

THE HIGH COURT

ON APPEAL FROM/

THE CIRCUIT COURT

SOUTH-EASTERN CIRCUIT

COUNTY OF CARLOW

BETWEEN/

W.J. PRENDERGAST & SON LIMITED

Applicant

-and-

CARLOW COUNTY COUNCIL

Respondent

Judgment delivered by O'Hanlon J., the 3rd day of June, 1988.

The Applicant as owner of a factory premises at Leighlinbridge, Co. Carlow, claims compensation against the Respondent under the provisions of the Malicious Injuries Act, 1981, in respect of the destruction by fire of the said factory premises and the contents thereof on the 29th January, 1986. By agreement between the parties the issue of liability was dealt with in the Circuit Court as a preliminary issue, leaving over the assessment of damages for later determination in the event of the question of liability being determined in favour of the Applicant. The amount claimed is in excess of £1m. The learned Circuit Court Judge decided the preliminary issue in favour of the Applicant, and from that decision an appeal has been taken by the Respondent to the High Court.

Two separate and distinct grounds are relied upon by the Respondent in resisting the Applicant's claim. The allegation

that the fire was caused maliciously by a third party is disputed. Secondly, the Respondent contends that the factory premises was in large part reconstructed after a previous fire, which took place in the year 1969, and that the work carried out was of such a character that planning permission was required, but that the Applicant failed to obtain such permission. In these circumstances the Respondent relies on the provisions of the Malicious Injuries Act, 1981, Sec. 12, sub-sec. (3)(e) to defeat the Applicant's claim in whole or in part.

The principal figures in the Applicant Company are William J. Prendergast and his son, Christopher. They each live in the vicinity of the town of Carlow, and about ten or eleven miles from the factory premises. The evidence was to the effect that one or other of them attended to locking up and securing the factory premises each evening at the end of the day's work, and that William J. Prendergast was the one who carried out this operation on the day the fire took place.

The factory was situate in a type of compound, surrounded by a high boundary fence made up of a masonry wall, with corrugated sheeting above the level of the wall, and the whole surmounted by posts and wires, with several strands of barbed wire in use. Here and there some strands of wire had been tampered with or severed, but the impression conveyed by the photographs which were put in evidence was one of quite substantial fortification against intruders. The only regular means of access to the factory was through large entrance gates leading into the yard; these were locked up at night and padlocked.

The factory was fitted with a fairly sophisticated type

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

3.

of burglar alarm involving an electronic beam which, if breached anywhere in the interior of the building would set off alarm bells inside and outside the factory, and flashing lights on the exterior of the premises. The setting off of the alarm would register with the firm in Dublin which installed the system, and they, in turn, were required to notify Mr. Prendergast at his home, and, (apparently), the Garda Siochana in Carlow. The control panel in the main office of the factory where the alarm system could be switched on and off also contained a plan which lit up to indicate the exact section of the premises where the alarm had been activated.

Mr. Prendergast (Senior), having locked up the premises and set the alarm on the 29th January 1986, went home and had an evening meal. He then went to the Sevenoaks Hotel in Carlow as a blood donor to give a pint of blood to the Blood Bank, which was operating there that evening. This was about 7.30 p.m. He said he disliked waiting for the procedure to be carried out and he was taken immediately, having asked permission of those in front of him in the waiting room. He said that on his arrival home at about 8.55 p.m. he was informed by his wife that the alarm had gone off in the factory; that she had been notified and that she, in turn, had telephoned Christopher to ask him to call out to the factory and find out what was happening.

William Prendergast said that he decided to wait at home until contacted by Christopher, so he sat and watched the news on television until about 9.30 p.m. At that stage, not having heard from Christopher, he telephoned the factory and spoke to him. He was told that the only suspicious evidence discovered by Christopher was a van from which the petrol cap

had been removed and a length of hose was inserted in the petrol tank. He decided to go out and said he arrived at the factory shortly before 10 p.m. He was met by Christopher and the two men went to look at the van, which was parked near a window along the side wall of the factory. William Prendergast said that he noticed the window was partly open and on looking in he saw a "shining glow" in the knitting room, about four yards in from the window, on his left as he put his head in the window, and between some stacks of materials.

He and Christopher then went round to the office at the front of the factory and went through the building to the knitting room. On opening the door they said that smoke came rolling out of the room and it was impossible for them to proceed further into the room. They telephoned "999" and in due course Garda White arrived from Leighlinbridge, followed some time later by Sergeant Cunningham and the Fire Brigade.

Dr. MacDaeid, a fire consultant brought in by the Applicant in the immediate aftermath of the fire, took samples from the area indicated by William Prendergast as the place where he had first seen the glow in the knitting room, (which Dr. MacDaeid said was about 10 feet in from the window), but found no traces of accelerants having been used.

Mr. Skelton, a fire consultant brought in by the Respondent, who was on the scene the day after the fire took place, said that he found evidence which suggested to him that kerosene vapours were present in at least three locations within the building, one area being the office at the front of the building where Christopher Prendergast had been sitting for half-an-hour and upwards, awaiting the arrival of his father.

The Applicant did not suggest that there had been any manifestations of ill-will on the part of any third party towards the Applicant prior to the fire. The business was said to be extremely successful and gave a lot of employment in the locality. There had been a major break-in about a year before the fire, when goods valued at £69,000 had been taken from the finished goods store - a building set apart from the main factory premises - but no significant damage had been done on that occasion.

The Applicant suggested that what took place on the night of the fire was, in all probability, a wanton act of vandalism on the part of some arsonist, who broke in and set the place on fire without any other motive than the desire to cause damage and destruction or an accidental fire caused by an intruder. While the Applicant produced no evidence of accelerants having been used for this purpose, the evidence called in support of the claim was designed to exclude the possibility of the fire having occurred accidentally, in circumstances where no claim to compensation would arise. It appears to be common case that an electrical fault was not responsible and evidence was given of all normal precautions having been taken to prevent an outbreak of fire.

There are certain difficulties involved in accepting the hypothesis put forward by the Applicant as the probable scenario for the outbreak which took place. It envisages an unlawful entry made by some wrongdoer at about 8.42 p.m. when the alarm is said to have gone off. As the outside gates remained locked it means that someone must have scaled the quite formidable boundary fence, and gained entry to the factory through the window into the knitting room, as no evidence was discovered of any other means of entry having been used.

On entering the factory the wrong-doer would have set off the alarm almost immediately and would then have been operating in a situation where alarm bells were ringing inside and outside the factory and warning lights were flashing on the exterior. Whatever about the response of people living in the immediate vicinity of the factory, like Anne Mackessy who could see the flashing lights from her bedroom window, there was the likelihood of a signal going through immediately to the burglar alarm firm and possibly the Gardai. It has to be assumed that the intruder set a fire going in this situation, and then made his escape through the open window, pausing after doing so to close the window in part as it was not open sufficiently to admit a person when noticed by Mr. Prendergast one and a half hours later.

The fire thus started must be assumed to have remained more or less dormant for a period of about an hour and a half which elapsed between the alarm sounding and Mr. Prendergast first noticing the glow in the knitting room at about 10.10 p.m.. It then became a massive fire which speedily engulfed the whole factory once Mr. Prendergast had opened the internal door leading from the finishing room into the knitting room.

There are many parts of the evidence put forward on behalf of the Applicant which I find difficult to comprehend.

If, as the Applicant says, the burglar alarm should sound in the Garda Station once it had been set off, I would have expected a quick response from the Gardai. There was no witness from the burglar alarm firm to confirm that this link with the Garda Station existed and should have operated, nor any explanation for the lack of response if it did operate. Mrs. Prendergast said her husband asked her to ring the Guards in Carlow at about 9.30 p.m. and that she assumed they were

there (ie at the factory) "long ago". There was, accordingly, only hearsay evidence as to the exact time the alarm went off.

The first person to investigate the situation at the factory was Christopher Prendergast. By looking at the panel in the office he could have found out immediately in which zone the alarm had been activated. He said that he did not do so as "he didn't know what the instructions meant". I find this very difficult to accept, when he was the person responsible for switching on the alarm whenever he was last to leave the factory, and for switching it off when the need arose. There had been a serious burglary a year previously and the burglar alarm was a vital part of the security system in the factory.

Christopher then says that he made his way down the factory as far as the knitting room and looked in, but proceeded no further. Some lights were on there, having been switched on by him from the make-up room. Instead of going in to have a good look round the knitting room he then went back out through the factory and proceeded to investigate outside, even to the extent of going out of the compound altogether to examine a tennis court which adjoined the factory. He said that in doing this he was following a set pattern which he had fixed for himself and that in the ordinary course of events he would have come back to investigate the knitting room and the store (both of which were at the end of the factory building furthest from the office) - entering them from the yard. However, he says that his attention was diverted by finding the van outside the knitting room, with the petrol cap removed and a section of hose-pipe projecting out from the petrol tank. As a result he says that he never entered either the knitting room or the store prior to the arrival of his father over half an hour later. Instead, he removed the

hose-pipe from the petrol tank; replaced the cap on the tank; failed to notice that an adjoining window was partly open, and adjourned once more to the office, where he read a magazine until his father arrived.

I find it incomprehensible that he should not have checked out the situation in every part of the factory when he went to investigate why the alarm went off, and even more so when he discovered the suspicious circumstance of the van having been tampered with - apparently by some intruder.

There follows the episode after the arrival of Mr. Prendergast Senior. He, accompanied by Christopher, went to look at the van and says that he noticed a glow some distance into the knitting room having put his head in through the open window. The "glow" was only ten or twelve feet in; the lower cill of the window was only about 3'8" above ground level and either man could have stepped in quite easily to investigate further. Neither did so. Christopher said that he did not even see the glow, so he was apparently not interested enough to look in the window to see what his father was referring to. The two men then made their way up through the factory, where there were about 24 fire extinguishers located at different parts of the building, but did not think of bringing one or attempting to use it. They were met, on opening the door of the knitting room, with billowing clouds of black smoke, although neither claimed to have seen any smoke when they were at the window outside.

Garda White arrived before the Fire Brigade and spoke to Mr. Prendergast Senior. Later Sergeant Cunningham also arrived and spoke to William and Christopher Prendergast. Neither man mentioned to either of the Garda officers the very suspicious

circumstance of having found the petrol cap removed from the van, and a section of hose inserted into the petrol tank. William Prendergast said he was too shocked, and Christopher said he did not think of telling the Gardai that night.

One of the most extraordinary features of the case is to find the co-Director of the Applicant Company sitting in the factory office for half-an-hour or more reading a magazine, while the fire in a knitting room, full of highly inflammable materials, is smouldering gently in the background. The suggestion is that by some form of delayed action the major outbreak was held back for about 1½ hours from the time the burglar alarm was set off and only took hold when the internal door was opened after the arrival of Mr. Prendergast Senior. This, notwithstanding that the window to the knitting room was partly open at all times. A previous fire, which occurred in the premises in 1969 had become a conflagration almost immediately.

Mr. Skelton, the fire consultant who gave evidence on behalf of the Respondent, gave as his opinion that a fire set by an arsonist, or occurring accidentally, in the knitting room, would have quickly become a conflagration, or else would have smouldered and died out completely within a comparatively short time. He further said that if smouldering in a room stacked with acrylic-type materials, it would have given off pungent fumes which would have percolated rapidly to every part of the factory and should have been apparent in the office where Christopher Prendergast sat reading for a considerable time while awaiting the arrival of his father. I find this evidence quite convincing.

I find the evidence in support of the Applicant's claim in relation to these matters, which I regard as crucial to

the case, so unsatisfactory and so unconvincing, that I am unable to come to a conclusion that as a matter of probability the fire was caused by the malicious act of a third-party in circumstances giving rise to a claim for compensation under the provisions of the Malicious Injuries Act, 1981. I therefore have to determine the issue of liability against the Applicant and in favour of the Respondent, and I propose to reverse the Order already made by the learned Circuit Court Judge and to dismiss the claim.

For the reasons already stated I find it unnecessary to deal with the other defence to the claim which has been raised in reliance on the provisions of the Malicious Injuries Act, 1981, Sec. 12, sub-sec. (3) (e).

Approved

D. J. K. W. L. O. W.

17/11/1988