ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2008/012

BETWEEN:

LYNROY EPHRAIM
(trading as E & E SERVICE STATION)

Appellant

and

REGINALD WALLACE WILLIAMS

Respondent

Before:
The Hon. Mr. Denys Barrow, SC — Justice of Appeal

On paper:
Mr. David Dorsett for the Appellant
Mr. Loy L.A. Weste for the Respondent

2008: October 24.

Civil Appeal – Procedural Appeal – refusal of Master to set aside default judgment – res ipsa loquitur- whether defence has real prospect of success

On 8th February, 2008, the respondent, the claimant in the Court below commenced proceedings in the High Court against the appellant for damages for destruction of the respondent's bus by fire whilst attending at the appellant's service station. The respondent claimed that the appellant was liable in negligence or for breach of duty for the losses occasioned by damage to the bus. The respondent relied on the doctrine of *res ipsa loquitur*. The appellant in his draft defence denied all allegations of negligence and sought to refute the respondent's claim of *res ipsa loquitur* by contending that the fire was likely caused by a phenomenon known as static electricity which can be generated by any movement or friction that occurs in a parked vehicle, such as counting money in which activity the respondent was allegedly engaged or from latent residue from the cigarette lighter attached to the respondent's key ring acting as an igniting agent. The appellant therefore contended that the doctrine of *res ipsa loquitur* could not apply as it could not be said that there was no evidence as to why and how the fire started.

By letters dated 26th March and 3rd April, 2008 respectively, the appellant made attempts to obtain further information from the respondent with respect to the particulars of negligence alleged in his

statement of claim but these requests were denied on the ground of *res ipsa loquitur*. The appellant on 28th April, 2008 filed a notice of application requesting that the respondent be ordered to provide the further information required and for permission to file his defence on receipt of the requested information. On 29th April, 2008 before service of that notice of application, the respondent obtained default judgment against the appellant. The appellant applied to set aside this judgment. The Master refused to set aside the default judgment on the basis that there was no real prospect of the defence succeeding, it being purely speculative and awarded costs of $500.00 to the respondent. Against this decision of the Master the appellant has filed a procedural appeal.

Held: allowing the appeal, setting aside the default judgment entered on 29th April, 2008 and awarding the costs of the application in the High Court to the respondent and costs of this appeal to the appellant:

(1) Even if the maxim of *res ipsa loquitur* operates, if the appellant produces evidence from an expert that proves that either of the factual events asserted by the appellant was a probable cause of the fire, that evidence is capable of disproving negligence.

Grenada Electricity Services Ltd. v Issac Peters, Civil Appeal No. 10 of 2002 (delivered 28th January, 2002), applied.

(2) The master was wrong to treat the appellant's explanations as speculative because the appellant was asserting as facts, (1) that the respondent was counting money and generating static electricity whilst his vehicle was getting gasoline at the pump and (2) that the key was attached to a lighter which may have contained latent residue which acted as an igniting agent. The appellant was entitled in law to assert these facts, give details of them in witness statements and prove them at trial. Such a defence has a real prospect of success.

(3) The appellant should bear the costs of the application to set aside the default judgment because it was the appellant's fault that judgment was entered, since he did not file a defence or apply early enough after his second request to the respondent for further information was denied.

JUDGMENT

[1] **BARROW, J.A.:** This procedural appeal is brought by the defendant in the court below against the order of the master refusing to set aside the default judgment. By order dated 24th October, 2008, I allowed the appeal, set aside the default judgment, awarded costs of the application in the High Court to the respondent and the costs of this appeal to the appellant. This judgment provides the reasons for that decision.

Procedural History

[2] On 8th February, 2008, the respondent commenced proceedings in the High Court against the appellant claiming damages for the destruction by fire of the respondent's bus. On 25th March, 2008, counsel for the appellant wrote requesting an extension of time within which to file a defence, to which the respondent agreed. The following day the appellant wrote to the respondent seeking further information with respect to the pleadings at paragraphs 4 and 8 of the statement of claim and requesting that that information be provided within 21 days. By letter dated 28th March, 2008, the respondent refused the request for information on the grounds of *res ipsa loquitur*, which had been pleaded in the statement of claim. A further request for information was made by the appellant on 3rd April, 2008 and denied by the respondent by letter of 14th April, 2008.

[3] By notice of application filed on 28th April, 2008, the appellant requested that the respondent be ordered to provide the further information requested. He also sought permission to file his defence within 28 days of receipt of that information. On 29th April, 2008, before service of the notice of application had been effected, the respondent obtained judgment in default of defence against the appellant which was served on the appellant on 9th May, 2008. The appellant applied to set aside the judgment in default of defence on 13th May 2008, which application was heard on 3rd June, 2008.

[4] By a decision delivered on 5th June, 2008, the master refused to set aside the default judgment. It is common ground that the basis for the refusal was that there was no real prospect of the defence succeeding, it being, in the opinion of the master, purely speculative. The facts, as asserted by the parties, are set out below.

Factual Background

[5] The appellant drove into the respondent's service station on 20th October, 2003 to purchase gasoline for the passenger bus ("the bus") which he owned and operated. He parked the bus alongside pump number one, switched off its engine, ordered the gasoline and gave the key for the bus to the appellant's employee to unlock the gas tank. The appellant's employee then placed the gasoline nozzle into the respondent's gas tank and

commenced pumping the gasoline ordered into the tank. During this pumping operation and whilst the respondent was still seated in the bus, a fire broke out in the vicinity of pump number one and the bus. The respondent suffered no injury but the fire caused "extensive and irreparable damage"[1] to the bus.

[6] The respondent claimed that the appellant was liable in negligence or for breach of duty for the losses occasioned by the damage to the bus. It was alleged[2], in particular, that the appellant, his servants and/or agents: (i) failed to take reasonable and effective measures (whether by inspection, examination or otherwise) to ensure that there was or would be no risk of fire to the bus whilst at the pump; (ii) caused or permitted the bus to catch fire while being pumped with gasoline; and (iii) failed to take any or any adequate steps to prevent the bus from being destroyed by fire, once it had started. The respondent stated further that he would be relying on the doctrine of *res ipsa loquitur*.[3]

[7] As mentioned in paragraph 3 above, the appellant requested further information by way of the particulars of negligence alleged. In particular, the appellant sought clarification as to whether the respondent was counting money while seated in the bus and ordering gasoline and if so, whether the items of monetary currency being counted rubbed one against the other. The appellant further requested that the respondent state precisely what "inspection, examination or otherwise" ought to have been taken and was not taken by the appellant, his servants and/or agents which would have ensured there was no risk of fire; what the appellant, his servants and/or agents did to cause or permit the fire; and what steps the appellant, his servants and/or agents ought to have taken and failed to take to prevent the fire from destroying the bus, once it had started. As earlier indicated, the respondent did not provide the further information requested.

[8] The appellant, in his draft defence, denied all allegations of negligence. The appellant contended that he, his servants and/or agents, had not caused the fire and had done all that was reasonable to reduce the risk of fire. He argued that it was not possible to institute measures to ensure that "there would be no risk of fire" for there was always a fire risk with

[1] Paragraph 10 of the Statement of Claim
[2] Paragraph 8 of the Statement of Claim
[3] Paragraph 9 of the Statement of Claim

any combustible or flammable material. The appellant contended further that all reasonable measures to prevent the fire destroying the bus were taken, which included using a fire extinguisher and moving the bus from the pumps. The appellant further asserted that "his heroic efforts killed the fire."[4]

[9] In support of his denial of negligence and to refute the claim of *res ipsa loquitur*, the appellant contended[5] that the fire was likely caused by a phenomenon known as static electricity. He argued that static electricity can be generated by any movement or friction that occurs in a parked vehicle, including friction that occurs when money pieces are rubbed together in the process of counting; in which activity the respondent was allegedly engaged.

[10] At paragraph 8 of the draft defence, the appellant stated that a cigarette lighter was attached to the key ring which held the key for the gas tank. He stated that latent residue from the cigarette lighter may have been on the key used to open the gas tank. This residue, he contended, may have acted as an igniting agent, thereby causing the fire. The appellant stated therefore that the doctrine of *res ipsa loquitur* could not be relied on as it could not be said that there was no evidence as to why or how the fire took place.

Whether the defence has a real prospect of success

[11] As briefly alluded to in the appellant's draft defence[6], even if the maxim of *res ipsa loquitur* operates, if the appellant produces evidence from an expert that proves that either of the factual events asserted at paragraphs [9]1and [10] above was a probable cause of the fire, that evidence is capable of disproving negligence. This proposition has been clearly and authoritatively confirmed by Byron CJ in **Grenada Electricity Services Ltd. v Isaac Peters**.[7]

[12] It follows the master was wrong to treat those explanations as speculative because the appellant was asserting as a fact that: (a) the respondent was counting money while the

[4] Paragraph 8 of the Draft Defence
[5] At paragraph 7 of the Draft Defence
[6] At paragraph 9
[7] Grenada Civil Appeal No. 10 of 2002 (delivered 28 January, 2003)

gas was being pumped and (b) the key was attached to a lighter from which latent residue of an igniting agent may have come. The appellant is entitled in law to assert those facts, give details of them in witness statements, and prove them at trial. In my view, such a defence has a real prospect of success and that conclusion involves no comment on the factual strength or weakness of the appellant's case. It is for this reason I thought the appeal must be allowed.

Costs

[13] The appellant challenged the master's award of costs in the sum of $500.00 to the respondent. In my view the appellant should bear the costs of the application to set aside the default judgment because it was the appellant's fault that judgment was entered, since he did not file a defence or apply, early enough after the second request for further information was refused, for an extension of time. Even if the application to set aside judgment had succeeded it would have been right for the appellant to have borne the costs of that application.

[14] However, the respondent should bear the costs of the appeal since there is no reason in relation to the appeal to depart from the usual rule that costs should follow the event.

The Order

[15] The order entered on 24th October, 2008 is as follows:

> "1. The appeal against the order of the Master made on 5th June, 2008 refusing to set aside the default judgment entered on 29th April, 2008 is allowed.
> 2. The default judgment is set aside.
> 3. The appellant shall file his defence within fourteen (14) days of either the delivery of the further information sought from the respondent, if ordered or agreed, or the making of a decision of the High Court refusing the request for further information.
> 4. The costs of the application in the High Court to set aside the default judgment in the sum of $500.00 shall be paid by the appellant to the respondent.
> 5. The costs of this appeal in the sum of $2000.00 shall be paid by the respondent to the appellant."

Denys Barrow, SC
Justice of Appeal