BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2004/0162
Between:

ALLEN WHEATLEY
d/b/a Wheatley Consulting
WESLEY PENN
d/b/a Accurate Construction
National Education Services Co. Limited

and

JOHN SCHULTHEIS
BETTITO FRETT

BVIHCV2004/0163
Between:

PEARLINE WILLIAMS -VERGEER

and

JOHN SCHULTHEIS
BETTITO FRETT

BVIHCV2004/0167
Between:

MALCOLM MADURO

and

JOHN SCHULTHEIS
BETTITO FRETT

Appearances: Terrance Neal with Kevon Swan of Mc Todman & Co. for the Claimants
Alan Griffiths Q.C. instructed by Michael Pringle of Maples and Calder for the First Defendant,
Lorna Shelly Williams of Farara Kerrins for the Second Defendant

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2005: November 29th, 30th
December 21st

JUDGMENT

(Negligence – fire in commercial building – damages to occupants and neighbouring vessels – duty of care owed by owner/landlord of building to occupants and owners of vessels ;

Res ipsa loquitur – whether Claimants can rely on this evidential rule in the circumstances of this case where cause of the fire unknown to Claimants)

[1] Joseph-Olivetti, J: Fire – the lifesaving gift to mankind for which compassionate Prometheus incurred the implacable wrath of Zeus and suffered cruel and inhumane punishment – is also a dangerous one as this case all too vividly portrays.

[2] Mr. Bettito Frett is a businessman of some considerable success as he owns a marina complex at Wickhams Cay, Road Town, Tortola, British Virgin Islands. In the early hours of 25th September 2004 a fire broke out in one of his commercial buildings and despite, it would seem, the best efforts of the BVI Fire Department, the fire went out of control and destroyed not only the building but four vessels which were moored at docks adjacent to or near the building.

[3] The Claimants, two of whom are owners of the boats (Ms. Williams- Verger and Mr. Maduro) and the other three, alleged tenants of the building, who conducted business thereon, by separate actions (which were later consolidated) brought suits in negligence against Mr. Frett for the damages they allegedly suffered to their property and businesses as a result of the fire. They also sued Mr. John Schultheis, another tenant of the building, as they allege that the fire originated in a part of the building used by Mr. Schultheis as a restaurant.

[4] Mr. Schultheis in turn claims against Mr. Frett an indemnity, in case he is found liable on the basis that the fire arose from want of repair of the electrical wiring in his portion of the premises. To support his claim he relies on a covenant in his lease agreement whereby Mr. Frett covenanted with him to maintain the electricals on the leased premises. Mr. Frett denies the claim.

[5] I must also say that Mr. Frett is counterclaiming for rent allegedly owed to him by Mr. Penn for the portion of the building leased to him. Mr. Penn denies liability.

[6] All parties filed pre-trial memoranda of the issues for determination in accordance with the Court's Order and with CPR 2000 Part 38.5. On review of these, the main issues arising can be grouped under the broad heads as set out in the next paragraph.

[7] Issues Arising:

1. Have the Claimants made out a case to answer against both or either Mr. Frett and Mr. Schultheis with particular reference to the maxim of res ipsa loquitur?

2. Are Mr. Frett and or Mr. Schultheis jointly and/or severally liable in negligence to the Claimants or any of them for any damages arising from the fire?

3. In the event that Mr. Schultheis is found liable is he entitled to be indemnified by Mr. Frett.?

4. Is Mr. Penn indebted to Mr. Frett for arrears of rent?

5 In the event that either or both of them are found liable, what damages if any, are each of the Claimants entitled?

Have the Claimants made out a case to answer against both or either Mr. Frett and Mr. Schultheis with particular reference to the maxim of res ispa loquitur?

A. Mr. Schultheis' submissions

[8] Mr. Schultheis prefaced his case before he led evidence by observing that the Claimants had not made out a case to answer, which was an intimation of the no case submission he made at the end of the trial.

[9] In a nutshell, his Learned Counsel says that the Claimants are relying on res ipsa loquitar and that they are not entitled to do so for three reasons. Firstly, that for the maxim to apply at all the fire must be shown to have originated in Mr. Schultheis' premises and that on the evidence they have not done so. Secondly, that the rule only applies where negligence is the prima facie cause of the event and here this is not so as electrical fires can start without negligence, for example, by rats or water damage. For this last proposition, which

he treated as a matter of law he relied on the dicta of Lord Wright M. R. in Collingwood v. Home and Colonial Stores Ltd[1]. Thirdly, that the doctrine does not arise where, as here, Mr. Schultheis raises a case of alternative cause, that is, one other than negligence. In this regard he too relies on his expert's opinion that the cause of the fire could not be determined but that the most probable source of ignition was an undetermined electrical failure[2]. (It is noted that the expert, Mr. Douglas Davidson had been retained by the insurance adjusters on behalf of Mr. Schultheis' insurers to investigate the fire and his report, which comprises his initial report to his principals and a response to certain questions posed to him by way of clarification on behalf of Mr. Schultheis, was admitted into evidence by consent as expert evidence without calling the maker).

B. Mr. Frett's Submissions

[10] Mr. Frett made a no case submission at the close of the Claimants' case and the court indicated that it would rule on this at the end of the trial. Perhaps, in retrospect, a ruling should have been made at that time as not having done so perhaps cast a rather unfair burden on Mr. Frett to hedge his bets by calling evidence. As it is, in the light of my ruling Counsel had little choice but to call evidence and renew her submission at the close of the trial.

[11] Essentially, counsel for Mr. Frett submits that the maxim of res ipsa loquitar does not apply to him because (1) the cause of the fire is known based on the expert's report. And, (2) counsel contends that Mr. Frett was not in occupation or control of the building at the relevant time - an element essential to the applicability of the maxim.

C. Claimants' Submissions.

[12] Needless to say the Claimants trenchantly resisted those submissions. In summary their counsel asserts that they are entitled to rely on the maxim as they did not know the cause of the fire, that a fire in these circumstances ordinarily results from the negligence of

[1] [1936]3 All E. R. 200 page - "The learned judge adds that a short- circuit might be caused by rats or water escaping and in other ways. His conclusion, therefore, is on the facts that the fire was an accidental fire."
[2] See Expert's Report – Answer to Question 1. page 3 at Tb. 2 of Report Bundle

someone and that Mr. Frett was the owner and in control of the building as even if he rented it out he still had a duty of care to maintain it and to ensure that no reasonably foreseeable harm resulted from any failure or omission on his part or on the part of someone for whom he is responsible. With respect to Mr. Schultheis, he says that the fire originated in the part of the building occupied by him and that he too was prima facie responsible for the fire.

[13] All the parties cited numerous authorities on the meaning of res ipsa loquitar, as set out in their written submissions and in the additional cases referred to at trial. As I understand it, there is no dispute as to what the law is; what they differ on is whether or not it is applicable to these particular facts.

[14] I accept Learned counsel for Mr. Schultheis' submission that the Privy Council case (emanating from Hong Kong) of NG Chun Pui and others v. Lee Chuen Tat and another[3] is the most recent and definitive and indeed the highest binding authority on res ipsa loquitar. That case concerned a road traffic accident. The facts were briefly that a coach skidded across the central reservation of a highway to collide with a bus traveling on the opposite carriageway causing serious damage - death and personal injuries and damage to property. The claimants at trial called no oral evidence but relied on diagrams of the accident and a report that the coach was in good repair and condition immediately prior to the accident and relied on their plea of res ipsa loquitar. The defendants gave evidence to the effect that the accident was caused when the driver of the coach took emergency action to avoid a collision with a vehicle which had suddenly cut in front of it. The court at first instance decided in the claimants' favour.

[15] Lord Griffiths, who delivered the judgment, stated at p. 300 K that the 'so called doctrine of res ispa loquitur' is no more than a Latin maxim to describe a state of the evidence from which it is proper to draw an inference of negligence. He went on to say that it is misleading to speak of the burden of proof shifting to the defendant where that maxim is invoked as the burden of proving negligence rests throughout on the plaintiff.

[3] [1988] RTR 298, delivered 24th May 1988

[16] He then explained the circumstances in which the maxim may be invoked. He said that where a plaintiff has suffered injuries as a result of an accident which might not have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the Court to draw the inference that on a balance of probabilities the defendant must have failed to exercise due care even though the plaintiff does not know in what particular respects the failure occurred. So, if the Defendant adduces no evidence, there would be nothing to rebut the inference and the plaintiff would have proved its case.

[17] He also approved of Erle C.J.'s dicta in Scott v London and St. Katherine Docks Co.[4] -

> 'But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.'

[18] And that of Megaw L.J. in Lloyd v. West Midlands Gas Board[5]

> "I doubt whether it is right to describe res ispa loquitur as a "doctrine." …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 of the plaintiff's safety. 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

[4] (1865) 3 H & C 596
[5] (1971) 1 W.L.R. 749 at 755:-

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 a balance of probabilities 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.' (Emphasis added.)

[19] Therefore, applying this learning, to my mind, to withstand the challenge of no case, the Claimants must prove at the close of their case, without taking into account the evidence called on behalf of the Defendants the following:-

1. that the precise cause of the fire is unknown to them ;

2. that a fire arising in a building in these circumstances is not normally something that would occur in the ordinary course of things without negligence on someone's part,

3. that either Mr. Frett and or Mr. Schultheis were occupiers of the building or in management or control of it at the relevant time .

4. that either Mr. Frett and or Mr. Schultheis owed a duty of care to them to ensure that anything they did or omitted to do in or about the building did not result in harm to them, that they breached that duty which breach resulted in damage to them.

[20] Did the Claimants know the specific cause of or event giving rise to the fire? The several Statements of Claim do not assert this neither did the Claimants' in their witness statements nor in their oral testimony at trial pretend to have any knowledge of the genesis

of the fire or its nature, they did not plead it was an electrical fire, just a fire. Each of them gave evidence to the effect that he or she arrived on the scene and met the building on fire. The Defendants did not challenge this or seek to establish that any of the Claimants had any knowledge as to the cause of the fire or precisely in what part of the building the fire started. In these circumstances it would be onerous to exclude the maxim simply because they could not identify the specific area of origin and I think it would suffice to show, as they did, that Mr. Schultheis was in occupation of a part of the building in which he operated a restaurant as without more the chances of a fire starting in the restaurant are more likely than in any other part of a commercial building. Further, what both Mr. Frett and Mr. Schultheis are seeking to do is to attribute knowledge of the cause of the fire to the Claimants via the expert evidence which forms no part of their case but is the cornerstone of Mr. Schultheis' case. This is not permitted in light of the learning in Lloyd. The Claimants have thus crossed the first hurdle.

[21] Is fire in a building such as the one in the present case ordinarily caused by negligence? The dicta in Collingwood is merely obiter and must be read in context. Lord Wright M.R. did not determine this issue but in the dicta relied on he was merely quoting the trial judge's finding of facts in the particular case before him which concerned an electrical fire which arose in a basement. Furthermore, and more importantly, the case was not at all concerned with the maxim of res ipsa loquitur. In any event, and with all due respect to the learned trial judge, it is common knowledge that in this part of the world rats do not ordinarily enter premises and cause damage resulting in fire, without negligence on someone's part for example, in failing to detect the presence of the rats in time, or failing to maintain the building thus making it possible for rats to enter or allowing the building to be kept in an unsanitary state. Likewise, water seepage does not ordinarily occur and cause damage leading to fire without negligence on someone's part. I therefore hold, in these circumstances, that prima facie a fire in a commercial building does not in the ordinary course of things happen if those in control use proper care.

[22] On the third issue I find that Mr. Frett was in management and control of the building although he shared such control to some extent with his tenants including Mr. Schultheis

and at least two of the Claimants - Mr. Penn and Mr. Maduro. He cannot escape by saying the he was only the landlord as the evidence of the Claimants is that he rented out parts of the building, thus in the ordinary course of things he would have retained responsibility for common areas and he occupied part as an office. Furthermore, under the Registered Land Act Cap.229, section 52(c) the law implies in every lease, save where it is expressly provided otherwise, a covenant on the part of the landlord where part only of a building is let, to keep the roof, main walls and main drains and the common passages and common installations, in repair. And, Charlesworth and Percy on Negligence 7th Edn. para. 7-09 is instructive as it bears this out. The landlord is regarded as the occupier of those areas over which he has retained such control and the control need not be entire or exclusive. I therefore find that both Mr. Frett and Mr. Schultheis were in control of some areas of the building and in all the circumstances they were properly sued.

[23] On the question of duty of care, the law is clear. The categories of negligence are never closed. One owes a duty of care to one's neighbour, that is, to anyone who one can reasonably foresee would be damaged by one's acts or omission. Here, on the Claimants evidence one can readily infer that both Mr. Frett and Mr. Schultheis, knew or ought to have known of the presence of other persons in the building carrying on business there and that boats were moored in close proximity to the building and the nature of those persons' presence, whether as tenants or licensees or mere visitors is irrelevant. I have no doubt that in these circumstances each of the Defendants owed a duty of care to each of the Claimants.

[24] To sum up on these issues, at the close of the Claimants' case they have established that Mr. Frett is the owner of the building, that he has rented out part of the building to several tenants, occupies part himself and as landlord by implication of law retains control over common areas and common installations. They have established that Mr. Schultheis operates a restaurant on the first floor and that fire broke out in the building and caused damage to them. They do not know the cause of the fire or in what precise part of the building the fire originated.

[25] Accordingly, having regard to this evidence and to my finding about the prima facie cause of fires in the ordinary course of things in these circumstances, I hold that at the close of the Claimant's case, the Claimants have properly raised the inference that the fire which they allege caused damage to them was caused by the negligence of either Mr. Frett and or Mr. Schultheis or on the part of someone for whom either or both was responsible .In other words that they can rely on the rule of res ipsa loquitar as they have pleaded. Therefore the no case submissions fail. The Court can now go on to consider whether the evidence adduced by the Defendants rebut the inference of negligence.

Mr. Schultheis' Case

[26] I deem it useful to begin with the evidence of his expert witness. The expert called by the First Defendant determined that the fire occurred at approximately 7.23 A.M in the Spaghetti Junction Restaurant (Mr. Schultheis restaurant which comprises the Bat Cave also) and that although the fire department was called shortly after the fire was discovered, due to multiple equipment failures the fire grew out of control and heavily damaged the entire structure of the building and several boats. He found that the restaurant was unoccupied at the time as it had been closed for the season. He gave details of the equipment left in operation in the restaurant at the time of the fire.[6] This is in accordance with the evidence given on this by Mr. Schultheis.

[27] The expert's opinion, which has not been challenged by the Claimants, is that the exact cause of the fire could not be determined and that the most probable source of ignition identified in the area of fire origin was an undetermined electrical failure associated with the wiring shown in photos Nos. 96 and 97[7].

[28] The expert found that the fire originated low behind the bar of the Bat Cave, in and around the floor area. However, he could not determine whether the fire started above or below the flooring or sub-flooring materials but he stated that based on his investigations showing

[6] See Sections 1, 11.1 and 3 of Report of 11th Jan. 2005- First Report.

[7] See answer to question 1 to be found at page 3 of the Report of 18th Oct. 2005 – second Report and the second part of his answer to question 7 at page 4 of Second Report.}

electrical wiring attached directly to the underside of the combustible floor material, the potential for a fire ignition either under the floor or at an opening in the floor existed.[8]

[29] The expert found a wire which showed signs of abnormal electrical activity in the area of fire origin. He identified this wire as a potential ignition factor. However, he went on to say that he could not determine the exact location (above the floor or below the floor) and the exact circuit or electric panel to which it was connected. See answer to question 5 at page 3 of the Report of 18th Oct. 2005. He did find an electrical panel among the debris but he stated that Mr. Schultheis reported that the restaurant had been re-wired when he started the business and that there were newer style electric panel boxes in a storage closet just inside the entrance to the restaurant. (This tallies with the evidence given by Mr. Schultheis) (See Answer 6 to be found at page 4 of the Report of 18th Oct. 2005.)

[30] Another important finding of the expert is as to the seriously poor state of the electrical wiring in the building generally, code violations and the potential areas of concern associated with that. Counsel for the Claimants justifiably referred to that evidence as "evidence of an electrical nightmare". Some of the photographs he took (see photos 31 and 43 to 51 inclusive) are eloquent - they bear out his findings that the electrical wiring in the entire building fell below the accepted standards.[9] He also explained in the second part of his answer to question 7 that if a fire started in a hidden space at ceiling level in the lower portion of the structure, especially by an opening it would vent gases and heat upwards and fire progression would continue in that direction.

[31] Having regard to those findings, which I accept, I have no hesitation in holding that the fire was electrical in nature, that it originated low in the area of the Bat Cave and that the most likely cause was due to some fault developing in the electrical wiring of the building which precipitated the fire which fault was attributable to improper wiring or poor maintenance of the electrical wiring in the building.

[32] Now, did either of the Defendants have the responsibility for ensuring that the building was properly wired and if so was that Defendant negligent in carrying out that responsibility?

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[8] See answer to question 2 to be found at page 3 of the Report of 18th Oct. 2005.
[9] See Answer 7 to be found at page 4 of the Report of 18th Oct. 2005 and page 5 of the Report of 11th Jan.

[33] On the evidence I find that Mr. Frett as owner of the building and landlord had the overall responsibility to ensure the electrical wiring in his building was properly installed and properly maintained. Mr. Schultheis, having taken on the responsibility of re-wiring his portion of the premises shared that responsibility with Mr. Frett in respect of his premises. However, I accept his evidence (as it was not controverted by the Claimants and was supported in part by the expert, and Mr. Frett), that he re-wired his premises at the commencement of his lease in on 26th May, 1999, using persons he believed were competent and that his premises had a separate supply from the other portions of the building. The supply came from the meter outside the building which had connections to a breaker panel located in his utility closet. The wires ran from the meter up to the ceiling level of the Bat Cave, ran along the ceiling beams and then down to various electrical points, none being located lower than about 2 feet above the floor.

[34] This last finding to my mind eliminates any real likelihood of the fire having started above the floor in the Bat Cave and I find, based on this evidence in conjunction with the evidence of the expert referred to earlier that the fire most likely began under the floor of the Bat Cave rather than above and that Mr. Schultheis had no responsibility for electrical wiring underneath his floor. This was Mr. Frett's responsibility as imposed on him by law. I therefore find no negligence on Mr. Schultheis' part either in the wiring on his premises or in him leaving any electrical equipment in operation when the restaurant was closed which gave rise to the fire. The expert report clearly rules out any real possibility of the fire being in any way connected with that equipment.[10]

[35] With regard to the evidence of the electrical shortage in his bar as given by Mr. Maduro and which he did not dispute, I accept his evidence that this was in January, 2004 and not in August as Mr. Maduro testified and that he immediately called an electrician to attend to it and that this incident which did not amount to a fire had no bearing on the fire with which we are concerned. I say the same about the fire in the meter outside the building. Mr. Schultheis says and I accept as it was not controverted and accords with the normal

[10] See Experts Report of 11th Jan. pages 6 and 7.

manner in which electricity is supplied by the utility companies that that meter was the responsibility of the electricity company and that personnel from that company came and attended to it and that he himself had his electrician check it as well afterwards. The case against Mr. Schultheis is therefore dismissed with costs on a prescribed costs basis pursuant to CPR 2000 part 65.5. It follows then that it is not necessary for me to go on to consider his claim for an indemnity against Mr. Frett.

Mr. Frett's Case

[36] The gist of Mr. Frett's evidence on his liability for the fire is that he is the owner and landlord of the building and that he became aware of the fire at about 7.15 a.m. on the 25th September, 2004. He denies that the fire was due to any negligence on his part and denies any loss or damage suffered by the Claimants. He stated further that there was no fault in the electrical wiring and that it was in good repair and that he too has suffered loss as a result of the negligence of the fire department.[11]

[37] However, he gave no details of the qualifications of the persons who did the wiring or of dates of inspections or type of maintenance carried out. In short, he gave no particulars. As the rule of res ipsa loquitar applies, to displace the presumption, evidence merely of the general care he has taken is not sufficient.[12]

[38] Mr. Frett was allowed to expand on his statement at trial and to comment on the Claimants' and Mr. Schultheis' evidence. He gave oral testimony to the effect that he was aware that Mr. Schultheis made extensive renovations and changes to the electricals on the premises rented to him, that he built a deck for Mr. Schultheis and that one year prior to the fire he hired a qualified electrician to do work in the dance area and in the outside bar. He also said the electrician examined the entire building to determine if there was sufficient power as he was hoping to install a new panel board. He said that he was not aware of the "fire" in the bar or in the meter and that Mr. Schultheis had not reported any of those incidents to him. I accept that part of his evidence about Mr. Schultheis not

[11] See his witness statement Tab 7 of bundle of witness statements.
[12] See Charlesworth and Percy on Negligence 8th Edn. para. 5-107 page 423.

making reports as Mr. Schultheis did say that he did not report these fires but that he thought that Mr. Frett had knowledge of them. Nothing turns on this however in light of the dismissal of the claim against Mr. Schultheis. It is noteworthy that Mr. Frett stated the specific purpose of the examination by the electrician but did not say that the electrician examined any of the wiring or in particular the wires in the ceiling of the ground floor tenants to ensure that they were properly installed and maintained and in compliance with the applicable codes. I take this omission to mean that this was not done.

[39] In cross- examination by the claimant he admitted that prior to that inspection in 2003 he last had an inspection 13 years earlier when the building was constructed. In re-examination he explained that the building was constructed in phases and that on completion of each phase an electrical contractor did the electrical works and that the relevant government department inspected the works. He also confirmed that every tenant had a separate meter. See also the Expert's Report 18th Oct. page 5 which bears out the tenants were separately metered.

[40] I regard his evidence on the whole as too general to displace the presumption that it was some negligence on his part which caused the fire. I have found that the fire was attributable to faulty electrical wiring and so I must be satisfied from his evidence that this was not due to any act or omission on his part in ensuring that the building was properly wired and the electricals maintained. It would have been extremely useful if we had heard directly from the electricians employed by him as to what exactly they were required to do or even had sight of a certificate from the relevant Government Department. Furthermore, the expert's finding about code violations and improper practices discovered especially as it relates to the condition of the wiring in the floor underneath the Bat Cave and his general observations on the state of the wiring cast grave doubts on the reliability of Mr. Frett's evidence. I therefore find that Mr. Frett did not take reasonable care to ensure that his building was wired in a safe and proper manner and that this failure on his part resulted in the fire which caused loss and damage to the Claimants for which he is liable.

Award of damages to Mr. Wheatley

[41] Mr. Wheatley claims to have been a tenant of Mr. Frett's. This is disputed. He carried on a business on the premises known as Wheatley Consulting which was engaged in general business consultancy. This business had been in operation for about 15 years prior to the fire. He shared an office with Mr. Penn and claims to have lost business for 10 days (25 September to 7 October) at $1,000.00 per day and half the cost of their office improvement, equipment and furniture said to be valued at $55,050.00 and relocation costs to Paraquita Bay of $10,000. Mr. Wheatley did not provide any documentary evidence to support this loss as he claims all documents were destroyed in the fire. This is most likely. Nevertheless, he did give a detailed breakdown of the furniture etc and I do not find the values unrealistic. See letter to his lawyer at page 18 Doc. Bundle which list he testified was sent by his lawyers to the Defendants.[13]

[42] On whether he is a tenant or not, this is not really material as the claim is framed in negligence and I have found that Mr. Frett owed a duty of care to all persons whom he could reasonably foresee could be harmed by any of his acts or omissions in relation to the building. Mr. Wheatley is one of those persons. There is direct testimony from Mr. Frett that he knew Mr. Wheatley was on the premises although he claimed he did not know what he was doing there. See also his Defence para. 2 at Tab 14 of the Pleadings Bundle where he states that Mr. Penn permitted Mr. Wheatley to use the premises for business thus again showing his knowledge of Mr. Wheatley's occupation and the nature thereof. Mr. Wheatley's evidence which I accept is that he was in occupation since about – 2001 and that he shared the premises with Mr. Penn and that it is inconceivable that Mr. Frett could not have known of his presence. Further, I accept his evidence that he paid rent to Mr. Frett and that Mr. Frett never declined the rent. In all the circumstances, I find that he was a tenant of Mr. Frett's.

[43] In cross-examination he admitted that the daily amount of $1,000.00 claimed was gross revenue and that he paid a total of approximately $2,200.00 to $2,500.00 a month to his two employees at the time. Doubtless there are other costs incidental to a business such

[13] See para. 9 of his witness statement at Tab. 2 Witness Statement Bundle

as rent for example and maintenance of vehicles and or transport and accordingly I will make allowance for that by reducing his gross by 25% otherwise no serious challenge was posed to his special damages and on a balance of probabilities I find that he has proved his damages.

[44] I therefore award him damages as follows: - $27,525.00 being half the value of office equipment, furnishings and improvements; $7,500.00 as loss of profit for 10 days, and $5,000.00 for relocation expenses. I have awarded him half the amount claimed on relocation as I am not satisfied that that amount was established as he did not give a breakdown of the expenses or produce any documentary evidence which he ought to have had in his possession as it was after the fire but I accept that some expenses were incurred as it was not challenged. These amounts will attract interest at 5% per annum from the date the claim was filed until judgment; I think it equitable as this was a commercial venture. He is also to have his prescribed costs.

Award of damages to Mr. Penn

[45] Mr. Penn was a tenant of part of Mr. Frett's premises which he shared with Mr. Wheatley. He said that the initial tenancy arrangements were made by him on behalf of Mr. Wheatley and himself and that the tenancy commenced in or around February 2000. He carried on business on the premises as general building contractors in the name of Accurate Construction. The business was in operation for about 5 years prior to the fire.

[46] He testified that he lost the entire contents of his offices in the fire. He claims half the value of the equipment, furniture and fixtures, which expenses he had incurred equally with Mr. Wheatley. This amounts to $27,525.00. In addition, he claims loss of income of $20,000.00 being $2,000.00 per day at 10 days (25th to September to 7th October). I am satisfied that he has proved his loss in relation to equipment etc. and award him the sum claimed of $27,525.00. However, he was not cross-examined as to whether the $2,000.00 per day represented gross or net revenue but having regard to how the claim for Mr. Wheatley was presented I think it most likely that the figure represents gross revenue and will treat it as such.

[47] Undoubtedly, a business of this nature requires employees and has other necessary expenses like rent to enable it to earn income. I will as I did with Mr. Wheatley's claim make allowance for that by reducing the daily amount claimed by 25%. The award under this head will therefore be $15,000.00. Those amounts will likewise bear interest at the rate of 5% per annum from the date the claim was filed until judgment. He too is awarded prescribed costs.

Award of Damages to National Educational Services Co. Limited

[48] Mr. Wheatley gave evidence on behalf of this Claimant company of which he is a director. The company is a sub-tenant of Mr. Penn and Mr. Wheatley. Mr. Frett was fully aware of this. It carries on the business of booksellers and stationers and used its premises for the purposes of a warehouse for its stock in trade.

[49] Mr. Wheatley said that the Company's entire inventory stored on the premises was destroyed in the fire and placed a value on the stock of $10,000.00

[50] This evidence was not challenged. I am therefore satisfied that the company has established this loss on a balance of probabilities. I will award the sum of $10,000.00 as claimed together with interest at 5% per annum from the date of the filing of the claim, 29th October 2004 to date of judgment i.e. 21st December 2005 and prescribed costs.

Award of Damages to Ms. Williams- Vergeer

[51] Mrs. Williams-Vergeer's (Mrs. Williams) had a 17' Boston Whaler which was destroyed in the fire. She used it in her business which was that of selling souvenirs and other related items on a 7 day week on Norman Island. She, due to her financial circumstances, and in an effort to mitigate her losses purchased a second-hand boat 33 days after the fire. Unfortunately, after about 1½ months of use the boat broke down, it was uneconomical to repair it and she was eventually forced to give up her business altogether and to take up employment at her sister's ice cream parlour – La Dolce Vita -in July 2005. She now earns $1,200.00 per month or $50.00 per day. I do not find that she was unreasonable in trying to resuscitate her business before seeking alternative employment.

[52] Mrs. Williams is claiming the value of her boat and $200.00 per day which she says is an average figure as she used to make more than $200.00 per day during the season – December to June.

[53] Mr. Frett posed three main challenges on damages. First, that she chained her boat at the dock (she was the tenant of one of his mooring slips) without leaving him a key so that he was unable to free the boat at the time of the fire.

[54] I find this without merit as there is evidence from Mr. Maduro that his and other boats which were not so chained were destroyed in the fire, and evidence from Mr. Frett himself that when he got to the site the officers were preventing persons from accessing the building and that in any event he was busy trying to clear his own offices to deal with the boat. Accordingly, this act on her part did not cause or contribute to her loss.

[55] Secondly, Mr. Frett says that she ought to have obtained alternative employment earlier to mitigate her loss. The onus is on Mr. Frett to show that she acted unreasonably – See Barrow, J. as he then was at para. 58 of Cyrus Claxton v Dawson.[14] There is no evidence of this.

[56] Thirdly, Mr. Frett contends that she is only entitled to loss of use up to the time of purchase of the replacement boat and not thereafter as the purchase amounted to a new cause. Doubtless, had Mrs. Williams not bought another boat she would have been faced with allegations of failure to mitigate and now having bought a boat, which proved unworkable in the end, she is taxed with novus actus interveniens. This cannot be right. Purchasing a second–hand boat is the very thing one would have expected her to do to mitigate her losses. She did not buy say a helicopter. Accordingly her action was not unreasonable and so does not break the chain of causation because it did not work out. She is entitled to the costs of the replacement boat, which unfortunately she did not claim for and to loss of use from the date of the fire until judgment less the period of 1½ months during which the replacement boat worked and any wages she loss during that period having regard to her working season. I compute this to be approximately 7 working months from December

[14] BVIHC 2002/0180

2004 to May. 2005 i.e. 180 days less 45 days (period replacement boat worked) equal to 135 days @200.00 per day equals $27, 000.00 plus $7,200.00 being $150.00 per day for 48 days (the difference between what she is earning now and what she used to earn from her business) making a total on loss of use of $ 34,200.00

[57] Finally, on her claim for the boat including the engine, Mr. Frett says that the boat was five years old at the date of the fire and therefore its value could not be the same as at purchase (price paid was $10,000.00) and he queries the bill evidencing the value of the engine as that bill is dated after the fire and could obviously not be related to the engine in place at the time. Mrs. Williams attempted to explain this bill by saying that the date was wrong.

[58] I have no evidence from either Mr. Frett or Mrs. Williams as to diminution in value of the boat but it is logical that there would be some diminution in value from date of purchase to date of fire. However, I am mindful that where a chattel is wholly destroyed that one is entitled to its replacement value and no doubt to purchase the same boat now would be more costly. As there is no evidence of this I will award her the sum claimed of $10,000 for the boat and $7,359.00 for the engine, as it is obvious that the boat had to have had an engine, treating the disputed bill for $7,359.00 as evidence of replacement costs of the engine.[15]

[59] To sum up the award is as follows: - Loss of use $ 34,200.00; replacement value of boat and engine $17,359.00. In addition I award interest on those sums at 5% per annum from the date of the filing of the claim to date of judgment i.e. 21st December 2005 and prescribed costs.

Award to Mr. Maduro

[60] Mr. Maduro testified that he was a tenant of Mr. Frett's at the relevant time. Mr. Frett disputes this. He operated the business of boat chartering and connected activities from the premises and he had a fleet of boats numbering 3 which were all docked in Mr. Frett's marina obliquely opposite the premises as part of the rental arrangement. His tenancy was

[15] See Tab 14 of Pleadings Bundle

disputed but that is not germane to the issue as I have found that Mr. Frett owed all the claimants a duty of care in respect of acts or omissions done by him on the building. In the event I am wrong, I find that although initially a tenant who subsequently gave notice to quit Mr. Maduro did not leave but continued to pay rent which Mr. Frett accepted. On that basis he continued as a periodic tenant.

[61] Mr. Maduro testified that his business had been in operation for 5 years prior to the fire and that the entire contents of his premises and his whole fleet were destroyed in the fire. The nature of his business was such that he was engaged in several types of chartering with his own boats including bareboat rentals, fishing and snorkeling trips. In addition he was involved in the storage of boats and hiring out of boats for customers on commission. In his witness statement he stated that his vessels were valued at $119,000.00, equipment and office contents at $31,420.00 and that he lost monies he had spent to build a dock and office improvements for $7,500.00 and claimed loss of income from his business at the rate of $1,200.00 to $1,500.00 per day and continuing.[16] He expanded on his witness statement by giving evidence to the effect that two boats were insured and that from the proceeds of the insurance he opted to buy a bigger boat instead of replacing the two vessels. His evidence on the values of the boats and his loss of use varied significantly from that claimed but when taxed in cross- examination he explained that the values claimed reflected what he had been told by marine surveyors would be the costs of replacement. Unfortunately, he had no supporting documents which should have been made available .Further, he testified in chief that despite his best efforts he was unable to raise the necessary capital to restart his business and continues to lose income.

[62] I shall consider each boat separately. First, the Monza which according to the Bill of Sale produced dated 10/08/04 shows a purchase price of $37,000.00.[17] This was his latest addition to the fleet and it was not insured. He was directed to his statement of case in cross examination and asked to explain the discrepancy in the claim for the Monza. What I gleaned from his answer is that the amount of $38,000.00 stated in the particulars is the replacement value for the boat of which he was advised by his marine insurers.

[16] See his witness statement para. 11 at Witness Statement Bundle Tab 5
[17] See Document Bundle Tab 1 page 1

Unfortunately, he did substantiate that which in the circumstances is not particularly onerous. I will therefore award him $35,000.00 as replacement value for the boat which he had conceded at trial.

[63] He claims loss of use for the Monza of $200.00 - $250.00 per day net profit but admitted that the boat did not go out every day, sometimes did not go out for 2 – 3 days and that his work is seasonal December to July. He is clearly claiming loss of use of the Monza from the date of the fire to date of judgment. First, did he take reasonable steps to mitigate his losses? He did not approach his bank for a loan, something which at first blush struck the Court as unreasonable having regard to the profits he alleged he made from his business and to the fact that he had a long standing relationship with his bank. However, when pressed he explained that he already had a loan and no savings as he is building his home. This does not strike me as unreasonable and in any event, the legal position now is such that one can take account of the victim's financial position in assessing his loss and whether he acted reasonably or not[18]. I think that he is entitled to his loss of use for the entire period claimed which equates to approximately 8 working months or 128 days at $150.000 per day ($19,200.00).The award for loss of use then is $19,200.00. Interest is awarded on both amounts at 5% per annum from date of filing of claim to judgment.

[64] Second, loss of the 21' Contender, Sunset. This is a 21 ft fiberglass, centre consol open sport fisherman type with canvas top built in 1997 and powered by single 225 hp Johnson engine as described in his amended statement of claim.[19] He bought this boat in Puerto Rico for $18,300.00.[20] He said it earned $250.00 per day and that the boat worked on average 4 days a week during the season. He testified that he received $25,000.00 from his insurers for the boat and this is the best evidence of replacement value. The award for replacement value is therefore $25,000.00.

[65] On loss of use of Sunset and the Queen Anne, Mr. Maduro's evidence is that they were both insured and that he took a business decision to use the insurance proceeds to buy a new and bigger boat in January 2005 even though he explained that the bigger boat brings

[18] Lagden v.O'Connor [2003] UKHL 64 and see Barrow J in the Cyrus Claxton case at para.25 page 8.
[19] See Tab6 Pleadings Bundle
[20] See the document at Tab 1 page 2 of the Document Bundle

in less money than did those two. He therefore cannot claim for reduced loss of earnings after the purchase of the new boat as he admitted there was nothing preventing him from buying replacements boats. I will reduce his daily earnings figure by 25% to account for maintenance and award him $150.00 per day for Sunset for the months of December 2004 and January 2005 (32 working days based on a four day week.) This amounts to $4,800.00.

[66] Third, loss of the Mako - Queen Anne. This is a 25.5ft. fiberglass, centre consol T-top open sport runabout built in 1980. He said it earned $250.00 to $400.00 per day. Again, the vessel worked on average 4 days a week during the season. He is entitled to its replacement cost and to loss of use up to the purchase of the replacement boat. I am satisfied that he would have had some maintenance costs and though surprisingly, having regard to the length of time he was in that business, he was unable to give us an idea of those costs of any of the boats. Taking these factors into consideration the award for this boat is $30,000.00 replacement costs based on the amount recovered from the insurers, and $8,400.00 on loss of use for the working days in the working months of December, 2004 and January 2005 at $262.50 per day (the lower of the two figures stated with a reduction of 25% to reflect maintenance costs equivalent to $262.50 per day for 32 days).

[67] On the costs of building the dock and improvements to office, I will award him the sum claimed of $7,500.00 as I am satisfied that he did the work and that Mr. Frett did not contribute materials as he claimed.

[68] I am satisfied that he has proved his loss on equipment having regard to the nature of his business and award the sum of $31,420.00. Interest of 5% per annum is awarded on all sums from the date of filing the claim to judgment and he is to have prescribed costs.

Mr. Frett's Counterclaim against Mr. Penn

[69] On his counterclaim Mr. Frett is claiming $29,250.00 for arrears of rent. Mr. Penn did not give any evidence on this aspect of the case although he denied that he was so indebted. The breakdown of the claim is interesting. It states:

Rent due and owing from April 2002 to December 2002 9 months at $1,500.00	$13,500.00
Rent due and owing from January to December 2003 @ $750.00	$9,000.00
Rent due and owing from January to September 2004 @ $750.00 per month	$6,750.00
	$29,250.00

[70] Mr. Frett has not in his counterclaim explained the variation in the rent neither has he done so in his evidence at trial. Despite the fact that Mr. Penn omitted, as it turned out inadvertently, to address the matter in his witness statement and was denied leave to do so at the trial, Mr. Frett still has to satisfy the Court on a balance of probabilities that the money is owed as he claims. I am not so satisfied for the reason already adverted to as it strikes the Court as incredible that any businessman will allow a tenant to owe rent for approximately 30 months without taking steps to evict him and had it not been for the fire we are left to assume that this situation would have continued – this is just not believable. Further, I view Mr. Frett's eagerness to tell us from the stand that both Mr. Penn and Mr. Wheatley were at some point inmates at Her Majesty's Prison and hence his accommodation, as lacking in sincerity. His counterclaim is therefore dismissed.

[71] In conclusion to sum up, the Court orders as follows:

1. The claims against the First Defendant, Mr. Schultheis are dismissed. The Claimants to pay him costs on a prescribed costs basis under CPR 65.5;

2. Mr. Frett is liable in damages to each of the five Claimants and must pay to each, the following:-

    i. to Mr. Wheatley – $27,525.00 for loss of office equipment, furnishings and improvements; $7,500.00 loss of profit, $5,000.00 for relocation expenses with interest of 5% per annum from the date the claim was filed until judgment and prescribed costs

ii. to Mr. Penn - $27,525.00 for loss of office furniture, equipment and improvements; $15,000.00 for loss of income together with interest on those sums of 5% per annum from the date the claim was filed until judgment and prescribed costs;

iii. to National Educational Services Co. Ltd. - $10,000.00 for loss of inventory together with interest at 5% per annum from the date of the filing of the claim, 29th October 2004 to date of judgment i.e. 21st December 2005 and prescribed costs;

iv to Mrs. Williams - loss of use $34,200.00, replacement value of boat and engine $17,359.00 together with interest on those sums at 5% per annum from the date of the filing of the claim to date of judgment i.e. 21st December 2005 and prescribed costs;.

v. to Mr. Maduro - for the Monza - loss of use $19,200.00, replacement value $35,000.00; for the Contender Sunset – loss of use $4,800.00, replacement value $25,000.00; for the Mako Queen Anne - loss of use $8,400.00, replacement value $30,000.00; Equipment and office furniture $31,420.00, dock and office improvements $7,500.00 together with interest on those sums at 5% per annum from the date of the filing of the claim to date of judgment i.e. 21st December 2005 and prescribed costs;.

3. Mr. Frett's counterclaim against Mr. Penn is dismissed.

Rita Joseph-Olivetti
Resident High Court Judge, BVI