

JUDGMENT : His Honour Judge Bowsher Q.C. TCC. 3rd March 2003.

Background

1. This action arises out of a fire that destroyed most of a food factory in Brent Road, Southall on 4 January, 1998.
2. The first claimants (Sahib) operated that factory as leaseholders. At the time of the fire, the second Claimants (the Co-Op) had entered into a contract to buy the freehold and were the beneficial owners of the freehold.
3. The defendants are architects.
4. The claimants allege that damage from the fire was caused at least in part by the negligence of the defendants. The defendants deny liability and allege contributory negligence on the part of the claimants.
5. For reasons that will appear from this judgment, I find that the fire started as a result of the negligence of Sahib. One of the central questions is whether the disastrous spread of the fire through the factory was caused in whole or in part by negligence on the part of the defendants
6. By order of His Honour Judge Havery Q.C., this trial is limited to the trial of liability including contributory negligence.

The Premises and the use of the bratt pan

7. Sahib has for some years manufactured chilled and frozen food for supermarkets, including Waitrose and Sainsburys. Those supermarkets are extremely demanding in their standards and insist on making inspections to ensure adequate quality control. Fire precautions are no concern of the supermarkets.
8. Sahib's Brent Road factory was refurbished in 1995. The defendants were retained in relation to that refurbishment. There is a dispute whether in doing that work they were retained by Sahib or by a major shareholder of Sahib, Katsouris Fresh Foods Limited (KFF). The defendants deny that they owed any duty to Sahib or to the Co-Op. There was no written retainer.
9. The fire plainly started as a result of the negligence of employees of Sahib. It is alleged that the extensive and disastrous spread of the fire was due to the negligence of the defendants in and about the refurbishment.
10. The general scheme of the factory was that unprepared and, in the case of vegetables, sometimes actually dirty food came in at one end of the factory; then as it progressed through the factory it was cleaned, prepared, cooked, then frozen or chilled and left the other end of the factory as wrapped products for the supermarket chillers or frozen food cabinets. The first part of the factory was known as the "low risk" area and the second part of the factory was called the "high risk" area. The risk referred to was the risk of contamination of the food, not the risk of fire. There was a physical barrier to prevent employees moving between the low and high risk areas.
11. So far as the risk of fire was concerned, the highest risk was in the "high risk" area in continuous deep fat fryers. Those continuous deep fat fryers were in one room in which there were no operatives because it was too hot and too dangerous. In that room there were two Koppens continuous fryers, 7 metres long and 2 metres high. Food was fed in from the outside on a conveyor belt system and taken out from the outside at the other end. It has been suggested that that room was unattended. That is not correct. It was attended from the outside at each end. The room was designed so that it was enclosed with sandwich panels filled with non-combustible mineral wool. Miss Elizabeth Tooth of Crocker Tooth Priestley, called as an expert architect witness by Sahib, said that the requirement of non-combustible mineral wool panels for that enclosure was made by Sahib and not by the defendants. Those panels were supplied by a company named LR Insulation Limited (LRI). The panels they supplied were called Flameguard, and a more expensive version with tongue and grooved joints was named Flamelock. After the fire, that enclosure remained largely intact and undamaged.

12. The fire started in a room in the low risk area of the factory. That room was called the veg prep cook area or Room G49. In that room were three "Bratt Pans". A bratt pan is a large quadrilateral pan like a table with upturned sides. Two of the pans were steam heated. One was heated by a gas flame underneath it. It is the gas heated pan with which we are concerned. On the evening in question, I was told, that gas heated pan was being used to caramelize onions as the first stage of cooking.
13. Mr. Reynolds gave evidence. He was the Production Director at Sahib Foods at the time of the refurbishment but he had left that employment before the fire. In his written witness statement he described the Bratt pan and its purpose: *"I recall that it was intended that the veg prep cook area, which was also known as area G49, would contain a gas fired bratt pan. The other items of cooking equipment in this area were two steam heated bratt pans. There were also extraction canopies fitted into the ceiling above the cooking equipment which were designed to extract the steam that was produced during the cooking process. I recall the bratt pan that was to be placed in this area was a Zanussi manufactured gas fired bratt pan, which is about 1 metre square in size. The bratt pan is used for cooking products such as rice and sauces and, if for frying at all, shallow frying. It should not be used for deep frying foods. I would describe shallow frying as using less than an overall depth of 2 mm of cooking oil and deep frying is using more than 2 mm. The deep frying of food would take place in the continuous fryers located in the fryer enclosure elsewhere in the factory.*
Bratt pans are designed to be attended to by an operator at all times. They are not designed to be left to cook food unattended, unlike continuous fryers. Once a batch of products has been cooked and the working shift completed, any residual cooking oil or other cooking matter should be drained off and the bratt pan switched off by the operator. I recall that at the factory, we relied on the operators to switch off their equipment. The supervisors on site were also supposed to check that the equipment had been switched off before leaving the shift."
14. That view given by Mr. Reynolds of what ought to happen is confirmed by instructions given by Zanussi for models of bratt pan current in 1994/5: *"The appliance must be used only for the intended purpose, that is to say, cooking meats – with sauce, braised and stewed, sauces, lightly fried food, omelettes and stews in general. Any other use is considered unsuitable.*
Do not use the appliance as a fryer because the temperature of the bottom of the tub rises above 230 degrees C with the danger of the oil catching fire (excluding the equipment for such use, whose functioning thermostat has a maximum temperature of 185 degrees C."
15. At the trial, Mr. Reynolds was asked about the residue of oil left in the pan after cooking. His oral evidence was somewhat ambivalent, but he eventually said that with some foods there was no residue because all of the oil was absorbed, but with other foods there was a residue that was poured off into a container and thrown away. Before pouring the oil off (by tilting the pan) the oil had to be allowed to cool. Mr. Reynolds agreed that when caramelising onions, there would be a residue of oil. Clearly, the quantity of oil left in the pan would depend very much on the skill and care of the operative. There were recipes. Sahib's recipes have been destroyed in the fire, but some similar recipes have been obtained from KFF. The recipe for caramelising onions requires 1kg of oil, 2kg of butter, 2 kg of red wine, 4.5 kg of red currant jelly and other more solid ingredients. On the same page of the KFF recipe to which I have referred there was another recipe for twice the amounts. There are instructions that those ingredients are not to be put in all at once, but some are to be allowed to reduce. But since the operative on duty at the time could not speak English, and there is no evidence of what instructions were given to him in his own language, it is open to question whether the recipe was followed. In fact, the physical observations of the fire expert after the fire demonstrate that it was not followed. The evidence of the experts, supported by photographs, is that the fire started by the burning of a deep level of oil in the gas fired bratt pan, that is, to a depth of 100 mm. The experts are also agreed that if a shallow level of oil of about 1 to 2 mm of oil in the pan had caught fire there would have been insufficient to ignite the wall panels.
16. There was other evidence that the evidence of Mr. Reynolds was not accurate. What he says was done may be an accurate account of what ought to have been done, but it was not what was done. I might have been inclined to think that Mr. Reynolds gave an accurate account of what was done in his time but that things went downhill after he left. But the evidence of Mr. Sahib Ahluwalia, which I accept, was to the contrary.

17. Mr. Ahluwalia gave his evidence with great dignity and good humour. Dignity and good humour are not badges of accuracy of evidence, but I accept his evidence. He was the Managing Director of Sahib from its establishment in July, 1989 until December, 1989. Thereafter, he remained with the company until the fire, but his authority and the influence of his shareholding were reduced as KFF and its shareholders took an increasing shareholding in the company. Mr. Reynolds came to report to Messrs Costas and Louis Constantinou who became joint Managing Directors of Sahib, and he also reported to Mr. Tony Yerolemou, the Chairman and Managing Director of KFF. Mr. Tony Yerolemou was not on the Board of Sahib, but he took major decisions because KFF and allied interests had a majority of the shares of Sahib.
18. The considerable skill of Mr. Sahib Ahluwalia lay in marketing and selling rather than in production, but he said he had been in this type of business for 20 years and he saw what went on in the factory. He said, in relation to the use of 2 mm. of oil: *" 2 mm of cooking oil hardly -- could even not be enough to do shallow frying in my view, with my experience. 2 mm is really nothing. I mean, it might be enough to do some flash frying, where you are just throwing things in and bringing them out, but not for shallow frying. For shallow frying, you do need, in my view, more oil in whatever vessel you are using than 2 mm. In my view, for the sort of process that those bratt pans were being used for, they would need at least 10 to 12 mm at least. ... You heat up the oil first, and then you throw the ingredients in. Some oil would be absorbed, yes. So you top it up again before you put the next batch of ingredients in."*
19. Mr. Ahluwalia then went on to explain that the menu, with its carefully measured ingredients, was not used in the veg prep area. *"The process you have just described is actually making the product. The process for which this particular bratt pan was used, and is also used in other places, is a prepping process. In the prepping process, you do not continue to add different ingredients into it, and you do not add any spices or anything, it is just preparing -- for example, in this particular case, it was prepping the onions, they were caramelised. So all you are doing is caramelising the onions, taking them out. Then those onions go to the main kitchen -- this is in the prep kitchen, that you are prepping the product. Then you go to the main kitchen, where you actually do what you have just described actually then make the product, a curry or whatever, into which these prepped onions or aubergines or potatoes or whatever is going. So you do not do in the prepping bratt pan what you would do in the main recipe cooking bratt pan."*
20. That evidence is consistent with the evidence of the operative which I have heard at second hand. He told one of the fire experts that he had left the bratt pan with 50 to 100 mm of oil in it at the end of the day, and that is consistent with the burn marks seen on the pan. The evidence of Mr. Ahluwalia is also consistent with the evidence of Mr. Raymond Turner, a self employed general health and safety consultant who gave evidence of oil being poured into the bratt pan from 25 litre drums
21. Both Mr. Reynolds and Mr. Vassilas (of the defendants) said that there was a measuring device for delivering the oil in measured quantities into the gas fired bratt pan. I reject their evidence. After the fire, no sign was seen of such a measuring device and Mr. Turner's evidence is directly inconsistent with the use of such a device. Counsel for the defendants has suggested that there was a measuring device there when Mr. Reynolds was working for Sahib and that it must have been removed after he left when, under his successor, Mr. Arnold, there was pressure for greater production. I have been shown plans that include indications of measuring devices, but the plans do not show such an indication near the gas fired bratt pan.
22. There is clear evidence of negligence on the part of Sahib:
 - (a) Mr. Openshaw, then a director of LRI, visited the factory before the refurbishment and he advised Mr. Reynolds specifically in relation to the veg prep area that non-combustible panels should be used wherever cooking was taking place. Mr. Reynolds replied that the veg prep area was used only for steam cooking and that satisfied Mr. Openshaw that as result non-combustible panels would not be required in that area. Mr. Reynolds was wrong and negligent in giving that statement. One of the bratt pans was fired by a naked gas flame and if Mr. Openshaw had known

that, he would have pressed his advice that non-combustible panels should be used: if that advice had been heeded, the spread of the fire would have been limited.

- (b) Sahib employed as the operator of the gas fired bratt pan Mr. Gurcharan Singh, an asylum seeker who could not speak English. On the day in question, he worked from 6 a.m. until 8 p.m. At the end of the day, he was responsible for turning off the gas supply to the bratt pan. There may be many women who work hours like that in their own homes and kitchens, but Mr. Reynolds agreed that it was not sensible to employ a man to work those hours and rely on him to perform an important task like turning off the gas at the end of the day. Mr. Singh did not turn off the gas supply or the pilot light. The gas burners were left on in the maximum position. In that failure, Mr. Singh was negligent, though in the circumstances one could only sympathise with him if he were here to accept that sympathy. His employers, Sahib, were not only vicariously liable for his negligence, they were independently negligent for relying on him to perform a responsible (though simple) task after working such long hours. It is true that his supervisor ought to have checked, and Sahib are vicariously liable for his failure also.
 - (c) Sahib were also negligent in allowing the gas fired bratt pan to be used with a depth of oil far in excess of that recommended by the manufacturers. Mr. Singh told Dr. Sanders of Dr. J.H.Burgoyne and Partners, through an interpreter, that he left cooking oil in the pan to a depth of about 50 to 100 mm. Dr. Sanders and another fire expert, Dr. Bland, agree that burn marks on the inside of the pan show that the pan had contained oil to a depth of 100 mm when the oil ignited. The evidence of Mr. Reynolds is that the night shift should have come on at 10.00 pm to clean the pan and its surroundings. However, before they arrived, the fire had started.
 - (d) The gas fired bratt pan was designed to be fitted with a thermostat controlled by a revolving switch to control the temperature of oil in the pan. On the day in question, and probably for some time earlier, the thermostat was broken, and if the gas was left on (as it was) there was nothing to stop the temperature of the oil rising until combustion took place. In the opinion of Dr. Sanders, that is what happened. There was no maintenance contract for the gas fired bratt pan. I have no evidence whether the broken thermostat was reported and not dealt with or not reported. In either event, Sahib were negligent.
 - (e) Later models of this bratt pan were fitted with an override temperature cut-out switch set at a fixed maximum temperature. This was an old model that did not have such a switch and there is no evidence that such a switch was required when the pan was brought back into service. However, the fire experts agree that it would have been preferable for an override thermostat to have been fitted.
 - (f) Mr. Reynolds said that operators at the bratt pan would use a paddle to turn over the vegetables while cooking and in doing so they would cause oil to go over the sides and onto the underside of the pan. Also, when emptying the pan after cooking, they would use a large scoop like a shovel and would tend to overload the scoop and spill more oil and food onto the floor and onto the gas flame where it would congeal and form a flammable solid that would be difficult to remove. That evidence is inconsistent with his evidence about shallow fat.
23. As a result of all those concurrences, attributable to the negligence of Sahib, a fire started at about 9.00 p.m. when the fire alarm went off. Action was taken by Mr. Balasingham, a production supervisor on the high risk side, and he did everything that one could expect of him. It is worth noting that he started work at 10.00 a.m. and was still working at 9.00 p.m. When he was due to finish work I do not know.
24. When the fire alarm sounded, the Fire Brigade was called and the Security Guards did what they could before their speedy arrival, but the fire spread rapidly and most of the factory burnt down.
25. The fire started as a result of the negligence of Sahib. There was no negligence on the part of the Co-Op. The principal question before me is whether the spread of the fire was due to the culpable negligence of the defendants in breach of duty to either or both of the claimants. There is also a

question whether the spread of the fire, as opposed to its initiation was due in part to any negligence on the part of Sahib.

The Fire Experts

26. Dr. Neil Sanders, called by Sahib, and Dr. John Bland, called by the defendants, gave evidence as fire experts. Dr. Sanders inspected the site on 5 and 6 January, 1998 and spoke to several employees of Sahib. Dr. Bland did not visit the site.

27. The fire experts very helpfully reached extensive agreements. I will refer to only a few of them: *"In our view, it is unlikely that ignition occurred within less than about 1 hour from the end of cooking at a nominal temperature of 180 degrees C.*

We agree that if the bratt pan had been switched off immediately after the appliance was last used or at the end of the shift this fire would not have occurred.

We agree that, if the bratt pan thermostat had been functioning correctly and had been correctly located at the time of the fire, this fire would not have occurred.

We agree that, if the bratt pan had been fitted with an overheat limit thermostat which was functioning correctly and correctly located, this fire would not have occurred.

We agree that it would have been preferable for the bratt pan to have been fitted with an overheat limit thermostat."

As to the overheat limit thermostat, the gas fired bratt pan was bought second hand and it may be that when made or bought it was not required to have an overheat limit thermostat. The experts are agreed that it would have been good practice for an overheat limit thermostat to have been fitted when the bratt pan was refurbished but Dr. Sanders stated that an overheat limit thermostat was not then required.

After discussion of a test by way of research, the experts then said: *"In our view, based on data for pool fires involving combustible liquids and BRE data for heat output from a fire in a larger fryer, the oil in the bratt pan would have burned at a rate of about 1.75 mm depth per minute (although there is a range of possible rates, say between 1.0 and 2.5). A rate of 1.75 mm per minute equates to a heat output of about 473 kilowatts, which is 58 per cent greater than in the aforementioned test [which was 300 mm]. The bratt pan was located about 600 mm from the side wall, which is 50 per cent greater than in the test, but the width of the bratt pan was more than twice the width of the test burner. Therefore, the radiation heat transfer 'view factor' from the bratt pan to the wall would have been at least as high as the view factor in the test. Dr Sanders' photographs of the scene indicate that there was a vertical joint in the panel wall approximately in line with the front of the bratt pan. The diagram of the test set-up shows that the burner was located much closer to the floor than the pan of the bratt pan. In the test, the combustion products would have impinged on the ceiling and the upper part of the side walls. In the real case, it is likely that combustion products would have been removed by the extraction hood, even after the fan had failed. It is likely the fan would have failed within about two minutes from the start of the fire due to the effects of the hot gases passing up through the duct. However, the extraction duct was in contact with the ceiling panels where it passed through the ceiling. In the real system, there would have been no preheating regime ... "Considering the above points, it is Dr Sanders' view that the sandwich panels would probably have ignited in about the same time as in the aforementioned test (that is, in 3.5 minutes) and ignition may have occurred more quickly.*

"Dr Bland believes that ignition at the side wall would probably not have occurred in less than 3.5 minutes. After this period of time, there would have been an increasing risk of ignition."

At a burn rate of 1.75 mm per minute, an oil depth of about 8 mm would take about 3.5 minutes to burn.

We agree that if the veg prep cook enclosure had been constructed as a 'fire compartment' capable of containing a fire for one hour, this fire would not have spread outside the enclosure. The main features of such an enclosure would have been:

- *Walls and ceilings constructed from non-combustible panels (such as mineral wool).*
- *Fire resisting doors or automatic shutters of the appropriate specification.*
- *Automatic fire shutters in the ventilation ducts where they crossed to other areas of the factory.*

We agree that, under the circumstances, the fire would probably not have spread outside the enclosure if somewhat less than the compartment precautions had been taken

We agree that there was no evidence that the factory breached the relevant Building Regulations. We are aware that the premises had a Fire Certificate. As far as we are aware, both the relevant parts of the Building Regulations and the Fire Certificate are intended to prevent danger to persons, and are not intended to prevent damage to property."

The experts explained that the concentration of the Building Regulations on preventing danger to persons meant that there were protected escape routes. As a result, there was no loss of life in this disastrous fire in which virtually the whole building was burnt down. The experts said that apart from the legal regulations there were other publications regarding the use of EPS panels in food factories and other duties to protect properties.

28. It follows from those agreements and from the general evidence of the fire experts that if oil of a depth of 1 or 2 mm in the gas fired bratt pan had caught fire, the wall panels of the veg prep area would not have ignited. It also follows that if only 6 mm. or possibly 8 mm. of oil had caught fire, the wall panels of the veg prep area would have ignited.
29. It also follows that if the veg prep area had been protected with non-combustible panels then despite the concurrence of a number of negligent acts and omissions on the part of the claimants, the factory would not have burnt down.

The duties of the Defendants

30. The defendants deny that they had any contract with Sahib. There is no written contract and no letter of retainer. The only witness of fact called by Sahib was Mr. Ahluwalia. He said he had nothing to do with the retainer of the defendants. Mr. Vassilas of the defendants said that although he dealt with Mr. Reynolds of Sahib on details, all decisions about money were made by Mr. Yerolomou who was not a director of Sahib but was a director of KFF. His wife was a director of Sahib and he clearly controlled the purse strings through various shareholdings which included but were not limited to shareholdings in the name of KFF.
31. Mr. Kyriakides of the defendants said that he took his instructions from Tony Yerolomou and "I agreed the terms of our engagement, such as they were, directly with Tony Yerolomou of KFF". However, and most importantly, Mr. Kyriakides said in oral evidence that he regarded Sahib as the client and he provided drawings to Sahib to ensure that Sahib's requirements were met. Applications for statutory permissions were made by the defendants in the name of Sahib and fee notes were rendered to and paid by Sahib. In strict company law, there was an irregularity in a controlling shareholder who was not a director arranging a retainer of architects on behalf of a company, but I am satisfied that that is what happened. If there had been any contract with any person other than Sahib it is more likely to have been with Mr. Yerolomou than with KFF. I am satisfied that the defendants were retained by Sahib. However, there were no special terms of the retainer and the duty of the defendants to Sahib is no different from their duty in tort.
32. Even if there had not been a contractual retainer of the defendants, they would have owed duties of care in tort to Sahib as the occupiers of the premises and the operators of the business for which the works were being designed and done.
33. The defendants argue that, although they accept a duty of care to Sahib, that duty is limited by the fact that the duty in contract is with KFF and they do not owe a duty to Sahib to do anything that they were not required to do under their contract with KFF. Since there was, in my view, no contract with KFF that argument fails. However, I should say that the argument hinged on what was called a cost benefit analysis in relation to a food factory owned by KFF at Abbeydale Road. It was suggested that a similar approach would have been taken to Sahib's premises. However, Mr. Vassilas agreed in cross-examination that Mr. Yerolomou had no objection to authorising the expenditure of money if a case was made for it and that had anyone perceived a risk in relation to Room 49 the money would have been forthcoming to deal with that risk.

34. The defendants also owed a duty of care to the Co-Op as beneficial owners in respect of latent defects in the building of which there is no reasonable possibility of inspection: **Bellefield Computer Services & ors v. E.Turner & Sons Limited & ors** [2002] EWCA Civ 1823 approving my decision in **Baxall Securities Limited v. Sheard Walshaw Partnership**[2001] BLR 36 at paras 107 and 111. It is true, as counsel for the defendants submits, that there has been no evidence from the Co-Op and that submissions of counsel on their behalf are limited to submitting that it was reasonably foreseeable that a fire would cause damage to property resulting in damage to the owners of the property. That submission is sufficient to ground a duty of care in the terms in which it was defined in **Bellefield** and in **Baxall**. But that duty of care has to be translated into the facts of the case by evidence. Without evidence, one can say that it is reasonable to expect a purchaser of the freehold of a factory to instruct a surveyor to inspect the building before purchase. But there is no evidence that there were "latent defects in the building of which there is no reasonable possibility of inspection". I have heard evidence of changing awareness in the architects' profession of the dangers of the use of EPS panels in food factories but I have heard no similar evidence of the state of similar awareness in the surveyors' profession. It might have been in advance of or lagged behind the architects' profession. I do not know whether in the eyes of a surveyor at the time the use of EPS panels in Room 49 would have been regarded as a "defect" nor do I know whether such a defect (if it was a defect) would have been regarded by a surveyor as "latent". If a surveyor had asked to see the plans he would have seen the composition of the walls, but was it reasonable that he should so ask? If he had just looked at the walls should he reasonably have seen what was the composition of the walls? Was there in fact a survey at all and what, as a result, was the advice given? I know the answers to none of these questions. The Co-Op has failed to call any evidence to show that the duty owed to them had any relevance to the facts of this case and therefore I find that that duty was irrelevant and the Co-Op cannot succeed in its claim against the defendants.

Standard of care owed to Sahib

35. The defendants owed a duty to carry out their duties with reasonable skill and care. What is that standard of care? For the law relevant to this case one need look no further than the citations and the statement of the law made by Webster J. in **Wimpey v. Poole** [1984] 2 Ll. LR 499 at 505 – 507.
36. In **Wimpey v. Poole**, Webster J. first cited the well known test stated by McNair J. in **Bolam v. Friern Hospital Management Committee** [1957] 1 WLR 582 at 586 and approved by the Privy Council and then by the House of Lords in **Chin Keow v. Government of Malaysia** [1967] 1 WLR 813 and **Whitehouse v. Jordan** [1981]1 WLR 246: "... where you get a situation which involves the use of some special skill or competence, the test is as to whether there has been negligence or not is not the test of the man on top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising or professing to have that special skill".

After some discussions of the submissions, Webster J. then said: "*The second gloss which Mr Phillips sought to put upon the test was that it is the duty of a professional man to exercise reasonable skill and care in the light of his actual knowledge and that the question whether he exercised reasonable care cannot be answered by reference to a lesser degree of knowledge than he had, on the grounds that the ordinary competent practitioner would only have had that lesser degree of knowledge.*

I accept Mr Phillips' submission; but I do not regard it as a gloss upon the test of negligence as applied to a professional man. As it seems to me that test is only to be applied where the professional man causes damage because he lacks some knowledge or awareness. The test establishes the degree of knowledge or awareness which he ought to have in that context.

*Where, however, a professional man has knowledge, and acts or fails to act in way which, having that knowledge he ought reasonably to foresee would cause damage, then, if the other aspects of duty are present, he would be liable in negligence by virtue of the direct application of Lord Atkins' original test in **Donoghue v Stevenson**."*

37. Counsel for Sahib says that the defendants had knowledge of risk that they failed to act upon. In response, Counsel for the defendants says that there was nothing known to the architect that was not known to the client. There is an issue of fact.

Was there a breach of duty of care?

38. It is agreed that in 1994, the year with which we are concerned, knowledge of the risk of the use of EPS panels in relation to food factory fires was developing in the architects' profession. Over the years there have been some well publicised disastrous fires that would make the steps needed from the ordinary reasonable architect to comply with the required standard of care in 1990 quite different from what would be required today. I have heard evidence of the progression of knowledge of the danger of fire, but I do not think it necessary to recount the details of that evidence. Quite where 1994 fitted into that progression is, on the facts of this case, not too important. What is more important is the actual knowledge of the defendants.
39. The two architects called as expert witnesses, Miss Elizabeth Tooth and Mr. Michael Highton, agreed that in 1994 some architects would have been aware of the combustible nature of the core of steel faced EPS panels, but an ordinarily competent architect might not have known of the performance of such panels in a serious fire. Relying on the judgment of Webster J. in **Wimpey v. Poole**, the claimants point out that PKS did in fact know all that they needed to on this topic. That was shown by the evidence of Mr. Kyriakides (Day 3, 73-74) and Mr. Vassilas, (Day 2 85, 87). It is important to emphasise that this knowledge was not simply knowledge that EPS will burn. It was knowledge that steel faced EPS panels will delaminate in a big fire, that the EPS core will then rapidly degrade, that the melted cores will transmit fire one to another very rapidly, that exactly this had happened in numerous recent fires, including at Sun Valley in 1993 and Noons' (a competitor – close to home) in 1994, and that there was available a reasonably priced fire-resistant alternative which specialist sub-contractors were currently recommending for all cooking areas.
40. In his oral closing speech, Mr. Wilmot Smith Q.C. on behalf of the defendants responded that there was nothing known to the architect that was not known to the client. It is questionable whether that was correct in fact, but if it was correct in fact, I do not understand the point of the submission. Miss Tooth also had difficulty with the point when it was put to her in cross-examination. A competent architect does not present a design that he knows to be deficient in an important respect and then discuss with the client whether the deficiency should be removed. Still less does he present such a design and say, I did not need to tell the client about the deficiency because the client already knew that such a feature was required. Take a simple example. An architect designs a house as a residence for a client who happens to be a surveyor and forgets to require a damp-proof course under a parapet wall. If after construction the client complains, it is no answer for the architect to say, "Well you knew about the need for the damp proof course as well as I did". The architect is employed to use his own skill and judgment. There is no duty on the client who happens to have a particular skill to examine the architect's designs and tell the architect where he has gone wrong. If I, as a lawyer, go to a solicitor for advice and pay him for it, I do not see why I should be criticised if I fail to do that solicitor's work all over again and check whether he has got it right.
41. The case for the defendants is not as simple as that because it is said that there was what was known as a Risk Assessment and the client participated in a discussion of the risk and what was to be done about it. It is at this point that the defendants pray in aid their submission (which I have rejected) that the contract made by the defendants was with KFF. There has been an attempt to muddy the waters by alleging that discussions with KFF about a totally different food factory owned by KFF in some way affect the standard of care in relation to the factory operated by Sahib. I reject that approach. I repeat what I said in paragraph 33 above and in particular the words: *"Mr. Vassilas agreed in cross-examination that Mr. Yerolomou had no objection to authorising the expenditure of money if a case was made for it and that had anyone perceived a risk in relation to Room 49 the money would have been forthcoming to deal with that risk."*
42. The defendants knew the risk. That is established by their oral evidence and it is not necessary to delve into the documents to prove that. There is one particular document that proves that they knew of the risk and there is disputed evidence that they may or may not have passed on that document to Sahib. Whether or not they passed on that document is not conclusive. If the document was passed on, there is no evidence that Sahib said in response, *"We understand the risk of our factory burning down. We*

accept that risk. Please take the cheaper option and design Room 49 to save a few thousand pounds and we will not complain if as a result the factory burns down after one of those unfortunate incidents that tend to happen in food factories”.

43. I should add that I was not the slightest impressed by the submission that since the defendants had complied with their statutory requirements and as a result no one was killed or injured they had fully performed their duties. Nor was I impressed by repeated submissions that warnings about this sort of fire were "insurance led". That submission seems to me to be close to the frequent thief's submission that the only people to suffer from his activities are insurers. However, I should pay tribute to the defendants that their design in providing the required escape routes did substantially contribute to the absence of loss of life or personal injury in this disastrous fire. That is not the point of this litigation. This litigation is about property and money.

44. The principal document relied on to show knowledge of the risk on the part of the defendants was a letter of 6 October, 1994 from LR Insulations Limited (LRI) to Mr. Lambie of the defendants. In that letter, LRI wrote: *"Enclosed with this letter is our specification and costing for the insulation element of the above project. We have costed the project based on the information shown on the room loading sheets and your specification.*

We have great concern that polystyrene core panels have been selected for use in areas where cooking or frying will take place. On page 7 of your specification, you refer to polystyrene having a core with "fire resisting additives." There is no such thing as a non-combustible polystyrene. All polystyrene and polyurethanes are combustible regardless of grade. We would strongly recommend that our Flameguard range of non-combustible panels are used in areas where there is a risk of fire. The fryers should be in self-contained units and here the enclosure should be constructed from our Flamelock panels. This system has been installed at a very large food factory in Shropshire. Two recent fires in frying enclosures were successfully contained for over two hours. There is, of course, a cost implication for these panels. May I suggest that one of my fire engineers visits you and puts his suggestions forward? I feel sure that your clients' insurance company would object to the scheme as it is proposed at present. If I can be of any further assistance please do not hesitate call me."

45. Mr. Bailey who wrote that letter gave evidence. He said that this letter was not a standard letter off the word processor, but that a letter in similar terms, tailored to the facts of individual cases, had been sent out since about 1992. He said that if there was gas in there, Room G49 was included in their warning. He also agreed that, as the terms of the letter indicate, it referred to places where there was "cooking or frying". Those words would include a place where there were bratt pans whether they were referred to a cookers or fryers, and would eliminate all discussion of whether frying was shallow or deep frying. Evidence was also given by Mr. Openshaw, now retired, who was the Technical Director at LRI. He said that a letter in that sort of terms had been sent out for about 10 to 15 years before 1994. There had been some serious fires and that was why they had developed the Flameguard and Flamelock panels in about 1986. He said that steam heated areas were believed to be fairly safe but that if there was a naked flame there was a danger. On a hygiene visit, he went to the Veg prep area with Mr. Reynolds on some unspecified date and asked whether the area should be enclosed and was told by Mr. Reynolds that the area was used only for steam cooking. He said that if told that there had been frying facilities, "I would have pushed the issue a lot sterner than I did. We were told it was steam cooking. It did not bother me".

46. A further warning was given to Mr. Lambie of the defendants in an estimate dated 3 November, 1994. Under the heading of "**Half Hour fire rated doors**", Mr. Bailey of LRI wrote: *"All polystyrene and polyethuranes irrespective of their grades are combustible. It is not possible to install fire rated doors into these panels. See letter attached regarding our concern at the use of polystyrene panels in certain areas."*

The "letter attached" was the letter of 6 October, 1994.

47. Miss Tooth said that once an architect received the letter dated 6 October, 1994 from LRI, *"I cannot see how any competent architect at that point would carry on with the EPS specification for the cooking areas"*. I accept that evidence. Miss Tooth was asked in cross-examination about a number of other documents that might have been warnings to the defendants. Each of those documents may have been, and

probably was, sufficient warning to the defendants, and might have led to lines of enquiry that have been examined in detail. But I see no point in considering warning after warning when one should have been enough. If the weight of one other warning is reduced by cross-examination, that does not reduce the weight of the warning given by the letter of 6 October, 1994.

48. Was the letter of 6 October, 1994 passed on to Sahib? Whether the letter was passed on without comment is of minor importance. It is such an important letter that it should have been passed on to the highest authority (in this case Mr. Yerolemou) with a specific statement, "In the light of this letter we advise that we amend our plans regarding Room 49 and there will be a cost adjustment of £x". That never happened. I add that that situation should never have arisen. The plans should have been so drawn up in the first place that amendment was not required.
49. Mr. Vassilas said that "In the tender process, all quotations and covering letters received by PKS, including those of LRI (in particular that of 6 October, 1994 and its covering letter) were given to Sahibs and KFF". The letter has not been found in the documents of Sahib, and the defendants seek to explain that by saying that the fire destroyed many documents in the hands of Sahib. But the fire did not destroy copies of the same documents in the hands of the defendants. The absence of any copy of a covering letter enclosing the warning from LRI was sought to be explained by a degree of informality in passing documents to Sahib.
50. Parts of the estimate of 3 November, 1994 appear in the documents disclosed by Sahib but the letter of 6 October, 1994 does not appear in the documents disclosed by Sahib. The defendants sent copies of some documents to Mr. Ahluwalia, but as he was not involved in the project, he passed them to Mr. Reynolds.
51. Mr. Reynolds was called by the defendants, but he did not say that he saw the letter of 6 October, 1994. There was certainly no letter from the defendants warning Sahib of the gravity of the letter of 6 October, 1994. However, Mr. Ahluwalia, and more importantly Mr. Reynolds, both accepted in their oral evidence that they knew that polystyrene panels were combustible and that if polystyrene panels caught fire there could be rapid spread of fire. Mr. Openshaw of LRI told Mr. Reynolds of the risks and Mr. Becket and Mr. Reynolds went to LRI to see a demonstration of the risks. Because of their knowledge of the risks, Sahib, not the defendants, took the decision to enclose the continuous deep fat fryer in Rockwool panels, though Mr. Vassilas denied that it was the decision of Sahib.
52. There was much evidence about a risk assessment regarding RoomG 49.
53. Mr. Michael Highton, giving expert evidence as an architect called by the defendants, said that "on the basis of the risk assessment carried out, ... which would have included input from the client that a bratt pan is not used for deep fat frying, a reasonably competent architect would have concluded that it would not be necessary to enclose the room containing the bratt pan in fire resisting construction".
54. There are two questions of fact underlying that opinion:
 - (a) Was there input from the client that a bratt pan is not used for deep fat frying?
 - (b) Did the architect in question actually know about the danger of spread of fire from EPS panels?
55. The answer to the second question is, Yes. I turn to the first question.
56. Mr. Highton refers to the injunctions that bratt pans should never be used for deep fat frying. If something is forbidden, it follows that it can be done and that some people will do it. In this connection, Mr. Highton wrote at paragraph 5.63 of his Report, *"In carrying out a risk assessment, I am of the opinion that a reasonably competent architect would understand that he is entitled to assume that the equipment for which he is designing will be properly used or, at worst, only slightly misused"*.

So, said Mr. Highton, the reasonably competent architect may need to design for use of the pan with a broken thermostat, but not for its use with a known thermostat failure at the same time as the pan was full of oil for deep fat frying, and was left unattended for two hours and not switched off. I am afraid I must disagree with Mr. Highton in that regard. If equipment were only slightly misused in the manner suggested by him, there would be no fires and no need to design buildings against the risk of fire. But we all know that there are fires, particularly in cooking areas. That is why, in this cooking

area, there was provision for a fire alarm, a fire blanket, and a fire extinguisher. Moreover, the architect could have seen by inspection that there was a naked gas flame under one of the bratt pans, and that deep fat frying did take place. If, as is alleged, he made a risk assessment, he could have discovered that normal procedure in the factory meant that if the gas was not turned off at the end of the day, the pan would be left unattended with the gas turned on with fat being supposedly left to cool until the cleaners came on duty at 10 p.m.

57. Although it was said that Mr. Reynolds helped Mr. Vassilas with a risk assessment, neither had any clear or reliable memory of what was done or considered.
58. In his written statement, Mr. Reynolds said that he and Mr. Vassilas conducted a risk assessment involving at various stages Mr. Becket and Mr. Openshaw and other contractors. He said, "I cannot now recall the details of the risk assessment but I know it involved going through the room loading sheets for the factory to assess what items of equipment would be contained in each room; the staffing levels in each room; and the services such as water and gas or electricity which would need to be supplied to each room." I have seen some of the room loading sheets to which he refers. In particular, there is a room loading sheet for Room G49, described as a Vegetable Cooking Area. Mr. Reynolds had fobbed off the concern of Mr. Openshaw by telling him that the area was only used for steam cooking, but if he said the same thing to Mr. Vassilas (and there is no evidence that he did) he ought not to have been believed. The Room Loading sheet clearly stated that power supply was required for 2 bratt pans and a gas bratt pan. There were two steam powered bratt pans. A gas bratt pan could not be thought to be a steam cooker. The description of the equipment was, "Kettles, fryer, bratt pans". It was established in evidence that the "fryer" must have been the gas bratt pan. As Miss Tooth indicated, one could not expect an architect to know all the details given by the fire experts about how much oil on fire would be required to set light to the EPS panels. But any reasonable architect, like any reasonable householder, can be expected to know that frying, even in a household frying pan, may produce a fire: hence the provision in Room G49 of a fire blanket. A frying pan on fire can be very frightening for a household cook, and as Miss Tooth said, a fire in a much larger bratt pan would be all the more frightening and one cannot rely on the operator (probably ill trained in fire precautions) to have the courage and presence of mind to throw a fire blanket over a bratt pan fire. A fire starting in Room G49 was quite on the cards. The architect knew that if the fire spread to the EPS panels it was likely to spread rapidly through the factory. He would not have known what circumstances were required to cause the fire to ignite the EPS panels, but in view of the gravity of the potential consequences, he should have found out and eliminated the possibility of those circumstances before deciding against the modest cost of using flameproof panels.
59. Mr. Highton's conclusions in his report absolving the defendant's from blame were based in part on a finding of fact made by him about the risk assessment. Mr. Highton wrote: *"The risk assessment carried out by Paul Vassilas and Barry Reynolds established that a bratt pan was not a hazardous cooking appliance and the bratt pan was located at a distance from the nearest wall that was, in the event, six times the safe working distance."*

Some of the written evidence before Mr. Highton when he wrote his report (in particular parts of the written statement of Mr. Reynolds) would justify Mr. Highton in that view of the facts, and I do not criticise him for forming that view of the facts. However, having heard much oral evidence, and having examined more documents in greater detail with the assistance of counsel, I disagree with that view of the facts. The gas bratt pan was a hazardous cooking appliance. Whether the gas bratt pan was located at a distance from the nearest wall that was "in the event" 6 times the recommended safe working distance is dependent on a view of its likely use expressed in Mr. Reynolds' witness statement that was shown at the trial to be wholly unrealistic and contrary to demonstrable facts available to the defendants at the time. Moreover, as Miss Tooth said, an architect should not assume that equipment will not be moved. Because I disagree with Mr. Highton's view of the facts, I reject his opinion based on those facts. I make no criticism of Mr. Highton's competence as an expert witness.

60. I find that the defendants were negligent and in breach of their duty towards Sahib.

Contributory negligence

61. Paragraph 15 of the Defence in this action alleges that the fire which destroyed the building was caused by the inappropriate use of the room in which it started. It is further pleaded that that misuse is not something against which the defendants should have guarded in their design and therefore the defendants are not responsible for any resulting damage: "Further and in the alternative any damages which Sahib may recover fall to be reduced by their contributory negligence". The contributory negligence alleged is not further defined or particularised.
62. I agree that the fire started as a result of the negligence of Sahib in the respects that I have mentioned. However, I take the view that the defendants should by their design have guarded against the consequences of the negligence on the part of Sahib. They could have, but did not, guard Room G49 against the spread of fire in the same way that they successfully guarded the room containing the deep fat fryers. If the defendants had done their duty, Room G49 would largely have been destroyed but the rest of the factory would have survived.
63. One approach to the apportionment of loss is not on the basis of percentage contribution but on the basis of causation. On that basis one might say: (1) Sahib is wholly responsible for the destruction of Room G49 and any consequential loss that would have flowed if that had been the only fire damage: (2) the defendants are wholly responsible for any physical and consequential loss to Sahib resulting from the failure to contain the fire within Room G49. On that approach, the assessment of damages, which is still to take place, could be made on the basis that the judge first of all assesses the total loss to Sahib (both physical and consequential in terms of trading loss), and then deducts from that figure the total of what would have been lost (both physical and consequential) if the fire had been contained in Room G49 as it ought to have been.
64. A complicating factor in that approach would be to consider whether Sahib had in any way contributed to the failure of the defendants to make a design that would have contained the fire within Room G49. Contributory negligence of that nature is not pleaded. However, in written closing submissions, counsel for the defendants submit (in paragraph 99) that "Sahib knew that if there was a fire in the veg prep cook area then it could spread to the panels and throughout the building." As to that latter submission, there is no pleading to support it, but there is support from the evidence of Mr. Openshaw to which I have referred in paragraph 22 of this judgment. There was also my finding in paragraph 51 of this judgment that both Mr. Ahluwalia and Mr. Reynolds accepted in their oral evidence that that they knew that polystyrene panels were combustible and that if polystyrene panels caught fire there could be rapid spread of fire. Against that knowledge, it has to be remembered that it was not their responsibility to design the building. The fact of their knowledge did not make them negligent in any respect. They had no duty either to their employers and still less to the defendants to use that knowledge in any way.
65. My attention has been drawn to the decision of the Court of Appeal in **Pride Valley Foods v. Hall and Partners** (2001) 76 CLR 1. The facts of this case are different from the facts of that case and one cannot simply look at percentages applied to contributory negligence in that case and apply them to this case. The most helpful statement of principle is to be found in the judgment of Sedley L.J. at page 59. Comparing the principles to be applied on the one hand in cases of contribution between joint tortfeasors and on the other cases of contributory negligence, he said: *"Contribution starts from a point at which two or more defendants have been held to have contributed by their own fault to the claimant's injury. The remaining task is then to measure their contributions by gauging the relative causative potency of their respective faults and their comparative blameworthiness. Contributory negligence, by contrast, starts from a point at which the defendant alone has been held to have caused the claimant's injury by his fault. Not one but three questions then arise. The first is whether the claimant too was materially at fault. The second, if he was, is whether his fault lay within the very risk which it was the defendant's duty to guard him against. It is only if his fault was not, or not wholly, within the causative reach of the defendant's own neglect that the question of relative culpability enters into the picture."*
66. If, contrary to my view, there was a fault on the part of Sahib revolving around the knowledge of Sahib about risks in the use of EPS panels, that fault did lie *"within the very risk which it was the defendants' duty to guard him against"*. It was the duty of the defendants to guard Sahib against that risk

and, quite apart from the fact that it is not pleaded, I see no contributory negligence in relation to the spread of the fire. Before citing the words of Sedley L.J. I have expressed my views in that regard in rather blunter terms in this judgment.

67. The claimants submit that I should make a finding of contributory negligence reducing the total claim by 50%. The defendants submit that the finding should be of 90% contributory negligence. I do not agree with either submission.
68. Having read again the judgment of Sedley L.J., I find that the right approach is the one set out in paragraph 63 of this judgment. Since there was no discussion of such an approach at the trial, I made that finding as a provisional finding subject to further submissions from counsel. I submitted a provisional draft judgment to counsel and invited further submissions from counsel on that approach either in writing or orally. Having received further submissions I still hold the view that the right approach is the one set out in paragraph 63 of this judgment.
69. Counsel for the defendants cite the terms of section 1(1) of the Law Reform (Contributory Negligence) Act, 1945: *"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage ...[there follow some provisos that are not relevant for present purposes]."*
70. Sub-section 1(2) of the Act does require that where damages are reduced under the Act, "the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault." But there is no statutory requirement that the court should after finding the total damages then apply to that total a percentage assessment of fault to one party or the other. That is what is almost invariably done, and in most cases (for example running down cases) is the only thing that can be done. But it is a rough and ready approach and one that should not be adopted where a more precise assessment can be made.
71. In the present case, Sahib was in no way responsible for the spread of the fire, as opposed to its initiation. The defendants owed a duty to Sahib to prevent the spread of the fire, so why should Sahib be found responsible for a percentage of the liability for the spread of the fire?
72. The purpose of the 1945 Act was to do away with the injustices of the *"last opportunity rule"* seen in **Davies v. Mann** (1842) 10 M & W 546 (the Donkey Case), and the **Volute** [1922] 1 AC 129. The Law Revision Committee said in their report (Cmnd 6032 of 1939 p. 16) and Lord Simon in **The Boy Andrew** 1948 AC 140 at 149 agreed, that there was no such thing as a last opportunity rule but the question was, *"Whose act caused the wrong?"* However the question was framed, the result was the same. Where two parties were to blame, the claimant got all or nothing. Under the Act, the question for the court to decide in making an apportionment is not *"Whose act caused the wrong"* but *"Whose act caused the damage?"*. The important words of the Act are, *"the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage ..."* Where it is possible to reduce damages on the basis of assessment of causation of damage it is much more just and equitable to do it in that way than by plucking percentages out of the air.
73. Counsel for Sahib has invited me to consider making an assessment of the consequences of Sahib's fault in terms of percentages of contributory negligence "de bene esse" (whatever that may mean) against the possibility that this matter may be considered by the Court of Appeal. I am unable to make such an assessment because in the light of my findings it would be illogical to do so. I find it impossible to select any percentage that would be, in the words of the Law Reform (Contributory Negligence) Act 1945, "just and equitable". However, if the Court of Appeal were to consider that my approach is wrong, I have made enough findings of fact for them to make their own assessment.
74. I am asked to make it plain whether I am giving judgment for the building losses. In his closing speech, counsel for the defendants submitted that the building losses were losses of the Co-Op. I indicated then and I repeat now that I leave that question over for the assessment of damages.

75. There shall be judgment for Sahib against the defendants for damages to be assessed on the basis that that the judge first of all assesses the total loss to Sahib (both physical and consequential in terms of trading loss), and then deducts from that figure the total of what would have been lost (both physical and consequential) if the fire had been contained in Room G49 as it ought to have been.
76. The claim of the second claimants, the Co-Op is dismissed.
77. The defendants are to pay the costs of Sahib, to be the subject of detailed assessment. At the request of Sahib, I adjourn the question whether those costs should be on the standard basis or on an indemnity basis until after the assessment of damages.
78. The Co-Op is to pay the defendants their costs of the action to be the subject of a detailed assessment.
79. I make an order for an interim payment on account of costs in favour of Sahib in the sum of £159,000 to be paid by 4 p.m. on 24 March, 2003.
80. Permission to appeal is refused.

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