CN652

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

6/1

CP 1814/87

[redacted]

2015

BETWEEN THE ATTORNEY GENERAL OF NEW ZEALAND in his capacity as successor in title to the BROADCASTING CORPORATION OF NEW ZEALAND

First Plaintiff

A N D A.G. HARRIS & OTHERS

Second Plaintiff

A N D WILSON & HORTON LIMITED

First Defendant

A N D PANMURE TAMAKI TRANSPORT LIMITED

Second Defendant

CP 1736/91

BETWEEN WILSON & HORTON LIMITED

Plaintiff

A N D THE NEW ZEALAND INSURANCE COMPANY LIMITED

Defendant

Hearing: 3 - 28 October 1994

Counsel: Mr D.J. Heaney & Mr C.R. Langstone for Plaintiffs in CP1814/87
Mr A.H. Waalkens & Mr C.A.J. Clark for First Defendant
Mrs P. Courtney & Mr B. Vautier for Second Defendant

Mr A.H. Waalkens & Mr C.A.J. Clark for Plaintiff in CP 1736/91
Mr P.D. Green & Ms J.A. Webber for Defendant

Judgment: 20 DEC 1994

JUDGMENT OF TEMM J.

Solicitors: Heaney Jones, Auckland
Bell Gully Buddle Weir, Auckland
McElroys, Auckland
N.Z.I. Insurance New Zealand Ltd (J.A. Webber)

These two actions were heard together. They arise out of a fire that destroyed a warehouse and its contents, mainly a large number of reels of newsprint. In the first action, CP 1814/87, the plaintiffs sue the defendants in negligence for the loss of the newsprint (in the case of the first plaintiff) and for loss of the building (in the case of the second plaintiff). The first plaintiff also sues the first defendant for breach of a contract of bailment.

Damages for the loss of newsprint are claimed at $1,198,899 (nett after salvage), and damages for reinstatement of the building are claimed at $335,287.

In the second action, CP 1736/91, the plaintiff sues the defendant as its insurer, claiming various declarations setting aside the insurer's refusal to pay under two contracts of insurance on the grounds of non liability and of material non-disclosure of a change in circumstances during the currency of the policies and at the time of their renewal.

For reasons that will become clear I intend to issue separate judgments in each action.

CP 1814/87

BACKGROUND

It took this case nine years to come to trial. As a result the evidence of some of the eye witnesses is clouded by time. Some inconsistencies and vagueness in recollection of detail is inevitable. In a few respects I have come to the conclusion that particular facts have not been correctly described because the witnesses concerned must be mistaken. I

do not intend to convey any criticism by that finding. Every witness before me was direct and straightforward and gave not the slightest reason to doubt his honesty and veracity.

The warehouse was about 30 metres long and 25 metres wide. It had attached to it a two level office block and a workshop. It was owned by the Harris Trust of which the second plaintiffs are trustees.

The office and warehouse had been leased to Panmure Tamaki Transport Ltd (PTT) but the lease had expired, new terms had not been agreed and PTT occupied as tenant holding over under the former agreement. PTT had much vacant space in the warehouse and arranged with another carrying company, W.R. Leighton Ltd, to find some use for it. Leightons had a contract with Wilson & Horton Ltd, newspaper and magazine printers and publishers, for cartage of reels of newsprint and became aware that the printers needed more storage space.

Wilson & Horton had a printing contract with the Broadcasting Corporation of New Zealand (BCNZ) (represented in this action by the Attorney General). By that contract (the Listener Agreement) BCNZ bought quantities of newsprint from the manufacturer which Wilson & Horton stored and used as its printing programme required when it came to the weekly production of the "NZ Listener" magazine. The printer's own warehouses became full during early 1985 and it arranged with Leightons to store BCNZ's newsprint in PTT's warehouse at a weekly cost of 20 cents per reel, paid by Wilson & Horton Ltd and charged on to BCNZ (at a different rate based on weight).

Wilson & Horton's warehouse workers did the storage. They used special fork hoists that they brought with them from their own warehouse not far away. They stacked the reels on end as they usually did, because to stack them on their side can cause distortion - the lower ones get partly flattened by the weight of those on top.

Between April and October 1985 the number of reels in the warehouse varied from time to time, but usually there were about 3,000, the number varying as some were removed and others were delivered in replacement. At the time of the fire, 27 October 1985, there were 2,957 in stock. Each reel was 0.75 metres from side to side and 1.1 metres in diameter. They were stacked on end six to eight high depending on the roof line. A stack of eight reels was about six metres in height. Each reel weighed approximately 400kg.

The roof was gabled with a central ridge running from north to south supported by seven steel girders called portals because each had a leg welded vertically at each end which was set into the ground and protected by concrete blocks that also comprised the walls of the warehouse. The whole of the western wall was built in this way but the north and south walls were only partly concrete block construction; the higher parts of each wall were made of corrugated plastic.

The eastern wall was built of concrete blocks to a height of about three metres and added on outside it was the two level office block. The workshop of about 11 metres long by 8 metres wide, was added on to the western end of the north wall.

On the eastern side of the ridge-line a clerestory had been built running lengthwise for about two-thirds of the length of the roof and placed equidistant between the south wall and the north. The window was about one metre in height and whether made of glass or corrugated plastic (like the end walls) is not known. The Harris Trust did not build the warehouse and the knowledge of the Trustees about the details of its construction was very limited. The roof was corrugated iron laid over a layer of insulation paper which was supported by wire netting.

The warehouse was well lighted by the expanse of translucent plastic at each end and by the long clerestory window. But it also had electric lights suspended from either the rafters or the purlins between each rafter. The remains of one or two of these lights were later found in the ruins.

The evidence does not show how many lights there were in the warehouse at the time of the fire. It is thought that there were ten altogether set in two rows of five running north and south. That there were lights is beyond doubt, but how many there were no-one could tell me, probably because for most of the time they could not be seen from the ground.

The reels were stacked eight high for the central part of the warehouse and at five different spots the eight reel stacks surrounded a seven reel stack leaving "a well" in which a light was hanging. At one of these spots the eight reel stacks surrounded two seven reel stacks side by side, suggesting that a light was hanging at an awkward point and needed more space than the others. If there were five other lights where no wells

had been left for them it is not clear why they were not provided space in the same way. Perhaps they were hanging at a higher level than the others or perhaps they were hanging nearer to the side wall, clear of the highest stacks of eight reels. As it happens whether they existed or not turns out to be irrelevant.

Each reel of newsprint was covered in plastic and wrapped in heavy kraft paper by the manufacturer with a heavier round plastic piece fitted at each end under the kraft wrapper to protect the edges of the paper. When eight reels were stacked one on top of the other they reached 6.2 metres in height and the stack weighed 3.2 tonnes.

The warehouse was classified D2 under the relevant bylaw in force, which the local body had enacted by adopting a New Zealand Standard bylaw 1900, Chapter 5 that is documented in the evidence. The building was not equipped with a fire-fighting water-sprinkler system.

PTT and its employees did not have anything to do with the newsprint. It was handled at all material times by Wilson & Horton warehouse storemen. But PTT had access to the warehouse in the north-east corner of which was a truck and chassis, and a Ford station wagon. The truck belonged to PTT and its engine had been removed for repairs. The station wagon belonged to a PTT employee who was working on it on the morning of Saturday 26 October.

A number of different people were key holders to the warehouse - some PTT employees, some Wilson & Horton employees and probably some employees from W.R. Leighton Ltd. There was a pedestrian access door on

both north and south walls, no access at all on the west wall and two roller doors on the east wall, one near the north-east corner and the other at the south-east corner. There were two pedestrian access doors on the east wall under the office block. One led directly from the warehouse to the office area at ground level, and the other led directly from the warehouse to an open space under the office block. It had been fitted with a glass door.

THE FACTS OF THE FIRE

Just after 9 a.m. on Sunday 27 October (Labour weekend) 1985 the Fire Service received a number of fire alarm calls and two fire engines were sent to the scene. One left Mt Wellington station at 9.08 a.m. manned by Mr Fothergill and Mr Jordan (together with two other firefighters who were not called as witnesses), and as they approached the scene they both could see a plume of smoke rising high in the sky "perhaps a 1000 feet or so". The reported that fact immediately by radio which is timed at 9.10 a.m. Ex. P18)

At the same time the other fire engine under command of Mr Heslop was dispatched from the Ellerslie station and arrived at the scene a few moments before Mr Fothergill, who drove a slightly different route, and took up station on the east wall. Mr Heslop stationed his appliance on a right-of-way leading to the warehouse.

He could see that the north-east corner was blazing fiercely, and made his way down the eastern wall to get an appreciation of the situation. As he did so Mr Fothergill and his crew were cutting their way through a fence to get access, their appliance being stationed on a vacant adjoining section.

Mr Heslop did not see any smoke or flames coming from the south wall. Mr Fothergill and Mr Jordan did. I think that probably the fire was so intense both on the north-east corner and in the office block that Mr Heslop did not need to go as far as the south wall to realise that his attack should be the "north front" and leave the others to the "east front".

My first finding of fact is that when the first two fire engines arrived at 9.12 a.m. the warehouse was burning fiercely with smoke and flames to be seen coming out of the north, east and south walls. The plastic covering in each end had melted and the wind "was a very light breeze from the north". (Evidence p.504) The plume of smoke seen by the firemen was probably the result of part of the roof collapsing which "prompted a flurry of 111 calls". (Evidence p.506).

There has been much theorising in the evidence about the cause, origin and spread of the fire, with some refined calculations that become inconsequential in the light of these primary findings.

The third engine to arrive was commanded by Mr Broome and reached the scene about eight minutes later at 9.20 a.m. He went immediately to the west front of the fire and climbed on to the roof of an adjoining building which had a common wall with the warehouse. He said he then climbed on to the roof of the warehouse and walked towards both the north and south of the building. He could not say how long he was on the roof: "(could have been) over ten minutes, more than ten, could have been as little as two, the time scale becomes very confused, and also its a long time ago". (Evidence p.259). He said at first that he could see down

through the roof to the truck, (so some of the roofing iron at least must have collapsed by the time he arrived) but later he said that perhaps he was looking through the space in the north wall where the corrugated plastic had melted. His evidence as to walking on the roof attracted some incredulity from other witnesses - (Mr Fothergill thought he must have been confusing this fire with some other one), but again this particular fact is probably irrelevant in the outcome of the case. I mention it only because it attracted much emphasis in the course of the theorising.

The Area Fire Commander, Mr Mears, arrived at 9.21 and took command. Eventually there were 93 firemen fighting the blaze from 19 appliances, including a high level snorkel. It was a major fire that took about two hours to control, but for the next three days firemen were in attendance as flare-ups occurred repeatedly, especially over the first 24 hours or so. These were caused through flaming debris falling down the spaces between each stack of reels (called "chimneys" by the firemen) where they smouldered and set alight reels at lower levels. To minimise the risk the Fire Service required the warehouse to be emptied as quickly as possible and front end loaders were used to remove much of the newsprint which was taken to a rubbish dump and abandoned.

Altogether about half the newsprint was not salvageable, and in the end, it seems, out of 1254 tonnes of BCNZ newsprint in the store at the time of the fire, 618 tonnes was dumped. This took place over a period of 12 months, but the record-keeping of salvage attempts is not complete and how much was abandoned in the first few days, and how much at various times later, is impossible to ascertain. The value of the newsprint at the time of the fire was assessed at December 1985 at $1,235,190. After

allowing for salvage the claim by BCNZ for loss of its newsprint is $1,198,899. The warehouse was reinstated at a cost of $335,287. The two plaintiffs claim those amounts respectively, together with interest back to various dates in 1986.

THE CAUSE OF THE FIRE

Fire investigation skills have advanced considerably in the last ten years and I intend no criticism of those who first investigated this fire by saying that they could well have proceeded differently in 1985 had they known then what they now know in 1994.

As is usual in such matters the insurers involved instructed loss adjusters immediately and several were on the scene while the firemen were still at work. Nothing much could be done until the next day when Mr Ellison, Mr Waters and Mr Kelliher conferred on the scene, (although Mr Waters had gone into the ruins the day before and counted the reels to establish the quantity). Mr Barnett, a professional fire engineer, was brought into the matter next day, while Mr Fry and Mr Simpkin, electrical engineers, were called in the day after that. Other experts to be mentioned were drawn into the case in later years.

The suspicions of the investigators quickly fell upon the lighting system. Not surprisingly they saw as a cause lights in the wells being left on so that they overheated and set fire to a reel of newsprint. They found (at a point later known as F3) a well in the stack which looked as though it was more heavily charred than the others which, they thought, could have been burning for longer than other parts and so be the seat of the fire. In that well and another immediately to the north (F4), Mr Ellison found the

remains of lightbulbs, lightbulb fittings and what seemed to be the remains of an aluminium reflector (lampshade). He also found the remnants of copper wiring there and elsewhere of which he took possession. One of the lightbulb remnants could be identified as 500 watt, although another fragment in the other place suggested that it might have come from a 750 watt lamp. In the workshop area were some undamaged lights which were set in aluminium reflectors.

Mr Kelliher and Mr Waters both saw the same evidence of lamp remnants and copper wire and each collected samples. When these three gentlemen examined the copper wire strands all three noticed (and no doubt remarked to each other) that on some of the ends of copper wire there could be seen a copper bead which they saw as very significant. Mr Waters said:

> "the wiring showed signs of beading which is consistent with fusing and indicated that the circuit was live at the time of the fire - in other words the lights were on."

To similar effect Mr Ellison said:

> "The wires showed beading and indicated to me that the lights were on at the time of the fire. If the wires had simply burnt through when the power was not on, it is most likely that beading would not have occurred."

Mr Simpkin came to the same conclusion after examining photographs of the copper wire which he had also seen at the site. His evidence was:

> "As can be seen from these photographs there is a type of beading present which is consistent with live wires having touched once the PVC outer insulation was burnt through. I am in no doubt but that the lights were on in these warehouse premises at the time of the fire."

Mr Kelliher wrote a report after his inspection that came to light very late in the course of preparation for the case. After describing his

conclusion as to the existence of two lines of lights he described the pieces of copper wire and said:

> "The wiring was heavily bubbled and blobbed suggesting very strongly that the distortion of the wiring is as a result of fusion rather than external heat If this is the case, it indicates that the lights were operating at the time of the fire."

This unanimity of opinion set this case on its ultimate course and is based on the assumption that beading at the end of a copper wire indicates fusion rather than burning.

The only different opinion was expressed somewhat tentatively by Mr Fry, who like Mr Ellison and Mr Simpkin is also an electrical engineer. he said:

> "I looked at the ends of the breaks in the flexible cable to see if there had been arcing which may have given rise to a fire. I could see no signs of arcing on the flexible cable which I found in light well (F3). I concluded in my report therefore that there was no evidence of electrical arcing having caused the fire."

I think it necessary to explain that in New Zealand terms "arcing" and a "short circuit" are different things. It is not so elsewhere. "Arcing" is what happens when an electrical charge leaps from one electrical conductor (a wire carrying electricity) to another conductor. When that happens there is a powerful electrical force that may cause the second conductor to melt - not completely always - but enough to leave traces of the effect of the electricity. This is what Mr Fry was looking for and did not find. A "short circuit" on the other hand occurs when two conductors, each carrying electricity, touch one another. There may also be melting when this happens and it is not easy to distinguish the two phenomena. Some experts now say that the distinction is unnecessary. Both events can be described conveniently in the same way as "tracking", because in either event an

electrical current is present, and for many purposes that is all that needs to be proved. If there had been, in this case, live wires in the lighting circuit then either "arcing" or a "short circuit" would have proved the existence of an electrical current which, in turn, would have been the foundation for an argument that the heat of a lighted lightglobe ignited paper on a roll and so caused the fire.

The plaintiffs relied upon the evidence of the experts already mentioned (except Mr Kelliher who was called by the first defendant to emphasise the tentative and incomplete nature of his enquiries). They also relied heavily upon the supporting evidence of Professor Leslie Andrew Erasmus.

The Professor is now Professor Emeritus from the University of Canterbury. He was a member of the Department of Engineering in that school of learning for 30 years, and was for a time its Head of Department. He has had a distinguished academic career as his curriculum vitae demonstrates, and is undoubtedly an expert in his field.

He was called into this case three months ago. He examined all the copper wire samples but it is necessary to say that he could not see every exhibit that had been collected at the scene. As a result of the lapse of time and the natural history of business relationships various participants in the case have belonged to one firm then another, and sometimes a third as a result of which some of the exhibits have been lost or thrown out as offices changed because somebody, not necessarily one of the witnesses in the case, was led to believe that this wire or that one was unimportant. That can happen easily in circumstances like these, and it would not be fair to

any of the parties to draw any conclusions except that that is a likely result when cases are prolonged as this one has been. There is nothing sinister in the absence of some exhibits, and I so find.

Professor Erasmus found one wire that aroused his interest. He called it Sample 1. It was a tiny copper wire only 0.93 mm in diameter but typical of the kind one finds in lighting wire, often one of a set of three twisted together and insulated by polyvinyl chloride (PVC), which is in turn one of a set of three similar conductors shown in Fig. 1 of Ex. 26. By this I mean to convey that a lighting circuit usually comprises three "wires", each of which is three smaller wires twisted together, and in New Zealand one set is encased in black PVC, one in red PVC and the third in green PVC, all further insulated in ribbed white PVC.

The Professor's interest was in one of these tiny wires which was still attached at the time of his examination to two similar wires. All three can be seen in a photograph taken through an electron scanning microscope (as shown in Figure 17 of Ex. 26), taken at a point 25mm from the end of the sample.

Fig. 17 is a photograph taken at a magnification of 23; below it is Fig. 18, taken at a magnification of 150. This shows one of the three wires which has signs of melting on what is the upper half, the edges of which are marked by diamonds, half blue, half lemon. At the lower half of the photograph are marks (scratches or striations) marked by green double half-diamonds.

These, said the Professor, are very significant. They are typical of the marks to be seen on copper wire made at the time the wire is manufactured by being drawn through a die as part of the manufacturing process. The fact that they are visible in Fig. 18, at the same time that there is also visible signs of melting on the upper half of this tiny wire indicates that the wire was affected by an electrical force that melted the upper surface and not the lower surface. Having regard to the thinness of this wire (0.93mm) and to the ability of copper to conduct or transmit heat, this was only to be interpreted as melting caused by an electrical arc - therefore the damage to the wire was done while it was carrying an electric current. Therefore the lighting circuit was alive when this happened, and save for some extraordinary event the lights on the circuit would be shining.

To examine the matter more closely the Professor put the wire in question under another process of magnification which enabled him to see through the wire in section and examine its microstructure. The result was photographed and produced as Fig. 19 of Ex. 26. The black spots he explained are hollow spaces or "pores" created by gases formed as a result of the arcing, and the existence of such "porosity" is evidence that this phenomenon could only occur as a result of an electrical charge. Furthermore, he pointed out that in the same photograph the way that two separate conductors had been melted together, was strong evidence in support of his opinion, especially since the upper of the two had been burned away as the photograph shows.

He said that the molten damage on the conductor caused by arcing continued for 17mm from the end of the wire in question (i.e. measured

from the left of Fig. 19 of Ex. 26). This feature attracted much attention later.

He did not say that a bead on the end of a copper wire is an indication that the wire must have suffered from damage caused by arcing or a short circuit when the wire was carrying a current of electricity. This may be the central scientific point in the whole case, because it was the presence of such a bead that led the investigators at the scene to believe that the lighting circuit was alive at the time of the fire.

The defence called some very strong scientific evidence in rebuttal.

Professor Bernard Beland is a Canadian with a distinguished career in academia and as a consultant electrical and fire engineer. His curriculum vitae takes up the first three pages of his brief of evidence. He says he has investigated some 800 fire scenes and testified in courts of law "about 50 times in Canada and in many States of the United States". He has published many articles on ignition, thermal transfer and electrical causes.

He said that to see a bead at the end of a piece of copper wire was no indication at all that the wire was carrying electricity at the time that bead was formed. To prove his point he drew from his pocket in the witness box a strand of copper wire 0.25mm in diameter, lit a match and applied the light to the end of the wire. A typical copper bead resulted. Counsel produced the wire as Ex. 1D21.

He then deposed that in experiments he had conducted in his laboratory he had never found that an electrical arc between two conductors

would produce melting damage greater than two or three times the diameter of the wire.

> "In all cases I've conducted with small size conductors both (the) size in this case and other sizes usually larger than in this case the melting is usually only a matter of a few millimetres, maybe 4 - 5mm. I say as a general rule maybe two times, up to twice or three times (the) diameter of the wire." (Evidence p.297)

His point was that in "thousands of tests conducted by myself, my associates (and) my son I've never seen melting for (a) length on the surface only for a length of 17mm." (p.298)

He expressed the opinion in plain terms that the melting damage on Sample 1 as examined by Professor Erasmus was caused by heat from the fire and was not the result of arcing phenomenon between live wires.

The Professor was subjected to a careful and well prepared cross-examination for which counsel is to be congratulated. It was a commendable forensic achievement worthy of study by those who seek to acquire that skill; which lamentably few attain. But at the end of it all the Professor left me with the impression that Professor Erasmus's opinion was open to doubt.

I reserved my judgment on this and other matters to take time for reflection. These learned gentlemen gave their time and expertise to the Court and it would not be right to deal with their careful opinions in any other than a considered and respectful way.

Furthermore I wondered how far I should give weight to the fact that Professor Erasmus had had the benefit of electron microscopy whereas

Professor Beland had only had access to the critical photographs of Sample 1. Sometimes the eye sees more than the lens of a camera.

But while my doubts were mounting I heard the next expert witness, Mr Cox, called by the second defendant. He is a forensic consultant based in Melbourne and has compiled, he explained, over 2,000 reports on fire investigations throughout Australia, New Zealand and the Pacific Region. By contrast, and only by way of comment, not criticism, Professor Erasmus has never been called upon to attend a fire scene, and has carried out a microscopic examination of copper conductors taken from a fire scene on "probably" three occasions. (Evidence p.543)

With leave from the Court, Mr Cox took Professor Erasmus's Sample 1 and examined it under an electron microscope from which he took microphotographs. (Ex. 2D3) He said that if copper is heated to melting point (1083°C) or beyond and allowed to cool slowly "oxygen from the environment will combine with copper to form a eutectic and that eutectic has a lower melting point." (Evidence p.452) But with an electrical arc the event occurs so quickly the oxygen remains in a solid state and the eutectic product is not formed. The simple point is that if a eutectic product is discernible in damage to copper wire, then it is not likely (to put it at its lowest) that the damage was caused by arcing. It is much more likely that the damage is caused by radiated heat of such intensity as to reach or exceed the melting point of 1083°C.

Mr Cox's Ex. 2D3 shows some photographs of Sample 1 at a magnification of 25 and others at x100. At the top of the exhibit are two photographs at x200. He then pointed out several features of importance

including the presence of a eutectic structure. (Evidence p.453) This led him to say that notwithstanding the opinion of Professor Erasmus, Sample 1 was an example of copper wire damaged by heat, not by an electrical arc.

From that it followed, in his opinion, that Sample 1 was not carrying electricity at the time it was damaged and the cause of the damage was not an electrical arc but radiated heat from the fire in the warehouse.

The remaining feature of the expert evidence is the presence of striations on Sample 1 identified by Professor Erasmus in Fig. 18 of Ex. 26. He said that these marks, microscopically recognisable, showed that the part of the wire on which they appeared could not have been subjected to melting. If it had, they would have been obliterated. But since they were visible on Sample 1, at the same time as melting damage on the upper part of the wire, it was his opinion that this melting damage could not have been caused by radiated heat from the fire, or it would have gone right through this tiny wire (only 0.93mm thick) and wiped out the striations or scratches that had been made as the copper wire was drawn through the manufacturer's die.

Both Mr Cox and Professor Beland did not regard this matter as decisive in deciding whether electrical arcing or radiated heat was the cause of the melting. Professor Beland said that this particular feature he had experienced before, even in cases where the wire sample had not been carrying electricity. (Evidence p.319) Notwithstanding the fact that copper is a good conductor of heat, yet he had produced a similar effect himself with a torch.

Mr Cox produced two diagrams (Ex. 2D1 and 2D2) which were intended to demonstrate "the heat sink" phenomenon; when two metals (or even objects) with different temperatures come into contact they seek equilibrium as heat passes from one to the other. Some materials receive heat or transmit heat quickly, others do not. Paper is not a good conductor in this context, and said Mr Cox, it was perfectly possible that the wire Sample 1, had fallen on to paper, had suffered radiated heat damage on its exposed side but that the heat from the unexposed side had been transmitted to the paper in such a way as to leave that side of the wire undamaged. (Evidence p.456) As he said, his diagrams were intended to describe "a way in which part of a piece of copper (wire) can be melted and part can remain intact...".

There was evidence that the state of a tungsten filament found in the debris could indicate that it was alight at the time of the fire, but this theory was abandoned by the plaintiffs. In the face of the evidence from Dr Buckleton (p.497) it was a theory that could not be sustained.

This technical evidence led me to the point that I was by no means convinced that the single sample of copper wire which Professor Erasmus selected from the many available, was carrying electricity at the time it suffered the damage described. The plaintiffs have not been able to prove on the balance of probabilities that the electrical lighting circuit was alive at the time of the fire and I find that it has not been proved that the fire started because the lights in the warehouse were left on over the long weekend and became overheated.

THE EXPERIMENTS

In one sense the evidence of the experiments conducted by each side is no longer directly relevant if the lights were turned off when the fire broke out. But in respect of the allegations of negligence they may have a measure of importance.

At first glance one might think that reels of newsprint are highly inflammable, or at least readily combustible, and that they could easily catch fire if a sufficiently hot lightglobe were left alight in the wells created in this warehouse. The evidence shows that that is by no means so.

Mr E.E. Stevens is a consulting engineer practising in Auckland. Like a number of other experts called in this case he has had wide experience in fire investigation. He prepared a 32 page booklet (Ex. 1D24) comprising six plans of the warehouse (including one showing how this newsprint was stacked), six graphs recording temperatures during experiments he conducted and 20 pages of photographs of both the experiments and the scene of the fire. (This exhibit is especially valuable for anyone wanting to understand the background facts of this case).

Mr Stevens decided to test the theory that the fire was started by the heat from an electric lamp igniting a reel of newsprint. He had read the evidence of Mr C.R. Barnett who advanced this opinion on the basis that a 500 watt mercury vapour lamp, suspended in one of the "wells" and surrounded by eight reel stacks, would radiate heat sufficiently to set fire to the newsprint. Mr Barnett estimated that a lamp 300mm (or closer) to a reel of newsprint, left alight in one of the wells or cavities, could generate sufficient heat to reach ignition temperature of about 230 degrees (Celsius).

Mr Stevens set up an experiment in which one lamp was suspended in an enclosed building at a distance 300mm from a reel of newsprint, and another was suspended so that the edge of the lampshade was touching a reel, each lamp being set in a cavity surrounded by reels of newsprint (Ex. 1D24 illustrates this). He found that if the lamps were left on for over seven weeks the highest temperature reached on the surface of the kraft paper surrounding the nearest reel of newsprint was less than 50 degrees (Celsius) in both cases and nowhere near ignition level.

Mr Barnett carried out his own experiments after he had read the brief of evidence of Mr Stevens and made a videotape of the course of events which was produced as Ex. P8. If a 500 watt lamp is left touching the kraft paper for several hours the wrapper becomes charred. If the wrapper around a reel is torn and loose pieces of newsprint protrude, a lamp touching that newsprint would cause flaming ignition at rather less than five hours. If the lamp was not touching the wrapper but very close to it, (a few millimetres away) charring would develop but ignition did not occur during the course of the experiment (about seven and a half hours).

I concluded from the evidence that it is more difficult to set alight a reel of newsprint from a 500 watt light globe than might have been thought, and that it would only occur if the lamp were to be touching or almost touching the wrapper of the reel. Mr Stevens' experiment showed that if the side of the lampshade were touching the reel, and the lamp itself no closer than the radius of the lampshade, (200mm or thereabouts) the wrapper would not catch fire.

ORIGIN OF THE FIRE

The plaintiffs both sought to prove that the fire began under the third rafter from the southern end of the warehouse, at a point where a cavity existed in which the remnants of a lamp were found. (Point F3). It was said that there was deeper charring to be measured on reels of newsprint at this point than anywhere else, so the fire must have burned longer here and gradually spread elsewhere in the building.

The defendant's witnesses contradicted this opinion and argued for a point of origin in the station wagon on which the owner had been working on the Saturday morning of that weekend. At one stage in the hearing counsel suggested to a witness that the fire had begun in the office area, but despite the extensive damage done to that part of the premises the witness concerned rejected the suggestion.

Both motor vehicles were more heavily damaged on the side nearest to the newsprint stacks and it seems to me probable that the fire engulfed the station wagon and the truck by spreading from the stacks of reels than by the other way around.

An important piece of evidence came from a former director of PTT, Mr Ruijne, who spoke of seeing an unusual reel being taken off the stack. He described it as being like the stub of a candle with the central core burned out like a crater, lower than the outside edge with one side being burned lower than the other. He said:

> "... It was different from all the other reels and I was concerned about it. It was pointed out to me by somebody else and it might have been a possible cause of the fire. I don't know, it just looked different and it looked like somebody perhaps (had) put something in there - petrol on it or whatever - and started the fire .." (p.432)

This matter was not referred to by any other witness, and I infer that those who were investigating the fire did not see the reel in question. Had they done so, I think it reasonable to assume that they would have had it tested for the presence of traces of a fire accelerant would have completely altered the course of their enquiries.

I can draw no conclusions from Mr Ruijne's evidence as to the origin of the fire, but what he says must raise the possibility of arson.

There was much evidence put before the Court as to whether the damage perceived was consistent with a fire starting at a high level (meaning at point F3) or at a low level (meaning the station wagon), but in the upshot the precise place where the fire began seems to be irrelevant. Where it began is as much a mystery as how it began. Once the suggestion of an overheated lamp is rejected as unproved, a wide range of possibilities arise. This case is just another illustrating the point made by one expert who said that in most cases the cause of a fire is never established.

In so finding, I do not mean to convey that the volume of evidence on origin was unnecessary. On the contrary, had the evidence of a live electrical circuit been sufficient to meet the onus of proof, the evidence as to the spread of the fire, depth of charring, the curious differences in the way the rafters buckled and related matters, would have assumed importance. But without proof of cause, proof of origin does not seem possible in the circumstances of this case.

DID BCNZ APPROVE THE PREMISES?

The first defendant called as a witness Mr I.J. Smith, who was manager of Wilson & Horton's Webprint Division which was directly concerned with the storage of reels of newsprint. He said that on a date he could not identify, but "about three weeks before the fire", he showed a BCNZ official, Mr Havell Stephen-Smith, through the warehouse. He said that he drove Mr Stephen-Smith to the site, walked with him through the stacks of newsprint, told him that Wilson & Horton did not use the whole space and paid only for what it did use. Then he said that he expressly pointed out to Mr Stephen-Smith that there was no sprinkler system for fire fighting in the warehouse, but that Mr Stephen-Smith "was evidently satisfied with" the storage of BCNZ's newsprint "at that warehouse".

On this evidence Wilson & Horton have pleaded against the first plaintiff *volenti non fit injuria*, alleging that BCNZ knew of the risk of damage by fire and voluntarily accepted the risk of storage in a warehouse that was not equipped with a sprinkler system. Furthermore the inspection made it obvious to Mr Stephen-Smith (and therefore BCNZ) that its newsprint was being stacked 8 reels high, and to the extent that to store the newsprint in that way was a breach of local body building bylaws, that the breach was condoned and approved by BCNZ because Mr Stephen-Smith was satisfied with the way the newsprint was stacked.

Mr Stephen-Smith gave evidence contradicting Mr I.J. Smith, and by reference to his diary testified that he had been to Auckland only three times in 1985, once in October, once in November to visit the site after the fire had occurred, and the other visit earlier in the year. The October visit is recorded as having taken place on 14 October which he still remembers with

particular clarity because it followed his father's 80th birthday celebrations on 13 October. He had his 1985 diary which recorded a 9 a.m. meeting that lasted all morning "and may have included lunch", and another at 2 p.m. with an advertising agency for about an hour. He said that the rest of the day he believed he spent in the Auckland office of the Listener magazine. He was quite adamant that he did not visit the PTT warehouse until 8 November, because his diary for that day has a record of the address of the warehouse, and his visit to Auckland then was made on his own initiative to inspect the site of the fire (and one supposes, the extent of the damage to his company's newsprint).

There was nothing in the cross-examination of Mr Stephen-Smith that caused me to have doubts about his evidence. If anything I rather thought his responses to the questions put to him, reinforced his evidence-in-chief. I intend no reflection upon the honesty and veracity of Mr I.J. Smith when I say that on this issue I am not persuaded that Mr Stephen-Smith inspected the warehouse and approved it before the fire. He had his diary entries to support his recollection of events on 14 October and of what happened on 8 November when he did go to the scene. Mr I.J. Smith was dependent upon his memory of events nine years before and he had no diary record of the visit. I think he is mistaken.

I find that Mr Stephen-Smith paid only one visit to the warehouse and that visit took place on 8 November 1985 after the fire had occurred. It is not established that he visited the warehouse on 14 October in that year.

That being so, the defendants have failed to prove that BCNZ expressly approved of the use of the warehouse to store its newsprint, or of

the way the newsprint was stacked or of the fact that the building was not fitted with a water-sprinkler fire-extinguishing system.

BUILDING BYLAW RESTRICTIONS ON USE

Mr D.N. Barnes was the Chief Building Officer for the Mt Wellington Borough Council from 1983 to 1986. He was called to give evidence that Leonard Road is in the Mt Wellington Borough, and that the warehouse was subject to the provisions of N.Z. Standard Model Building Bylaw 1900, Chapter 5, which was in force in the Borough at all material times.

On 25 October, (the sixteenth day of the hearing) Mr Waalkens conceded that the bylaw was in force and waived the need for formal proof. The bylaw is Doc. 130 in the agreed bundle.

Mr Barnes inspected the site after the fire, but he had not visited the warehouse before that and did not know how the newsprint was being stacked.

The warehouse fell into Category D2 under the bylaw as a moderate fire risk. In that classification there were limitations on its use. Having regard to the wide range of goods that might be stored in a warehouse, from ingots of metal to bales of feather down, the restrictive uses are limited by weight per square metre. In a D2 warehouse the maximum weight per square metre is 1000kg.

Because each reel of newsprint weighed 400kg, any stack comprising three reels or more was over the loading limit and in breach of the bylaw.

A stack of eight reels of newsprint to a height of six metres fell into the category of high fire risk under the bylaw - category D3 - which required, among other things, the fitting of a water sprinkler fire-extinguishing system.

Mr Barnes expressed himself strongly at paragraph 4.6 of his brief of evidence, but it is sufficient to say that in his 18 years' experience as a building inspector, this breach of the bylaw stood out as one of the more serious breaches of the particular bylaw that he had encountered.

The concession that the bylaw was duly enacted and in force at the material time, and the evidence of Mr Barnes and others, leads me to conclude that when the reels of newsprint were stored in the Leonard Road warehouse in stacks that were three reels high or more, then that storage was in breach of the Borough building bylaw.

It is worth recording here that Wilson & Horton's own newsprint warehouses at Wilkinson Road, Ellerslie are equipped with sprinkler fire fighting systems so that stacks of newsprint eight reels high (or approximately six metres from ground level) would not be in breach of category D3 because a water sprinkler system is an adequate response under the bylaw to that increased level of fire risk.

The probabilities are that Wilson & Horton's storemen were unaware of the bylaw's provisions, and stacked the reels of newsprint in the D2 warehouse as they were accustomed to do in the company's own D3 warehouses. As the oral evidence and the photographs show so clearly,

without a sprinkler system the firefighters had great difficulty in dealing with a fire where the newsprint was stacked almost to the roof of the warehouse.

I accept the evidence that had a sprinkler system been installed in the warehouse at Leonard Road, the fire would have been much less destructive and that probably it would have been extinguished without serious damage to the building. Alternatively if the newsprint had been stacked no more than two reels high, the firefighters would have been able to quell the flames much more quickly and again, damage to the building would have been significantly less than the total destruction that resulted.

There was evidence from Mr W.R. Townend, the production manager for the manufacturers of the newsprint, giving technical information about newsprint, the dimensions of each reel, prospects of salvage after water damage and other matters.

He deposed that the Tasman Pulp & Paper Co. Ltd supplied about 50 newsprint stores in New Zealand with varying capacities from 10 tonnes to 10,000 tonnes (i.e. from about 15 reels to about 25,000 reels). Of those 50 stores, he thought very few were equipped with sprinkler systems, "probably less than five". (p.328)

That fact, that so few newsprint stores are equipped with a water sprinkler fire extinguisher system, is of no relevance when applying the provisions of the relevant bylaw. If a warehouse is to be used for a category D3 (high fire risk) purpose, it should be equipped for that purpose

as laid down by the bylaw. If a warehouse can only be used for a category D2 (moderate fire risk) purpose, its use should be restricted accordingly.

The bylaw prohibits any person from "occupying" any building for a purpose which involves a higher fire risk than that for which the building has been erected, and also prohibits any person from permitting such a contravening purpose. (Clause 5.5)

THE PLEADINGS

A. The Plaintiffs

By their amended statement of claim of 17 August 1993, the first plaintiff (BCNZ) sued the first defendant (Wilson & Horton Ltd) for damages for loss of its newsprint (together with interest) alleging negligent omission to observe a legal duty of care, and in addition, for damages in the same amount for breach of a contract of bailment; then BCNZ sued Wilson & Horton and PTT as second defendant jointly, alleging negligence, pleading the same particulars as before and the same measure of damages.

The second plaintiff (the Harris Trustees) sued both defendants jointly and severally alleging negligent omission to observe a legal duty of care towards the warehouse owned by the Harris Trust, claiming the cost of reinstatement, loss of rental and costs. The Harris Trustees also sued PTT for breach of an implied term of the lease granted to PTT "to yield up the warehouse in good and tenantable repair" as contained in s.106(b) of the Property Law Act 1952.

The allegations of negligence in BCNZ's actions (including the action for breach of the contract of bailment, the breach being based on

negligence) are contained in paragraph 12 of the amended statement of claim, and comprise 22 particulars.

The Harris Trustees' first claim in negligence against BCNZ and Wilson & Horton is based on the same 22 particulars pleaded in paragraph 12; the Trustees' second claim (against PTT only) alleging breach of the term in the lease said to be implied by s.106(b) of the Property Law Act, is based on "neglect or default". In their closing submissions counsel for the Harris Trustees made clear that this was a repetition of the same 22 allegations of negligence which comprised the neglect or default referred to in that cause of action.

In the light of my finding that it has not been proved that the lighting circuit was alive at the time of the fire, many of these particulars fall by the wayside. For that reason I do not intend to mention any further the allegations in sub-paragraphs (a), (e), (f), (g), (k), (l), (m), (n), (o), (p), (q), and (r) of paragraph 12 of the statement of claim.

The allegation in sub-paragraph (d) is one of blocking a fire egress door in the west wall of the warehouse, contrary to the provisions of the relevant building bylaw. There is no such door in the west wall and this allegation is dismissed. Even if there were such a door and it had been blocked, on the evidence that would not have been causative of damage. There was such an inferno by the time the fire brigade arrived that no fireman could have walked through such a door. Those who eventually managed to get into the office made that quite clear.

The allegation in sub-paragraph (h) is that the reels were stacked "touching one another, thereby reducing the air flow in the warehouse". On the evidence there is nothing in this point because it was not causative of damage.

The allegations in sub-paragraphs (i) and (j) are that it was negligent of the defendants to stack the reels of newsprint on end, or to allow them to be packed on end instead of stacking them horizontally. The evidence is that this manner of stacking newsprint is standard practice around the world to avoid flattening reels on the bottom of a stack. It was not negligent to stack the reels on end, and in any event it was not causative of damage. Both these allegations are dismissed.

Sub-paragraphs (t) and (u) are repetitive general pleadings alleging that the defendants or their employees, agents, or sub-contractors failed "to exercise all reasonable skill and care in the circumstances". As such they add nothing to the case and as make-weight pleadings I set them to one side.

Out of the 22 specified particulars of negligence only the following are left for consideration:

> "(b) In storing certain rolls of newsprint (being a portion of the paper) to a height of 6.2 metres approximately in the warehouse...
>
> (c) In storing certain rolls of newsprint (being a portion of the paper) above the maximum height at which paper could be stored in the warehouse in breach of clause 5.5.1 of NZS 1900 Chapter 5 (sic)
>
> (s) In storing the paper in a warehouse which did not have an adequate sprinkler system
>
> (v) The plaintiffs rely upon the doctrine of *res ipsa loquitor* (sic)"

As to sub-paragraph (v) this is not an allegation of negligence. The principle of *res ipsa loquitur* is an evidential matter and can be invoked in support of a plaintiff's case when the damage suffered can only have been caused by the negligence of the tort feasor. On the facts of this case the principle cannot be applied to the fire itself because the cause of this fire is unknown and various possibilities exist, including arson, that do not inevitably indicate negligence by the defendants.

Before considering and deciding the allegations of negligence in sub-paragraphs (b), (c) and (s) I turn to the defendants' pleadings.

B. The Defendants

The first defendant, Wilson & Horton Ltd, raised several defences:

(i) a general denial of any negligence

(ii) a plea invoking the maxim *volenti non fit injuria* against BCNZ

(iii) an allegation of negligence against BCNZ in permitting its newsprint to be stored negligently and alternatively, of being contributorily negligent if the newsprint was stored negligently.

Wilson & Horton also filed its own statement of claim against the second defendant (PTT) seeking a contribution or indemnity for any damages awarded to either plaintiff against Wilson & Horton. This claim was founded in negligence, particulars of which were, in substance, the same particulars alleged against Wilson & Horton by the plaintiffs.

The second defendant filed a statement of defence admitting that the plaintiffs had suffered loss but denying any negligence. As further

defences to BCNZ's claim PTT alleged contributory negligence and pleaded *volenti non fit injuria* on the ground that Mr Havell Stephen-Smith had approved both the site and the way that the newsprint had been stacked.

As to the claim by the Harris Trustees for loss of the building, PTT denied any liability as lessee and while admitting it had failed to deliver up the premises in good and tenantable repair, it pleaded that, in the circumstances, it was not liable to do so.

In reply to Wilson & Horton's claim against it, PTT filed a tit-for-tat defence repeating generally the allegations of negligence that had been directed against it, claiming either that all the responsibility rested on Wilson & Horton, or claiming contributory negligence if any liability was found against PTT.

Finally PTT lodged its own claim against Wilson & Horton for the losses it had suffered in the destruction of its office and property amounting to $65,380.40, plus interest. But when the case for PTT was opened counsel informed me that, after discussion with counsel for Wilson & Horton, the amount of the claim was reduced to $40,000.

THE CLAIM AGAINST WILSON & HORTON LTD

The three remaining allegations of negligence, viz. in storing the newsprint "to a height of 6.2 metres approximately in the warehouse", (para 12(b)) and in storing the newsprint "above the maximum height at which paper could be stored" under the bylaw (para 12(c)), and in storing the newsprint "in a warehouse that did not have an adequate sprinkler system"

(para 12(c)), all emerge in one way or another from the provisions of the relevant building bylaw.

The bylaw restriction on using a category D2 warehouse is governed by weight per square metre, not by height. In the case of reels of newsprint of the kind in question height can be calculated because the maximum weight of 1000kg means that no more than two reels can be stacked on end since each reel is approximately 400kg in weight. Two 750mm reels so stacked would measure 1.5 metres in height.

The particulars pleaded in paragraphs 12(b) and 12(c) are therefore an interpretation of the bylaw's provisions applied to the facts.

The particular in paragraph 12(c) (the absence of a sprinkler system) relates to the provisions in clause 5.10.4 of the bylaw, which enables more liberal use of a warehouse if the fire risk is met by the existence of an automatic sprinkler system.

Proof of breach of a bylaw, without more, does not give rise to an action for damages (see ***Askin v Knox*** [1989] 1NZLR 248,253). But in the context of this case the provisions of the bylaw set a standard to be followed by warehouse-keepers. The power of a local body to enforce a bylaw by prosecution or other enforcement proceedings is not directly relevant. What is relevant is that a local body has the statutory authority to impose restrictions on the use of buildings within its area. It was not argued that the particular form of restriction - weight per square metre - was unreasonable or unlawful. It has the virtue of simplicity and, having regard

to the wide diversity of merchandise that could be stored in a warehouse, probably no other formula is suitable.

The existence of a duty of care owed to the plaintiffs was not disputed, nor could it be. Wilson & Horton undertook to store BCNZ's newsprint and, as part of that transaction, BCNZ accepted full responsibility for any damage to its newsprint "excluding any damage arising by or out of or through the negligence" of Wilson & Horton. Anyone using the warehouse had at least an implied duty of care towards the owner of the warehouse to avoid causing damage to its structure.

It is clear from the evidence that Wilson & Horton stacked the newsprint and in doing so acted in breach of the bylaw. But two questions remain to be answered before the plaintiff's claim can be upheld - firstly, was there a breach of the duty of care owed by Wilson & Horton to the plaintiffs' property, and secondly, if there was such a breach, did that breach cause the damage of which the plaintiffs complain.

While the provisions of the bylaw can be regarded as a standard to be maintained by those using a warehouse, a minor breach of those standards might well not amount to a breach of the duty of care. If Wilson & Horton had stacked the newsprint in accordance with the bylaw so that each stack was two reels high, but on one, or two, or even three stacks had added an extra reel, so that they were three reels high, I would not be disposed to say that such stacking was in breach of the duty of care, even though it was in breach of the bylaw. A bare infringement of that kind, without more, would not be significant.

Working from Mr Stevens' floor plan of the newsprint (Ex. 1D24(4)) I calculate that there were 391 stacks comprising 2,797 reels. According to the evidence there were 2,957 reels in storage at the time of the fire, but some were removed (mainly from the southern end of the warehouse) as part of the firefighting process before Mr Stevens drew his plan. Assuming for the purposes of illustration, that Wilson & Horton had stacked the reels according to the bylaw, it could have had had 391 stacks two reels high, a total of 782 reels. It might have had more stacks also at the northern end of the warehouse behind the truck shown on Mr Stevens' plan (perhaps an additional 50 stacks) and also perhaps 100 more at the southern end of the warehouse from which some reels had been removed. (Not all the space at the southern end was available for stacking BCNZ's newsprint; a small part was let to another sub-tenant who had also stacked paper there). So the total number of stacks could have been close to 550, and the total number of reels stacked according to the requirement of the bylaw would have been about 1,100. The actual number stacked (2,957) exceeds by 1857 reels the lawful number permitted on the assumed calculations made above, and these numbers illustrate the extent of the breach of the bylaw's provisions.

But mere numbers do not answer the question as to whether Wilson & Horton was in breach of its duty of care to the plaintiffs. The precise duty resting on Wilson & Horton was to stack the newsprint carefully so as to avoid damage to it, and to avoid increasing any risk of danger of damage by fire to the newsprint or to the building. This duty arises from the fact that any reasonable person would know that newsprint is a combustible commodity.

That risk was increased by stacking the reels so high that the task of fighting the fire that occurred was made more difficult, as the evidence of Fire Commander Mears (pp518-519) and others disclosed. Furthermore I infer that to stack so much newsprint so close to the rafters resulted in an increased intensity of heat which led to the steel girders buckling and collapsing, destroying the roof of the warehouse. The newsprint was stacked so high that there was insufficient headroom for a man to walk erect between most of the stacks and the roof of the warehouse. (This is depicted in Mr Stevens' plan 5 of Ex. 1D24, and can be seen in various photographs, e.g. in photographs 14 and 15 of Ex. 4 and photo 16 of Ex. 4A).

For these reasons I uphold the plaintiffs' claim that Wilson & Horton was negligent in the way it stacked the newsprint as pleaded in paragraph 12(b) and (c) of the amended statement of claim and find accordingly that the first defendant was in breach of its duty of care to the plaintiffs.

The remaining issue on the negligence claim is whether Wilson & Horton was in breach of its duty of care for storing the newsprint "in a warehouse that did not have an adequate sprinkler system".

The evidence of Mr Townend mentioned earlier (p.30) is that of about 50 newsprint warehouses supplied by his company, only a few "probably less than five" were equipped with sprinkler systems. While common practice is not decisive in considering what is an appropriate standard of care, yet it must be weighed as one indication of what those concerned deem to be necessary.

On the other hand Wilson & Horton's own newsprint warehouses are equipped with sprinkler systems, subject to a limitation on the height at which newsprint can be stacked. Correspondence between the Insurance Council of New Zealand and Wilson & Horton's insurers was produced by Mr MacAndrew in which various requisitions were imposed by the Council relating to Wilson & Horton's newsprint premises. Much of this is collateral to the issue now under consideration, but the letters do show that even with a sprinkler system installed there was a stacking height limitation imposed of 7.2 metres dictated by the need to reduce the fire hazard. Subject to other conditions, the annual insurance premium payable could be reduced by 50 per cent if adequate sprinkler systems were installed to the satisfaction of the Council which required an annual survey to be conducted. It was in one of these surveys, (25 November 1980) that maximum height restrictions were mentioned.

There is no evidence as to how many warehouses were available in 1985 that were equipped with sprinkler systems and that could have been used to store BCNZ's newsprint.

I come to the conclusion that it is not reasonable to say that Wilson & Horton were under a duty to store BCNZ's newsprint in a sprinkler-equipped warehouse. If the warehouse in question was not sprinkler-equipped the stacks could not be built to the height permissible in a warehouse that was so equipped, and the building bylaw applicable to the warehouse in question would no doubt give clear guidance as to what height was reasonable.

The heart of the problem in this case is that Wilson & Horton's warehouse storemen stacked BCNZ's newsprint as they were accustomed to do for Wilson & Horton, and nobody seems to have given any thought to the absence of a sprinkler system or to the provisions of the local body's bylaw. As a result they constructed "high fire hazard" stacks (Category D3) in a "moderate fire hazard" (Category D2) warehouse. Had they constructed moderate fire hazard stacks in the Category D2 warehouse no criticism could be made and the absence of a sprinkler system would not have any bearing on the matter.

I therefore find that there was no duty of care resting on Wilson & Horton to store BCNZ's newsprint in a sprinkler-equipped warehouse and not in any other. It could have selected any appropriate warehouse so long as it made sure that the newsprint was stacked in such a way as to avoid increasing the risk of damage by fire.

This then leads to the second question raised by the issues of negligence - viz. if there was a breach of the duty of care did that breach cause the damage of which the plaintiffs complain?

THE CAUSE OF THE DAMAGE

In one sense it might be said that the breach of duty caused no damage at all. The damage resulted from a fire, the cause of which is unknown and which had its origins in some source quite separate and distinct from the way that the reels of newsprint were stacked. Therefore it might be argued, the breach of duty did not cause the damage and that should be the end of the case. I do not agree.

An outbreak of fire is an ever-present risk. Any householder or property owner knows that and must take precautions against it. A warehouse keeper is in no different position, especially when storing property belonging to someone else. BCNZ put its property into the hands of Wilson & Horton and accepted responsibility for every contingency thereafter, but expressly excluded from that responsibility any damage "arising by or out of or through the negligence" of Wilson & Horton. A reasonable warehouse keeper would keep in mind the risk of fire, especially when storing a combustible material such as newsprint. Different considerations would apply if the goods being stored were building bricks, or bags of cement or ingots of lead or something else that was not combustible.

Wilson & Horton can fairly be regarded as experienced in handling newsprint. The company is long-established as a printer and publisher. It holds in stock, as part of its business, large quantities of newsprint. Its paper stores are warehouses and as a warehouse keeper the company can fairly be regarded as well experienced in the business of storing newsprint.

I hold as a finding of fact that Wilson & Horton ought to have known of the provisions of the building bylaw affecting the Leonard Road warehouse. A reasonably careful warehouse keeper would have ascertained what those provisions were, and having ascertained them, would have complied with them. If Wilson & Horton had done so, it would have stored in the warehouse only about 1,100 reels of BCNZ's newsprint and the other 1,857 reels would have been safely stored somewhere else. (These numbers, as I have said earlier, are illustrative only. The evidence is not sufficiently clear for me to tabulate them precisely).

When the fire broke out, had the newsprint been stored carefully, the damage to BCNZ's total stock of newsprint would have been far less because only 1,100 rolls or thereabouts would have been at risk, and had the newsprint been stored carefully to a height of only 1.5 metres or thereabouts the firefighters would have had less difficulty in quelling the flames. Finally, had the newsprint been stored at no higher than that level, I infer that the intensity of the heat would have been significantly less and that probably the rafters would not have failed and the damage to the building would have been less than it turned out to be. It is possible that the plastic sheeting in the north and south walls would have melted in the heat anyway but there is no evidence on the point and I cannot make a finding to that effect. Similarly, if the clerestory window was made of plastic material, it may also have failed, but the evidence as to the material fitted to that part of the building is vague and I cannot make a finding on the evidence before me as to that matter either. What is clear is that the western wall of the warehouse became unsafe and "was beginning to move under the stress of the swelling paper" (Commander Mears, para 9 and Ex. 3D8).

The only finding of fact justified on the evidence is that the damage to the building and to most of the newsprint was the direct result of the overheight stacking of the reels, and that if the newsprint had been stored in accordance with the bylaw the damage to the building would have been significantly less than it was, and much of the newsprint, perhaps about two-thirds, would have been saved because it would have been stored elsewhere.

From these findings it follows that the plaintiffs have succeeded in their claim against Wilson & Horton for damages caused by negligence for which they are entitled to judgment. The amount of that award is considered separately later in this judgment.

The plaintiffs also claim damages from Panmure Tamaki Transport Ltd which is the next matter for consideration.

CLAIM AGAINST PANMURE TAMAKI TRANSPORT LTD

Of the five causes of action in the amended statement of claim dated 17 August 1993, the first two causes of action claim relief against Wilson & Horton only, the third and fourth causes of action claim against both defendants jointly and severally, and the fifth cause of action claims against PTT only.

(1) Third Cause of Action

After repeating all previous pleadings in the claim, including the 22 allegations of negligence in paragraph 12, BCNZ alleges against PTT:

> "20. The second defendant as the lessor (sic) and an occupier of the warehouse in which paper was stored, owed a duty of care to (BCNZ) not to cause damage to the paper."
>
> "21. Negligently and in breach of the (duty) of care owed to (BCNZ) by ... the second defendant, ... the second defendant failed to take proper care of the paper in all or any of the respects set out in paragraph 12 hereof..."

It seems to me important at the outset to note that the duty of care alleged is "not to cause damage to the paper". This is a narrow pleading. To succeed on this ground the BCNZ must prove on the balance of probabilities that PTT caused damage to the paper. It is not enough that the proof goes only as far a standing by and allowing damage to be caused to

the paper. Nor is it enough to prove a different duty (e.g. a duty to intervene) which PTT failed to discharge.

Of the 22 particulars of negligence alleged in paragraph 12 most relate to the actions or omissions of Wilson & Horton (para 12(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (r), (s). In addition paragraphs (t) (u) and (v) as mentioned earlier do not require consideration. The remaining particulars are as follows:

> (m) In using mercury vapour lightbulbs exceeding 400 watts too near to rolls of newsprint...
>
> (n) In failing to ensure that light fittings in the warehouse were working properly.
>
> (o) In failing to ensure that the mercury vapour lightbulbs were properly ventilated.
>
> (p) In failing to ensure that the mercury vapour lightbulbs did not overheat and shatter.
>
> (q) In failing to ensure that the mercury vapour lights in the warehouse were turned off during the evening of 27 October 1985.

I set these remaining particulars out in full because they are relevant to consideration of the fourth and fifth causes of action.

But in respect of the third cause of action, these particulars (m) to (q) all relate to the claim that the fire was caused by lights left on for too long and too close to the paper so that prolonged heat caused ignition. Since that claim as to the cause of the fire has not been proved these particular allegations have no further relevance.

In the result there is nothing proved to support the third cause of action, that PTT was in breach of a duty of care "not to cause damage to the paper", because whether that duty existed in law or not, there is no evidence that PTT caused any damage to the paper.

In argument, but not in the pleadings, the plaintiffs submitted that PTT should be held liable to the plaintiffs because as head-tenant, it "permitted" Wilson & Horton as a sub-tenant,, to stack the newsprint in breach of the bylaw.

They relied for this argument on the following clause in the bylaw:

> "5.5 Occupancy of buildings
>
> 5.5.1 Subject to clause 5.55 no person shall hereafter ... permit to be occupied ... any part of a building for any ... purpose which in the opinion of the engineer involves a higher fire risk than that for which the building has been erected ... unless it complies with the requirements ... for such higher fire risk; provided ... " (here follows an existing use right of no relevance to the argument).
> (Clause 5.55 mentioned relates to obligations of owners in respect of existing buildings that do not comply with the bylaw and likewise has no relevance to the argument).

The argument was that PTT permitted Wilson & Horton to stack the newsprint in breach of the bylaw and was therefore itself in breach of clause 5.5.1. The precise pleading on which this argument was based was paragraph 12(c) which reads as follows:

> "12. In breach of the term of the Listener agreement set out in paragraph 9 hereof (Wilson & Horton) was negligent in all or any of the following respects:
>
> '(a) ...
> (b) ...
> (c) In storing certain rolls of newsprint ... above the maximum height at which paper could be stored in the warehouse in breach of clause 5.5.1 of NZS 1900 Chapter 5".

Apart from the fact that the bylaw imposes restrictions on use based on weight per square metre, not by height as already mentioned, the prohibition against permitting occupation "for any purpose" is a purpose "which in the opinion of the engineer involves a higher fire risk", etc. The condition pre-requisite to the prohibition is that the engineer should have investigated the circumstances and should have come to that opinion.

The evidence is that the engineer of the Mt Wellington Borough Council never inspected the warehouse before the fire, and never reached any such opinion. At a late stage in the hearing, after the close of all the evidence, counsel for the defendant in the associated claim (CP 1736/91) called, by leave, a further witness, Mr D.C. Macdonald, now Manager of Roading for the Manukau City Council. (The ruling is at p.532 of the evidence).

It so happens that he had held the office of Local Authority Engineer for the Mt Wellington Borough throughout 1985, and would have been the local body officer referred to as "the Engineer" in Clause 5.5.1 of the bylaw.

His brief of evidence and cross-examination shows that he had never visited the site in question, that he knew nothing about the case until 9 a.m. that very day and the opinion that he formed, that the newsprint had been stacked in breach of the bylaw, had been reached that morning, 26 October 1994, based on what he had been told of the way that the newsprint had been stacked.

Apart from the way that paragraph 12(c) has been pleaded as an allegation against Wilson & Horton, but not against PTT, I come to the

conclusion that any prohibition contemplated by Clause 5.5.1 never existed at the time of the fire because the engineer had never formed the opinion before the fire that the use (or occupation) of the Leonard Road warehouse involved a higher fire risk than that for which the building had been erected.

The third cause of action against the second defendant fails.

(2) Fourth Cause of Action

This is a claim by the Harris Trustees against both defendants, jointly and severally, alleging negligence. The pleading follows that in the third cause of action:

> "25 In the circumstances aforesaid (PTT) as a lessee and/or licensee and/or occupier and/or user of the warehouse owed a duty of care to (the Harris Trustees) not to cause damage to the warehouse."
>
> "26. Negligently, and in breach of the duty of care owed to (the Harris Trustees) by (Wilson & Horton) and/or (PTT) (Wilson & Horton) and/or (PTT) failed to take proper care of the warehouse in all or any of the respects set out in paragraph 12 hereof."

Again the duty is narrowly pleaded as "not to cause damage to the warehouse".

There is no evidence that PTT did cause damage to the warehouse. Damage resulted from the fire (which was not proved to be of PTT's making) and the hazard of fire was increased by the way that Wilson & Horton stored the newsprint; but for the reasons already explained in respect of damage to newsprint, there is no evidence that PTT caused the damage to the warehouse.

For that reason the fourth cause of action must fail as against the second defendant.

(3) Fifth Cause of Action

This claim by the Harris Trustees against PTT only, relies upon the term implied in leases by s.106(b) of the Property Law Act 1952.

> "Section 106
> In every lease of land there shall be implied the following covenants by the lessee:
> (a) ..
> (b) That he will at all times during the continuance of the said lease, keep, and at the termination thereof yield up, the demised premises in good and tenantable repair accidents and damage from fire .. (etc) (all without neglect or default of the lessee) excepted:
>
> Provided that this covenant shall not be implied in any lease of a dwelling house."

In their closing address counsel for the plaintiffs acknowledged that they relied for relief under this section upon proving negligence on the part of PTT and submitted quite briefly that PTT had been negligent relying upon the particulars of negligence which had been pleaded in paragraph 12 of the statement of claim and which had been agreed in detail earlier in the closing address (paragraph 82, p.56).

This claim cannot succeed. Damage by fire is an exception under the statute unless there has been neglect or default by the lessee, i.e. PTT. There is no evidence of default, and none that proves that PTT has been in breach of a duty of care owed to the Trustees. During the closing address counsel had in mind that some liability might attach to PTT if its employees had left the lights on over the long weekend. As it turns out, that has not been proved to be so. The fire occurred but the cause is unknown.

The second defendant cannot be held liable under the fifth cause of action.

Since all three causes of action against Panmure Tamaki Transport Ltd have failed, the second defendant is entitled to judgment against the plaintiffs with costs according to scale.

THE CLAIM BASED ON BAILMENT

The first cause of action in the amended statement of claim is for damages for negligence which is repeated in the third cause of action already dealt with above. BCNZ therefore succeeds in its first cause of action in the same way and to the same extent that it succeeds in its third cause of action.

There remains only the second cause of action in which BCNZ claims damages from Wilson & Horton based upon bailment. The contract was clearly proved and the only defence to it was a denial of any negligence. That defence has failed and the first defendant is entitled to judgment against the first defendant for breach of the contract of bailment.

THE CROSS-CLAIMS

Each of the defendants cross-claimed against the other, seeking a contribution or indemnity in respect of any damages awarded against the particular claimant.

A. Wilson & Horton's Claim

This claim is founded upon an alleged duty resting on PTT to warn Wilson & Horton or to draw to the company's attention a number of matters particularised in paragraphs 6 and 7 of Wilson & Horton's statement of claim dated 11 December 1992.

In paragraph 6 Wilson & Horton pleaded that if it was negligent, then PTT was also negligent "in permitting the newsprint and paper to be stored at the warehouse in a negligent manner" (as alleged by the plaintiffs) "in that the second plaintiff (sc. defendant) did not warn or otherwise draw to the attention of Wilson & Horton" 13 particular matters.

The allegation as pleaded is therefore, that PTT negligently permitted Wilson & Horton to store the newsprint, the negligence consisting in failing to warn Wilson & Horton of the specified matters. Of these sub-paragraphs 6(a), (b), (f), (h), (k), (l) and (m) relate to lights and are no longer of any relevance. Sub-paragraphs (c), (d), (e), (i) and (j) relate to the way that the newsprint was stacked, the stacking all having been done by Wilson & Horton, not by PTT or its employees.

PTT sub-let space in the warehouse to W.R. Leighton Ltd, which in turn sub-let space to Wilson & Horton. These were apparently oral arrangements without any special or unusual terms and conditions as to liability for negligence.

I do not see any ground for holding that PTT was under a duty to warn Wilson & Horton as to the way it stacked newsprint. That was a matter in respect of which Wilson & Horton was more skilled than PTT and

there is no foundation in the evidence for holding PTT to be responsible for Wilson & Horton's own acts or omissions.

In paragraph 7 of the statement of claim, Wilson & Horton alleged a further nine particulars of negligence of which six relate to lights and the lighting system that are now irrelevant. A seventh allegation is one of failing to install a sprinkler system which I reject as an act of negligence. There was no foundation in the evidence to justify a finding that PTT was under any duty to do so.

The eighth particular alleges negligence "in failing to adequately or at all keep watch over the premises". Again there was nothing in the evidence to justify a finding that PTT was under a duty "to keep watch over the premises", and this allegation is dismissed.

The last allegation is one of negligence "in working on or repairing vehicles or parts thereof in the vicinity of the stored rolls of paper". Again there was nothing in the evidence to justify a finding that PTT was under any duty to refrain from working on or repairing vehicles and this allegation is dismissed.

The cross-claim by Wilson & Horton against Panmure Tamaki Transport Ltd has no foundation in fact or in law and is dismissed.

B. PTT's Claim

By an amended statement of claim dated 23 August 1993, PTT claimed for damages against Wilson & Horton based on negligence. Six particulars of negligence were specified in paragraph 1.7 of which sub-

paragraphs (1) and (4) related to lights and in view of earlier findings have no relevance. One allegation in sub-paragraph (5) alleges negligence in allowing rolls of newsprint to be stacked so that reels "touched one another reducing airflow". This was an aspect of the lighting argument where it was said that the lights had been left lighted without sufficient ventilation so that the temperature rose to ignition level. It is now irrelevant.

Another allegation in sub-paragraph (6) related to storing reels of newsprint "so that the rolls were stored on their flat surface side rather than their round surface side". I take this to mean that the reels of newsprint should have been stacked on their side rather than on end, but this allegation is dismissed for the reasons already given. (p.33)

The remaining two particulars of negligence are as follows:

> "2) Storing or permitting newsprint to be stored to a height of 6 2 metres approximately in the warehouse;
>
> 3) Storing or permitting newsprint to be stored above the maximum height at which paper could be safely stored."

The allegations are in substance the same as those successfully argued by the plaintiffs and for the same reasons I uphold them.

Wilson & Horton's argument in answer to the cross-claim was comparatively brief (see paragraph 105 of the closing submissions). There was no question of foreseeability raised, nor could there be in the circumstances of this case. It was clearly foreseeable that if a fire broke out in the warehouse, it could spread to PTT's office adjoining the eastern wall.

Damages were agreed as to amount at $40,000. There will be judgment for the second defendant against the first defendant for that sum, together with costs according to scale. Interest is also claimed but it is not clear on the evidence as to how that is to be calculated. Counsel may file a memorandum if they cannot agree as to the date from which it should run and what is said to be an appropriate rate. Having regard to interest rate levels between 1985 and the present day, 11 per cent may well be appropriate.

DAMAGES

A. The Building

The cost of reinstating the building is set out in the evidence of Mr B.W.J. Ellison. In summary he deposed that the actual cost of reinstatement was $285,930.00 and with some extra expenses for cutting away steel girders and payment of Fire Service charges, the total direct expense came to $293,356.

Of this counsel for Wilson & Horton challenged the sum of $25,413 which was the cost of bringing the south wall up to standards required by the local body. It was submitted that this work was an improvement to the building and should not be at the expense of the defendants.

The evidence was that this work had to be done (it involved fire proof reinforced glass) and as increased expenses they "were unable to be avoided". These are the costs that often come to charge when reinstating a building after a fire; frequently local body building regulations require, in reconstruction, modifications to what had been in existence before the fire.

I regard this item as a necessary expense and do not uphold the defendant's objections to it.

Another item of expense was estimated at $30,000 by Mr Ellison (p.39) and concerned the cost of repairing a wall damaged by a front end loader in the course of removing paper. The evidence about this item is meagre, (p.39) and it is not at all clear how the damage occurred and precisely what was done. It is probably the kind of mishap that can occur, especially if it involved moving reels of newsprint while the Fire Service was still actively fighting the fire.

Counsel for the first defendant submitted that it was not an expense for which the first defendant should be held responsible, but in the absence of clearer evidence to the contrary, I regard it as the kind of consequential damage of which the cost of repairing should fall properly on the tortfeasor, not the innocent property owner.

The second plaintiffs claim $16,931.14 for the fees they had to pay to their engineers and for Mr Ellison's services

Mr Ellison's services were retained by the second plaintiffs' insurers (paragraph 6 of his evidence) and his account for $4,392.12 (Ex. 31) is disallowed for remoteness. But the other costs of $12,539.02 for the services of the consulting engineers (Ex. 30) are the necessary result of the decision to reinstate the building. In my judgment they are not too remote and are recoverable.

The next item of claim in respect of the building was for loss of rentals for 10 months at $2,500 per month. There are no submissions made in opposition to this and it is allowed.

There will be judgment for the second plaintiffs against the first defendant for:

1.	The costs of reinstatement	$293,356.33
2.	The loss of rental	25,000.00
3.	The engineers' fees	12,539.02
		$330,895.35

The plaintiffs are also entitled to interest on this sum at 11 per cent per annum, calculated from the date when the reinstatement was complete, viz. 19 August 1986.

B. The Newsprint

BCNZ paid $1,197,185.60 to replace its newsprint and paid other costs referred to in paragraph 13 of the amended statement of claim, bringing its total losses as claimed to $1,214,904.16.

From this there has been deducted the net profit received from the salvage operation of $16,005.10, leaving a net claim of $1,198,899.06.

Wilson & Horton heavily criticise the way that salvage was undertaken. As counsel put the matter in closing "...the salvage operation was a spectacular failure - badly handled from the outset".

As the salvage commenced Mr Waters, an insurance loss assessor and loss adjuster, was asked to act on behalf of BCNZ's insurers. When he arrived at the scene on the day of the fire, cartage contractors acting under instructions from the Fire Service were already removing reels of newsprint that were being taken to the rubbish dump at Whitford. Mr Waters thought that cartage costs to remove all the paper could reach $50,000 and he made enquiries to assess the value of the newsprint for salvage purposes. The next day a man named Hastings offered to take all the newsprint, free of cartage costs, and made an offer in writing to this effect. Shortly afterwards however, Mr Waters was offered $50,000 by Paper Sales (NZ) Ltd. A week later he was made a similar offer by another firm called Paper Reclaimers. He also had an offer for $51,100 from a man named Greenwood who seemed to have some connection with Hastings.

In any event Hastings began to move reels of newsprint to a covered site nearby, which Mr Waters objected to, but Hastings claimed the right to it and since the reels he was removing were in a covered, secure place he was not stopped at first. But about seven days later Mr Waters refused to allow Hastings to move any more material from the site, which led to Court proceedings. Hastings sued Mr Waters and his employers and sought an injunction. Mr Waters then withdrew from the salvage operation and handed the task over to Mr A.W. Cotton. Ultimately the action by Hastings was discontinued, but his involvement caused confusion from the outset.

Mr Cotton's responsibilities began on 30 November 1985 and he negotiated with Paper Sales (NZ) Ltd who had made an offer of $50,000 to Mr Waters. This company has experience in reprocessing paper and Mr

Cotton decided to arrange for the salvaged paper to be reprocessed by this company rather than sell it outright.

The advice given to him by Paper Sales seems to have been over-optimistic; he was led to understand that salvage recovery would reach at least $300,000. He called for public tenders and received four replies - three were for just under, or just over, $100,000, and one only, from the man involved earlier Mr Hastings, for $310,000 to be paid by monthly instalments.

Not surprisingly Mr Cotton rejected the Hastings offer, and on the information he had been given, he declined the other offers as too low. As it now turns out, any one of those three offers would have produced a much better return than $16,000.

Wilson & Horton therefore submit that the claim for damages should be reduced by a sum to reflect what could, and should, have been the salvage value if salvage recovery had been handled differently.

In support of this submission they called evidence from Mr Harry Greenwood who is the managing director of another paper reprocessing company, A.P. Woodham Ltd. He made an arrangement with Mr Hastings and it was Mr Greenwood's employees who moved some of the newsprint by arrangement with Hastings, to a nearby empty warehouse until Mr Cotton stopped them from doing so.

Mr Greenwood said that in his opinion much of the newsprint was salvageable, that some of the reels in the middle of the stacks were

undamaged, that he could have converted the salvaged material into "butchers' wrap, foolscap, note pads and all manner of paper products". He says that an opinion expressed by Mr Cotton in December 1985 that it was hoped to salvage 700 tonnes of paper worth $680.00 per tonne or $476,000, was reasonable based on what he, Mr Greenwood, had seen of the paper after the fire.

In fact the salvage efforts produced a return of just under $170,000 and after expenses, a net figure of only $16,000.

Mr Greenwood's evidence is somewhat blunted by the fact that he had quite forgotten that he had put in a tender for the newsprint at only $96,660. I formed the impression that his opinion was to some extent affected by the prospect of the discomfiture of his business competitors, Paper Sales (NZ) Ltd.

It is clear that salvage efforts took much longer than expected, (they extended into 1987) that there was something of a glut in the surplus paper market, reducing prices, that for a combination of reasons over half the newsprint was eventually dumped as not salvageable, and that with hindsight, it would have been better to have accepted any one of the tenders rather than try to effect salvage through Paper Sales (NZ) Ltd.

But having said all that, I am not prepared at this distance from the events to find as a fact that Mr Waters or Mr Cotton acted negligently and that BCNZ's claim should be reduced by some figure for failure to mitigate its loss. I conclude that it is easy to criticise in retrospect in a case like this; I also conclude that had Mr Cotton accepted any one of the three tenders,

he would now be criticised for not processing the newsprint on behalf of BCNZ, so achieving the return that in December 1985 he had hoped to achieve.

I think both Mr Waters and Mr Cotton did the best they could on the information they were given. I suspect that Mr Cotton's confidence in Paper Sales (NZ) Ltd, may have been misplaced, but I do not regard that as a good foundation for a finding of negligence.

The claim by Wilson & Horton for reduction of the damages payable to BCNZ on the ground that it failed to mitigate its loss has not been proved, and it is declined.

There will be judgment accordingly for the plaintiffs against the first defendant, and for the second defendant against the plaintiffs. The second defendant is entitled to judgment against the first defendant on the cross-claim.

Costs should follow the event, and should be fixed by the Registrar according to scale. If need be the Registrar can refer the matter of costs to me with memoranda from counsel.

CP 1736/91

In this action Wilson & Horton Ltd claim various declarations against its insurer, The New Zealand Insurance Company Ltd (NZI) requiring NZI to indemnify Wilson & Horton under either or both of two insurance policies. NZI has refused to do so alleging material non-disclosure by the insured.

BACKGROUND

This case was heard at the same time as the associated proceeding, CP1814/87, and this judgment can be read in conjunction with the contemporaneous judgment given in that case.

A fire broke out in a warehouse in which Wilson & Horton had stored 2,957 reels of newsprint belonging to the Broadcasting Corporation of New Zealand (BCNZ). The newsprint and the warehouse were damaged and BCNZ and the owners of the warehouse successfully claimed damages from Wilson & Horton on the ground of negligence.

A local body bylaw in force at the time of the fire classified the warehouse as a category D2 fire risk, and limited its use to storage of goods that did not exceed 1000kg per square metre. This meant that newsprint could be stacked no more than two reels high because three reels would weigh in excess of the limit per square metre. In fact, Wilson & Horton had stored the newsprint in stacks six, seven and eight reels high, almost to the roof of the building and by so doing increased the fire hazard because firefighting became more difficult, partly because there was a greater volume of combustible material and partly because the reels of paper were hard to get at.

When Wilson & Horton first learned of the possibility of a claim its brokers wrote to NZI and on 27 November 1987 they sent to the insurer a letter enclosing a copy of the statement of claim in CP1814/87, filed in Court on 5 November. This document listed many particulars of negligence, two of which were as follows:

> "(c) In storing certain rolls of newsprint ... above the maximum height at which paper could be stored in the warehouse in breach of Clause 5.5.1 of NZS 1900, Chapter 5.
>
> (d) In storing certain reels of newsprint ... over a fire egress door in the east wall so that firemen were unable to gain entry . in breach of Clause 5.29.1 of NZS 1900 Chapter 5."

These references, "NZS 1900 Chapter 5", were to a model building bylaw which had been adopted by the Mt Wellington Borough Council and was in force when the fire broke out on 27 October 1985. The evidence of Mr Macandrew is that they attracted no attention at NZI when the copy of the statement of claim was received. The insurer's attention was concentrated on other aspects of the matter, primarily whether an exclusion clause in one of the policies applied (about whether Wilson & Horton rented the warehouse or was only a licensee of part of it) and whether NZI's liability under the other policy was a second ranking liability after the insurers of BCNZ and the warehouse owners had discharged their insurance obligations.

After receiving the copy of the statement of claim NZI wrote to Wilson & Horton's solicitors on 25 January 1988 saying that the company was "not in a position to accept liability for the claim" and suggesting that Wilson & Horton should "act as though it were uninsured".

Over the next three years there was a degree of shadow boxing between the solicitors for Wilson & Horton and NZI. Mr Macandrew was NZI's Auckland Industrial Branch Manager at the time, and pursuing the interest in the rental/licence issue he wrote on 15 November 1988 (Doc. 92) to Wilson & Horton's brokers, asking four questions relating to this matter. The files of correspondence show that throughout 1988 Wilson & Horton's solicitors and its insurance brokers were repeatedly trying to get NZI to commit itself as to whether it accepted liability or not. (see Documents 83-91)

The letter to the insurance brokers of 15 November 1988 did not receive a reply and although there was other correspondence, an answer was not supplied to Mr Macandrew's questions until 19 August 1991. Thereafter NZI refused to pay out on the ground that it was not liable under either of the two policies of insurance, and Wilson & Horton filed these proceedings two months later on 24 October 1991.

NZI filed a statement of defence on 15 July 1992. There is no significance in the delayed response; both parties seemed to be hoping that the whole question might go away because there had been a long and highly valued business relationship, over many years, between insurer and insured. After the statement of claim was filed and served NZI was told not to take any action on it in the meantime.

NZI's first statement of defence was a general denial of liability and relevant provisions of the two insurance policies were quoted. No mention was made of the breach of the building bylaw.

In July 1993, the associated action by BCNZ against Wilson & Horton having moved at a pedestrian pace, the plaintiffs in that action delivered briefs of evidence of some of their witnesses which threw some emphasis on the breach of the building bylaw. When NZI received a copy of this evidence it carried out enquiries and for the first time raised an issue of material non-disclosure by filing an amended statement of defence on 17 August 1993. (Several amended defences were filed, but it was this version in which, for the first time, material non-disclosure was raised as a defence.)

THE POLICIES

NZI issued two insurance policies to Wilson & Horton in May 1986, one covering public liability and the other in respect of material damage. For convenience they have been referred to throughout the case, and in most of the documents, as "the P/L Policy" and "the M/D Policy". Although they are dated after the fire they contain the terms that were in force at the time of the fire (October 1985).

The P/L Policy contains an exclusion clause as follows:

"This insurance does not apply to:

(a) ...
(b) ...
(c) Property Damage to:

1. Property owned by or leased or rented to (sic) the Insured or
2. Property in the physical or legal control of the Insured.

But this exclusion shall not apply to liability for Property Damage to:

(i) Premises which are leased or rented to (sic) the Insured where such Property Damage is caused by Fire. ..."

NZI interpreted this to mean that BCNZ's newsprint was not covered by the P/L Policy because it was "property in the physical or legal control of "the Insured". which point Wilson & Horton does not dispute.

It then interpreted "property damage" as not covering the warehouse building because Wilson & Horton did not lease or rent those premises; it merely had a licence to occupy part of them. Hence it argued, the P/L Policy did not cover the warehouse claim.

The P/L Policy also contains a condition which reads as follows:

> "5. If at the time of any Occurrence there is or but for the existence of this Policy would be any other Policy of indemnity of insurance in favour of or effected by or on behalf of the Insured applicable to such occurrence the insurance under this Policy shall be excess insurance over and above the amount of liability covered under such other Policy of indemnity or insurance and the limits of liability under this Policy shall be reduced by an amount equal to the limits of liability afforded under such other Policy." (see Doc. 58 p.8)

NZI was aware that as between BCNZ and Wilson & Horton a written agreement obliged BCNZ to carry all risks except for "any damage arising by or out of or through the negligence" of Wilson & Horton. Negligence being denied, NZI said that Clause 5 meant that in the absence of negligence BCNZ's insurers should carry the loss on the newsprint.

Another clause in the P/L Policy that attracted much argument is:

> "Continuing Indemnity
>
> The Company undertakes to keep the insured (indemnified) in terms of this policy in respect of all the business activities carried on in New Zealand coming within the description of the business set out herein, and the insured undertakes to keep the Company advised of any extension of such business or additions to the plant used therein but failure through oversight to advise the Company shall not prejudice the Insured's right of indemnity through (sic) the matter shall be put right as soon as discovered."

The P/L Policy has a condition on which Wilson & Horton rely:

> "2. Notice in writing shall be given as soon as possible to the Insurer of:
>
> (a) ..
> (b) every change materially varying any of the facts or circumstances existing at the commencement of the Insurance that shall come to the knowledge of an officer of the Insured."

It is argued that this is a modification and narrowing of the common law duty of disclosure, and that the description, "officer of the Insured", while not defined, clearly meant one of the senior officers of Wilson & Horton Ltd, and not just any employee of that company.

The M/D Policy contained a clause relating to "Customer's Goods" providing that:

> "19. This insurance extends to cover Goods belonging to the Insured's customers whilst at the premises described herein insofar as such goods are not otherwise insured."

Invoking that clause NZI pleaded in its statement of defence that if Wilson & Horton had not been negligent the written agreement between BCNZ and Wilson & Horton requiring BCNZ to insure against all risks meant that NZI was not liable under the M/D Policy to indemnify for the loss of BCNZ's newsprint.

(This argument and the earlier one invoking Clause 5 of the P/L Policy both fall away since Wilson & Horton has been held to be negligent in its duty of care to BCNZ).

SCOPE OF LIABILITY UNDER THE P/L POLICY

It is clear from the terms of the policy (and not disputed) that the newsprint was not covered by this policy. The only question is whether the warehouse was covered.

That depends entirely upon whether the warehouse can properly be described as falling into the category of "premises which are leased or rented to the Insured". No lease existed; the only remaining issue is whether the term "rented" is to be given a meaning wide enough to cover Wilson & Horton's arrangements with W.R. Leighton Ltd which had sub-let the warehouse from Panmure Tamaki Transport Ltd.

It is one of the features of a lease that the lessee has exclusive possession of the premises. It is also a characteristic of a tenancy that the tenant has exclusive possession. (see ***Street v Mountford*** [1985] 2 All E.R. 289).

Wilson & Horton did not have exclusive possession of the warehouse. Others had access to it, including employees of Panmure Tamaki Transport Ltd, of W.R. Leighton Ltd and possibly Moore Paragon Ltd who also stored paper in the building.

The "rent" that was charged to Wilson & Horton by W.R. Leighton Ltd was based on a rate of $0.20 per reel per week, the total cost being calculated on the number of reels in the warehouse. The arrangement was made orally, there was no formal agreement in writing; nor it seems, even an exchange of letters.

In fact the payments made by Wilson & Horton for storing BCNZ's newsprint were really storage charges.

The reason for the exception of "premises leased or rented" from the exclusion clause may be in the fact that if the Insured did lease or rent premises it would, as lessee or tenant, have exclusive possession over those premises, and from the Insurer's point of view would be in total control of them. Anything less than a lease or tenancy could mean that parties other than the Insured might have access to the premises, so that the risk of accident or misadventure would be increased.

But whatever the reason for the exception, there is no reason to give the phrase "leased or rented" any other meaning than the plain ordinary meaning of premises exclusively possessed by the Insured under a lease or tenancy.

Since Wilson & Horton's right to use space in the warehouse cannot come within such a definition, it necessarily follows that the warehouse is not included in the exception to the exclusion clause, and the liability for damage done to it is not an insured risk under the P/L Policy.

The Insurer's refusal to pay on this ground is sustained. The arguments as to the scope and meaning of Clause 5 and the Continuing Indemnity clause have no further relevance.

THE SCOPE OF THE M/D POLICY

The property insured by the M/D Policy is defined as:

"All tangible property both real and personal of every description whatsoever the Insured's own or for which the Insured may be responsible or which may be acquired by the Insured on lease hire or loan or which may be held in trust or on commission by the Insured including all property automatically as it is handed over or becomes the responsibility of the Insured or for which they wish to assume responsibility. Without limiting the generality of the foregoing it is agreed and declared that the Insured Property includes:

(a) Buildings
(b) Contents
(c) Stock
(d) ...)
(e) . .) not relevant
(f) ..)" (Doc. 59)

The warehouse building for which Wilson & Horton paid storage fees does not fall within this definition and is not covered by the M/D Policy. The Insurer's refusal to indemnify against this claim is justified.

The newsprint falls within the definition however and is included in either "contents" or "stock".

Condition 6 of the M/D Policy is important, providing specifically for insurance cover to cease. It reads:

"6. The insurances (sic) ceases as regards the property affected unless the Insured before the occurrence of any loss or damage obtains the sanction of the Insurer:

(a) If the nature of the occupation of or other circumstances affecting the property be changed in such a way as to materially increase the risk of loss or damage.

(b) .. " (not relevant) (Doc. 59)

BCNZ's newsprint had been stored in Wilson & Horton's own paper stores which were equipped with a fire extinguisher, water-sprinkler system. During the early part of 1985, because of pressure on storage space, the newsprint was moved to the Leonard Road warehouse which was not so equipped.

I find that this action did "materially increase the risk of loss or damage" for the obvious reason that if a fire broke out in the Leonard Road warehouse the risk of damage because of the absence of an automatic sprinkler system would be greater than it would in Wilson & Horton's own paper store.

NZI was not notified of this change of arrangements. Mr Macandrew said he knew nothing of the Leonard Road warehouse until after the fire. On the plain language of Condition 6, the liability to indemnify for loss or damage to BCNZ's newsprint under the M/D Policy ceased as soon as it was moved into storage which did not have an automatic sprinkler system.

Other aspects of the change in circumstances are dealt with later under the non-disclosure argument. The defence that Condition 6 applies so that the insurance ceased and that NZI was not bound to indemnify for the damage to the newsprint is upheld.

NON-DISCLOSURE

The allegations of non disclosure were specified in particular in paragraph 14 of the fifth amended statement of defence. (They had also been pleaded in earlier versions of the defence). There were eight particulars of which three related to the lighting system, two to a fire door and the remaining three read as follows:

> "14.5 that it intended to store and/or was storing rolls of newsprint to a height such as to be in breach of the standards and/or bylaws referred to herein;

14.6 that it intended to store and/or was storing newsprint to a height such that a higher fire risk would be created than that allowed in terms of buildings constructed for moderate fire risk D/2 Classification under the NZ Standard 1900, Chapter 5;

14.7 that it intended to store and/or was storing newsprint in a manner which would be contrary to and therefore in breach of the then current bylaws, in particular Clause 5.5.1 of the NZ Standard 1900, Chapter 5;"

The increased fire hazard was not made known to NZI. As already mentioned, the insurer did not know that just over a million dollars worth of paper was no longer stored in Wilson & Horton's sprinkler-equipped paper stores.

An insurer's right to refuse to pay out on a policy for material non-disclosure is well known. What has to be proved is that the fact not disclosed is material, and that it was known or ought to have been known to the insured. (see ***State Insurance v McHale*** [1991] 2 NZLR 399.)

The relevant fact in this matter is the volume of combustible material stored in breach of the building bylaw in a warehouse not sprinkler-equipped. There was no real dispute that it was material because it is plain that "the mind of the prudent insurer could be affected" by knowledge of this fact which in turn could have had a bearing on whether to continue the risk or alter the premium.

The defence to this plea was in substance that those in a position of responsibility in Wilson & Horton were unaware that the bylaw was being infringed.

But the law imposes a duty on an insured to make known to the insurer facts which are known, "or which in the ordinary course of affairs,

ought to be known" to the insured. (see ***Blackley v National Mutual Assn.*** [1970] NZLR 919, 936.

In this case Wilson & Horton stored newsprint and had done so for many years. In contracting to store BCNZ's paper, the company was obliged to do so in an appropriate place. The manager of the Webprint Division was in charge of all the stores of newsprint and he could and should have ensured that the paper was stacked in accordance with the bylaw. I take it as almost elementary that those who use or operate a warehouse ought to find out the legal requirements that must be met to use or operate such places according to law. It is no defence to plead ignorance in a matter of this kind.

WAIVER

Wilson & Horton raised waiver as an answer to the plea of material non-disclosure. It was submitted that NZI had a report from its own assessor promptly after the fire. (At the time there was a possibility that some of the newsprint belonged to Wilson & Horton). That report (Ex. 3D6) refers to the suspicion that the fire was caused by the electric lights and describes how the reels of newsprint had been stacked. It does not mention the breach of the bylaw.

The plea was therefore advanced that because NZI knew of the system of stacking the reels at the outset (1985) it waived its right to refuse liability because of material non-disclosure since it did not raise the issue until the amended statement of defence filed on 17 August 1993.

An examination of the correspondence shows that NZI did not take a firm position until it had to do so and that the insurer's concentration was upon the terms of the two policies. That is understandable because as it turns out, refusal was justified even without the non-disclosure argument.

But it was clear from 1986 onwards that NZI was not willing to accept liability under either policy. It did not refuse liability explicitly so far as I can see, but it did convey clearly enough, certainly by the letter of 25 January 1988 that Wilson & Horton should "act as though it were uninsured". This letter was written after receiving a copy of the statement of claim issued by BCNZ at the end of 1987, and after receiving a letter from Wilson & Horton's solicitors who wanted to know if NZI would take over the proceedings.

By 30 May 1988, Mr Macandrew was able to say quite clearly that "the loss of the paper is not covered under the Material Damage Policy by virtue of Clause 18 of the special provisions". (That was a slip; he was relying on Clause 19 which related to uninsured "Customer's Cover"). He also said that whether it would be covered by the P/L Policy was still subject to legal advice, so there were signs that the Insurer was disputing liability, even if couched in somewhat honeyed phrases. In the same letter he said that the building was in a different situation from the paper, and the company needed more information on the sub-letting arrangement.

By this time, May 1988, it could not be said that any waiver existed.

There was further correspondence during that year, and the next milestone was Mr Macandrew's letter of 15 November 1988, in which he

asked Wilson & Horton's broker four somewhat pointed questions bearing on the lease/rental/licence issue. (The answers to those questions were not supplied until August 1991).

In June 1990, Wilson & Horton's solicitors gave NZI notice of a claim made against the company by the lessee of the warehouse, Panmure Tamaki Transport Ltd, and asking NZI to confirm that it would be covering Wilson & Horton. A prompt reply three days later (Doc. 93) gave no such confirmation and pressed for an answer to the four questions sent off nearly eight months before. By June 1990 there was no waiver and Wilson & Horton's solicitors were aware that at that time liability was not accepted.

Further correspondence took place during 1990 and 1991 when eventually the answers to the questions were supplied on 19 August. Thereafter NZI made it clear that it was getting legal advice on the facts that had been supplied on the lease/licence issue, and by November 1991 it is plain that both parties knew that no liability had yet been accepted under either of the policies.

On 24 October 1991 Wilson & Horton issued these proceedings (and told NZI not to file a defence for the time being) and by that stage no-one could fairly argue that NZI had waived any of its rights. On the contrary Mr Macandrew wrote on 19 November 1991 saying that NZI's position would be set out in the statement of defence that it was to file or as its "counsel may advise".

The real issue about waiver is whether the delay between the end of 1991 and August 1993 is such a length of time that NZI can be deemed to have slept on its rights to argue material non-disclosure. I do not think so.

This issue of non-disclosure was brought squarely to the attention of NZI in July 1993 when Mr Barrett's brief of evidence came to hand. It is true that it had been mentioned in certain sub-paragraphs of a long list of particulars in the copy of the statement of claim filed by BCNZ and others in the related action at the end of 1987. But as I have mentioned the particulars were cryptic and did not explicitly plead that there had been "a breach of the bylaw". I accept Mr Macandrew's evidence that he did not advert to this matter until he read Mr Barrett's brief.

The unusual length of time from October 1985 to July 1993 would, taken on its own, raise a possibility of waiver. But when one looks at the correspondence over that period, the course of events, what was actually said and done and the long-standing business connection between NZI and Wilson & Horton, the combination of facts militate against a plea of waiver and I reject that defence to the claim of non-disclosure.

CONCLUSION

Other matters were raised in this long case, but in the light of the findings already made I come to the view that they are irrelevant. NZI for example, made detailed and lengthy submissions pleading illegality based on the *"ex turpi causa"* maxim but they have been overtaken by the findings on the plain meaning of the policies. The insurer also raised a plea of recklessness in the way that the newsprint was stored. Again I conclude that that plea does not require a decision.

I find that the defendant was justified in refusing to indemnify the plaintiff under both policies of insurance, and is entitled to judgment against the plaintiff with costs according to scale