in the act of civil arson on 6 December.

**Findings**

I find that the first plaintiff deliberately lit the fire in the subject premises, on 6 December 1989,

**Orders**

In accordance with the joint approach requested by both parties, set out at p64, I make no orders at this time consequential on the above finding; both parties are at liberty to apply on 2 days notice.