

CITATION: GEOFFREY KURT BYRNES and TERESITA GENON BYRNES
[2017] NTLC 027

v

NICOLE FISHER and NAOMI KIM EVANS

TITLE OF COURT: Local Court
JURISDICTION: Civil
FILE NO: 21703095
DELIVERED ON: 23 November 2017
DELIVERED AT: Darwin
HEARING DATES: 26 and 27 September 2017
JUDGMENT OF: Judge Neill

CATCHWORDS:

Expert evidence; drawing any inference where evidence not called from a relevant witness; res ipsa loquitur.

Jones v Dunkel [1959] 101 CLR 298

Cooper & Ors v Westpac General Insurance Limited [2007] ACTCA 20

Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd [2012] VSC 99

REPRESENTATION:

Counsel:

Plaintiffs: Ms Sibley

Defendants: Mr Connolly

Solicitors:

Plaintiffs: De Silva Hebron

Defendants: Ward Keller

Judgment category classification: A

Judgment ID number: 027

Number of paragraphs: 78

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

No. 21703095

BETWEEN:

GEOFFREY KURT BYRNES and
TERESITA GENON BYRNES trading as
G & T PROPERTIES
Plaintiffs

AND

NICOLE FISHER
First Defendant
and
NAOMI KIM EVANS
Second Defendant

REASONS FOR JUDGMENT

(Delivered 23 November 2017)

Judge Neill:

Introduction

1. This case involves a dispute between landlord and tenant arising out of fire damage to residential premises. The Plaintiffs are the owners of those premises at 4 Diamond Way Durack (“the premises”). The Defendants jointly leased the premises pursuant to a residential tenancy agreement entered into on 17 July 2015 (“the lease”).
2. In the early hours of 27 August 2015 while the Defendants were absent overnight a fire caused damage to the premises.

Pleadings and Issues

3. The Plaintiffs claim the Defendants left candles burning unattended in the premises that night and were therefore responsible for the occurrence of the fire. The Plaintiffs claim the Defendants are liable to compensate them for their loss arising from the fire. They plead their case in contract relying on clauses 11 and/or 19 of the lease and in the alternative in tort, alleging negligence on the part of the Defendants.
4. The Plaintiffs' Statement of Claim was filed on 13 January 2017. They plead in paragraph 5 that the Police and the Fire Services came to the premises, extinguished the fire and conducted an investigation into the cause of the fire. The Defendants admit this in paragraph 5 of their Notice of Defence filed 15 February 2017.
5. The Plaintiffs plead in paragraph 7 as follows:

“7. The Investigation revealed the Fire resulted from accidental or negligent conduct by the First and Second Defendants which was a breach of the Agreement.

PARTICULARS OF BREACH OF THE AGREEMENT

- (a) the Fire originated from the area the TV cabinet was located in the lounge room area;*
 - (b) the only source of ignition that could be identified by the Investigation was the remains of candle holders;*
 - (c) the First and Second Defendants informed the Investigation:*
 - i. the three candles were burning in the candle holders on a set of timber draws (sic) prior to their departure from the Property;*
 - ii. they were unable to recall whether the candles were extinguished or not when they departed the Property.*
 - (d) the principal (sic) res ipsa loquitor (sic) is relied upon.*
6. The Defendants plead in response in paragraph 7 of their Notice of Defence as follows:

“7. As to paragraph 7 of the Statement of Claim the Defendants:

- (a) deny that the Fire resulted from their accidental or negligent conduct;*

- (b) *say that the Investigation only established candles as a possible source of the ignition of the Fire because of the incidental presence of the remains of candle holders on or about the remains of the TV Cabinet/set of drawers located in the lounge room;*
- (c) *say that they recall extinguishing the candles prior to their departure from the Property although they could not be 100% certain that they had extinguished the candles or if one of the candles had reignited after blowing it out;*
- (d) *say that their usual practice was to extinguish candles prior to departing the Property;*
- (e) *say that the remains of the candle holders were located on a section of the TV Cabinet/set of drawers that was less extensively damaged by the Fire and where they have not burnt through;*
- (f) *say that the cause of the Fire is more consistent with an electrical fault;*
- (g) *say that it is for the Plaintiff to establish that a Fire of the type which occurred does not ordinarily happen without negligence and that the Plaintiff bears the onus of establishing its case on the balance of probabilities.*

7. Accordingly it is common ground that the Defendants had been burning candles at the premises some unspecified time prior to their departure from the premises on the night of the fire. There is no other common ground on the pleadings relevant to the cause of the fire. The Defendants deny that they left the candles burning when they departed.

8. At the conclusion of the evidence, Mr Connolly for the Defendants conceded the pleaded quantum and the reasonableness of the repairs to the premises necessitated by the fire damage, together with the pleaded quantum of the loss of rental income while the repairs were being carried out, in the pleaded total sum of **\$83,597.14**.

9. Accordingly, the sole issues remaining to be considered by me are the causation of the fire and the Defendants' role in that, if any.

10. Clause 11 of the lease provides:

“The Tenant Agrees:

11. To replace immediately any damage caused to the Property by the wilful, accidental or negligent conduct of the Tenant or persons coming into or upon the property with his consent. Consent to the repair of any damage may be given or refused in the Owner's

absolute discretion and upon such terms as the Owner thinks is in the best interest in maintaining the financial and visual viability of the Property.”

11. Clause 19 of the lease provides:

“The Tenant Agrees:

19. To indemnify the Owner and Agent against:

- (a) any injury, loss or damage which may be caused to the Property;*
- (b) the death or injury of the Tenant, the members of his family or household, his guests and invitees; and/or*
- (c) loss or damage to the Tenant’s property or the property of other persons,*

resulting from use or misuse of the Property by the Tenant or other persons on the Property with his consent.”

12. Clause 11 makes the Tenant liable to “replace any damage” caused to the property by the Tenant’s conduct even if that conduct was “accidental” – on the face of it, irrespective of any intent or negligence. Similarly, clause 19 makes the Tenant liable to “indemnify the owner” against any “injury, loss or damage which may be caused to the property” resulting from the Tenant’s mere “use” of the property – again on the face of it, irrespective of any intent or negligence. The Defendants did not plead nor did they argue at the hearing any possible different interpretation of clauses 11 and/or 19 of the lease.
13. To succeed in their claim in contract, the Plaintiffs must prove on the balance of probabilities that the Defendants engaged in conduct and that the conduct caused/resulted in damage to the premises, within the meaning of clauses 11 and/or 19 of the lease.
14. To succeed in their claim in tort the Plaintiffs must prove on the balance of probabilities that the Defendants owed them a duty of care in respect of the premises and that the Defendants have breached that duty by their act or failure to act, and that breach of duty has resulted in loss or damage to the Plaintiffs.
15. I am satisfied and I rule that the Defendants did owe the Plaintiffs a duty of care in respect of the premises on the basis of their relationship of landlord and tenant.
16. I am satisfied and I rule that the fire at the premises on 27 August 2015 did cause damage to the premises and thus loss and damage to the Plaintiffs in the conceded amount of **\$83,597.14**.

17. The Plaintiffs will succeed if they can prove on the balance of probabilities that the Defendants left a candle or candles burning in the premises and that this caused the fire. The Plaintiffs bear the onus of proving this. No other potential cause of the fire was pleaded and no evidence was lead at the hearing of any such other potential cause.

The Evidence

18. The documentary evidence before the Court was all contained in a Court Book prepared by the Plaintiffs' lawyers and tendered by consent as **Exhibit P1**. The documents in that relevant to the causation of the fire and the Defendants' role in that include documents 4.1 to 4.4 prepared or at least presented by Police investigator Detective Sergeant Jackson Evans who gave oral evidence before me. It also includes documents 5.1 to 5.3 being a letter dated 2 October 2015 and an attached expert report of Peter van Boxtel, a Fire Investigation Manager with the NT Fire and Rescue Service, and 148 photographs taken by attending police of the aftermath of the fire at the premises and subsequently considered by Mr van Boxtel. Mr van Boxtel gave oral evidence before me. Finally, there are documents 6.1 to 6.7 prepared and presented by Loss Adjuster Mr Wade Eilersen who also gave oral evidence before me.

Detective Sergeant Jackson Evans

19. Documents 4.1 to 4.4 discuss the possible cause of the fire and its likely area of origin within the premises. Document 4.4 records attending police members' locating the apparent source of the fire "*...in the middle rear lounge room*" and noting the fire being "*... restricted to what appeared to be a TV/entertainment unit which was doused by members using vehicle fire extinguishers*". The remains of the entertainment unit were removed outside by attending police – document 4.2. Document 4.2 goes on to say: "*SCS members attended along with Crime Scene and VAN BOXTEL (FRS). Further examination of the entertaining unit identified the remains of a number of tea-light candles*". It is not apparent whether that identification of the remains of tea-light candles was made by attending police or by Mr van Boxtel. No oral evidence pertaining to this was given by police witness Detective Sergeant Jackson Evans.
20. Detective Sergeant Evans gave oral evidence he had a conversation with the Defendants on 27 August 2015, later on the day of the fire. He made no direct note of that conversation and he did not take a statement from either of the Defendants. He recorded in his Case Note – document 4.2 – as follows: "*...they suggested they left without putting the candles out because they were*

in a rush further stating that there are constantly candles burning in the house". Document 4.3 records Detective Sergeant Evans arriving that day at the premises at 9:00am and leaving at 11:10am. The Case Note shows that the Defendants arrived at the premises that day at 10:30am by taxi and that the Case Note records it was created at 12:26pm that same day. Accordingly I find that his conversation with the Defendants took place between 10:30am and 11:10 am and Detective Sergeant Evans recorded his summary of some of that conversation in his Case Note at 12:26pm, not more than one hour and 56 minutes later, possibly as short a time as one hour and 16 minutes later.

21. In evidence-in-chief and in cross-examination Detective Sergeant Evans had no independent recollection at the hearing, two years and one month later, of the precise words the Defendants or either of them had said to him. In chief, he recalled: *"They suggested that they often leave candles burning and it was a possibility that they'd left it burning or something of the sort"* – transcript 26 September 2017 at page 9.3. In cross-examination he conceded, allowing it at its "highest" that his record in the Case Note of what the Defendants had said to him had been his "general impression" at the time he made that record later on the day of the fire – transcript at page 9.6.
22. I cannot be satisfied on the balance of probabilities from Detective Sergeant Evans' record in his Case Note and his oral evidence on 26 September 2017 that the Defendants told him that they did in fact leave candles burning when they left the premises on the evening of 26 August 2015. Detective Sergeant Evans' failure to record precisely what the Defendants had said to him, his use of the word "suggested" in his almost contemporaneous Case Note, his choice of the words "suggested" and "possibility" and "or something of that sort" in his oral evidence, together with his concession in cross-examination that his Case Note was, at its "highest", only a "general impression" of what the Defendants had in fact told him, combine to make his evidence unreliable on this issue.

Peter van Boxtel

23. Mr van Boxtel gave oral evidence that he was a fire investigator with the Northern Territory Fire Services and he had been employed in that role since 2002. His report in document 5.2 in Exhibit P1 includes his statutory declaration of 4 October 2015 which sets out his relevant qualifications and experience as a fire investigator ("the report"). His expertise and the report were challenged by Mr Connolly for the Defendants at the commencement of the hearing but after hearing argument I ruled that Peter van Boxtel was an expert in the field of fire investigation and I admitted the report into evidence where it was received as part of Exhibit P1.

24. Mr van Boxtel attended the premises on 27 August 2015 at the request of police, to conduct a fire investigation. He concluded in his covering letter dated 2 October 2015 – document 5.1 - which accompanied the report as follows: *“A fire investigation was conducted and concluded the area of origin was the TV cabinet located in the lounge room area. The only source of ignition that could be identified was the remains of candle holders.”*
25. The report is set out in a numbered point form. It includes background information from other sources and from Mr van Boxtel’s own observations of the state of the premises, and his conclusions.
26. Under the heading *“4. Building External Observations”* the report lists:
 - “4.1 Nil signs of fire or smoke.*
 - “4.2 An entertainment table was located on the rear verandah*
 - “4.3 The table had been involved in fire.”*
27. Under the heading *“5. Building Internal Observations”* the report contains two photographs. The first is taken of a verandah outside the premises and shows a low lying rectangular prism, obviously fire damaged, which was identified as the TV/entertainment unit referred to by police in document 4.4 referred to in paragraph 19. above. The second photograph is taken inside the premises in the “middle rear lounge room” from where police had removed the smouldering TV/entertainment unit, as stated in document 4.4 above. This photograph shows a square burned patch about the width of a standard doorway on one side of the lower half of one wall with evident smoke and heat blackening of the wall rising from the top of the square and spreading out to the left hand side as the smoke reached the ceiling. Under this heading the report lists:
 - “5.1 Smoke damage to the majority of the structure.*
 - “5.2 Fire has been contained to the rear entertainment room.*
 - “5.3 Fire was contained to a small portion of the wall on the western side of the room.”*
28. Under the heading *“6. Path of Travel”* the report lists:
 - “6.1 Fire originated on the entertainment table.*
 - “6.2 Fire and smoke the (sic) travelled upwards on the wall.”*
29. Under the heading *“7. Area of Origin”* the report lists:
 - “7. Entertainment table.”*
30. Under the heading *“8. Point of Lowest Burn”* the report lists:
 - ‘8.1 Entertainment table top.’*
31. It is difficult for me to accept the statement in 8.1 that the point of lowest burn was the top of the entertainment table. This is because the second photograph

under the heading “5. *Building Internal Observations*” referred to in paragraph 27. above depicts a blackened, and apparently burned, square area of wall starting at the skirting board at floor level and not at a height appropriate to the top of the entertainment table. Photographs 55 to 58 in document 5.3 show this even more clearly. I do not know whether Mr van Boxtel could have explained or clarified this apparent discrepancy; he does not do so in documents 5.1 or 5.2 and he was not asked about this in his oral evidence before the Court.

32. Under the heading “9. *Point of Origin*” the report lists:

“9.1 *Entertainment table.*”

33. Under the heading “10. *Source of Ignition*” the report lists:

“10.1 *Candles located on top of entertainment table.*”

34. Under the heading “12. *Additional Information*” the report lists:

“12.1 *A number of candle holder remains were located at the point of origin.*”

“12.2 *The occupants advised that they left the candles burning when they left the structure* (emphasis added).

“12.3 *The candles were located in the area of origin.*”

35. Under the heading “13. *Conclusions and Comments*” the report lists:

“13.1 *Ignited candles were left in the room on top of the entertainment unit* (emphasis added).

“13.2 *It is my opinion that radiant heat transfer (sic) onto other combustible materials and ignited creating the fire.*”

36. Mr van Boxtel expanded on this in his oral evidence. He confirmed his opinion stated in the report that the source of ignition of the fire was candles burning on top of the entertainment table which was against the wall in the rear entertainment room – transcript 26 September 2017 at page 12.1. He identified from the photographs in document 5.3 what appears to be the remains of a glass candle holder in the vicinity of where the TV/entertainment unit had been located before it was removed to the verandah – transcript at page 16, and photographs 115 to 118. He also tentatively identified the remains of a holder for a tea candle – transcript page 16.1 (“*I dare say that would be a holder for the tea candle*”), and photograph 116.

37. I note that these are the only reasonably clear photographs of candle holders among the 148 photographs in document 5.3 and while they appear to depict two candle holders of different types in the vicinity of where the TV/entertainment unit had been situated before it was removed to the verandah by police, there is no photographic or other physical evidence identified by Mr van Boxtel establishing that those two candle holders had in fact been on top

of the TV/entertainment unit before the fire, as stated in 10.1 and 13.1 of the report.

38. However, in his oral evidence Mr van Boxtel did purport to identify the remains of a third candle holder, said to be depicted in photographs 93 to 107 of the TV/entertainment unit located on the verandah when the photographs were taken. He said in describing what he had observed among the burned objects on top of the unit: *“There’s also remains of glass that appeared to me at the time to be a candle holder and, yeah, like I said, remains of a television”* – transcript 26 September 2017 page 14.8. I cannot myself identify those remains of a candle holder with any certainty from those photographs but I accept that Mr van Boxtel has the advantage of me – he did personally inspect the table at the time and he has considerable experience as a fire investigator. As against that, he incorrectly identified the burned remains of a CD player as the burned remains of a TV – see later in these Reasons.
39. Mr van Boxtel explained that he had examined power points, power cords and power boards in the rear entertainment room and he had been able to rule those out as a source of ignition of the fire because they were undamaged – transcript page 13.9 and photographs 78 to 87.
40. In cross-examination Mr van Boxtel admitted that he had not personally spoken to the Defendants or either of them. His statement in 12.2 of the report that *“the occupants advised that they had left candles burning when they left the structure”* was therefore not based on any admission the Defendants had made to him. When asked the source of that advice he said: *“I would suggest it came from the police”* – transcript page 17.9.
41. I conclude that Mr van Boxtel’s evidence is of no assistance on the question of what the Defendants actually said about leaving any candles burning when they left the premises that night.

Expert Evidence

42. I have found that Mr van Boxtel is an expert in the field of fire investigation. He has investigated this fire and provided his report setting out his expert opinion on the cause of the fire. However, that is not the end of the matter.
43. In *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2012] VSC 99 the Victorian Supreme Court identified the matters essential to an expert’s report as follows:
 - i) The expert has specialised knowledge based upon his training, study or experience that permits that expert to give the opinion.
 - ii) The opinion evidence is wholly or substantially based on that specialised knowledge.

iii) The reasoning process is sufficiently clear to demonstrate that the witness has used his or her specialised knowledge.

iv) Facts and assumptions used by the expert witness are set out in the report.

v) The party tendering the expert evidence is able to establish the facts necessary to support the opinion.

44. It was put to Mr van Boxtel in cross-examination that his conclusion in 13.2 of the report “*that radiant heat transfer(ed) onto other combustible materials and ignited creating the fire*” depended upon his finding in 13.1 that the occupants had left candles burning on top of the entertainment unit. He agreed that it did, in part, but said he also took into account “*the evidence I saw at the scene, yes*” – transcript page 18.2.
45. The evidence which Mr van Boxtel saw at the scene enabled him to identify the room and the place in the room at the premises where the fire occurred. It enabled him to form the opinion that the fire broke out on an entertainment unit bearing an electrical device which he incorrectly identified as a TV. It enabled him to observe the remains of what might have been one glass candle holder on top of the entertainment unit. It enabled him to identify the remains of two different candle holders on the floor in the room where the fire broke out, in the vicinity of where the fire broke out.
46. However, none of this evidence at the scene establishes that there were candles (as opposed to one candle holder) on top of the entertainment unit, that there were candles in any of the three identified candle holders on the night in question, that such candles were burning, or the mechanism whereby any such burning candles caused the fire. Mr van Boxtel was informed by police that the Defendants had admitted that they had left candles burning in the premises (transcript page 17.9) and it is clear from his report – points 12.2 and 13.1 - that he took that as an established fact.
47. I am satisfied and I find and that Mr van Boxtel’s subsequent investigation of the fire and its cause was informed and constrained by his reliance on the police information.
48. If the Plaintiffs are not able to establish the fact necessary to support the opinion of their expert Peter van Boxtel as to the cause of the fire, namely that candles were left burning in the premises on 26 and 27 August 2015, then Mr van Boxtel’s expert opinion will be fatally undermined.

Wade Eilersen

49. Mr Eilersen was the author of seven reports tendered in these proceedings – they appear in Exhibit P1 as documents 6.1 to 6.7. Most of the evidence in those reports is relevant to the issue of damages and in view of Mr Connolly’s concession as to the quantum and reasonableness of damages I do not need to weigh that evidence.
50. Mr Eilersen also gave evidence of his opinion about the cause of the fire. In his first report document 6.1 he says he attended at the premises later on the day of the fire, 27 August 2015. He says at page 2.9 that he spoke to the tenants (the Defendants).
51. At page 3 in paragraphs one and two he says first that the electrical device on the entertainment unit was a CD player rather than a TV set. He says second that there was not a single entertainment unit; rather there was a small timber stand positioned on a set of timber drawers with a five stacker CD player positioned on that stand. He says third there were “*three tea light candles burning on a set of timber drawers*”. He says fourth: “*The CD player was energised at the mains power supply however; the CD stacker was turned off at the unit*”.
52. Mr Eilersen does not directly say how he knows these four things. When he arrived at the premises the entertainment unit and the electrical device on it had already been removed from the rear entertainment room to the verandah by the attending police. Clearly, Mr Eilersen could not have personally inspected the unit or candles burning on it *in situ* inside the room. He could not have inspected the connection between the CD stacker and the power point inside. He could have inspected the power point in the room and noted if it was turned on. He could not have determined whether the CD stacker was turned on or off “at the unit” because it was extensively damaged by the fire – indeed, it was so damaged that Mr van Boxtel had not been able even to determine the nature of the device; he had thought it was a TV – transcript 26 September 2017 page 14.8.
53. I conclude that Mr Eilersen’s comments in the first two paragraphs on page 3 of his first report document 6.1 are inadequately attributed, and that properly read and considered, he is referring back to the last paragraph on page 2 of his first report where he talks of advice from “*the two tenants, Ms Evans and Ms Fisher*”. I am satisfied and I find that in paragraphs one and two on page 3 he is summarising a conversation he had with the Defendants and he is not reporting the results of his own inspection and observations.
54. The Defendants when they spoke to Mr Eilersen on 27 August 2015 were apparently asked by him to recall whether they had switched the CD player off at the unit but left it turned on at the power point on the previous evening, not

something which in my view a person would ordinarily recall doing on a specific occasion.

55. Mr Eilersen reports in the third paragraph on page 3 of his first report as follows: “*As far as the tenants can recall, they extinguished the candles prior to their departure, though they could not be 100% certain of this or if one of the candles reignited after blowing it out*”.
56. Mr Eilersen went further than this in his fourth report document 6.4 at page 2.5. There he reported simply that the occupying tenants were not sure that they had extinguished all candles prior to their departure on the night in question. However, in his oral evidence on 27 September 2017 he conceded he had no new information from the Defendants or elsewhere between his first and fourth reports and that there was therefore no basis for the change in the way he reported the Defendants’ information to him about extinguishing the candles – transcript page 23.8.
57. I conclude that the evidence of Wade Eilersen, both documentary and oral, does not establish on the balance of probabilities that the Defendants told him that they had left candles burning when they left the premises on the evening of 26 August 2015.

The Defendants’ Evidence

58. The Defendants did not give evidence themselves and they called no evidence at the conclusion of the Plaintiffs’ case.

Jones v Dunkel

59. The rule in this frequently quoted case goes no further than to lead to an inference that where a witness does not give evidence their evidence would not have helped their case. In *Cooper & Ors v Westpac General Insurance Limited* [2007] ACTCA 20 at page 9 the ACT Court of Appeal discussed the rule as follows:

“In our opinion the rule in Jones v Dunkel cannot assist the respondent. The rule may permit an inference that the evidence of the witness in question would not have assisted the party who failed to tender it. It does not provide a basis for a further inference that the evidence of that witness would have been damaging to that party and cannot be used to fill gaps in the evidence or convert conjecture and suspicion into inference (emphasis added)”.

60. In the present case I rule that the failure by the Defendants to give evidence does not provide a basis for a further inference that their evidence would have

been damaging to their case, and that failure cannot be used to convert conjecture or suspicion into the inference that they left candles burning at the premises when they departed overnight on 26 August 2015.

Conclusion on Candles Left Burning

61. The Plaintiffs bear the onus of establishing that the Defendants left candles burning at the premises. For the reasons I have set out earlier, I am not satisfied on the balance of probabilities that the Defendants or either of them admitted to anyone that they in fact left candles burning at the premises when they went out on the night of 26 August 2015.
62. I am not satisfied on the balance of probabilities that there is any evidence, other than any admission by the Defendants, which separately establishes the Defendants or either of them in fact left candles burning at the premises when they went out on the night of 26 August 2015.

Evidence of any Other Cause of the Fire

63. No positive evidence was adduced of any possible source of the fire, other than burning candles. Mr van Boxtel did give evidence excluding power leads and a power board present in the rear entertainment room as a possible source. Photographs 78 to 87 in document 5.3 clearly depict these. They all appear undamaged. Mr van Boxtel gave evidence that these power leads and the power board gave no indication of any electrical fault – transcript page 13.9.
64. Mr Eilersen said in his first report that the CD stacker was turned on at the power point but turned off at the CD unit. I have already concluded that the source of this information was the Defendants, and I have expressed my scepticism that the Defendants would have been likely to remember that detail. I do note that photographs 86 and 87 clearly show the mains power point is switched on.
65. No evidence and no opinion, documentary or oral, were adduced before me as to whether an electrical fault in the CD player itself could have been the source of the fire and if so, whether the occurrence of such a fault would require the CD player also to have been turned on at the CD unit or whether its being turned on only at the power point could have sufficed.
66. No evidence was adduced before me of any opinion as to whether the CD player was too damaged by the fire to be examined usefully for any electrical fault. Nevertheless, photographs 88 to 91 and 93 to 107 strongly suggest that was the case – the destruction of the electrical device on top of the unit appears almost total.

Res Ipsa Loquitur

67. The Plaintiffs have pleaded in paragraph 7 d) of the Statement of Claim that: “*the principal (sic) of res ipsa loquitur (sic) is relied on*”. Spelling errors aside, this pleading needs to be addressed.
68. The Latin words *res ipsa loquitur* in a pleading context mean “the matter speaks for itself”. This has been described as “*not a distinct rule of law but an application of an inferential reasoning process from which negligence may be inferred*” – see *Cooper & Ors v Westpac General Insurance Limited* above at paragraph 17.
69. In paragraph 16 of the same case the ACT Court of Appeal adopted an analysis of *res ipsa loquitur* in these terms:
- “16. As His Honour observed, the principle of *res ipsa loquitur* may be invoked when three elements are established:
- (1) *there is “an absence of explanation” of the occurrence that caused the injury;*
- (2) *the occurrence was of the kind that does not ordinarily occur without negligence; and*
- (3) *the instrument or agency that caused the occurrence was under the control of the defendant*”.
70. In the present case the occurrence that caused the injury was the fire at the premises. Because I have not found that the Defendants left candles burning at the premises and there is no evidence before me of any alternative cause of the fire, there is an absence of explanation of that occurrence.
71. I am satisfied that the fire was an occurrence of the kind that does not ordinarily occur without negligence. Accordingly elements (1) and (2) are established.
72. However, I am unable on the evidence before me to identify the instrument or agency that caused the fire, which means I cannot find any such instrument or agency was under the control of the Defendants.
73. I rule that the principle of *res ipsa loquitur* is not applicable in this case.

Conclusion

74. I find that the Plaintiffs have failed on the balance of probabilities to prove that the Defendants left candles burning when they left the premises overnight on 26 and 27 August 2015.
75. I find that the Plaintiffs have failed on the balance of probabilities to prove that any conduct of the Defendants or any use of the premises by the Defendants, or either of them, have caused or resulted in damage to the premises within the meaning of clauses 11 and/or 19 of the lease.
76. I find that the Plaintiffs have failed on the balance of probabilities to prove any breach of any duty of care owed to them by the Defendants or either of them in respect of the premises.
77. Judgement is entered in favour of the Defendants against the Plaintiffs.
78. I reserve the question of costs and adjourn that question before me for submissions on 7 December 2017 at 9:00am.

Dated this 23rd day of November 2017

John Neill
Local Court Judge