BARBADOS

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

Claim No. CV 0271 of 2013

BETWEEN:

SONIA EVERSLEY **CLAIMANT**

AND

SANDY LANE HOTEL CO. LTD. **DEFENDANT**

Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court

Dates of Hearing: 2019: June 19

August 13, 14

October 15, 18, 22

December 16

Date of Decision: 2021 August 31

Appearances:

Mr. P. K. H. Cheltenham, QC in association with Ms. Keren D. Prescott and Ms. Yasmin Brewster for the Claimant

Mrs. Marguerite Woodstock Riley, QC in association with Mrs. Amanda Riley-Jordan for the Defendant.

DECISION

INTRODUCTION

[1] This matter is a very fiercely contested one, especially considering that the parties at all material times enjoyed the relationship of employer and employee.

[2] The parties are respectively, Mrs. Sonia Chase nee Eversley ("the claimant" or "Mrs. Chase") and Sandy Lane Hotel Co. Ltd. ("the defendant" or "Sandy Lane"). At the time of the accident described in the next paragraph, Mrs. Chase had been working at the luxurious five-star Sandy Lane hotel ("the hotel') for just over five years as a housekeeper.

[3] On 4 December 2010, Mrs. Chase reported that she was on active-duty cleaning one of the elaborately decorated doors of the hotel, when suddenly she heard a cracking sound. This sound signaled the unexpected fall of the marble from above and around the door frame. The claimant alleged that she used her right arm to protect herself from the falling marble and sustained injury in the process

[4] When the claim was filed in 2013, Sandy Lane did not accept that the accident happened as related by Mrs. Chase, and requested her to prove the fact of the accident and the manner in which it occurred.

[5] Sandy Lane further argued that such injuries as Mrs. Chase may prove, were caused wholly or partly by her own negligence. Furthermore, Sandy Lane contended that the door frame was installed by reputable contractors and the company acted reasonably in entrusting the said installation to them and took reasonable steps to satisfy itself that the work was properly done.

[6] This matter commenced on the 18 February 2013 when the claimant filed a claim and statement of claim.

[7] The early case management and hearings were conducted before another judge of the High Court. On 15 October 2018, the matter first came before me and sometime in 2019 counsel for the parties indicated to me that they wanted a trial on liability only. Consequently, the proceedings have been confined to the issue of liability.

THE PLEADINGS

[8] On 18 February 2013 the claimant filed her claim form and statement of claim. At **paragraphs 3** and **4** of the statement of claim, the claimant sets out the factual and legal bases of her claim as follows:

> "3. On or about the 4th day of December, 2010, while acting in the course of her employment, the Claimant was carrying out her duties in guest room, number 417 on the seahorse wing. While she was bending cleaning a door made of glass and mahogany and which door separated the bedroom and bathroom, she heard a cracking sound above her. As soon as she looked up, she noticed that the area around the door frame, which is

made of marble, started to collapse from the top. On seeing this, the Claimant used her right arm to prevent the marble from hitting her head. Immediately after, the marble from the sides of the door frames started to collapse.

4. The accident was caused by the negligence of the Defendant its servants or agents by failing to provide the Claimant with a safe place of work and also by breach of the common duty of care under Section 4 of the Occupiers Liability Act, Cap. 208.

PARTICULARS OF NEGLIGENCE AND BREACH OF STATUTORY DUTY

(i) Failing to provide or maintain a safe system of work;

(ii) Failing to take any or reasonable care to ensure that the Claimant would be reasonably safe during her course of employment;

(iii) Failing to take any or any adequate care for the safety of the Claimant;

(iv) Exposing the Claimant, while she engaged upon her work, to a risk of damage or injury from the falling marble of which the Defendant knew or ought to have known.

(v) Failing to take suitable and sufficient steps to prevent, so far as was reasonably practicable, the fall of the marble from the building so that it would not fall and strike the Claimant.

(vi) Causing or permitting the ceiling to be or to become or to remain in an unsafe and dangerous state, in that marble was likely suddenly the fall therefrom;

(vii) In the circumstances, failing to discharge the common duty of care to the Claimant in breach of the Act.

(viii) Failing to engage competent contractors and to effectively supervise and manage the installation of the marble."

[9] The defendant did not admit the facts of the claim and requested the claimant to prove the same.

[10] At **paragraphs 4**, **5** and **6** of the defence, the defendant sets out its defence in the following terms:

> "4. It is denied that the accident was caused by the negligence of the Defendant its servants or agents by failing to provide the Claimant with a safe place of work or by breach of the common duty of care under Section 4 of the Occupiers Liability Act, Cap. 208 as alleged in paragraph 4 of the Claimant's Statement of Claim.
>
> 5. Further or alternatively, such injuries, loss and damage, as the Claimant may prove were wholly caused or contributed to by the Claimant's own negligence.
>
> **PARTICULARS OF THE CLAIMANT'S NEGLIGENCE**
>
> i. Failing to take any appropriate care for her own safety.
>
> ii. Failing to keep a proper lookout;
>
> iii. Failing to take any other sufficient steps to avoid the falling material;
>
> iv. Failing to observe the falling material.
>
> 6. In further answer to paragraph 4 of the Claimant's Statement of Claim it is averred that the said door frame was installed by a reputable independent contractor and the Defendant acted reasonably in trusting the said installation to

them and took reasonable steps to satisfy itself that the work was properly done.

PARTICULARS

i. The marble architraves and linings were provided by Architectural Craftsman USA and installed by AL Habtoor Marble, form Dubai. They were selected by the construction management company Brown and Root and CRSS Constructors Inc. Companies with very high reputations and experience.

ii. This marble detail exists throughout the hotel in all rooms, there had been no previous incidents before nor any incidents since and the Defendant would not have reasonably foreseen such an event. Further, the Defendant's property is regularly inspected and maintained."

THE ISSUES

The issues that arise for consideration are:

1. Whether the defendant's contention that the accident was caused or contributed to by the claimant's negligence has been established;

2. Whether as an occupier of the premises the defendant has discharged its common duty of care pursuant to Section 4 of the Occupiers Liability Act, Cap. 308;

3. Whether as an employer of the claimant, the defendant discharged its duty to provide a safe place of work and a safe system of work.

THE EVIDENCE

[11] Mrs. Chase filed a witness statement on 31 July 2017, and also gave oral testimony to amplify the statement. Additionally, Doran Prescod and

Anderson Chase gave witness statements and oral testimony in support of her case.

THE CLAIMANT'S EVIDENCE

[12] In her witness statement Mrs. Chase gave an account of the accident. She stated at **paragraphs 2**, **3** and **4** thereof:

> "(2) On the 4th day of December, 2010, I went to work as usual at Sandy Lane Hotel. My shift started at 1 o'clock in the afternoon and ended at 9:30 in the night. I was sent to work on guest room number 417 on the seahorse wing to prepare for departure/arrival.
>
> (3) Around 4:10 p.m. I went alone into room 417. I started by stripping the room. This includes taking off sheets and removing towels. After this was done, I started to clean the sliding door which separates the bedroom from the bathroom. This door is made of wood and its frame is made of marble.
>
> (4) While I was bending cleaning the bottom of the door, I heard a loud, cracking sound. I looked around to see where it was coming from only to see the marble falling above me. It fell so quickly that all I could have done was to raise my right hand to stop the marble from hitting my face or my neck. The marble was extremely heavy. I recall screaming at the top of my voice."

[13] In her oral evidence Mrs. Chase gave similar details of the accident but she also gave an account of what she considered to be the system of work with which she was obliged to comply.

She said:

> "… The first thing I do with this incident, there was a departure so I have to check the safe. It is not my job to check the lights, that is for the engineers. When there's a departure or arrival I check the room and make it ready. I can't say what happens after. I clean from the patio back down. If I see broken glass I have to report it. If a glass has a chip and things like that. When we finish cleaning the Supervisor comes in to make sure everything is in the room for the guests…I know in September the room is painted and drapes are changed. That is more of a general cleaning. I can't take down drapes. They are heavy…"

[14] Mrs. Chase came over as a very credible witness and there was no doubt that she described an accident that occurred in circumstances in which she could have done nothing to prevent it.

EVIDENCE OF ANDERSON CHASE ("MR. CHASE')

[15] Mr. Chase is the claimant's husband. He was married to the claimant in 2015. He is an important witness because he has been employed by Sandy Lane since 2005. He also worked in the housekeeping department as a care attendant.

[16] His evidence confirmed that the door from which the marble fell was *"made of wood with a piece of glass but you can't see through it"*. There are *"runners at the top"* of the door and there is *"marble on both sides and on the top of the door, the frame."*

[17] Mr. Chase also testified in cross-examination that cleaners, engineers, I.T personnel, and supervisors checked and prepared the rooms.

[18] Mr. Chase essentially supported the later evidence of defence witness, Jo-Ann Roett that various persons and departments would have been responsible for the inspection and maintenance of the rooms.

THE EVIDENCE OF DORAN PRESCOD ("MS. PRESCOD")

[19] Ms. Prescod was tendered as an expert witness. In her testimony she admitted that she had not visited the rooms at Sandy Lane and had assumed that the door was attached to the marble so that the marble would be disturbed every time the door was opened.

[20] Apart from this error which occurred because of lack of familiarity with the rooms at Sandy Lane, Mr. Miles Weekes, the expert witness for Sandy Lane, for the most part, appeared to agree with most of her opinions.

[21] Mr. Weekes did confirm also that a horizontal strip of marble would have been joined by the two vertical strips in the door frame. According to Ms. Prescod, there would be a possibility of lippage (movement of the tiles) which could occur at the joint.

[22] Mr. Weekes also agreed with Ms. Prescod that marble was a very heavy material and the type of adhesive used was important.

[23] Ms. Prescod explained that the marble was very heavy. She also said that marble tiles could move. She put it this way:

> "Yes many a time. We call it lippage. The tile slowly walks forward. You see evidence of this in the grout lines. The grout falls out. The tiles are no longer flush. One protrudes ahead of the other, whichever tile is blown. Once that one falls, the rest will tend to fall with it. It is heavy and puts pressure on the other pieces."

[24] Ms. Prescod gave her opinion on what caused the marble to come down. She said:

> "They ignored the signs - grout line coming down and lippage. Constant knocking when the door opens and closes. It will come down. It is clear in my mind that wasn't enough support. Because of that, the tile fell. If that one falls the others will fall."

THE DEFENDANT'S EVIDENCE

[25] The defendant's evidence was given by Jo-Ann Roett, the director of Finance, Risk and Compliance of Sandy Lane and Miles Weekes, an expert witness with several decades in construction.

[26] Jo-Ann Roett ("Ms. Roett") said that she has been employed with Sandy Lane since 2001 and that she has been *"involved in project meetings, renovations, maintenance and engineering, all aspect of the Hotel." M,*

[27] She explained that the marble architraves and linings were provided by Architectural Craftsmen USA and the marble from Dubai. These companies were chosen by the construction management companies that managed the redevelopment at Sandy Lane Hotel between 1998 and 2001. She said that these companies were of *"high reputation and experience".*

[28] At **paragraphs 6** to **9** of her witness statement Ms. Roett gives the main particulars of Sandy Lane's defence to the claim. She stated:

> "6. The marble in and on the doorway was installed for several years and is in all guest rooms throughout the hotel. Within the guest rooms there are marble doorways in the door to the bathroom, the frame of the bath, the doorway to the shower, the doorway to the toilet, the doorway from the foyer to the room and the doorway to the bathroom. There are 112 rooms in the Hotel all with marble doorway features; 11 of those rooms are two-bedrooms, 6 are one-bedrooms suites, 95 are regular bedrooms. There are therefore over 700 doorways with marble linings in the Hotel. There had been no previous incidents nor any incidents since of marble falling from the doorways or marble linings.
>
> 7. Sandy Lane has always prior to 2010 and thereafter ensured it employed competent and experienced staff to ensure the property is maintained to the highest standards. This includes a Director of Maintenance whose responsibility included maintaining the physical plant and fixtures, ensuring the safe and efficient operation of engineering services within the Hotel; to include routine maintenance, perform regular inspection of Hotel facilities and actively manage the maintenance team.
>
> Our rooms are regularly inspected by our engineering department and as part of their routine inspection the marble pieces in all the rooms are checked to make sure they are not cracked or loose or have moved away from the grout. This included tapping the marble to ensure it did not shift or a hollow noise was heard.
>
> 8. Prior to every room arrival every room is checked. There is a checklist for housekeeping, the engineering department and IT department. Inspections are undertaken by supervisors and the duty manager will also do spot checks. A copy of the checklist is attached hereto and marked "JR1".

> 9. Housekeeping staff are also required to follow written standards and procedures which include the cleaning of the marble walls, the use of marble safe cleaner. Housekeepers are also required to report defects to engineering, including all broken, loose, faulty items. A copy of housekeeping procedures are attached hereto and marked "JR2".

[29] It is significant to note that although "JR1" and "JR2" detail a comprehensive checklist and written standards and procedures respectively, neither of them includes anything that is aimed at checking or upholding the integrity of the marble.

[30] Ms. Roett in direct examination testified that there have been no issues of marble falling from any door before or after the incident.

[31] When asked whether she would consider that Sandy Lane has taken all reasonable steps to ensure that the room was safe for guests, Ms. Roett replied in the affirmative.

[32] Ms. Roett also testified that each room at Sandy Lane undergoes a full in-depth maintenance as part of what it designated the "Care Programme".

[33] She said that each room is taken out of use for 3-5 days. The drapes and upholstery are removed and cleaned and the engineering department do in-depth maintenance.

[34] Finally with respect to inspections, Ms. Roett mentioned that Richley International is contracted by Sandy Lane to do mystery shopper visits once

or twice per year. A copy of the inspection sheet for Richley International was attached to her witness statement. This is a comprehensive sheet which includes a check that all doors and frames are "in good condition, free of wear and tear and damage".

[35] In amplifying her statement, Ms. Roett corrected a statement made by Ms. Chase that the door from which the marble fell was made of wood, without a glass panel.

[36] Ms. Roett testified that the door to the bathroom is likely to be used more frequently than the one from the foyer to the bedroom, where the marble fell. She also said that that the bathroom door was bigger and heavier.

[37] Ms. Roett also gave testimony that the sliding doors in the room were not attached to the marble, and therefore the statement that was made (by Ms. Prescod) that the sliding doors were attached to the marble is incorrect; so too was the statement that the marble would be disturbed every time the door was opened.

[38] Counsel for the defendant completed the amplification of Ms. Roett's evidence with the following exchange:

> "Q: Ms. Roett, to move on, a comment was made about the air condition in the room. Are these turned off when the guests are not there?

A: No sir.

Q: And would there be any extreme fluctuations in temperature of the room at any time?

A: No sir.

Q: So finally Ms. Roett, you would consider that Sandy Lane has taken all reasonable steps to ensure that the room was safe for their guests and staff?

Q: Yes sir."

[39] In cross-examination, Ms. Roett appeared to be very uncomfortable. Additionally, I found her evidence to be unreliable. At no point in cross-examination, which went on for just over an hour, did she appear lucid, comfortable or believable.

[40] Some of the responses to questions were not credible. Other responses suggested an indifference which was, in and of itself, also unbelievable. After all this was a situation in which a work colleague had been injured in unusual circumstances.

[41] She was unable to recall whether she was at work when the incident occurred.

[42] She could not remember the reason for the marble falling.

[43] She did not know how long the room was out of commission, following the disastrous event.

[44] After agreeing that the contractors who installed the marble to refit room 417 would have provided a report, she later said that she "can't recall" reading the report. *"I agree that a report should have been done but I do not know if it was done"*, she said.

[45] She could not recall whether there was a bill for repairs to the marble from external contactors over the last year.

[46] Apart from her failure to recall, Ms. Roett said she never visited room 417 after the accident, even after the repairs were effected.

[47] Here are some of the exchanges that occurred between Ms. Roett and Mr. P.K.H Cheltenham QC:

> "Q: Did you at anytime at all, visit that room?
>
> A: At what point in time Sir?
>
> Q: Anytime at all prior to the re-marbling or re-tiling of the room?
>
> A: I did not use the to take note for the rooms I went into, Sir.
>
> Q: Sorry?
>
> A: I did not take a mental note of the rooms that I had visited, Sir.
>
> Q: Were any external consultants brought in to look at this miraculous event? Well it is the first time it ever happened, so were any external contractors brought in for that?

A: Consultants or contractors?
Mr. Cheltenham QC interjects:
"I use the word loosely."
A: No, I just want to be sure. Contractors - Yes Sir, would have been brought in.

Q: And they were brought in to effect the marbling of the room?

A: Yes sir.

Q: But they gave no …. Provided no analysis to you as to what they found?

A: They may have, but I honestly don't remember, Sir."

[48] Counsel for the claimant made another attempt to find out what caused the marble to fall. A brief extract of that exchange follows:

"Q: But you subsequently found out the cause.

A: [Pause] I – pretty – I
Counsel interjects: "Yes"
A: I would hope so, yeah.

Q: You hope that you learnt the cause – you hope that you learnt the cause, but you've forgotten it right now?

A: I cannot remember right now, Sir."

[49] Ms. Roett who said that the marble was not expected to fall, admitted that quite a bit of marble came down.

[50] At no point in her testimony did she indicate that Mrs. Chase caused or contributed to her injury.

EVIDENCE OF MR. MILES WEEKES ("MR. WEEKES")

[51] Mr. Miles Weekes ("Mr. Weekes") an expert witness called by the defence, gave a witness statement which was admitted into evidence. At the time of filing the statement Mr. Weekes was a chartered quantity surveyor and construction project manager with over 35 years of experience in the construction industry in Barbados.

[52] Mr. Weekes testified that he was, in his capacity as a chartered quantity surveyor, contracted by the defendant for three (3) separate periods. These were: 1991 - 1992, for renovation works management; 1998 - 2003, for redevelopment works management; and 2011 - 2014, for mechanical service upgrades. These stints provided him with good knowledge of the design and construction of the hotel.

[53] Mr. Weekes stated that his 5-year stint between 1998 and 2003 related to a complete rebuilding of the hotel. The business which would undertake this endeavour was selected via competitive tender. The selected company was Brown & Root Building Co. This company, he said, was one of the world's premier construction management and building contracting firms; it was based in the U.S.A., and was a subsidiary of Halliburton Co.

[54] Mr. Weekes gave evidence that a "top" international construction management firm, named CRSS Contractors Inc. ("CRSS"), was selected to the complete rebuilding of the hotel via competitive tender.

[55] Mr. Weekes stated that, once CRSS ceased being construction managers, the defendant recruited a project management team spearheaded by an individual named Mr. Clive Conner. Mr. Weekes gave evidence that Mr. Connor is an experienced construction manager who has previous professional experiences with the British contractor Higgs and Hill, as well as construction work experience in Barbados.

[56] It is Mr. Weekes' evidence that room 417 is a standard guestroom located at the top of the Seahorse Block of the hotel. Its design is like that of the other thirty-nine (39) room in the Seahorse Block. The design is also like that of another fifty-six (56) rooms located in other blocks throughout the hotel. The hotel has one hundred and twelve (112) rooms in total.

[57] Mr. Weekes stated that the marble architraves and linings surrounding room 417's doorway were provided by Architectural Craftsman USA. He also testified that the marble was installed by a company named A1 Habtoor Marble from Dubai ("Habtoor"). According to him, these two (2) companies were selected respectively by Brown & Root Building Co. and CRSS. Mr. Weekes asserted that the defendant reasonably relied on the selection of

the Architectural Craftsman USA for the hotel's marble architraves and linings, and Habtoor for the installations thereof.

[58] Mr. Weekes testified that, on completion of the rebuilding efforts for the hotel, all the hotel's rooms were inspected before they were used by guests. Ordinary procedure called for Habtoor to request inspections of the completed installations. A member of the project management team would, following the completion of the inspections, sign off on the installations being completed properly. No further actions would be taken before the hotel's rooms were then handed over to the defendant's management for use by the hotel.

[59] Mr. Weekes stated that, once marble architraves and linings are installed, they do not require additional maintenance. Based on this statement, he asserted that the accident was not foreseeable.

[60] Furthermore, it is Mr. Weekes' evidence that he was not and is not aware of any other accidents in which marble at the hotel had fallen.

[61] Mr. Weekes countered Ms. Prescod's evidence that the runners to the sliding doors in room 417 were attached to the marble.

[62] Like Ms. Roett, Mr. Weekes testified that the runners were not attached to the doors and, therefore, the marble is not disturbed when the doors are opened.

THE CLAIMANT'S SUBMISSIONS

[63] Mr. P. K. H. Cheltenham QC, counsel for the claimant, filed written submissions on 26 November 2019 and 6 December 2019, respectively. Oral submissions were also made on 16 December 2019.

[64] Mr. Cheltenham's submissions can be summarised as set out in the paragraphs immediately following.

[65] The claimant's case is based on the common law tort of negligence, and more specifically on employers' liability and the responsibility of the employer to provide a safe system of work and a safe place of work.

[66] The claimant is required to establish three components of the tort of negligence. They are:

(a) the claimant must be the defendant's neighbour to whom the defendant owed a duty of care.

(b) the defendant must have breached the duty of care; and

(c) the claimant must have suffered damage as a result of the defendant's breach of duty of care.

[67] Mr. Cheltenham QC contends that the three ingredients of the tort of negligence have been established.

[68] Mr. Cheltenham QC sets out the legal arguments in support of the claimant's case at paragraphs 35 to 42 and 47 to 52 of his written submissions. His submissions addressed the defendant's liability as an employer; his liability

as an occupier, and the issue of contributory negligence. A summary is set out below:

Employers' Liability

(1) Since she was employed by the defendant and the incident occurred during the course of her employment, the claimant was the defendant's neighbour and was owed a duty of care. The defendant is deemed to have breached that duty if it is shown that the premises were not maintained in as safe a condition as a prudent employer, taking reasonable care, would make them. Equally, the defendant is deemed to have breached its duty if it is shown that a safe system of work was not devised at all or, if devised, the risks inherent in the working environment were not continuously assessed.

(2) The facts, as garnered from JoAnn Roett's testimony, indicate that the defendant carried out an annual Care Programme, which she classified as planned, preventative maintenance. She also indicated that the defendant's employees carried out inspections in accordance with a checklist. However, at the time the incident occurred, notwithstanding that marble was a dominant feature of the defendant's rooms, the checklist made no reference to inspection of the marble. The requirement to check the marble was only added to the checklist after the incident of 4 December, 2010. Despite her testimony that this incident was the first and only event of its kind, Ms. Roett never visited room 417, nor was she able to recall what was ultimately determined to be the cause of the incident.

(3) Mr.Weekes testified that once installed, marble required no maintenance other than for aesthetic purposes. He indicated that the installation of the marble at the defendant's premises was carried out by an external company, which was selected by an external contractor. While he stated that pursuant to normal procedure, a

project manager would inspect and sign off on an installation as being done properly, he conceded that he could not say whether this was done in every respect.

(4) While Mr. Weekes expressed the opinion that lippage could only occur at a joint and is more applicable to a scenario where there are lots of joints, his description of the placement of the marble in the room revealed that there was at least one joint – where the horizontal piece met the vertical one. There was no close-up of the area from which the marble fell. He also testified that he received no document which stated the cause of the incident.

(5) In her testimony, Ms. Prescod stated that the defendant ignored the signs which preceded the incident on 4 December 2010. Such signs included the grout line coming down and lippage. She opined that there was insufficient support for the marble. It was worth noting that no witness was called on behalf of the defendant who could testify as to how the adhesive was applied.

(6) Mr. Cheltenham QC submitted that the defendant failed to provide a safe place of work in breach of its personal duty of care to the claimant. It employed two sets of external contractors, placing reliance on positive reviews which the contractors received in the construction industry press. However, the defendant had little or no knowledge of the authors of these reviews or the motives underlying the publications. The evidence revealed that an external contractor selected the company which installed the marble. It also revealed that an external contractor, CRSS, was initially responsible for ensuring that the marble was installed properly. This duty devolved to the defendant's local management team when CRSS departed. But the evidence revealed that it was not known whether inspection of the proper installation of the marble was carried out in every respect.

(7) Counsel for the claimant submitted that the defendant failed to devise a safe system of work or to ensure compliance with that system, in breach of its personal duty of care to the claimant. While it executed a monthly Care Programme and formulated a checklist to be followed by employees as part its maintenance, the defendant ignored one of its rooms' most prominent features – the marble. Evidence led on behalf of the defendant revealed that while the checklist used prior to 4 December 2010 did not include a requirement to inspect the marble, the defendant had instituted a practice of tapping the marble. The institution of this practice suggests that the defendant had particular knowledge of some fact which made harm to the claimant more likely. In spite of this knowledge, however, no more than average precautions were taken with respect to the marble.

(8) Mr. Cheltenham QC contends that in all the circumstances as employer the defendant breached its personal duty of care and is liable in damages for the breach.

Occupiers Liability

(9) Mr. Cheltenham QC submitted that as an occupier the defendant may not be answerable for the danger presented by the falling marble if in all the circumstances, it acted reasonably in entrusting the installation of the marble to an independent contractor. However, it must be shown that it had taken such steps as it reasonably ought to in order to satisfy itself that the contractor was competent and that the work was properly done.

(10) Mr. Weekes' testimony was that the installation of the marble was entrusted to an external, independent contractor which was selected by one of the external project management teams hired by the defendant. However, while the defendant attempted to assess the competence of the project manager, no evidence was led on behalf of the defendant to demonstrate that it took any

steps to satisfy itself that the installer was competent. Similarly, no evidence was led on behalf of the defendant to demonstrate that it took sufficient steps to satisfy itself that the marble was installed properly in every respect. Indeed, Mr. Weekes admitted that he absolutely could not say whether the procedure for inspection and approval of the installation was followed in every respect.

(11) Mr. Cheltenham QC submitted that if it were reasonable to expect that the defendant would hire an expert to instal the marble, it ought to have been equally reasonable to expect that the defendant would hire an expert to inspect or maintain the marble. This was not done. Consequently, although they went about tapping the marble, they either overlooked or ignored signs in room 417, which were likely to have manifested themselves prior to the incident on 4th December, 2010.

(12) Mr. Cheltenham QC submitted that the *"defendant breached the duty of care owed to the claimant pursuant to section 4 of the* ***Occupiers Liability Act, Cap. 208*** *by failing to satisfy itself that the installer was competent, failing to satisfy itself that the marble was installed properly in every respect and by failing to ensure that any inspection or maintenance of the marble post installation, was carried out with the requisite degree of care and skill. Having breached the statutory duty of care as occupier of the premises, the defendant is liable to the claimant in damages for the injuries she suffered consequent upon that breach."*

(13) Contributory Negligence

In respect of contributory negligence Mr. Cheltenham, QC. said:

"The thesis advanced by the defendant that the claimant caused or contributed to her own injuries has not been established. The claim is completely without merit and devoid of legal or

> evidential support. Therefore, it is submitted that liability should not be apportioned."

THE DEFENDANT'S SUBMISSIONS

[69] Counsel for the defendant, Mrs. Marguerite Woodstook Riley QC gave written submissions on 29 November 2019, and orally on 16 December 2019.

[70] Mrs. Woodstock Riley QC submitted that the issues which the court must consider, are:

> (1) Whether the defendant has discharged the common duty of care under the Occupiers Liability Act Cap. 208; namely, has the defendant taken such care as in all the circumstances of the case is reasonable to see that the claimant was reasonably safe in using the hotel premises for the purposes for which she is permitted to be there?
>
> (2) Has the defendant discharged its duty to provide a safe place of work and a safe system of work?
>
> (3) If the construction of the marble in the doorway was faulty did the defendant act reasonably in entrusting the work to an independent contractor? And did it take such steps as it reasonably ought to in order to satisfy itself that the contractor was competent and that the work was properly done.?

[71] Mrs. Woodstock Riley QC answer the above questions in the concluding paragraphs of her written submissions which state at paragraphs 60 - 63:

> "60. After careful dispassionate consideration of the facts of this case and the law applicable to same it should be abundantly clear that the Defendant herein has complied with the common duty of care required under section 4 of the Occupiers Liability Act, Cap 208 of the Law of Barbados and its duty as an employer.

> 61. Further, the evidence in this case posited by Mr. Miles Weekes and Ms. Jo-Ann Roett in their witness statements and evidence in chief show that the Defendant at all materials times has provided not only a safe place of work but also a safe system of work which is often and routinely updated to continue to ensure same is always the case.
>
> 62. The Defendant acted reasonably and responsibly in entrusting the construction of the marble door frame to a reputable independent contractor with extensive international experience with projects of this magnitude in accordance with its obligations under the Occupiers Liability Act, Cap 208 of the Laws of Barbados.
>
> 63. As unfortunate as the Claimant's injuries are, there has been no evidence that the Defendants breached any legal duty bestowed on them. Though the Court may want to be empathetic, it is governed by the law when making its judgment. The facts support the submission that the Defendants have complied with all legal and statutory obligations and that the Claimant has not proved her case."

[72] Mrs. Woodstock Riley QC cited three cases in support of her submissions:

Shortall v Greater London Council 210 EG 25;

Gary McGivney v Golderslea Limited (2001) 17 Const. LJ 454 CA (CV. DIV);

Gray v The Admiralty [1953] 1 Lloyd's Rep. 14

[73] Mrs. Woodstock Riley QC also contended that the claimant has provided no evidence to support any breach of duty by Sandy Lane, whether as employer or occupier.

[74] Mrs. Woodstock Riley QC submitted further that the claimant's case rests on Ms. Prescod's allegations that the manner in which the door was hung was important.

[75] Ms. Prescod had said that:

> "The door which the Claimant identified is the door from the foyer to the bedroom. This is the only way into the bedroom. This door is used often. The door is pulled open from both sides. Hanging the door from the ceiling would place pressure on the marble. In addition, the constant pulling and tugging of this door would have created stress on the above marble holding the mechanism. There would be further stress if the door is pulled open aggressively. Every time the door is opened, the marble is being disturbed."

[76] This has been proven to be incorrect based on the evidence provided by Mr. Miles Weekes, which the court accepts.

[77] Finally, Mrs. Woodstock Riley QC also relied on the evidence of Ms. Roett that there is an abundance of marble features throughout the hotel and Mr. Chase, Mr. Weekes and Ms. Roett all agree that there have been no other incidents of marble falling.

THE LAW

Employers Liability

[78] At common law, employers have a duty to take reasonable care to ensure the safety of their employees.

[79] In **Wilsons and Clyde Coal Co. Ltd. v English [1938] AC5**, Lord Wright described this duty as three-fold:

1. a duty to employ reasonably competent staff;
2. a duty to provide safe equipment and materials;
3. a duty to provide a reasonably safe system of work.

[80] Although a duty to provide a safe place of work was not listed in **Wilsons and Clyde Coal**, it is now settled that the employers' duties extend to the provision of a safe place of work: see **Latimer v AEC Ltd. [1953] AC 643**.

[81] Therefore, in **Watson v Arawak Cement Ltd (No 958 of 1990 Barbados High Court (unreported)** the plaintiff was employed by the defendant as a general worker. He was deployed to work on a ship in control of a third party. When attempting to leave the ship at the end of the day's work, he fell from an unlit walkway inside the ship and sustained injuries. **Chase J** held that the defendant was liable because of its failure to provide a suitable means of egress from the ship and a failure to instruct him on the method of leaving the ship.

[82] In the instant case Mr. Cheltenham QC has submitted, that Sandy Lane has failed in its duty to provide a safe system of work and a safe place of work. It is therefore, these two duties that are relevant to this case.

Occupiers Liability

[83] Counsel for the claimant submitted that Sandy Lane has breached the common duty of care owed to the claimant under the **Occupiers Liability Act**.

[84] **Section 4** of the **Occupiers Liability Act** provides in part, as follows:

> "4. (1) An occupier of premises owes the same duty (in this Act referred to as "the common duty of care") to all his visitors, except so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and want of care, which would ordinarily be looked for in such a visitor.
>
> (4) In determining whether the occupier of premises had discharged the common duty of care to a visitor, regard is to be had to all the circumstances.
>
> (5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.
>
> (6) Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair or other like operation by an independent contractor employed by the occupier, the occupier is not to be treated without more as

> answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done."

CONTRIBUTORY NEGLIGENCE

[85] The defendant had pleaded that the claimant had caused or contributed to her injuries by her negligence. By the time written submissions were filed, the defendant submitted the following in full support of the pleadings in the defence:

> "It is conceivable that the claimant could have made some attempt to move out of the way in circumstances where she first heard a "cracking sound".

[86] Based on the testimony in the case, there is no evidentiary basis for considering that the claimant was negligent. I, therefore, do not propose to devote any further space in this judgment to this issue.

ANALYSIS AND DISCUSSION OF ISSUES

Finding of Material Facts

[87] Prior to embarking on a discussion of the issues, I think it helpful to outline my major material findings on the facts.

[88] My findings are:

1. Mrs. Chase was injured when going about her work. The marble architraves and door linings which framed the door

leading from the foyer to the bedroom of room 417 came crashing down unexpectedly.

2. No evidence was led by the defendant with respect to the cause of the collapse of the marble.

3. No evidence was led by the defendant with respect to actual maintenance inspection or upkeep of room 417. There was abundant evidence about checklists, the several layers of inspection, maintenance, and practice and procedures to ensure high standards at Sandy Lane. However, neither witness for the defence provided any direct evidence that anybody had visited the room prior to the fall of the marble, and had verified that they carried out any checks on the marble or any other aspect of room 417. In response to a question on cross-examination, Ms. Roett boldly declared that she did not make a mental note of the rooms she visited.

4. Although I am prepared to accept that until 2010, there was no case of marble falling of which Mr. Weekes or Mr. Chase was aware, I have not been similarly convinced with respect to Ms. Roett. In her evidence, she appeared to leave open the possibility that other incidents may have occurred.

5. I accept, on the evidence presented, that Sandy Lane did engage reputable contractors, one of whom employed Habtoor, who installed the marble.

6. I do not accept that prior to the incident in 2010, that any procedures or checks, such as tapping the marble or checking the grout, were done to discover whether the integrity of the marble was compromised. It is my finding that checks of this nature were instituted after the 2010 incident, most likely on the advice of the overseas experts who would have visited Sandy Lane after the incident.

7. Having not visited Sandy Lane, Ms. Prescod's theory as to how the accident had occurred was flawed to the extent that she felt that the grout was disturbed when the door was opened. However, her comments about lippage (i.e., movement of the tiles) and observing the grout lines seem to be a credible explanation for the fall of the marble. This view is supported by the fact that tapping the marble and inspection of the grout form part of the revised checklist after the accident.

8. In respect of the 2010 calamity, the facts that would explain the fall of the marble were in the control of Sandy Lane and the evidentiary rule 'res ipsa loquitur' would have been appropriate on the facts of this case. On this view, the mere fact of the marble falling suggested negligence in the defendant, who then had a duty to adduce evidence to show that it was not negligent. No such evidence was given by the defendant.

THE ISSUES

[89] Having decided that the accident was neither caused nor contributed to by the claimant's negligence, there are only two issues that arise for consideration. These are:

1. Whether as an occupier of the premises, the defendant has discharged its common duty of care pursuant to section 4 of the Occupiers Liability Act;

2. Whether as an employer of the claimant, the defendant discharged its duty to provide a safe place of work and a safe system of work.

Issue 1

Has the Defendant discharged its common duty of care?

[90] Having carefully considered the evidence, I hold that the defendant employed independent contractors of international repute by competitive tender. One of those independent contractors also employed a company of repute to install or oversee the installation of the marble.

[91] It is common ground between the parties that on 4 December 2010 when the claimant was struck by falling marble, she was an employee of the defendant, acting in the course of employment. Consequently, the defendant was a lawful visitor and was therefore, owed the common duty of care under the Occupiers Liability Act.

[92] Mr. Cheltenham QC submitted that Sandy Lane was required to specifically ensure that the installer of the marble was competent and the work properly done. He submitted further that this duty is not discharged by employing contractors of repute and a project manager, and since no evidence was led that Sandy Lane took any steps to satisfy itself that the installer was competent, it breached the common duty of care.

[93] In this regard Mr. Weekes did testify that there was a practice of inspection and signing off on the marble installation, though he could not say that this

was followed in every respect. When one considers that there were over 700 doorways containing marble, it is not surprising that Mr. Weekes could not verify that the accepted process was completed with every respect.

[94] I therefore hold, that the defendant acted reasonably and responsibly, in entrusting the construction of the marble door frame to a reputable independent contractor, in accordance with the Occupiers Liability Act.

[95] The marble, having been installed in 2001 or thereabouts, throughout the hotel, would have endured for about a decade, before any incidents occurred. In all the circumstances, therefore, I am holding that the claimant did not establish on a balance of probabilities that the defendant breached the common duty under the Occupiers Liability Act.

[96] Since it is my opinion that the discussion with respect to the duty of care for the safety of the employee at common law will ultimately determine liability in this matter, I will proceed to discuss the second issue.

Issue 2

Has the defendant discharged its duty to provide a safe system of work and a safe place of work?

[97] It is well accepted that the claimant has the responsibility to show that she was injured by a negligent act or omission for which the defendant is in law, responsible. This necessarily involves proof of a duty owed by the defendant

to the claimant, breach of that duty, and an injury to the claimant caused by the breach of duty. (see **Clerk & Lindsell on Torts 20th Edn.** at **paragraph 13** to **04**).

[98] In the case at bar, the fact of the relationship between the employer and employee, creates a duty of care. The employer has a duty to take all reasonable precautions to ensure the safety of the employee. The employer must provide a safe system of work and a safe place of work and not expose the employee to unreasonable risk.

[99] Moreover, the duty to provide for the safety of the employee is a non-delegable duty, and therefore in the context of an independent contractor, it would not be enough to assert that the employer fulfilled his duty by entrusting the task of installation of the marble to a contractor of repute. While the employer can delegate the performance of the duty to others, the employer remains responsible for its negligent performance (see discussion in **20th Edn. of Clerk & Lindsell on Torts at paragraph 13-06**.)

[100] It has been alleged by the defendant that the claimant has not provided any evidence to discharge its burden of proof in the case. However, I do not share that view. The determination of whether the claimant has discharged its duty depends on not only the evidence of the claimant, but the evidence of Ms. Prescod and any other supporting evidence in the case. Ms. Prescod has

provided a reason for the marble falling, which although partly flawed, because of lack of knowledge of the doors at Sandy Lane, gave an insight into what could have caused the marble to fall, by the focus on the possibility that the tiles may have moved, and the grout may have been deteriorating.

[101] The fact that the defendant subsequent to the 2010 incident, added the process of tapping the marble and inspecting the grout as part of its routine inspection, compels the inference that whatever the cause that was determined by the outcome of the investigation into the falling of the marble, it had something to do with the movement of the marble and the disintegration of the grout.

[102] I have therefore concluded that the claimant has provided enough evidence to prove its case on a balance of probabilities. Moreover, since the defendant has provided no evidence to show that in relation to room 417, it carried out the inspections and other procedures to ensure that the duty to look after the safety of the employees was being observed, it is very easy to find that the case in respect of employers liability has been established.

[103] Alternatively, as mentioned earlier, I am of the view that the facts of this case lend themselves to the application of the evidentiary rule of res ipsa loquitur. Indeed it is my view that the facts of the case raised a presumption of negligence on the part of the defendant which was not rebutted by Sandy Lane.

[104] In this regard, the evidence tendered by Mrs. Chase was enough to raise a presumption that her injury was caused by the negligence of the employer who had a responsibility to provide evidence to the contrary.

[105] It is my view, that in relation to room 417, the defendant sought to rely on general procedures and systems at Sandy Lane, without providing a scintilla of proof that these procedures and inspections were being observed.

Res Ipsa Loquitur

[106] Even though there was no plea of res ipsa loquitur and on the evidence, it was not urged on behalf of the claimant, it is a mere rule of evidence and need not be pleaded as a matter of law (**Bennett v Chemical Construction (GB) Ltd. [1971] WLR, 1579**) ("**Bennett**").

[107] In **Scott v St. Catherine Docks Co. (1865) 159 ER 665, 667**, **Erle CJ** propounded what has been accepted as the authoritive definition of 'res ipsa loquitor' in these terms:

> "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 defendant, that the accident arose from want of care."

[108] In the instant case there is no evidence as to how or why the marble fell. Experience suggests that marble will not fall unless there is negligence. The

process of inspection and protection of the integrity of the marble is entirely within the control of the defendant. It is my contention that on the facts, it having been established that suddenly and without warning, marble collapsed and fell on the claimant, the proof of those facts leads to an inference of negligence which the defendant must rebut by evidence that demonstrates that it was not as a result of lack of care on its part.

[109] In **Bennett**, the evidence for the claimant was that two heavy panels fell on him. The defendants called no evidence in rebuttal. The judge was unable to determine what specifically caused the panels to fall, but he concluded that they could only have fallen as a result of those working on the panels.

[110] Another example which I submit is reasonably analogous to the case at bar, is that of **Pearce v Round Oak Steel Works [1969] 1 W.L.R. 1491** ("**Pearce**")

[111] In **Pearce**, the plaintiff was injured at work when a 15 pound weight on a machine at which he was working fell on his foot. The weight was held by a bolt which broke because of metal fatigue which a routine inspection would have revealed. The plaintiff's evidence was that the machine was made about 1930 and bought by the defendants in 1959. The defendants had used the machine until the plaintiff's accident without any difficulty. The defendant called no evidence at the trial.

[112] The English Court of Appeal held that based on the circumstances of the accident, a presumption of negligence arose, which the employers could rebut by showing that they had used reasonable care not only in inspecting and maintaining the machine but also when they acquired it, and since they had called no evidence at the trial the employers had failed to discharge the burden.

[113] In **Ottawa Electric Co. v Crepin [1931] S.C.R. 407**, an infant plaintiff was injured, when he fell on a loose end of a live electric wire of the defendant company which wire had broken during a storm by what was believed to be a swaying tree branch which brought two wires together causing a short circuit.

[114] It was held by the Supreme Court of Canada that the evidence of the wire being on the sidewalk was sufficient to attribute negligence to the defendant, in the absence of any other apparent cause or explanation excluding negligence.

[115] Significantly the court also held that the plaintiff having established that a live wire was left on the highway, he was not bound to explain or particularize the facts or negligence which caused or contributed to that since those facts were more in the knowledge of the defendant; and the case appeared to be one in which the occurrence of such an accident in itself justified calling on the defendant to prove that it happened without negligence on its part.

[116] In this case the facts relating to why the marble fell were, and are clearly within the knowledge of the defendant. There was therefore, a responsibility that fell to the defendant to adduce evidence that the marble fell through no negligence on its part. Instead of providing such evidence Sandy Lane's main witness could not remember the reason why the marble fell, could not recall where she was when the accident occurred, and could not recall whether there was a written report or not. She did not even visit the room in which this remarkable event occurred.

[117] Remarkably, the defendant in whom the knowledge resides, claims that the claimant has failed to prove how the accident occurred and therefore she was unable to discharge the burden of proving negligence. I am of the view that the evidential burden had shifted to the defendant to adduce evidence that no acts or omissions of itself or its employees or agents were responsible for the accident. On the facts it manifestly failed to do so.

[118] I reviewed the cases submitted by both counsel and found them to be helpful. However I consider that the absence of an explanation for the fall of marble was perhaps the most significant characteristic of the facts of this case. The cases provided did not address this aspect of the case which was addressed in the cases cited herein under the rubric: 'Res ipsa loquitur' and are but a small fraction of such cases in the reports.

DISPOSAL

[119] For the foregoing reasons I hold that the defendant has breached its duty to the claimant to provide her with a safe system of work and a safe place of work. The claimant is therefore successful in her claim.

[120] Costs are awarded to the claimant, such costs to be assessed, after submissions of both parties, if not agreed.

Cecil N McCarthy
Judge of the High Court