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[243]**

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2009-404-5567

BETWEEN	PR DEVCICH & ORS AS TRUSTEES OF THE PAUL DEVCICH FAMILY TRUST AND JJ DEVCICH & ORS AS TRUSTEES OF THE JANICE DEVCICH FAMILY TRUST First Plaintiffs
AND	P R DEVCICH AND J J DEVCICH Second Plaintiffs
AND	AMI INSURANCE LIMITED Defendant

Hearing: 22, 24-28, 31 May, 1-3 June 2010

Appearances: Mr P J Dale and Ms C Brick for plaintiffs
Mr R Johnstone and Mr G H Nation for defendant

Judgment: 20 July 2010

JUDGMENT OF LANG J

*This judgment was delivered by me on 20 July 2010 at 4 pm, pursuant to Rule 11.5 of
the High Court Rules.*

Registrar/Deputy Registrar

Date.....

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PR DEVCICH & ORS AS TRUSTEES OF THE PAUL DEVCICH FAMILY TRUST AND JJ DEVCICH &
ORS AS TRUSTEES OF THE JANICE DEVCICH FAMILY TRUST And Anor V AMI INSURANCE
LIMITED HC AK CIV-2009-404-5567 [20 July 2010]

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[1] The plaintiffs are the trustees of family trusts associated with Mr Paul Devcich and his wife Janice. They are the owners of the house property situated at 2/14 Coronation Road, Epsom. Mr and Mrs Devcich have resided in that property since the plaintiffs acquired it several years ago. The plaintiffs insured both the house and its contents with the defendant, AMI Insurance limited.

[2] Shortly after Mr Devcich left for work on the morning of Friday 24 April 2009, a neighbour noticed smoke and flames coming from the northern side of the plaintiffs' house. The neighbour immediately arranged for the fire service to be called, and the first appliances were at the scene within a matter of minutes. The fire service personnel were able to extinguish the blaze very quickly, but not before it had caused extensive damage to the lounge area of the house. Other areas of the house were also damaged as a result of the smoke and heat from the fire. There was also damage caused by the water that the fire service personnel used to extinguish the fire.

[3] A neighbour telephoned Mr Devcich on his cellphone and he drove back to his house from the city. He then contacted AMI, and its representatives and investigators were quickly on the scene.

[4] The fire service immediately began an investigation into the likely causes of the fire. It soon became clear that the fire had been deliberately lit, because of the manner in which the fire had developed and the pervasive smell of hydrocarbons in the lounge. The remains of a plastic petrol container were also found in an area of the lounge where the fire had started. Subsequent examination of samples taken from the floor of the lounge also revealed the presence of significant quantities of hydrocarbons. These factors led the fire service to involve the police, who commenced their own investigation into who may have started the fire.

[5] After the fire service had extinguished the fire and completed its investigation, AMI took control of the property and secured it whilst it, too, continued its own investigation into the causes of the fire. This included lengthy

interviews of Mr Devcich, Mrs Devcich and their son Bradley by AMI's investigator during the days following the fire.

[6] During the period that the property was under AMI's control a second event of significance to this proceeding took place at the house. On an unknown date during the week after the fire, burglars entered the house and stole property having a total value of \$19,850 from the address. Mr Devcich discovered the burglary on 2 May 2009, when he went to the property to pick up some belongings. He immediately advised AMI that the burglary had occurred.

[7] As a result of the fire and the burglary, the plaintiffs lodged claims with AMI under their two insurance policies. They sought to be reimbursed in relation to both the cost of repairing the damage caused by the fire and the cost of replacing the items stolen in the burglary.

[8] AMI initially delayed making a decision as to whether or not to accept the claims until after the police had completed their enquiries. After detectives had interviewed Mr Devcich on two occasions, however, the police advised Mr Devcich that they did not propose to prosecute him for starting the fire.

[9] At that point, and notwithstanding the decision by the police not to prosecute Mr Devcich for arson, AMI declined both claims. It declined the claim relating to the damage caused by the fire on the basis that Mr Devcich had deliberately lit the fire himself. It declined the claim relating to the stolen property on the basis that the contents policy had already become void by the time the burglary occurred because of the fact that Mr Devcich had made a fraudulent claim under the fire policy.

[10] In this proceeding the plaintiff trustees seek judgment against AMI in respect of both claims. They deny that Mr Devcich lit the fire, and say that it is much more likely that the fire was caused by persons who lived in a neighbouring property. Those persons had been in a state of conflict with Mr Devcich in respect of a variety of matters for a considerable period prior to the fire. For that reason they say that AMI is bound to accept both their claims.

Onus and standard of proof

[11] AMI accepts that it bears the onus of establishing that Mr Devcich lit the fire. That is a reasonably heavy onus, because it requires AMI to establish that Mr Devcich has been guilty of conduct that is criminal in nature because he has committed the crime of arson. AMI's stance also necessarily involves allegations of fraudulent conduct on the part of Mr Devcich. If AMI's allegations are true, Mr Devcich has deliberately instigated a fraudulent insurance claim and he has committed perjury when giving evidence in support of that claim at trial.

[12] These factors affect the standard of proof that is required in the present case. Although the standard is not as high as the criminal standard, namely proof beyond reasonable doubt, it is not far removed from it: *Blanshard v The National Mutual Life Association of Australasia Limited* HC Auckland CIV 2001-404-1961, 23 September 2003 Harrison J at [51] and [52]. AMI is therefore required to adduce "clear and convincing evidence" that its allegations are correct: *Back v National Insurance Co of New Zealand Limited* [1996] 3 NZLR 363 per Hammond J at 370-371 and *Going v Farmers' Mutual Insurance Association* HC Whangarei CP 17/99, 17 February 2003 O'Regan J at [63] and [64].

[13] Notwithstanding the onus that it bears, AMI does not shy away from its allegations. It says that, taken together, numerous factors lead inevitably to the conclusion that Mr Devcich was responsible for setting fire to the house. It is therefore appropriate to evaluate those factors first.

[14] First, AMI points to the fact that Mr Devcich was at the property shortly before the fire started. He therefore had the opportunity to pour petrol on the floor of the lounge and then ignite it in the knowledge that he would not be seen by occupiers of neighbouring properties. His departure from the property to go to work would not attract any interest from neighbours either.

[15] I accept this submission as far as it goes, but the issue of opportunity is inextricably tied up with the much more complex issue of the likely timing and development of the fire. I deal with that issue later in this judgment.

[16] Next, AMI says that it is significant that Mr Devcich was the only person occupying the property on 24 April 2009. This is because Mrs Devcich had travelled to Melbourne with their daughter a week earlier, and was not due to return until about midnight the next day.

[17] AMI points out that if Mr Devcich was the person who started the fire, he would not have wanted members of his family to be placed in danger by it. Moreover, if they were present they would be witnesses to his actions in lighting the fire.

[18] I accept that this submission has some force.

The fire was not a random act of vandalism

[19] Counsel for AMI submits that the circumstances of the fire suggest that it was not a random act of vandalism. It occurred in premises that were surrounded by neighbours, and at a time when people in the neighbourhood were likely to be out and about on their way to work. For this reason a random intruder stood a high chance of being detected.

[20] The perpetrator also had to know that the house was unoccupied. As a result, he or she had to be in a position to know when Mr Devcich had left the property to go to work that morning. He or she also needed to be aware that nobody else was in the house.

[21] I accept these submissions. I accept that it is inherently unlikely that the fire was the spontaneous act of a stranger who was intent only on vandalising property for the sake of it. Rather, it is likely to be the act of a person who has deliberately embarked upon a pre-planned course of conduct for a particular reason. If Mr Devcich did not light the fire, it must have been lit by a person or persons who had a particular reason to cause him or his family harm.

Motive

[22] AMI submits that Mr Devcich had a strong motive for starting the fire. This arises out of the fact that the house had high moisture readings, and he had also detected at least one leak. The property was also clad in plaster, so it immediately presented the perception of being a leaky home.

[23] Mr Devcich knew that it was going to be a time consuming and costly process to address these issues. He had obtained an estimate of approximately \$70,000 to carry out basic repairs, but he knew that ultimately the problem could only be solved by extensive work being carried out on the house. In order to solve the problem completely he would need to de-clad and then re-clad the property. He was aware that these could cost him up to \$200,000 or perhaps even more. He told investigators that he knew of a person who had been required to undertake this type of work in order to address moisture problems in another house. That person had started out thinking that it would cost \$300,000 and take three months to complete the work. It ended up, however, costing him \$600,000 and taking six months to complete.

[24] One of Mr Devcich's business associates had also urged him not to embark upon the repairs himself. He told Mr Devcich that it would inevitably distract him from his business as a business broker at a time when that business required his full attention.

[25] Mr and Mrs Devcich had endeavoured to avoid these problems by attempting to sell the property. They had already tried to sell the property in 2007 after they had spent approximately \$50,000 in upgrading it. They were unable to attract a buyer, however, and took the property off the market after a short period.

[26] Mr and Mrs Devcich had placed the house on the market again in November 2008, and had engaged Mr Patrick O'Connor of Central Realty Limited to sell it on their behalf. They had earlier obtained a valuation that valued the property at \$1.1 million on the basis that it was in a weathertight condition. They were mindful, however, of the fact that the house had moisture issues. For that reason they

instructed Mr O'Connor to advise potential purchasers about those issues, and they reduced their asking price to \$890,000 in recognition of them.

[27] Mr O'Connor conducted further advertising and held several open homes in the property, but by April 2009 no firm offers had been received. He said that this was due in part to the depressed state of the Auckland housing market during this period. This had caused most properties to take longer than usual to sell, and properties at the higher end of the market were particularly affected. Mr O'Connor said that the Devcich property fell within in this bracket. He confirmed that the unknown cost of addressing the moisture issues also meant that they were targeting the hardest end of the market.

[28] Mr O'Connor had been in touch with a property developer, who had indicated that he might be prepared to purchase the property for \$700,000. This was well below the figure that Mr Devcich was prepared to accept. Rather than accept that offer, Mr Devcich said that he would undertake the repairs himself and then sell the house for its full value.

[29] One other couple had shown interest in the property by 24 April 2009, but they had not submitted any offer to purchase it.

[30] Matters were complicated further, AMI says, by the fact that, as Mr Devcich acknowledged, Mrs Devcich had never liked the house and was anxious to move to another property. She had also had enough of strangers being shown through her house by the real estate agents. AMI contends that Mr Devcich was therefore under considerable pressure from his wife to sell the property, but by 24 April 2009 the sale process had stalled.

[31] AMI also submits that Mr Devcich was in a tight financial situation at the time of the fire. His business income had dropped significantly over the previous few years, and this meant that he would find difficulty in meeting the substantial costs required to repair the house.

[32] AMI contends that all of these factors provided a powerful motivation for Mr Devcich to set fire to the house. A successful insurance claim would enable Mr and Mrs Devcich to live in rented accommodation at AMI's expense whilst their property was repaired. The repairs would solve, also at AMI's expense, the moisture problems. Mr and Mrs Devcich would then be able to sell the house for full value, because it would have a clean bill of health.

[33] Mr Devcich rejects these arguments. Although he acknowledges that he and his wife wanted to move to another house, he says that this did not mean that they were under pressure or that they were in any particular hurry to sell the property. He points out that Mr O'Connor confirmed in his evidence that Mr and Mrs Devcich did not appear to be desperate vendors. He also denies that he was under considerable pressure from his wife to move out of the house. Mr Devcich does not accept that their efforts to sell the house had come to a dead end. He says that when the fire occurred, Mr O'Connor was still waiting to hear back from the couple who had expressed interest in buying the property. Mr Devcich considered that, until that couple said that they were not interested in buying it, there remained the possibility of a sale in the near future.

[34] Mr Devcich accepts that his preference was to sell the house without first carrying out the remedial work necessary to rectify the moisture problems. This was because he had started a new venture as a business broker in November 2008, and he needed to devote his full attention to the development of that business. He was concerned that he might become distracted from his business if he was also required to devote time and energy to the remedial work.

[35] Mr Devcich says that by mid-April 2009, he and his wife had decided to market the property through Mr O'Connor for a further month. If that did not produce any result, they would rent the property out and move into rental accommodation themselves. They would then review the position in twelve months time, and would make a decision at that point as to whether they would repair the property themselves or try to sell it again.

[36] Mr Devcich also rejects the suggestion that his financial situation was such that he might have difficulty in meeting the cost of the repairs to the house. He pointed out that he had enjoyed substantial income working as a business broker during the years up until 2007. This had peaked in the year ended 31 March 2007, when he had earned the sum of \$350,000. His income then fell to \$175,000 in 2008, and fell further to \$117,000 in 2009. Mr Devcich said that the drop in his income between 2007 and 2009 had a simple explanation.

[37] In 2008 he had joined an agency that operated in a market where the values of the businesses that it sold were much greater than those that he had previously been selling. He said that when he changed agencies he had agreed to accept a smaller percentage of commission than he had previously received. He expected this to be offset, however, by the fact that he would be brokering the sale of businesses that would command substantial sale prices. Unfortunately this had not turned out to be the case, and he suffered a significant drop in income as a result. This had persuaded Mr Devcich and one of his associates to leave the agency and to set up their own business in February 2009.

[38] Mr Devcich said that the new business had performed well from the outset, because it incurred minimal expenditure and he and his partner split the profits equally between them. He said that the new business had already earned a single commission in the sum of \$100,000 prior to April 2009. At the time of the fire he therefore considered that he was once again in a position to begin earning a good income.

[39] Mr Devcich also points out that he had ready access to a finance facility that enabled him to draw down sufficient funds to meet the costs of the remedial work. He therefore says that he always had the financial ability to carry out the remedial work if that was what it took to solve the moisture problem so that the house could be sold. He therefore rejects AMI's argument that the fire was a convenient way for him to solve the problems with the house.

[40] I find that by April 2009 Mr and Mrs Devcich was having considerable difficulty in selling the house, and that Mr Devcich knew that this was likely to

continue for some time. The difficulty arose at least in part to the moisture problems that Mr Devcich had chosen to disclose to potential buyers. It was also exacerbated by the fact that the Auckland housing market was in a depressed state during the six month period leading up to April 2009.

[41] I accept that the sale process had not come to a dead end, and that the house was not completely unsaleable. For this reason it remained possible that Mr and Mrs Devcich would eventually find a buyer. I consider, however, that they would have been forced to drop their price considerably in order to be able to do so within the time frame that they had set with Mr O'Connor. The manner in which Mr Devcich rejected the property developer's proposal to buy the property for \$700,000 suggests to me that he would not have been prepared to accept a very low offer in order to quit the property quickly. This means that Mr and Mrs Devcich knew that the only way in which they could sell the property for a reasonable price was to carry out the repairs on it to remove the moisture problems. Even if they moved out and rented another property, the Coronation Road property would remain a problem lurking in the background.

[42] I accept that Mr Devcich had the ability to fund the remedial work. He could have used the finance facility to fund the repairs. I am equally satisfied, however, that Mr Devcich wanted to avoid the expense and distraction that the repairs would inevitably create. For that reason, I consider that he regarded the prospect of undertaking the remedial work himself as being unattractive. He probably, in fact, regarded it as an option to which he would only turn as a last resort.

[43] I also find that Mr Devcich was under considerable pressure from his wife to move out of the property. He made this clear when he was interviewed by the investigators. Mrs Devcich clearly did not like the house and it did not meet her needs. The sale process merely added to the pressure. I am satisfied that Mr Devcich knew that something had to be done and that he could not continue to live in the house for much longer.

[44] Although the prospect of setting fire to the house represents a drastic solution, it is one that had obvious benefits to Mr Devcich. I therefore cannot reject

the possibility that he saw it as a way out of the difficult position in which he found himself in April 2009. I therefore accept AMI's argument that the problems with the house provided Mr Devcich with a motive for setting fire to it.

[45] I also accept that the problems that Mr Devcich had encountered with his neighbours, discussed later in this judgment, provided him with further motivation to bring matters to a head so as to be able to quit the property.

Mr Devcich's credibility

[46] Mr Devcich's credibility is obviously a significant factor to be taken into account. AMI accepts that Mr Devcich has been consistent in steadfastly denying any involvement in lighting the fire. It says, however, that his credibility was undermined significantly by several aspects of the evidence.

The stops that Mr Devcich made on his way to work

[47] I discuss in greater detail later in this judgment (at [185] to [188]) the stops that Mr Devcich made on his way to work on the morning of the fire. He did not follow his usual route into the city on that day. Instead, he called in at the Epsom library to return magazines, at the Mobil service station in Manukau Road to buy petrol and at a drycleaners adjacent to the service station to leave a suit to be cleaned. The latter two visits provided Mr Devcich with receipts showing the time at which he visited the premises.

[48] AMI contends that these visits were no coincidence. It argues that they all formed part of his plan to provide himself with an alibi at the time that the fire began. It says also that the visit to the service station provided Mr Devcich with a plausible explanation if anybody later said that they could smell petrol on him.

[49] Mr Devcich rejects these allegations. He says that he regularly filled his car up with petrol, and that the other two visits were routine matters that just happened to take place on the day of the fire.

[50] If one proceeds on the premise that Mr Devcich was responsible for lighting the fire, the visits may carry some weight in confirming that premise. That is not, however, the correct approach for me to take. I am required to determine whether, taken as a whole, the evidence is sufficient to demonstrate that Mr Devcich started the fire. In themselves, the visits are insignificant. They are the type of mundane activities that many people would engage in on the way to work, particularly on a Friday. Even viewed in combination with the other evidence, the visits have minimal probative value. I therefore put them to one side in determining whether AMI has established that Mr Devcich started the fire.

The circumstances surrounding Mr Devcich's arrival at his office

[51] Mr Devcich told the investigators that he did not take his usual route into the city on the morning of the fire. He said that he had also found himself driving towards his old office rather than towards the office where he was working in April 2009.

[52] He also said that he had nearly been involved in an accident at an intersection whilst driving to work. When he was first interviewed by a detective on 24 April 2009, he said that this occurred when the driver of another vehicle drove through a red light and narrowly missed colliding with his car. When he was interviewed by AMI's investigator, Mr Francis, on 6 May 2009, he said that the near miss had occurred when another car had "pulled out" in front of him.

[53] Mr Devcich said that this incident had shaken him. He also said that when he arrived at work he did not go into his office to clear his e-mails as he normally did. Instead he told his business partner, Mr Newport, about the near miss and said that he needed a whisky. He accepted that this was an unusual comment for him to make, because he does not drink alcohol at all. He said that Mr Newport told him that it was a bit early for a whisky, and that they should settle for a cup of coffee instead. He said that he and Mr Newport then went to a nearby café, where they ordered coffee. A few minutes later he received the telephone call from his neighbour telling him about the fire. He then immediately retrieved his car from the car park and drove home. His cellphone records show that he telephoned his son

Bradley at 8.59 am, and Mr Devcich says that he made this call as he was leaving the car park.

[54] Counsel for AMI contended that Mr Devcich had concocted his evidence about this sequence of events. He submitted that he did so in order to provide an explanation to those in his office, and Mr Newport in particular, as to why he may have appeared to be on edge when he arrived at the office on the morning of the fire. Counsel submitted that there were obvious reasons why Mr Devcich would be on edge at that time. First, Mr Devcich would have been anticipating that news of the fire was imminent. Secondly, it confirmed AMI's theory that Mr Devcich used a timing device to ignite the fire. AMI contended that he would also have been on edge when he arrived at his office because he would not have known whether the device had functioned properly.

[55] Mr Newport's evidence was to the effect that he did not notice anything particularly untoward or suspicious about Mr Devcich's demeanour when he arrived at the office on the morning of the fire. He recalls that Mr Devcich came into his office and did not go directly to his own office to clear his e-mails as he would usually do. He also remembers that Mr Devcich was angry, and said that he had taken a wrong turn whilst driving to work and that he had nearly had an accident. He was not surprised by that remark, because he has noticed in the past that Mr Devcich does not concentrate when he is driving. He does not remember Mr Devcich saying where the near miss occurred, but believed (or assumed) that it occurred at an intersection. He does not recall Mr Devcich saying that he needed a whisky.

[56] Mr Newport said that he and Mr Devcich went down to the café where they usually went for a cup of coffee each morning. He said that they had only been there for a few minutes when Mr Devcich received the call from his neighbour telling him that his house was on fire. He said that Mr Devcich immediately went white and was clearly in a state of shock. He left the café immediately and did not finish his coffee.

[57] I consider that issues arise in relation to the circumstances surrounding Mr Devcich's arrival at the office. First, I consider it surprising that Mr Newport has no

recollection of Mr Devcich's remark about needing a whisky. That is the type of comment that one would expect Mr Newport to remember, particularly given the fact that it was allegedly made in his presence a relatively short time before Mr Devcich received the news about his house being on fire. I need to bear in mind, however, that neither the police nor AMI have ever contacted Mr Newport. They have never sought to obtain his version of what happened when Mr Devcich arrived at the office on the morning of the fire. For this reason, he was not asked to recall those events until shortly before trial, when counsel for the plaintiffs interviewed him in order to prepare his brief of evidence. The fact that these events occurred more than 12 months earlier may well account for Mr Newport's inability to recall Mr Devcich's remark about needing a whisky.

[58] More importantly, I consider it to be very unusual that Mr Devcich has never been able to provide any details at all about the circumstances surrounding the near miss at the intersection. At the very least, one would expect Mr Devcich to be able to say roughly where this incident occurred. One would also expect him to be able to give at least some description of the other vehicle. That is particularly the case given the fact that Mr Devcich is clearly a man who remembers even the smallest of details about what is said and done around him.

[59] I accept that this factor casts some doubt about the veracity of his evidence on this point. It supports AMI's submission that Mr Devcich decided to provide the police and AMI with a story that would explain his demeanour when he arrived at the office on the morning of the fire. This would counter the possibility that persons in his office, including Mr Newport, might tell investigators that Mr Devcich appeared to them to be nervous or on edge even before he received the news about his house. This finding obviously impacts adversely on Mr Devcich's credibility.

Mr Devcich's actions at the house immediately following the fire

[60] AMI points to several aspects of the evidence about Mr Devcich's conduct after he arrived at his house as being suggestive of guilt or guilty knowledge. It is not necessary to refer to this in any detail. In broad terms, the evidence suggested that Mr Devcich was in shock, that he was nervous and that he avoided eye contact

with those who spoke to him. He is also said to have asked whether he could remove his golf clubs from the garage of the address, and asked immediately how much the damage would cost to repair. AMI also alleges that Mr Devcich's son Bradley arrived at the address during this period and asked whether the joists had been damaged in the fire. Mr Devcich denied that Bradley said this and Bradley was not called to give evidence.

[61] I consider that all of this evidence is inconclusive, because it is very easy for comments that Mr Devcich made over this period to be taken out of context. It also needs to be remembered that Mr Devcich's house had just been significantly damaged by fire. That type of traumatic event is likely to affect a property owner, whether guilty or innocent, in a wide variety of ways. It would be drawing a very long bow, in my view, to label the conduct of Mr Devcich at this particular point as being suggestive of guilt. I also bear in mind the fact that the comment about the golf clubs was made to a police officer who interviewed Mr Devcich at about 12.30 pm. By that stage Mr Devcich had been at the address for the best part of three and a half hours, and was preparing to leave the scene. I therefore consider that this evidence is neutral, and does not advance the case for AMI.

[62] Next, AMI refers to the fact that several witnesses said that Mr Devcich immediately blamed his neighbours for starting the fire. AMI suggests that it is unusual for a person whose house has just been damaged by fire to immediately be able to point to a specific third party as being a likely suspect for the arson. I agree that this might be unusual generally, but I do not accept that it was particularly unusual given Mr Devcich's personality and the nature of the dispute in which he was engaged with his neighbours. Added to this is the fact that two of the neighbours, Mr A and Mr R, were in the vicinity of the house immediately after the fire and had drawn attention to themselves by their somewhat unusual conduct. I refer to these aspects of the evidence in greater detail later.

The telephone discussion between Mr Devcich and Mr O'Connor on the day of the fire

[63] The evidence about a telephone discussion between Mr Devcich and Mr O'Connor on the day of the fire falls into a different category. Mr Devcich's evidence on this point is that, after returning to his home on the morning of the fire, he mistakenly thought that an open home was scheduled for the following day. For that reason, he telephoned Mr O'Connor and told him to cancel the open home scheduled to be held on 25 April.

[64] AMI points out that there is a real problem with this evidence, because Mr Devcich has consistently claimed that he planned to play golf on the morning of 25 April and then cut the hedge in the afternoon. Given the fact that Mr O'Connor said that open homes were always held at midday or 1 pm, it follows that Mr O'Connor was apparently scheduled to conduct an open home on 25 April at a time when Mr Devcich would have been cutting the hedge.

[65] In his evidence in chief, Mr O'Connor said that he remembers learning about the fire in the telephone call that he received from Mr Devcich on 24 April. He also said that "the planned open home did not proceed that weekend" because of the fire. This clearly suggests that Mr O'Connor believed that an open home was planned for 25 April, and that it did not proceed on that date because of the fire. Counsel for the plaintiffs did not cross-examine Mr O'Connor about either the telephone discussion or about the timing of the final open home.

[66] In cross-examination, however, Mr Devcich endeavoured to deal with the issue by claiming that he had spoken to Mr O'Connor after Mr O'Connor had given evidence. He said that Mr O'Connor now agreed that the open home had been scheduled for the following weekend, and not for 25 April 2009.

[67] It is obviously highly unsatisfactory for evidence of this type to emerge in this way. If Mr Devcich took issue with this aspect of Mr O'Connor's evidence, counsel for the plaintiffs should have raised it in his cross-examination of Mr O'Connor. Alternatively, the plaintiffs could have recalled Mr O'Connor when they

presented their evidence at the close of AMI's case. As matters stand, however, I can give Mr Devcich's evidence about his recent discussion with Mr O'Connor very little weight. I am left with Mr O'Connor's evidence that an open home was planned for 25 April, and that it did not proceed because of the fire.

The purchase of petrol on the weekend before the fire

[68] This issue assumed considerable prominence during the hearing. It arose as a result of the fact that the Fire Service Investigator, Mr Coleman, formed the view at an early stage that an accelerant was used in starting the fire. He had also found the remains of the red plastic petrol container lying in the debris on the floor of the lounge.

[69] When Mr Coleman asked Mr Devcich whether he had any accelerants on the property at the time of the fire, he said that he had purchased five litres of petrol on the weekend before the fire. The petrol was in a standard red plastic jerry can or container. He later produced a receipt for the purchase of the petrol. He said that he had purchased the petrol because he planned to hire a hedge trimmer on 25 April in order to carry out maintenance work to make the property presentable to prospective purchasers.

[70] Mr Devcich said that he had stored the red plastic container on a shelf in the garage of the address. When the garage was checked after the fire, the container was found to be missing. For that reason it has always been presumed that the person who started the fire used the petrol in the container as an accelerant. It has also been assumed that the remains of the red plastic container that Mr Coleman found among the debris in the lounge were what was left of the container that Mr Devcich had stored in the garage.

[71] AMI alleges that Mr Devcich did not purchase the petrol to use in a hedge trimmer. It says that he purchased the petrol for the express purpose of using it to set fire to his house. It acknowledges that Mr Devcich has been open about the purchase of the petrol from the outset. It says, however, that this merely shows how carefully he planned the fire. It points out that Mr Devcich would have known that the fire

would be thoroughly investigated. He would also know that the investigators would be unlikely to accept that an opportunistic arsonist would take a container of petrol to the house. For that reason, Mr Devcich needed to be able to explain how the person who lit the fire was able to use accelerant that was already on the property. It points out that Mr Devcich did not have any petrol-driven machinery on his property, and therefore needed to explain the presence of petrol in his garage at the time of the fire.

[72] AMI also submits that it is highly unusual for anybody to retain a receipt for such a small purchase, and that this demonstrates that the recorded purchase of the petrol was part of a well-thought out plan to set fire to the house.

[73] Mr Devcich rejects these suggestions. He explains that he needed to cut the hedges surrounding the property in order to keep the property looking tidy for prospective purchasers. He had hired a hedge trimmer from a hire centre on previous occasions, and he had decided on the previous weekend that he would do the same after playing golf on Saturday 25 April 2009. He had therefore purchased petrol on 19 April 2009 so that he could use it in the hedge trimmer that he proposed to hire on 25 April. He produced a receipt recording the purchase of 5.52 litres of petrol from a Mobil station on 19 April 2009. He said that he purchased the petrol a week before he proposed to hire the hedge trimmer so that he would not have to waste time buying petrol on 25 April.

[74] AMI called evidence from the manager of the hire centre from whom Mr Devcich had hired a hedge trimmer on 23 November 2008. This evidence was to the effect that hedge trimmers of the type that Mr Devcich had hired use two-stroke fuel. This is produced by mixing petrol and oil in prescribed ratios. The manager said that whenever a customer hires a hedge trimmer, the hire centre would invariably provide that customer with a container of pre-mixed two-stroke fuel. The hire centre did not permit customers to use their own fuel in the machines because of the risk that they may incorrectly mix the ratios of petrol and oil necessary to produce two-stroke fuel. For this reason the manager said that it was not necessary for Mr Devcich to buy fuel to use in the hedge trimmer, and that the hire centre would not have permitted him to use his own fuel to operate it.

[75] Mr Devcich responded by saying that he had purchased the fuel in order to avoid the recurrence of an incident that had occurred on the previous occasion when he had hired a hedge trimmer from the hire centre. He said that after using the hedge trimmer on that occasion he had refilled the hire centre's petrol container using petrol and oil that he kept at his home. I infer that he did this in order to avoid paying the price that the hire centre would charge to refill the container. He said that when he returned the container and hedge trimmer to the hire centre, however, he was told that the container was not full. For that reason the hire centre charged him the sum of \$2.65 plus GST. He was told that this was the cost of one litre of two-stroke fuel, and that it was the minimum charge that the hire centre would impose. Mr Devcich said that he felt aggrieved by this, and was determined to ensure that it did not happen again. He proposed to prevent it happening by purchasing his own petrol. He said that when he hired the hedge trimmer the following weekend he would not have accepted the container of fuel that the hire centre would undoubtedly have offered him.

[76] There are several problems with this explanation. First, it is somewhat surprising that Mr Devcich would purchase petrol so far in advance of the hire of the hedge trimmer. He would inevitably be required to travel to the hire centre in order to hire the hedge trimmer the following weekend. A person in Mr Devcich's position would usually, in my view, also leave it to the next weekend to purchase the fuel as well. There are any number of petrol stations in the area where Mr Devcich lives. It would not have delayed him unduly on 25 April to purchase petrol on the way to or from the hire centre.

[77] Secondly, I have real doubts about Mr Devcich's evidence regarding what happened when he returned the hedge trimmer and petrol container to the hire centre in November 2008. In particular, it is very difficult to see how the hire centre could realistically have claimed that the container was not full if that was not the case. If Mr Devcich is correct in his claim that he had refilled the container, that fact would have been obvious to even the most casual of observers. It is also difficult to understand why the hire centre would have run the risk of antagonising Mr Devcich for the sake of charging him an extra \$2.65.

[78] More importantly, I do not accept that Mr Devcich is the type of person who would have agreed to pay the hire centre for fuel that it had not provided. He would not have capitulated on that issue as a matter of principle. Instead, he would have stood his ground until the hire centre staff accepted his explanation or until they became exhausted by the argument.

[79] I therefore accept AMI's submission that Mr Devcich's evidence in relation to this particular issue is unsatisfactory and that it further weakens his credibility.

Did Mr Devcich propose to cut more than one hedge?

[80] Counsel for AMI submits that Mr Devcich's explanation about the reason for purchasing the petrol is also weakened by a significant difference between his evidence on one point at trial and his treatment of that issue when he was interviewed by AMI's investigator, Mr Chris Francis, on 6 May 2009.

[81] During the interview with Mr Francis, Mr Devcich referred to the fact that he intended to hire the hedge trimmer in order to trim the hedge on the northern boundary of the property. He said that that hedge was quite high, and the advantage of the hedge trimmer that Mr Devcich had hired from the hire centre was that it came with a pole that enabled Mr Devcich to trim the top of the hedge. He did not refer to trimming any other hedges during this interview.

[82] At trial, however, he said that he also intended to cut other hedges on the property, including a hedge along the driveway. Counsel for AMI challenged Mr Devcich on this point, and suggested that he had expanded his evidence in order to provide an explanation for the fact that he had purchased a five litre container of fuel when he only intended to trim a single hedge.

[83] I accept that there is a difference on this point between the interview with Mr Francis and the evidence that Mr Devcich gave at trial. The significance of the difference is marginalised, however, by the fact that on both occasions when Mr Devcich was interviewed by the police he used the word "hedges" and not "hedge".

For that reason it cannot be said that he has recently invented this aspect of his explanation. I therefore put this criticism of Mr Devcich's explanation to one side.

Mr Devcich's personality

[84] Counsel for AMI submits that the Court has now had ample opportunity to observe Mr Devcich, both through his own evidence and that given by others who have dealt with him. As a result, he contends that the Court is in a good position to assess Mr Devcich's overall personality. He suggests that the person who lit the fire needed to possess the intellectual, psychological and physical capability to carry out the arson of the property. He submits that the evidence as a whole demonstrates that Mr Devcich possesses all of these capabilities.

[85] Judges are always reluctant to undertake an exercise such as this. They have no particular expertise that enables them to reach conclusions regarding the psychological makeup of a party or a witness. For the most part, they must rely on experts who have formal qualifications and practical experience that enable them to address such a topic with some confidence.

[86] Nevertheless, AMI relies on this factor as forming an important part of its case. I have also had the opportunity to observe Mr Devcich being cross-examined for a considerable time, and I have watched videotapes of him being interviewed by the police for extended periods on two separate occasions. I have also read the transcript of a lengthy interview that Mr Francis conducted of Mr Devcich on 6 May 2009, and I have read letters that Mr Devcich wrote to his neighbours in the course of his dispute with them. Further, I have had the benefit of a considerable body of evidence from other witnesses who have dealt with Mr Devcich in one way or another in respect of matters relevant to this proceeding. For that reason I consider that I am qualified to make some observations about his personality.

[87] There can be no doubt that Mr Devcich is an intelligent man. All of the evidence points to that conclusion. Similarly, there can be no doubt that he is extremely resolute, and would be a formidable and determined adversary. The

matters that I shall shortly discuss in relation to the way that he has dealt with his neighbours are testament to that.

[88] If confirmation of Mr Devcich's tenacity is required, the second occasion upon which he was interviewed by the police provides it. That interview occurred on 14 July 2009, and was conducted by Detective Constable Anstey of the Avondale Criminal Investigation Unit. It is no exaggeration to say that Mr Devcich battered the detective into submission during that interview. Detective Anstey said that he went into the interview firmly believing that Mr Devcich had set fire to the house. By the end of the interview, however, he was left in considerable doubt regarding that issue. He concluded that the evidence against Mr Devcich was insufficient to meet the criminal standard of proof beyond reasonable doubt. For that reason he told Mr Devcich that the police would not be taking the matter further.

[89] Mr Devcich's performance under cross-examination also confirms that he has little difficulty in handling situations involving quite intense pressure.

[90] I am also satisfied that Mr Devcich is an extremely careful and methodical person who is in many ways a creature of routine. The way in which he manages virtually every aspect of his business and personal life demonstrates that fact. The description that he gave of his morning and evening routines paints the picture of a man whose daily activities hardly vary. His recreation appears to be organised in the same way, with games of golf being played every Saturday morning at the same time.

[91] His business life is similarly organised. By way of example, he manages his finances by crediting all his income from his business to his finance facility. This means that he pays the minimum amount of interest on the facility. He then draws against that facility only when necessary. This might occur when he is required to pay his tax or, presumably, when he has to pay his credit card bills. All of his expenditure is conducted through use of a credit card so that, so far as possible, all expenditure goes through his business and a record is kept of it.

[92] Overall, Mr Devcich presents as a man who is highly organised and leaves little to chance so far as both his personal and business lives are concerned.

[93] He is also, however, extremely “black and white” in his outlook. He has firm views about things and does not brook any argument when he believes that he is in the right. Again, the way in which he dealt with his neighbours provides a clear example of that.

[94] My overall assessment of Mr Devcich’s personality is that he is a person who was capable of deciding that the destruction of his house by fire would provide an answer to his problems both with his neighbours and with the high moisture readings in his house. I also accept that he possessed the ability to carefully devise a plan that would leave little to chance. He would also be sufficiently determined and resolute to go through with the plan and not to buckle under the pressure of the subsequent investigation.

[95] In assessing the weight to be given to this factor I need to bear in mind, however, the fact that Mr Devcich is not the only person who possesses these characteristics. In most contexts they will be regarded as being desirable because they are likely to ensure success at both a business and personal level. No doubt for that very reason, many people in all walks of life aspire to possess them.

[96] I also need to recognise that, if this factor is given undue weight, it can be used to provide the answer to any weakness in AMI’s case. That could operate to produce an unjust result.

Factors that Mr Devcich relies upon as supporting the proposition that he did not light the fire

[97] Counsel for the plaintiffs relies upon three principal factors in support of his submission that the Court cannot be sure that Mr Devcich was the person who started the fire. First, he submits that there is evidence to support Mr Devcich’s consistent claim that his neighbours were responsible for lighting the fire. Secondly, he contends that, when Mr Devcich’s known movements are compared to the likely

time at which the fire was lit, it is impossible to say that Mr Devcich started the fire. Thirdly, he submits that there were several possible means by which an intruder could have entered the house. This supports the proposition that somebody else entered the house and lit the fire in the lounge.

The possibility that Mr Devcich's neighbours lit the fire

[98] Mr Devcich told the police and AMI's investigator that several recent incidents had caused him some concern. He said that on the two nights prior to the fire he had been woken in the early hours of the morning by noises outside his property. He said that he had gone downstairs to investigate, but had found nothing untoward. When he checked the security of his property the next day, he found that the side gate was still secure.

[99] He believes that his neighbours must have started the fire, and that it is possible that they were snooping around his property during the incidents that I have described. He considers that the fire occurred as part and parcel of a long-running dispute between himself and his neighbours. In order to understand this issue, it is necessary to traverse aspects of that dispute.

The dispute between Mr Devcich and his neighbours

[100] The plaintiffs' house is situated at the end of an L-shaped driveway leading off Coronation Road. After travelling a short distance down the driveway from the road, it is necessary to make a right angled left turn in order to reach their house. Mr and Mrs Devcich gain vehicular access to their property by turning into a turning bay at the end of the straight section of driveway that leads into the property from Coronation Road. They then reverse their vehicles down to their house.

[101] Another house is situated at the point where the driveway turns left and travels down to the plaintiffs' house. That house has been occupied for many years by an elderly lady, Mrs Ailsa Senk.

[102] The plaintiffs' property was originally part of Mrs Senk's land. The plaintiffs and Mrs Senk are now parties to a cross-lease arrangement under which each owns an undivided share of the land that was formerly Mrs Senk's property. They also have leasehold interests in respect of the land and buildings that they occupy. The driveway that serves the two sections is a common area that is available for the reasonable use of the occupants of both sections.

[103] In recent years Mrs Senk has created two self-contained flats within her house and has sub-let these to tenants, presumably to supplement her income. That fact has been a source of contention for Mr Devcich for two principal reasons. First, it has led to difficulties when the tenants and their guests have parked their cars in areas of the driveway that made it difficult for Mr and Mrs Devcich to drive to and from their house. Secondly, domestic incidents have occurred involving Mrs Senk's tenants. On at least one occasion, on Christmas Night in 2008, it was necessary for the police to be called to Mrs Senk's property to deal with these issues.

[104] These problems go back as far as 22 September 2003, when Mr Devcich wrote to Mrs Senk regarding his concerns about the manner in which Mrs Senk and her tenants were using the common areas. In that letter, Mr Devcich advised Mrs Senk that he believed that she was subletting her house to tenants illegally, but that he did not propose to do anything about that fact provided he and his family had clear access over the common areas.

[105] By January 2009 the difficulties between Mr Devcich and his neighbours had escalated, and Mr Devcich began keeping a log of all of the incidents involving his neighbours. In March 2009 he began a series of correspondence with Mrs Senk and her daughter regarding these incidents. The tone of the letters became increasingly hostile from both sides.

[106] Importantly for present purposes, Mr Devcich wrote to Mrs Senk on 16 March 2009 and formally requested her to remove her tenants. He told her that the flats were illegal (because they breached the District Plan) and that they breached an express provision of the cross-lease that they had both signed. This provision gave Mr Devcich the right of quiet enjoyment of his land. Mr Devcich gave Mrs Senk 14

days within which to agree to his request or to proceed to arbitration in terms of the cross-lease.

[107] The correspondence continued through into April 2009, with Mr Devcich advising Mrs Senk's daughter in a letter dated 8 April 2009 that he proposed to begin Court proceedings against her mother because she had not responded to his letter dated 16 March 2009. An incident had also occurred on the morning of 4 April 2009, in which Mr Devcich told Mrs Senk that he intended to call a tow truck to remove her car because it was parked in an area where it was not supposed to be.

[108] Then, on 9 April 2009, Mr Devcich wrote to Mrs Senk about an incident that had apparently occurred the previous day. He said that Mrs Senk had stopped a person who was driving down the driveway and had asked that person if he was coming to look at the house that was for sale. When this person said that he was, Mrs Senk allegedly asked him if he knew that it was a leaky home. Mr Devcich advised Mrs Senk that she should take his letter as formal notice that, if she or her daughter were to "utter untrue or slanderous statements" about Mr Devcich or his family, he would immediately commence legal action with a claim for damages. That letter evoked an extremely caustic response from Mrs Senk's daughter on 11 April 2009. Mr Devcich responded in similar vein the following day.

[109] Mr Devcich had also involved the Auckland City Council in the dispute. He complained to the Council about the fact that Mrs Senk had established separate flats with self-contained cooking facilities within her house. This prompted the Council to carry out inspections of Mrs Senk's house. The Council's Building Incident Officer wrote to Mr Devcich on 23 April to advise him that the Council had carried out several site inspections of Mrs Senk's property, the last of which had occurred on 15 April 2009. These had revealed that Mrs Senk was in breach of the District Plan by having additional cooking facilities in the flats, so the Council had requested her to remove them. The Council also advised Mr Devcich, however, that the breach had been remedied by the removal of the cooking facilities. It told him that it had advised Mrs Senk that the cooking facilities could not be re-established in the flats.

[110] Mrs Senk and her daughter clearly perceived that Mr Devcich was engaged in a campaign of harassment against them. They therefore arranged for the police to serve a trespass notice on both Mr and Mrs Devcich on 15 April 2009. The trespass notices advised Mr and Mrs Devcich that they were to stay off Mrs Senk's property and that they were not to speak to her.

[111] The sequence of events that I have just described demonstrates that at the time of the fire Mr Devcich was still engaged in a long-running dispute with Mrs Senk and her daughter regarding several issues.

[112] Mr Devcich does not suggest, however, that Mrs Senk or her daughter were responsible for setting fire to his property. Instead, he nominates Mrs Senk's tenants as the persons who are to blame for that act. He maintains that they had an obvious motive to cause trouble for Mr Devcich because he was the person who was determined to have them evicted from Mrs Senk's house.

[113] Mr Devcich's argument has always been that both men were at Mrs Senk's property on the morning of the fire and that they would have heard him leave for work. They would also have known that nobody else had been at his house for the past few days. This would have been evident from the fact that Mrs Devcich's vehicle had remained in the garage, and her daughter's vehicle had been parked outside the address after they left for Melbourne the previous weekend.

[114] Mr Devcich suggests that it would have been a simple matter for one or both of the tenants to walk down the driveway to his house. If they looked through the window of the garage, they would have seen the container of petrol sitting on the shelf. They could then have broken into the property, lit the fire and walked back to Mrs Senk's house within a matter of minutes. None of this activity would have been observed by any of the other neighbours.

[115] Mr Devcich contends that several factors support his theory.

The events that occurred on the day of the fire

[116] On the day of the fire Mr Devcich told AMI's Manager, Mr Steven Toohey, that Mrs Senk's two tenants were "very dicey people" and described them as "pretty rough sort of buggers". He also believed that they were involved in drug-related activities of some sort, because the upstairs windows of Mrs Senk's property were open day and night. Mr Devcich said that he did not know Mrs Senk's tenants personally, because he had deliberately chosen to have as little to do with them as possible.

[117] Mr Devcich also claims that the men acted in an unusual manner towards persons outside his property immediately after the fire. AMI's manager, Mr Steven Toohey, and its fire assessor, Mr Keith McDonald, confirmed that they were standing outside the property after Mr Coleman had advised them that they needed to leave because it was potentially a crime scene. At this point a male person, now known to be Mr [A], came out of the neighbouring property. When they looked in his direction the man asked "What are you looking at?" in a smart aleck manner. Mr Toohey responded by saying "Sorry, what was that?" and the man then asked what had happened at Mr Devcich's property. When Mr Toohey explained that there had been a fire, the man said that he had heard somebody kick the door down, and he had seen the firemen. He also said something along the lines of "It's not very nice when your neighbour has a fire" or "Nobody wants to see the neighbour's house burn down".

[118] Mr McDonald says that during this conversation Mr Devcich turned away from the man and did not look at him or say anything. Mr McDonald found this surprising given the fact that Mr Devcich had been claiming that his neighbours must have been responsible for the fire. The man that they had been speaking to then got into an early model BMW motor vehicle and drove away. Mr Toohey obviously thought that the man had been acting in a manner that was unusual, because he noted down the registration number of the man's vehicle.

[119] Mr Toohey later saw another man, now identified as Mr [R], come out of Mrs Senk's house and drive away in another vehicle that had been parked in a

parking bay on Mrs Senk's property. That man had earlier said something cheeky or smart to the fire service personnel who attended the scene.

[120] Mr Devcich has always been highly critical of AMI and the police because he considers that neither has ever taken his claims about Mr A and Mr R seriously. He says that they did not make proper efforts to find either man so that they could be interviewed about the possibility that they started the fire. It was not until just before the trial that serious steps were taken in that regard.

Mr A

[121] The police discovered at an early stage from speaking to Mrs Senk that Mr A was the person who had spoken to Mr Toohey and Mr McDonald and who had driven away in the BMW motor vehicle on the morning of the fire. Detective Constable Anstey of the Avondale CIB called in at Mrs Senk's address on one occasion shortly after the fire in order to speak to Mr A, but he was not present at the address. The detective left a message with Mrs Senk to the effect that he wanted to speak with Mr A, but he never heard back from him. The detective followed this visit up by leaving messages on Mr A's cellphone, but these produced no result. The detective also visited Mr A's work address in Grey Lynn, but discovered that the business had closed. The detective was therefore never able to speak to Mr A.

[122] AMI's investigator, Mr Chris Francis, was successful in contacting Mr A a few weeks after the fire, but Mr A was not interested in talking to him about the fire at that stage. Mr Francis did not take the issue any further until shortly before the trial, when he interviewed him in detail. Mr A agreed at that time to give evidence at the trial.

[123] Mr A is 48 years of age. He has some previous convictions, but none that are particularly material for present purposes.

[124] Mr A said that he had been renting two of the upstairs rooms in Mrs Senk's house for about eight months prior to the fire. These comprised a bedroom

and a lounge area. Mr A was able to gain access to these rooms by means of a separate entrance to that used by Mrs Senk, who occupied the whole of the ground floor of the house. Mr A said that he was paying Mrs Senk rent in the sum of \$230 per week.

[125] He said that about two or three months prior to the fire he had agreed to sub-let the lounge to a person by the name of [Mr] R. He did not know Mr R well, but had been asked by a friend to take him in because he needed somewhere to live. Mr A said that Mr R was paying him rent in the sum of \$100 per week.

[126] Mr A said that he was an engineer, and at the time of the fire had been working in his own business. He said that he worked irregular hours, often starting around 9 am but finishing late. He said that his occupation as an engineer meant that he went to work in scruffy clothes. He said that Mr R worked for another person on a full-time basis as a painter.

[127] Mr A confirmed that he was the person who spoke to Mr Toohey and Mr McDonald in the driveway of the plaintiffs' house on the morning of the fire. He said that he had been woken by Mr R after the fire engines had arrived, and that he had gone downstairs to see what was going on. He said that he had asked the fire investigator what had happened, and that he was told that the fire had started in the kitchen and that it had probably been caused by an electrical fault.

[128] Mr A acknowledged that he had asked Mr Toohey and Mr McDonald what they were looking at, and said that he had done this because they seemed to be looking in his direction with Mr Devcich whispering in their ear. He also said that Mr R had told him that he (Mr R) had said something cheeky or smart to the firemen that morning, and that he had told Mr R to back off and to keep out of it. He said that he had told Mr R that the fire was nothing to do with him and that he should keep out of it. He agreed that Mr R was possibly something of a "hot head".

[129] Mr A also acknowledged that he had initially not been willing to talk to either the police or Mr Francis about the fire. He said that he knew nothing about the fire, and did not want to become involved in something that did not have anything to do with him.

[130] When Mr A was asked about the ongoing dispute between Mrs Senk and Mr Devcich, he confirmed that he knew about it and that he had been shown copies of some of the correspondence by Mrs Senk. He was aware that Mr Devcich had put a notice on Mrs Senk's car and that he had threatened to have it towed away on one occasion when it was parked in front of her house. He was also aware that Mr Devcich had threatened to have Mr R's car towed away when it had been parked in the turning bay that Mr and Mrs Devcich used. He said that Mr R had been a little hostile to Mr Devcich as a result of that incident.

[131] Mr A also acknowledged that he knew that Mr Devcich was trying to have him and Mr R evicted from the property. He said that he knew the Council was going to inspect Mrs Senk's property, and said that she had asked them to put away the hot plate in their flat so that the inspector would not see it. He was not aware, however, that an inspection had occurred, and thought that that particular issue had been resolved. Mr A said that, although he was aware that he might be evicted as a result of Mr Devcich's actions, he was not overly concerned about that prospect. He said that, if it turned out that Mrs Senk was not allowed to have tenants in her property, he and Mr R accepted that they would have to leave. He flatly denied any involvement in lighting the fire and said that that suggestion was absurd and ludicrous.

[132] Three other aspects of Mr A's evidence are worthy of note. First, he said that he had spoken to Mr Devcich in the driveway of the property a week or two before the fire. He said that Mr Devcich had seemed happy on that occasion, and that Mr Devcich had told him that he and his wife were moving into an apartment in town. Mr A said that he had noticed quite a lot of vehicles moving up and down the driveway at about that time, and had assumed from this that Mr and Mrs Devcich were loading up their possessions and moving out.

[133] There is no evidence to suggest that Mr and Mrs Devcich ever made arrangements to move out of the Coronation Road house in order to begin living in an apartment in the city. I therefore consider that Mr A must be mistaken on this point. Mr Devcich is adamant that the conversation never occurred. I consider that, if the conversation occurred at all, it related not to Mr and Mrs Devcich but to their daughter. She had been living at the Coronation Road property with her parents for some time, but had moved out to live elsewhere on Good Friday in 2009. It is therefore possible that Mr Devcich may have told Mr A that his daughter was moving out in order to live in an apartment in town, and that the activity that Mr A observed related to that fact.

[134] Secondly, Mr A said that Mrs Senk's daughter had told him shortly after the fire that Mr Devcich was suggesting that Mrs Senk had been responsible for lighting the fire. Mr A said that the same suggestion was made to him by Mr Francis when he spoke to him a week or two after the fire. Mr A said that he regarded that allegation as bizarre, because Mrs Senk was 85 years of age and it was therefore highly unlikely that she would have been capable of that type of activity. I consider that Mr A is clearly mistaken on this point, because I am satisfied that nobody ever suggested to him that Mrs Senk was responsible for lighting the fire. The most that may have been said was that somebody from her house had lit the fire.

[135] Of greater importance, however, is an event that occurred as a sequel to the incident in which Mr Devcich placed a notice on Mrs Senk's vehicle and threatened to have it towed away. Mr A acknowledged that the notice on Mrs Senk's vehicle was discovered on a Saturday afternoon when he had a guest visiting him. That guest was a counsellor by occupation. He said that his guest thought Mr Devcich was going a bit far in placing the notice on Mrs Senk's car, and that Mr Devcich clearly had issues. For that reason they decided to pay Mr Devcich a visit to talk things through with him.

[136] Mr A said that he and his friend then went down the driveway and knocked on the door of Mr Devcich's house. When Mr Devcich answered the door, he began taping the discussion with Mr A's friend. Mr A thought

that this was highly unusual. He said that his friend asked Mr Devcich whether he was okay and whether he was feeling stressed. He also asked Mr Devcich why he was picking on an 85 year old lady, and told Mr Devcich that heart attacks and stress were a killer. Mr A said that the friend also told Mr Devcich that he needed to do something about talking to somebody about his problems rather than getting lawyers involved.

[137] Mr Devcich said that he was highly concerned by this incident. He said that Mr A remained some distance up the driveway whilst the conversation occurred. He said that Mr A spoke to him about whether he had mental issues. He also said that Mr A's friend was very large, and that his first reaction was that Mr A was setting a "heavy" onto him in order to intimidate him.

[138] I consider that this incident has sinister overtones. It is highly unlikely, in my view, that Mr A and his friend went to Mr Devcich's house with the intention of helping to calm things down. I consider it far more likely that they went there to intimidate Mr Devcich and to provide him with a not too subtle warning that he should back off from conduct that they perceived to be harassment of Mrs Senk.

Mr R

[139] Mr R's identity was only discovered during the course of the trial, and he was not interviewed by Mr Francis until after the trial had commenced. Notwithstanding this fact, he was summoned to give evidence on behalf of AMI later in the trial.

[140] Mr R is 39 years of age. He said that he thought that he had been living with Mr A for about six months at the time of the fire. During this period he was working casually as a painter, plasterer and general handyman.

[141] Mr R confirmed that he slept in the lounge area of the upstairs flat that Mr A rented from Mrs Senk. He confirmed that he had been present in the flat on Christmas night 2008, when Mr A's former partner smashed her way

into the property and the police were called. On that occasion, he had later gone outside and looked around the boundary of the property at about 2.30 am because he thought that he had heard the sound of somebody moving around outside. Other than on that occasion, he had never been closer to the plaintiffs' property than the end of Mrs Senk's house.

[142] Mr R said that he woke up to the smell of smoke on the morning of the fire. He said that he knew it was not somebody in their garden burning weeds. He immediately got up and went into the hallway of the flat. This runs along the side of the house that faces west towards Coronation Road. In the hallway he could see smoke that appeared to him to be like mist. He then looked out of one of the open windows in the hallway, and could see more smoke down the driveway in the direction of the plaintiffs' house. He then ran downstairs and out into the driveway leading to the plaintiffs' house. By the time he got to the boundary between the two properties, he could see that the house at the end of the driveway was ablaze. He then began calling out because he was concerned that somebody might be in the house. He said that when he got no response, he ran back inside and woke Mr A. As he did so, the first fire appliance arrived on the scene and the fire service personnel began to extinguish the fire.

[143] Mr R said that he and Mr A then went downstairs to watch what was going on. After the fire was under control, he and Mr A went back upstairs again to get ready to go to work. He said that they later went back outside and spoke to some of the firemen. He, too, said that when they asked how the fire had started they were told that it was likely to have been an electrical fault.

[144] Mr R confirmed that he was aware of the dispute between Mrs Senk and Mr Devcich regarding the issue of parking. He also recalled the incident in which Mr Devcich had threatened to have his car towed away because of where it was parked. He said that he was not aware that Mr Devcich had taken steps to have Mr A and Mr R evicted, and that he had never discussed that issue with either Mrs Senk or Mr A. He said that the prospect of eviction would not have worried him unduly, because he was in the process of moving out of Mrs Senk's address in any event.

[145] Mr R also recalled the issue of the Council inspection, and said that he believed that it was something to do with the living arrangements for the flat. He also accepted that he had been asked to put the hot plate away in the cupboard so that it would not be discovered during the inspection. He confirmed that he knew that Mr Devcich had initiated the inspection process, but said that that fact had not made him angry. He did not recall having seen any of the correspondence between Mr Devcich and Mrs Senk and her daughter. He viewed those issues as being essentially between Mr A and Mrs Senk, and believed that he did not need to become involved in them.

[146] Mr R accepted that he had been convicted of being in possession of methamphetamine approximately six years ago. He said that he had been fined \$500 on that charge. He denied that he was addicted to drugs and also denied that he and/or Mr A had been involved in drug-related activities whilst they were living in Mrs Senk's house. He, too, rejected the suggestion that he had played any part in setting fire to the plaintiffs' house.

[147] Counsel for the plaintiffs contended that Mr R's evidence lacked credibility in several respects. He suggested that it was highly unlikely that smoke would have entered the hallway of the upstairs flat in Mrs Senk's house in the manner described by Mr R. He pointed out that the evidence confirmed that the wind was blowing away from Mrs Senk's house on the morning of 24 April. As a result, any smoke would have been carried away from the plaintiffs' house and would not have drifted towards Mrs Senk's house. He therefore submitted that there must be real doubt regarding Mr R's evidence on this point.

[148] I consider that the answer to this submission lies in the likely timing of Mr R's observations. His evidence was that no more than five minutes elapsed between the time that he woke up and the arrival of the first fire appliance. That time estimate seems reasonable given the limited activity that he undertook between the time that he woke up and the point at which he woke Mr A. In all probability his return journey to the plaintiffs' house took no more than three to four minutes. If that is the case, I consider that he probably woke up a minute or two after Mr Iorns saw the glass in the windows blow out. Once that occurred,

substantial quantities of smoke escaped from the room in which the fire was burning. It is highly likely, in my view, that at least some of that smoke would have found its way into the upstairs flat in Mrs Senk's house through the open windows in the hallway notwithstanding the wind direction at that time. I therefore do not accept that this criticism of Mr R's evidence is valid.

[149] Next, the plaintiffs' fire investigation expert, Dr Lavendar, suggested that Mr R's evidence was also unreliable because of the description that he gave of the colour of the smoke emanating from the plaintiffs' house. I consider that that criticism needs to be placed in context. Mr R is a lay person who has no particular expertise in the field of smoke identification or interpretation. He was being asked to think back to events that had occurred 14 months ago. He has probably had no reason to think about those events since they occurred. It would be no surprise if his recall of detail is now unreliable.

[150] It also needs to be remembered that Mr R had just woken up when he smelled the smoke and ran outside. Once he saw the smoke and flames coming out of the plaintiffs' house, it is not surprising that his attention turned to the possibility that people might still be inside the house. The sight of a house being destroyed by a major fire would also be a shocking experience that would make it difficult for an observer to later be sure about peripheral details. I therefore place little store in the fact that Mr R may not have described the precise colour of the smoke accurately.

Is there a reasonable possibility that Mr A and/or Mr R lit the fire?

[151] Viewing the issue of the dispute between Mr Devcich and his neighbours in isolation, I consider that it is unlikely that it was sufficiently serious from the perspective of either Mr A or Mr R that it would cause them to decide to set fire to Mr Devcich's house. I reach that conclusion for several reasons.

[152] First, the dispute was for the most part directly between Mr Devcich on the one hand and Mrs Senk or her daughter on the other. All of the correspondence passed between those parties and that was where most of the heat was generated.

[153] Secondly, although I accept that Mr A and Mr R were directly involved in the issue about car parking and Mr R was obviously angry on the occasion that Mr Devcich threatened to have his car towed away, I doubt whether that issue would have been sufficient to make either man want to burn their neighbour's house down.

[154] I also accept that the car parking issue clearly prompted Mr R to visit Mr Devcich in the company of his counsellor friend. Although that incident had sinister overtones, I consider that retaliation of that sort is much less serious than a plan to burn an adversary's house down.

[155] Similarly, Mr A and Mr R had an obvious interest in the dispute regarding the issue of whether or not they were living in their flat illegally. They were clearly aware that the Council had become involved in that issue, and they knew that Mr Devcich had raised it. Mr A also acknowledges that he knew that there was a possibility that he might have to leave the flat. I did not take either man, however, to be particularly concerned about that possibility. Mr R was apparently in the process of moving out in any event, and Mr A had only been in the flat for a number of months when the issue of the inspection by the Council arose. Their evidence is to the effect that the prospect of being evicted from the flat was not a matter of major significance for them. If that is correct, neither man is likely to have sought revenge against Mr Devcich in such a disproportionate way.

[156] That evidence is confirmed to some extent by my assessment of how the two men appear to have regarded Mr Devcich when they were living in the upstairs flat in Mrs Senk's house. I have no doubt that they both thought that he was unusual because of the manner in which he reacted to the issue regarding the use of the driveway and the turning area. They also clearly thought that his actions in harassing an 85 year old lady about these issues were bizarre. They are also unlikely to have been impressed by his actions in causing the Council to become involved in the issue of whether they were in the flat illegally. I did not gain any hint when they gave evidence, however, that either man harboured hostility towards Mr Devcich of such intensity that it could give rise to a desire to burn his house down.

[157] Having said that, I accept that it is very difficult to judge a person's attitude or state of mind when it relates to events that occurred so long ago. Although both men now say that they were not concerned about being evicted, the heat from that issue has now completely dissipated. I therefore accept that their attitudes as professed in their evidence at trial may not accurately represent their position as at 24 April 2009. I therefore accept that care needs to be taken when assessing the weight to be given to their evidence at trial.

[158] I accept without hesitation that both men were generally unshaven and that they dressed in a scruffy manner when they went to work. These factors, coupled with their irregular work hours, may have caused Mr Devcich to view them with considerable suspicion. I do not, however, consider that there is any evidence to support Mr Devcich's belief that they were involved in drug-related activities whilst they were living next door to him. That belief demonstrates, in my view, that Mr Devcich was probably a little paranoid about his neighbours as a result of his observations of them since 2003. The incident that occurred on Christmas night 2008 also clearly unnerved Mr Devcich. It appears to have been the final straw, and made him determined to have the tenants evicted.

[159] I do not accept, either, that the manner in which the two men acted shortly after the fire suggests that they had an involvement in lighting it. It may demonstrate that they lack judgment and tend to engage in smart aleck behaviour, but it does not mean that they were responsible for lighting the fire.

[160] My conclusion regarding this issue is therefore that, although it can be argued that the two men may have had a motive for wanting to cause harm to Mr Devcich, that fact on its own would not be sufficient to establish a reasonable or realistic possibility that they were responsible for starting the fire. More would be required.

The timing of the fire in comparison to Mr Devcich's known movements

The timing of the fire

[161] The neighbour who first noticed the fire was Mr Donald Iorns. His property is situated on the northern boundary to the plaintiffs' property. Mr Iorns said that he first saw smoke outside the lounge area of the plaintiffs' property, but that at that stage the smoke was not thick. Behind the glass sliding doors, however, he could see very thick smoke. He described the smoke as being so thick that it looked like black velvet against the glass. Through the smoke he could see an orange glow, and he could also see flames further back in the room.

[162] A few seconds later Mr Iorns heard a sound that he described as being like "fummph", or "a sort of 'woosh'". He then saw the French doors of the lounge blow out, and the lounge burst into flames. He also saw the windows on the western side of the lounge blow out. This allowed a large quantity of thick black smoke to escape from the house.

[163] Once this occurred, Mr Iorns immediately ran inside his house and called for his wife to call the fire service. He then ran back outside and took a hose over to the boundary of the plaintiffs' property. Although he tried to spray water from his hose onto the blaze, it quickly became apparent to him that his efforts were having no effect. The flames from the plaintiffs' property had by this stage advanced over the boundary, and were beginning to burn vegetation on his property. The guttering on an outbuilding on his property then began to melt and sag, and the paint on the building began to blister. Mr Iorns therefore concentrated on trying to save his own property.

[164] A few minutes later, the fire service arrived and Mr Iorns saw a fireman at the corner of the plaintiffs' property. He then narrowly avoided being struck by a powerful stream of water that shot straight through the lounge of the plaintiffs' property. This marked the beginning of the efforts by the fire service personnel to extinguish the fire.

[165] The records kept by the New Zealand Fire Service show that the Fire Service logged the call from Mr Iorns' property at 8.20 am. That call was followed by numerous calls by other persons who had seen smoke coming from the plaintiffs' property. The first fire appliance arrived at the scene at 8.25 am, followed by two other appliances at 8.26 am. The fire service personnel were able to get the blaze under control within a matter of minutes. Thereafter they concentrated on dampening down hot spots so that the fire did not flare up again.

[166] The fire service investigator, Mr Coleman, arrived at the property and commenced his examination at 9.18 am. By that stage the fire had been completely extinguished. Mr Coleman's role was to determine the cause and origin of the fire.

[167] The fire had completely consumed most of the furniture and fittings in the lounge of the property. Mr Coleman found that the fire had originated in an area of the lounge adjacent to the remains of several pieces of furniture, including a 3-seater sofa. He identified this piece of furniture as being the object of origin, and a strong smell of hydrocarbons was evident around it. The remains of the red plastic fuel container were also found in this area.

[168] Heat and smoke patterns radiated away from the identified point of origin. A dining area at the southern end of the lounge had also been affected by heat and smoke. The area in which the fire originated was near the wall adjoining the kitchen and family areas of the house. These are situated in the northeastern corner of the house.

[169] Mr Coleman was able to eliminate electrical sources as the cause of the fire, because no such items were located in the vicinity of the point of origin. He concluded that the source of ignition was an open flame, but he could not say what type of flame might have started the fire. Mr Coleman was of the view that some form of open flame had ignited petrol vapours present in the vicinity. These then ignited the upholstery of the couch and the wall between the lounge and the family room.

[170] Mr Coleman's observations, and in particular his belief that the fire had been lit with the assistance of an accelerant, led him to the conclusion that he was dealing with a case of arson. For that reason he arranged for the police to be called to the scene.

[171] Mr Coleman said that the incident that Mr Iorns observed when the windows of the lounge blew out was what is technically known as a "flashover". The other experts called for both parties agreed with this conclusion. Flashover does not generally occur immediately after a fire is lit. In a fire such as that which occurred in the present case, the items that are ignited will burn until such time as the oxygen in the area of the fire has been consumed. The flames will then die down, but the temperature of the burning items, and of other items in the vicinity, will continue to rise. Eventually those items will reach a temperature at which they burst into flame simultaneously and spontaneously. This can create a powerful pressure wave that causes objects such as glass windows and doors to blow out. Once that occurs, smoke will escape and the fire will be provided with a new source of oxygen from outside the room. This will cause the fire to grow in intensity and magnitude until it is either extinguished by the fire service or until it has consumed all the combustible items in the area.

[172] Applied to the present case, I took the experts to say that it is likely that the fire began in the area near the sofa where the remains of the plastic fuel container were found. The sofa itself began to burn after an open flame of some description was used to ignite petrol vapours in the vicinity of the sofa. Other combustible items in the room also began to burn at this time. The flames eventually died down once the fire had consumed the available oxygen in the room. The temperature of the sofa and the other items in the room continued to rise, however, until they reached a temperature at which everything in the room self-ignited. This caused a sudden increase in pressure, or pressure wave, that produced the sound that Mr Iorns heard. It also led to the windows and French doors being blown out in the manner that Mr Iorns observed.

[173] Mr Coleman was of the view that his observations at the scene of the fire make it probable that a flashover had occurred. The notes that he made at the time

said that the fire was “very fast” and “very hot”. The fact that the fire had burned evenly and that it involved both upper and lower surfaces was also indicative of flashover. He considered that it was unlikely that more than 20 minutes had elapsed between the time of ignition and the time that the fire service arrived. This means that the flashover that Mr Iorns observed occurred approximately 15 minutes after ignition occurred.

[174] Mr Coleman emphasised that his estimate of a 20 minute period elapsing between ignition and the arrival of the fire service could not be regarded as a “hard” estimate, because it is impossible to be precise about timings in this kind of context. He based his estimate on the observations that he has made during his very lengthy service with the New Zealand Fire Service as a fire investigator. In making that estimate, he relied upon the fact that the lounge was a relatively large compartment and it would therefore take some time for the fire to penetrate out of it. By the time the fire was extinguished it had not penetrated out of the lounge area. Much of the furniture within the room was also still discernible because it had not been consumed completely by the fire. All of these factors suggested to Mr Coleman that a period of around 20 minutes would have elapsed between the time of ignition and the arrival of the fire service.

[175] The expert for the plaintiffs, Dr Ian Lavendar, agreed with this assessment. The expert called for AMI, Mr David Noble, disagreed. He considered that it was most likely that flashover had occurred 35 to 40 minutes after ignition. This means that it would have occurred approximately 40 to 45 minutes before the arrival of the fire service. He said that it would have taken considerably longer than 20 minutes for the oxygen in the lounge to have become depleted and for the items to reach the necessary temperature for self-ignition to occur.

[176] On this point I accept the evidence of Mr Coleman, supported as it is by Dr Lavendar. Mr Coleman’s analysis of the reasons why ignition occurred approximately 20 minutes before the fire service arrived is, with respect, convincing. His observation that the fire was very fast and very hot is supported by the burn patterns in the lounge and the damage that the fire caused. That observation is

inconsistent, in my view, with a fire that has taken 35 to 40 minutes to reach flashover.

[177] Mr Coleman's estimate of 20 minutes is also supported by the extent of the damage to the internal wall between the lounge and the family room. This wall is adjacent to the point where the fire began, and is an area where the fire obviously burned fiercely. The wall was of standard construction for an internal partition of this type. It consisted of timber framing covered on each side by a panel of gibraltar board that was 9.5 millimetres thick.

[178] The gibraltar board in question had a fire rating of 15 minutes. Mr John Gibson, an engineer called by the plaintiffs, explained that the fire rating of gibraltar board in this context relates to the partition as a complete unit or system. In order to establish the fire rating of a system, the flame from a gas burner is applied to a partition in a test chamber. The flame is gradually increased in intensity in an attempt to replicate the development of a real fire. The flame initially burns the paper on the outside of the board nearest to the flame. Once that has burnt away, the flame attacks the gypsum plaster that forms the core of the board. As the gypsum heats up, it turns to powder and eventually disintegrates. Once the board nearest to the flame has disintegrated, the flame begins to attack the board on the other side of the partition. A fire rating of 15 minutes means that tests have demonstrated that it will take 15 minutes for the gibraltar board on both sides of a partition to disintegrate.

[179] Mr Gibson pointed out that the tests began to be developed in the 1930's, and there has been a reluctance since that time to change the formula that is used in relation to the application of the flame. This stems from the fact that all of the data produced since the 1930's has been based on that formula. He said that it is now believed that real fires burn faster than those that are used in rating tests. For that reason he considered that the rating tests are likely to produce results that are conservative. I took that to mean that a partition that has a fire rating of 15 minutes may in fact be destroyed a little more quickly than the rating would suggest.

[180] The fire rating of 15 minutes in the present case therefore meant that it would take approximately 15 minutes for the fire at the plaintiffs' house to seriously compromise the integrity of both sides of the partition between the lounge and the family room. The gibraltar board on the lounge side of the partition had completely disintegrated. That is not surprising given the fact that the seat of the fire was nearby. The gibraltar board on the family room side of the partition was largely intact, however, and the flames had not penetrated into the family room. The principal damage to the family room side of the partition appears to have been caused by the water jets that the fire service personnel used to extinguish the fire. These have knocked holes in the gibraltar board in the family room. The fact that the gibraltar board in that room remained largely intact suggests to me that Mr Coleman is correct when he says that it is unlikely that more than 20 minutes elapsed between the time of ignition and the time when the fire service arrived at the scene.

[181] In considering the respective expertise of Mr Coleman and Mr Noble, I acknowledge that both men have undertaken considerable formal training in the field of fire investigation. Mr Coleman, however, clearly has greater practical experience in this area than Mr Noble. Mr Noble spent 16 years in the New Zealand Fire Service, 9 of which were as a firefighter. He spent the remaining 7 years as a Team Leader in charge of fire investigations. Although this has given him considerable experience in the field of investigating fires, it does not match the 39 years that Mr Coleman has spent with the New Zealand Fire Service, the last 19 of which have been spent acting as a fire investigator. It is also noteworthy that Mr Coleman was called as a witness for AMI, and he was not challenged by AMI's counsel regarding his opinion on this point.

[182] I also have a concern that the thoroughness of Mr Noble's investigation may have been compromised to some extent by a firm belief from the outset, expressed in unequivocal terms in his brief of evidence, that Mr Devcich was the only person who could have started the fire. Mr Noble must have been aware that Mr Devcich had always been insistent that his neighbours were responsible for starting the fire. This meant that, if Mr Noble was to establish that Mr Devcich was the person who started the fire, he needed to exclude the possibility that the persons nominated by Mr Devcich were the culprits. Mr Noble does not appear to have taken this possibility

seriously, however, because he made little effort until very late in the piece to track down Mr A and Mr R so that he could investigate Mr Devcich's claim.

[183] Given the fact that the first appliance arrived at the house at 8.25 am, I apply Mr Coleman's reasoning to find that ignition occurred at around 8.05 am.

[184] This conclusion needs to be compared to Mr Devcich's known movements at that time.

Mr Devcich's known movements at around 8 am on 24 April 2009

[185] Mr Devcich told Mr Coleman on the day of the fire that he thought that he had left home between 7.30 and 8.00 am that morning. When he was interviewed by Detective Ekins on 24 April 2009, he said that he had left home at about 7.40 am. He said that he drove from his home to the Epsom library on Manukau Road, where he dropped off some magazines. From there, he travelled on to the Mobil petrol station on Manukau Road where he filled his car up with petrol. He produced a receipt for that transaction showing that he paid for the petrol at 7.57 am.

[186] Mr Devcich said that he then went to the drycleaners adjacent to the service station, where he dropped off a suit to be cleaned. The receipt for this transaction shows that it was timed at 8.10 am. He then travelled on into the city to his office.

[187] There is an obvious problem in reconciling the times recorded on the two receipts, because there is a apparent gap of 13 minutes between the two transactions. That is surprising, because on Mr Devcich's version of events the two transactions ought to have occurred within minutes of each other.

[188] The answer may lie in the fact that no steps have been taken to verify the accuracy of the time recorded by either of the machines that printed the receipts. As a result, it is possible that the time recorded on one or both of the receipts is inaccurate. It is clear, however, that Mr Devcich was in the vicinity of both the service station and the dry cleaners shortly before 8 am at the latest. If that is the case, he must have left home at about 7.50 am, because the evidence suggests that it

takes approximately ten minutes to drive from Mr Devcich's house to the service station where he purchased the petrol. Some allowance must also be made for the time that the trip to the library would have taken.

[189] If Mr Devcich left home at about 7.50 am, he did so approximately 15 minutes before the time at which it is likely that the fire was ignited. I accept that some latitude needs to be given in terms of timing. If Mr Devcich was the person who lit the fire it means, however, that Mr Coleman's estimate of the period between the time of ignition and the arrival of the fire service is wrong by approximately 15 minutes. I consider that that is unlikely.

[190] AMI sought to counter this problem by submitting that Mr Devcich must have lit the fire using a delayed timing device. Instructions on how to make such devices are apparently readily available on the internet. They can be made, for example, by taping matches near the bottom of a joss stick or cigarette. The joss stick or cigarette is then lit and placed in the vicinity of an accelerant such as petrol. The heat caused by the smouldering joss stick or cigarette will not be sufficient to cause the vapour given off by the petrol to ignite. When the joss stick or cigarette burns down to the level of the matches, however, the matches will ignite and produce the type of flame necessary to ignite the petrol vapour.

[191] I accept that this possibility cannot be excluded, because the remains of such a device are likely to be completely consumed by the resulting fire. There is, however, no evidence at all to suggest that a timing device was used or that Mr Devcich ever had access to instructions on how to assemble one. As a result, it remains a matter of complete speculation as to whether or not a timing device was used.

[192] My own view is that it would have been risky for Mr Devcich to have used such a device because of the realistic possibility that it would not work properly. If the cigarette or joss stick stopped smouldering before it reached the matches, Mr Devcich would be left in the situation of having to explain to his wife how large quantities of petrol came to be poured over the floor of the lounge.

[193] The remaining possibility is that Mr Devcich engaged the assistance of another person to light the fire after Mr Devcich had left for work. There is, however, no evidence to suggest that this is the case. Again, it remains sheer speculation.

[194] The timing of the ignition of the fire is therefore a problem for AMI.

The possible means of entry for an intruder

[195] Up until the time at which it received Dr Lavendar's brief of evidence, AMI's position had always been that there was no sign of forced entry to the house. This meant that it was improbable that the fire was started by an intruder, and it was correspondingly probable that it was lit by Mr Devcich.

[196] The case for Mr Devcich is that the house offered three possible points of entry for the intruder who lit the fire. First, he could have entered the house through an open window behind a large television set in the lounge. Secondly, he could have climbed up a drainpipe and entered one of the open windows in the master bedroom. Thirdly, he could have forced open one of the windows in the family room adjoining the lounge.

The window behind the television set in the lounge

[197] When Mr Coleman inspected the lounge after the fire had been extinguished, he found that an open window behind the remains of the television set. Burn patterns and charring to the bracket and frame of this window confirmed that the window had been open during the fire.

[198] Mr and Mrs Devcich told Mr Francis that that window was usually closed. AMI therefore believes that the person who started the fire also opened the window in order to provide the fire with a source of ventilation from outside. It rejects the suggestion that the window provided a ready means of access to the lounge from outside even if it had been left open. It does so because of the fact that the window is very low to the ground. It would therefore be physically difficult for a person to

bend down to the extent necessary to climb through it. In addition, the television set provided a considerable obstacle to anybody trying to enter the lounge through the window because it was located just inside the window.

[199] Mr Devcich disagrees. He contends that the window may have been left open without his knowledge, because it was hidden from view within the lounge by a curtain and it was not readily visible from outside either. He therefore argues that it provided a possible point of entry to the house for the person who lit the fire. Alternatively, the intruder could have reached through the window and opened another larger window that was a short distance away. He could then have climbed in through that window. He says that the intruder may also have used the window that was left open as a convenient opening through which to throw a lighted taper or other similar burning object in order to ignite the petrol vapours in the lounge.

[200] Based on the fact that the window was usually kept closed, I consider that it is highly likely that it remained closed until the person who lit the fire opened it in order to provide the fire with a source of ventilation.

[201] Even if the window was left open, I consider that the points that AMI makes are well-founded. It may have been physically possible for an intruder to climb through the window and negotiate his way around the television set. It would not, however, have been easy. It would not have been very easy, either for an intruder to climb through the other window. For these reasons I do not consider that the window that was left open in the lounge provided a likely point of entry to the house.

The window of the master bedroom

[202] When Dr Lavendar inspected the property, he found that by standing on a large plastic rubbish bin he could easily scale a drainpipe affixed to the eastern side of the house. Once on the roof, it was a straightforward matter for him to walk around to the master bedroom, where access could be gained through an open window on the western side of the house. He therefore suggested that this was another possible point of entry that AMI had not taken into account.

[203] There are two problems, however, with this suggestion. First, the intruder would be highly exposed to occupants of neighbouring properties on the eastern, northern and western sides of the house during the time that it took to walk around from the eastern side of the house to the western side. The risk of being observed would be significant, and that would carry with it a real risk of detection.

[204] Secondly, the undertaking would involve considerable danger to life and limb. The drainpipe is quite high, and the intruder would run the risk of slipping and falling a considerable distance onto the hard surface of the rear yard. It was this consideration that dissuaded Dr Lavendar from completing the climb from the drainpipe onto the surface of the roof. Instead, he made his way onto the roof from an upstairs window, and walked across to the area of the drainpipe from there.

[205] These factors persuade me that the window of the master bedroom was a highly unlikely point of entry.

The window in the family room

[206] This did not become an issue for AMI until the point at which it received Dr Lavendar's brief of evidence shortly before the trial began. At that point it became aware for the first time that tool marks had been found on the frame of a window in the family room adjacent to the lounge. The transom of that window was also bent. Mr Devcich had made these discoveries when he made his own inspection of the windows in the house after AMI had declined the plaintiffs' claims. He then pointed them out to Dr Lavendar, who was able to examine the damaged window frame and speak about it in considerable detail in his brief of evidence.

[207] Dr Lavendar said that he had discovered significant damage to the cockspur window latch. The rubber butterfly seal at the bottom of the latch had been quite badly damaged through force being applied to it. These factors suggested to Dr Lavendar that somebody had made an attempt to force the window open. At trial he said that the damage was such that he believed that the attempt to open the window had been successful.

[208] AMI's expert, Mr Noble, had not noticed this damage when he inspected the house immediately after the fire. By the time he received Dr Lavendar's brief the window frame had been removed from the house and was being stored at a demolition yard. Mr Noble therefore arranged to purchase it so that it could be preserved for trial. He then re-inspected the frame in order to see whether he agreed with Dr Lavendar's observations. Mr Noble now agrees that the window and latch are damaged in the way that Dr Lavendar describes. He points out, however, that there is no way of knowing when the damage occurred. For this reason he suggests that the damage to the window does not assist the plaintiffs' cause. He also said that he would have expected more damage to be evident if the attempt to open the window had been successful. He therefore did not agree that it was likely that the window had actually been forced open.

[209] On this point I accept the evidence of Dr Lavendar. The evidence regarding the damage to the rubber butterfly seal at the foot of the cockspur latch is such that it demonstrates that considerable force must have been used to push the latch up. I therefore consider that there is a realistic possibility that the damage to the seal occurred when the window was being force open.

[210] It is not, of course, possible to say when the damage to the window occurred. It is clear from the photographs that were taken on the day of the fire, however, that the window frame was bent at that time. It must therefore be assumed that the damage occurred before the time of the fire. There can be no suggestion that it occurred later.

[211] The fact that the damage cannot be dated would ordinarily mean that this factor would be of limited significance. In the present case, however, there is an added dimension that requires it to be given greater weight than would ordinarily be the case. This flows from the position of the window immediately after the fire.

[212] The photographs that were taken immediately after the fire show that the window in the family room was slightly ajar at that time, and the cockspur latch of the window was raised. Mr Devcich is sure that that window was closed and latched when he went to work on the morning of the fire. There is no reason to doubt that

that was the case. AMI's position is that the window must have been opened by fire service personnel who attended the scene. The plaintiffs contend that that conclusion cannot safely be drawn from the evidence.

[213] The fire had been extinguished by the time the fire service investigator, Mr Coleman, carried out his investigation. After speaking to Mr Clarkson, the officer in charge of the attending fire crews, Mr Coleman concluded that all the doors of the house had been locked, and that it had been necessary to enter the front door by force. He also understood from Mr Clarkson that, other than the window behind the television set in the lounge, all the windows appeared to be secure.

[214] Mr Coleman did not, however, ascertain from Mr Clarkson which windows the firemen had opened after their arrival. He did not follow that issue up later with the fire crews who attended the scene either. His omission to take that step cannot be criticised. It reflects the fact that Mr Coleman was not conducting a forensic examination. He was concerned only with the issue of how the fire started, and not the issue of who may have been responsible for it. He left that to the police and the insurer.

[215] After speaking to Mr Clarkson, Mr Coleman checked all of the windows for signs of illegal forced entry such as broken catches, twisted window frames and tool marks or striations. These checks revealed nothing out of the ordinary. He, too, must have missed the tool marks on the open window in the family room.

[216] Mr Noble considers that it is most likely that the window was opened by a fireman who entered the family room whilst there was considerable smoke in the room. He points to the fact that a pot plant near the window is sloping at an unnatural angle. He considers that it is likely that the window was probably opened by a fireman who stumbled into the pot plant whilst working his way around the room at a time when his vision was severely impaired by the smoke. I accept that that is possible, but without some form of evidential foundation Mr Noble's theory remains largely a matter of conjecture.

[217] Another possibility is that a fireman opened the window in order to let the smoke out and to let fresh air into the family room. The problem with this theory is that the photographs show that other windows in the room were not open. The French doors that led out onto the rear yard were also closed. This suggests that the fire service personnel were not particularly concerned about providing ventilation to the family room when they entered the house.

[218] AMI did not call any evidence that shed light on the issue of whether or not a fireman opened the window. It would have been a simple matter for it to have done so. The end result, therefore, is that it is not now possible to be confident that that is how the window came to be open following the fire. Although that could normally be assumed to be the case, the damage to the window and the latch means that I cannot make that assumption.

[219] Taking these factors into account, I cannot disregard the possibility that the window was opened by force on the day of the fire and that an intruder gained entry to the house through it. AMI's argument that there were no signs of forced entry to the house is therefore incorrect.

[220] This fact means that it is not necessary to embark on a detailed discussion regarding the issue of where the person who lit the fire was standing when he lit it. As indicated earlier, the plaintiffs' theory is that the intruder left the room after pouring petrol in the lounge and then threw a lighted taper in through the open window behind the television set. AMI suggests that the perpetrator lit the fire whilst still in the lounge, and that he retreated to safety through the double doors leading into the hallway after doing so. On balance, I prefer AMI's theory on this point because I consider that it would not have been very easy to toss a lighted taper into the lounge in the manner suggested by the plaintiffs. That issue becomes essentially irrelevant, however, given my finding that it was possible for an intruder to have gained entry to the house through the window in the family room.

The knife that Mr Devcich found on 2 May 2009

[221] When Mr Devcich went to the property and discovered the burglary on 2 May 2009, he found a knife that he did not recognise sitting on the kitchen bench. He believed that the knife must have been left at the property by the intruders who lit the fire. He therefore immediately contacted both the police and AMI and told them what he had found. To his dismay, neither the police nor AMI took any steps to follow this up.

[222] Mr Devcich initially believed that the knife had added significance because he believed that it was a putty knife. He drew this conclusion from the fact that a substance similar to putty was stuck to the handle of the knife. The fact that Mr R works as a painter and plasterer led Mr Devcich to believe that the knife may have belonged to him.

[223] Mr Noble said that during the course of his investigation on 27 April 2009, he took a knife from a drawer in the kitchen and used it to take samples from the floor for analysis. When he left the property that day he left the knife on the kitchen bench. He says that this must be the knife that Mr Devcich found when he visited the property on 2 May 2009.

[224] Mr Devcich disputes this fact. He maintains that he does not recognise the knife. Dr Lavendar also said that the shape of the knife that Mr Devcich found differs from a shadow mark (presumably caused by smoke) produced by a knife that appears to have been sitting in the kitchen drawer from which Mr Noble says he took the knife used to collect samples.

[225] Clearly a knife was sitting in the drawer at the time of the fire because of the fact that the shadow was left. That knife appears to have been moved from the drawer at some stage after the fire, because the photograph showing the smoke shadow depicts an empty drawer.

[226] There is no photographic evidence, however, to confirm that the knife was on the kitchen bench on the day of the fire. Had it been there on that day, I have no

doubt that it would have been noticed and photographed by those who investigated the fire. I have only Mr Devcich's evidence to say that the knife had not been in the house before the fire. The evidence about the shape of the smoke shadow in the kitchen drawer is also nebulous, because as I read his evidence Dr Lavendar did not physically compare the knife that Mr Devcich found with the shadow in the drawer. Dr Lavendar also accepts that the debris on the handle of the knife is consistent with it having been used to collect samples from the floor.

[227] Taking all of those matters into account, I view the evidence about the knife as being confusing. It is more likely than not, in my view, that Mr Noble is correct when he says that he removed the knife from the drawer on 27 April 2009. That explains why nobody (including Mr Devcich) saw it on the kitchen bench on the day of the fire. It also explains why there is debris on the handle of the knife. For these reasons, I do not accept that the presence of the knife on the kitchen bench on 27 April supports Mr Devcich's theory that the fire was caused by an intruder.

Where does the answer lie?

[228] The issue of whether or not Mr Devcich started the fire is not an easy one, because both parties can point to persuasive aspects of the evidence. The time that it has taken me to deliver this judgment reflects in part the difficulty that I have encountered in reaching my decision.

[229] There can be no doubt that considerable suspicion continues to attach to Mr Devcich. I have accepted that he had a motive for deciding to set fire to his house, that he had the ability to devise a careful plan and the determination to carry it out. The dispute with his neighbours also gave him a ready target to blame once the fire was discovered. The fact that he blamed them from the outset lends weight to the submission that he deliberately tried to steer attention away from himself.

[230] Mr Devcich's actions upon arriving at his office attract attention. His credibility as a witness was also significantly weakened by his evidence about the purchase of the petrol and the telephone call that he made to Mr O'Connor on the

day of the fire. I also accept that the argument that Mr A and Mr R may have been responsible for starting the fire is not strong.

[231] When those factors are combined, AMI can clearly point to a respectable body of evidence supporting its argument that Mr Devcich was responsible for lighting the fire.

[232] The evidence is not, however, all one way. The evidence about timing is of particular concern, because I have concluded that Mr Devcich left his property approximately 15 to 20 minutes before the fire ignited. This means that he must have started the fire using a timing device or using the assistance of a third party. There is absolutely no evidence, however, to support either of those theories.

[233] On its own, the timing issue may not have been sufficient to cast doubt on AMI's argument. It does not stand alone, however, because there is also the evidence about the dispute between Mr Devcich and his neighbours. Although this evidence does not suggest that either Mr R or Mr A had a strong motive for starting the fire, they knew that they could be evicted from their accommodation and they knew that Mr Devcich was responsible for that state of affairs. They would have known when Mr Devcich left the property that morning, and it is likely that they would also have known that there was nobody else living at the address at that time. Finally, they had the ability and opportunity to start the fire without being observed by anybody else.

[234] Even combined with the timing issue, this factor may not have been sufficient to defeat AMI's claim that Mr Devcich was the person who lit the fire. The problem for AMI arises when the damage to the window in the family room and the possibility that it may have been left open after the fire are added to the mix. Once that is done, I cannot disregard the possibility that an intruder gained access to the house through that window and lit the fire using the fuel that was visible on the shelf in the garage.

[235] These factors persuade me that AMI has not established its claim to the required standard. I reach that conclusion because, taken as a whole, the evidence

leaves me in a state of genuine uncertainty. I am not sufficiently sure that Mr Devcich started the fire to decide the case in AMI's favour. For that reason I have concluded that the plaintiffs are entitled to be indemnified by AMI under their insurance policies.

Result

[236] I enter judgment in favour of the plaintiffs on the issue of liability in respect of both of their claims.

[237] The counterclaims by AMI are dismissed.

Quantum

[238] It was not possible to deal with the issue of quantum during the hearing because it quickly became evident that the evidence relating to the issue of liability would completely use up the two weeks allocated for the trial. It was not possible to extend the trial beyond that time because I was travelling overseas at the end of the trial, as was counsel for the plaintiffs. For that reason, the issue of quantum is yet to be determined.

[239] This issue is likely to be complicated because of the nature and extent of remedial work that the plaintiffs have already undertaken at their own expense. I have some doubt that the present proceeding will be an appropriate vehicle to resolve disputes that are likely to arise regarding AMI's liability to pay for the work that has already been carried out. Many of those disputes may involve technical issues that will require expertise in the fields of building and construction work to resolve. The parties should therefore give consideration to some other form of dispute resolution procedure to resolve those issues.

[240] There may, however, be disputes about the legal liability of AMI to pay for particular aspects of the building work that the plaintiffs have carried out or that they intend to carry out. It may be appropriate for those issues to be determined by the Court.

[241] The parties obviously need time to consider their respective positions and, if possible, agree upon a way forward. I therefore propose to allocate the proceeding a telephone conference before an Associate Judge in six weeks time so that directions can be given to advance the resolution of issues relating to quantum.

Costs

[242] I can see no reason why costs and disbursements should not follow the event in the usual way. If counsel cannot reach agreement, counsel for the plaintiffs should file a memorandum no later than 31 August 2010. That should be followed by memoranda in response and reply at 21 and 14 day intervals respectively.

Suppression of Name

[243] I make a final order suppressing from publication the names of Mr A and Mr R.

Next event

[244] A telephone conference will be held before Associate Judge Bell on 8 September 2010 at 3 pm. I would be grateful if counsel could file memoranda (or preferably a joint memorandum) prior to that date so that the Court is updated as to the current position.

Lang J