REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 98 of 2011

CV 2008-04642

BETWEEN

ADRIANA RALPH
LEE RALPH

APPELLANTS/CLAIMANTS

AND

WEATHERSHIELD SYSTEMS CARIBBEAN LIMITED

RESPONDENT/ FIRST DEFENDANT

PETROLEUM COMPANY OF TRINIDAD
AND TOBAGO LIMITED

RESPONDENT/SECOND DEFENDANT

PANEL: **P JAMADAR JA**
R NARINE JA
G SMITH JA

APPEARANCES:

N Sharma, A Goddard,
appeared on behalf of the Appellants

S Roopnarine, N Jasmath-Sahadeo,
appeared on behalf of the First Respondent

R Kawalsingh, J Mohammed,
Appeared on behalf of the Second Respondent

DATE DELIVERED: 26th September, 2016.

I have read the judgment of Smith JA and agree with it.

P. Jamadar
Justice of Appeal

I too, agree.

R. Narine
Justice of Appeal

JUDGMENT

1. The Appellants were the tenants of the top floor of a 3 storey building owned by the 2nd Respondent (Petrotrin). The First Respondent (Weathershield) was doing hot work repairs on the roof of this building on 2/2/07.

At about 7.30 pm the First Appellant left the building and about 1 hour later she received a report that the building (including the apartment) was on fire.

The Appellants sued the Respondents in negligence for their losses. The pleaded case included the allegation of Res Ipsa Loquitur.

2. At the trial the First Appellant and a neighbour, one Malcolm Jeffrey who was the other tenant of the top floor of the building, gave evidence. The Appellant was cross examined. Mr. Jeffrey was not. Neither saw when the fire actually started but the trial judge accepted Mr.

Jeffrey's evidence to the effect that the fire started on the roof of the building at about 8.30pm (para 20).

At the close of the Appellants' case the Respondents made a no case submission and elected to call no evidence in support of their Defence.

3. The trial judge upheld the no case submission. The trial judge found that the Appellants failed to provide available evidence to substantiate the pleaded Particulars of Negligence. In his view this was not a case to apply the maxim Res Ipsa Loquitur.

The trial judge alluded to the fact that at pre- trial case management he had warned the Appellants that they needed to prove their case and in spite of this, they failed to produce the evidence from the Fire Services.

In summary, the trial judge upheld the no case submission because of the failure to produce "**Available Evidence**" at the trial.

We are of the view that in so doing the trial judge fell into error.

4. The maxim Res Ipsa Loquitur is not a rule of law but merely a latin maxim to describe the state of evidence from which an inference of negligence can be drawn. Specifically, it is called into play on the evidence "AS IT STANDS" at the close of a claimant's case and not on the evidence that might have been available before this.

Both parties accept the law as approved in the Privy Council case of **Ng. Chun Pui [1988] UKPC 7** which affirmed the dicta of Megaw LJ in **Lloyde v West Midlands Gas Board [1971] 2 All ER 1240.**

"***I doubt whether it is right to describe res ipsa loquitur as a 'doctrine'. I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff prima facie establishes negligence where : (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible,***

which act or omission constitutes a failure to take proper care for the plaintiff's safety. (Emphasis added)

I have used the words 'evidence as it stands at the relevant time'. I think that this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on balance of probability is that that cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety? If so, res ipsa loquitur. If not, the plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the defendant, given thereafter may rebut the inference. The res, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted."

5. The Respondents correctly conceded that requirement (i) was not in issue here as it was not possible for Claimant to prove precisely what was the act which set in train the fire.
Re requirement (ii); the quote shows clearly that the issue of Res Ipsa Loquitur was to be assessed on the evidence as it stood at the close of the Appellants' case not the evidence that might have been available, as the trial judge did.

6. What was the evidence as it stood at the close of the Appellants' case

(a) On admissions from the Pleadings, Weathershield did works on the roof of the apartment building which, consisted inter alia, of applying heat from a blow torch to install a bituminous water proofing membrane on the roof. Commonly referred to as bituminous hot works.

(b) Four hours later a fire originated from the very roof they had worked on

(c) We can infer that it was improbable that anyone else had access to the roof in the interim from the following facts:

i. The workmen of Weathershield themselves had to access the roof via a ladder from the ground and not by any alternative access;
ii. The workmen left the ladder lying on the ground when they had finished work for the day;

iii. Only the Appellants and Mr. Jeffrey and his family were the occupants of the top floor of the building and the roof was immediately above them;

iv. Neither of them accessed the roof during the four hours after Weathershield worked on the roof; and

v. The only evidence of an alternative access to the roof was Mr. Jeffrey's evidence that he offered the workmen access to the roof through his apartment.

(See generally **Lloyde v West Midlands Gas Board [1971] 2 All ER 1240 per Megaw LJ at 1247 a-e)**

7. On a common sense approach to the evidence at the close of the Appellants' case there was in our view at least a prima facie case to draw the inference that the bituminous hot works was the cause of the fire and that it was not usual for fire to occur on the roof of such a building unless Weathershield was negligent in carrying out the hot works.

8. On the evidence at the close of the Appellants' case there was a prima facie case that Weathershield at least had to answer.

Having elected to call no evidence to rebut the prima facie case, they are liable to the Appellants in negligence.

9. With respect to Petrotrin we note the Appellants' pleaded case at paragraphs 2, 3 of the Statement of Case. The Appellants alleged that Petrotrin was responsible for the maintenance of the building including the roof (para 3) and further, Weathershield was Petrotrin's servant or agent (See paragraph 2 of Statement of Case).

This pleading alleged that Petrotrin was vicariously liable for the Appellants' loss. In fact at the Court of Appeal the Appellants reiterated this as the basis of their claim against Petrotrin (See eg page 14 of Transcript).

10. Petrotrin's defence admitted paragraphs 2 and 3 of the Statement of Case. There was an express admission that Weathershield was Petrotrin's servant and /or agent.

Therefore there was no need for the Appellant to lead evidence on this issue.

Petrotrin are also vicariously liable for Weathershield's negligence.

11. It is interesting to note that Petrotrin's Defence also went on to raise allegations from which a court might have been able to infer that Weathershield was an independent contractor which may have absolved Petrotrin from vicarious liability. But this could not alter our findings because:

1. Petrotrin never expressly denied that Weathershield was its servant or agent

2. However, having admitted vicarious liability, it would have been interesting to see whether Petrotrin would have then been allowed to lead evidence at trial contrary to its express admission, to establish Weathershield as an independent contractor. Petrotrin's election to call no evidence made this possible defence academic and unnecessary.

12. Before ending it is necessary to make reference to 2 sub issues that arose on which we asked for addresses. However, I will deal with these in a summary manner since they do not affect our decision.

a) Whether it was possible to plead Res Ipsa Loquitur as an alternative case to negligence.

b) Whether vicarious liability was a "new case" that needed to be fully ventilated.

13. Re (a) The Pleading Point

It is contended that by virtue of the Statement of Truth signed by a claimant, it is no longer possible to raise alternative and contradictory facts in a Pleading. Hence in this case the Appellants could not have pleaded both Res Ipsa Loquitur and give particulars of negligence against the Respondents.

We disagree.

It is permissible to plead Res Ipsa Loquitur and give particulars of negligence. The Statement of Truth will not affect this.

In the very case cited by Counsel for Petrotrin, **Clarke v Malborough Fine Art Ltd [2002] 1 WLR 1731** at paragraph 30, Palter J stated:

"30. If one of the consequences of CPR Pt 22 is to exclude the possibility of pleading inconsistent factual alternatives then it will have achieved far more than the prohibition of dishonest or opportunistic claims. It will prevent even claimants in the position of an executor or liquidator from advancing alternative claims based on incomplete but plausible evidence in circumstances where they are not able to choose decisively between the rival possibilities

without access to the trial processes of disclosure and cross-examination. A defendant to an honest claim will be able to compel the claimant either to choose between seemingly viable alternatives or to abandon the claim altogether. The former will require the claimant to make a judgment on the basis of incomplete information and in relation to witnesses to whom he may not have ready access and will mean that in many cases the alternative claim will resurface at trial compelling the claimant to make a late application to amend with all the obvious difficulties which that will entail. I do not believe that this is what CPR Pt 22 was intended to achieve. Nor did I believe that it is what the statement of truth requires. If the alternative set of facts is clearly pleaded as such then the claimant is not necessarily stating that he believes both sets of facts are true. In the present case if Parts E1 a and E1b are properly expressed as alternatives leading to an allegation of undue influence then what the claimant is affirming is his honest belief that on the basis of either one set of facts or the other Bacon was the subject of undue influence in his dealings with the defendants. It is really a matter of drafting but unless it can be said that one of the alternatives is unsupported by any evidence and is therefore pure speculation or invention on the claimant's part he is entitled in my judgment to sign a statement of truth in these circumstances." (Emphasis added)

Alternative facts can be pleaded once they can be supported by evidence. The aim is to prevent a case in which the pleader has no honest belief or which he knows will not be supported by evidence. (See also, **Clarke v Malborough Fine Art Ltd [2002] 1 WLR 173**1 **at paragraph 20**)

In the present case it was not shown that the Appellants had no honest belief in the particulars alleged nor that at the hearing stage their case was not going to be supported by evidence; hence the alternative pleadings of Res Ipsa Loquitur and specific Particulars of Negligence were permitted.

14. Re (b) Vicarious Liability being a new case. This was clearly not so. The Statement of Case raised this issue in paragraphs 2 and 3. Petrotrin expressly admitted this allegation.

However, because of the way the case progressed, vicarious liability could not have been raised before the trial judge because of the no case submission at the close of the Appellants' case and the election of the Respondents to call no evidence.

There was never a waiver or concession by Claimants on vicarious liability. Neither did they abandon the case before us- see transcript page 14. In fact, Petrotrin also recognized that this was the case argued by the Appellants. See pages 63, 67, 69 of the Transcript.

15. In the circumstances this appeal is allowed. The Orders of the Trial Judge are reversed. The Respondents are ordered to pay damages to the Claimants to be assessed by a Master in Chambers. We will hear the parties on the question of Costs.

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G. Smith
Justice of Appeal