

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2015/0030

BETWEEN

BERNARD PEDREITO OLANDO GRANT

Claimant

AND

TARRIS HILL TRADING LIMITED

Defendant

Appearances: Ms. Akilah Anderson, instructed by N. R. Samuel & Co., Counsel for the Claimant
Mr. Paul Edwards, instructed by Hunte & Co. Law Chambers, Counsel for the Defendant

2020: June 4th

2021: June 7th

JUDGMENT

[1] **ELLIS J:** At issue in this case is a claim for damages for injuries and loss sustained by Mr. Grant, ("the Claimant") following an accident which occurred when he visited the premises owned by Tarris Hill Trading Limited ("the Defendant") for the purpose of purchasing a quantity of cement.

[2] It is common ground between the Parties that the Defendant is in the business of selling building and construction material and supplies. At the time of the incident, the Claimant had already been a regular customer of the Defendant. On 9th February, 2009, the Claimant visited the Defendant's premises in order to purchase a number of bags of cement for the construction of his home which was then ongoing. He first attended to the Defendant's office where he completed his purchase. His purchase transaction was completed by Mr. Potter who was a former principal of the Defendant and who is now deceased.

- [3] The Claimant contends that when he first began to patronize the Defendant's business he would have to wait for an employee to retrieve the purchased bags of cement from the open shed and deposit it in his vehicle. Over the course of time the Defendant's employees became familiar with him and he had become accustomed to being told to help himself if the employees were busy at the time and if the relevant quantity of cement did not require the assistance of a backhoe or forklift. The Claimant contends that on the day in question, he purchased several bags of cement and he was instructed by Mr. Potter to go ahead and collect the same as the employees were all busy and the quantity of cement purchased did not require heavy machinery. The Claimant says that Mr. Potter stood in such a place and manner as to oversee the actual collection in order to ensure that the correct number of bags was taken.
- [4] After completing the purchase, the Claimant proceeded to another part of the Defendant's premises - (an open yard area where the open shed under which the Defendant stored the bags of cement), in order to collect the purchased bags of cement and load the same into his vehicle. The bags of cement were stored upon wooden pallets with each pallet carrying 88 bags of cement. Each bag of cement weighs approximately 42.5 pounds. The Claimant began to remove a number of bags of cement from a single pallet at the front of the shed when he saw "a shadow coming towards him" which turned out to be one of the columns of cement pallets which was directly behind the single pallet. Several bags of cement fell on him and seriously injured him. The Claimant states that he only realized the extent of his injury when he tried to stand and could not. He then realized that one of his feet was twisted at an unusual angle. He suffered a wide opening of the symphysis with a separation of the right sacro-iliac joint, a proximal shift of the right iliac wing, a fracture of the right transverse process of the 5th lumbar vertebrae and a moderate amount of free fluid of the sub-hepatic area.
- [5] The Claimant contends that his injuries were caused by the Defendant's negligence in failing to take such care as was reasonable in all the circumstances to ensure that a lawful visitor to its premises would be reasonably safe in breach of its common law duty of care. In doing so, the Defendant exposed the Claimant to risk of damage and injury which it knew or ought to have known. In addition, the Claimant also relies on the doctrine of *res ipsa loquitur* and he invites the Court to draw an inference as to the Defendant's negligence from the circumstances of the accident.

[6] The Defendant on the other hand, contends that when the Claimant purchased the cement he was instructed to wait for an employee to attend to him, as this was normal practice. Rather than waiting to be assisted, the Claimant caused or contributed to his injuries when he personally sought to remove and load the bags of cement. The Defendant asserts that at the time the bags of cement were kept on terraced pallets wrapped in industrial grade plastic which was unopened. Therefore, in order to retrieve the bags of cement which he had already collected, the Claimant first had to cut through the tightly wrapped industrial grade plastic and pull the bags of cement from a bottom pallet. The Defendants asserts that the Claimant removed bags of cement from the top layer of this pallet, with the result that the pallets in the second row were destabilized and fell onto the Claimant. The Defendant contends that at the time the Claimant was in a restricted area; accessible only to its employees and that he breached its policies and direct instructions by personally attempting to pick up and load the bags of cement into his motor vehicle.

[7] The Defendant therefore asserts that no negligence or breach of any duty arises. Rather, it asserts that the Claimant's alleged injury was wholly caused by or in the alternative was contributed to by his own negligence in that he:

- i. Failed to keep any proper or any proper look out;
- ii. Failed to heed or act upon the presence and position of the pallets of cement in the Defendant's shed;
- iii. Failed to heed of act upon the instructions of the defendant and/or its employees servants or agents;
- iv. Failed to remain within the area of the premises occupied by the Defendant to which his invitation related;
- v. Exposed himself to a foreseeable risk of injury;
- vi. Failed to take any or any adequate care of his own safety.

[8] It is important to note that both Parties issued Requests for Further Information pursuant to CPR Part 34.1 and that both Parties provided answers which now form part of their substantive cases.

ISSUES

- [9] In order to prove his case, the Claimant has a legal and evidential burden to prove that:
- (a) The Defendant owed to the Claimant a duty of care;
 - (b) The Defendant breached its duty of care to the Claimant; and
 - (c) The Defendant's breach of duty caused injury, loss or damage to the Claimant.
- [10] With regard to the proof of injury, this is not specifically denied by the Defendant. Instead, the Defendant asserts that it has no knowledge of the particulars of injury contained in the Report. In the Court's judgment, it cannot seriously be disputed that the Claimant suffered injury as a result of the incident and frankly nothing in the way that the trial was conducted indicates any real challenge on this issue. Rather, what appears to be in dispute is the extent of the injury loss and damage suffered by the Claimant and this will be the subject of a separate inquiry into the assessment of damages as the trial of this matter has been bifurcated.
- [11] At paragraphs 22 – 24 of the Claimant's witness statement, he recounts that he was unable to move his right leg and he says was turned to one side instead of pointing straight ahead. He states that he felt as if the bones in his pelvis and waist were moving about inside his body and that he felt sharp, shooting and excruciating pain throughout his body. He was transported in an ambulance to the Hospital to receive treatment and there he continued to feel excruciating pain in his lower back and pelvis. This evidence was not confronted in cross examination and the Court has no reason to doubt the veracity. The Court also attached a medical report which detailed his injuries.
- [12] The Court is therefore obliged to consider whether at the time of the accident, the Defendant owed a duty of care to the Claimant and if so whether the Defendant breach that duty and in so doing caused the Claimant's injury, loss and damage. If the Claimant discharges that burden, then Defendant has an evidential burden to prove that Claimant was contributorily negligent, which may reduce or eliminate its liability.

THE LAW

- [13] In the Virgin Islands, occupier's liability is governed by common law principles which prescribes that an occupier of premises owes an invitee a duty to exercise reasonable care to prevent damage to the invitee from an unusual danger known to the occupier or of which the occupier ought to have known. In **London Graving Dock v Horton**, Lord Oaksley further particularized the occupier's duty of care to an invitee:

"The duty of an invitor to an invitee is to give him a fair warning of any danger on the premises which he cannot be expected to foresee. Premises inevitably contain a great variety of dangers, some great, some slight, some usual, some unusual, and it is a question of fact whether the danger is to slight or so usual that no warning is needed, or so great or so unusual that the invitee, with the actual knowledge of the premises which he is known by the invitor to possess, ought, in the opinion of an ordinarily careful invitor to be warned of it."¹

- [14] In **Cox v Chan**² Sawyer J made clear that the occupier's duty is

"...not an absolute duty to prevent damage to the plaintiff, but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual danger of which the defendant knew or ought to have known and of which the plaintiff did not know or of which he could not have been aware."

- [15] In **Wheat v Lacon**³ the English House of Lords held that an "*occupier*" is anyone who exercises a sufficient degree of control over the premises:

"The foundation of occupier's liability is occupational control, that is to say, control associated with and arising from presence in and use of or activity in the premises... Whenever a person has a sufficient degree of control over premises that he ought to realise that any failure to use care may result in injury to a person coming lawfully there, then he is an "occupier" and the person coming lawfully there is his visitor: and the "occupier" is under a duty to his "visitor" to use reasonable care."

- [16] In **Indermaur v Dames**⁴ an "*invitee*" was defined as a person who enters premises "*upon the business which concerns the occupier, and upon his invitation express or implied*". An invitee is therefore any person who enters onto the occupier's premises with his express or implied consent.

¹ (1951) 2 ALL ER 1 page 13

² No. 755 of 1988 (1991 unreported judgment of the Supreme Court of the Bahamas)

³ [1966] AC 552

⁴ (1866) LR 1 CP 274 at 288

This is usually where there is some material benefit to the occupier⁵ with the most common example being a customer of a shop or other business. Where however, a person who has neither the right nor the permission to enter premises or who “*goes on land without invitation of any sort and which presence is either unknown to the proprietor or, if known is practically objected to*”⁶ that person is a trespasser. While an occupier does not owe a duty of care to trespassers he does owe of duty of common humanity. As Lord Pearson pointed out in **British Railways Board v Herrington**⁷:

“In my opinion, the occupier of premises does not owe any such duty to a trespasser: he does not owe the trespasser a duty to take such care as in all the circumstances of the case is reasonable to see that the trespasser will be reasonably safe in using the premises for the purposes for which he is trespassing. That seems to me to be the fundamental distinction, and it should be fully preserved.

It does not follow that the occupier never owes any duty to the trespasser. If the presence of the trespasser is known to or reasonably to be anticipated by the occupier, then the occupier has a duty to the trespasser, but it is a lower and less onerous duty than the one which the occupier owes to a lawful visitor. Very broadly stated, it is a duty to treat the trespasser with ordinary humanity: **Bird v Holbrook** ((1828) 4 Bing 628 at 641), **Grand Trunk Ry Co of Canada v Barnett** ([1911] AC 361 at 369) and **Latham v Johnson** ([1913] 1 KB 398 at 411, [1911–13] ALL ER Rep 117 at 124, 125). But that is a vague phrase. What is the content of the duty to treat the trespasser with ordinary humanity? The authoritative formulation of the duty, as given in **R Addie & Sons (Collieries) Ltd v Dumbreck**, is severely restrictive and is, I think, now inadequate. Subject to the difficulty created by that formulation, I think one can deduce from decided cases that, normally at any rate, the occupier is not at fault, he has done as much as is required of him, if he has taken reasonable steps to deter the trespasser from entering or remaining on the premises, or the part of the premises, in which he will encounter a dangerous situation. In simple language, it is normally sufficient for the occupier to make reasonable endeavours to keep out or chase off the potential or actual intruder who is likely to be or is in a dangerous situation. The erection and maintenance of suitable notice boards or fencing or both, or the giving of suitable oral warning, or a practice of chasing away trespassing children, will usually constitute reasonable endeavours for this purpose....If the trespasser, in spite of the occupier's reasonable endeavours to deter him, insists on trespassing or continuing his trespass, he must take the condition of the land and the operations on the land as he finds them and cannot normally hold the occupier of the land or anyone but himself responsible for injuries resulting from the trespass, which is his own wrongdoing.

⁵ Hartwell v Grayson (1947) KB 901; London Graving Dock v Horton [1951] AC 737; Fosbrooke – Hobbes v Airwork Ltd. [1937] 1 ALL ER 108 and Pratt v Richards 1951 2 KB 208

⁶ Addie & Sons (Collieries) Ltd. v Dumbreck [1929] A.C. 356 at 371

⁷ [1972] 1 ALL ER 749 at page 783

[17] In **London Graving Dock v Horton**⁸ the term “*unusual danger*” is defined in the following terms:

“I am not conscious that it has been stated in plain terms, but it is noticeable that what is declared to be the duty is not to prevent unusual danger but to prevent damage from unusual danger... I think 'unusual' is used in an objective sense and means **such danger as is not usually found in carrying out the task of fulfilling the function which the invitee has in hand**, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises...” Emphasis mine

[18] The word “unusual” does not mean “extraordinary” in the general sense, but any danger for which the user should have reasonable regard given the nature of the premises. It is a matter of fact and not of law as to what, in each particular circumstance, amounts to an unusual danger. It was put this way in the Trinidad and Tobago High Court case of **Harripersad v Mini Max Ltd**⁹:

The question of whether an existing state of affairs rendering premises dangerous is to be considered unusual or not must depend upon the particular facts and circumstances of each case, including the actual nature and degree of the danger involved, whether the type of risk is generally known to be associated with the particular type of premises, or whether the dangerous condition of the premises was open for all to see, and so could have been avoided with the exercise of reasonable care on the part of the injured party, and other matters of that sort, and that finally this question is to be answered on the facts of the case and is not, therefore, one of law as counsel contends.¹⁰

[19] Further in that passage, **Harripersad** quoted **Halsbury's Laws of England** to the effect that:

“The duty of the occupier of premise on which the invitee comes, is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware, or in other words, to have his premises reasonably safe for the use that is to be made of them. If this duty is neglected, an invitee who is injured thereby can recover damages in respect of his injuries. The occupier is not bound, however, to adopt the most recent invention or devices, provided that he has done what is ordinarily and reasonably done to ensure safety”.

[20] Therefore to be considered as an unusual danger, the alleged danger should be something which the invitee did not know of, nor could the invitee have been aware of same. It follows that whether the danger is unusual or not depends not only on the character of the danger itself, but also on the nature of the premises on which it is found and the range of experience with which the invitee may fairly be credited.

⁸ [1951] AC 737 at 745

⁹ High Court of Trinidad and Tobago, No. 564 of 1973, December 1, 1978 at paragraph 5

¹⁰ Extracted from Caribbean Commonwealth Tort Law *supra*

THE EVIDENCE

- [21] During the trial, the Claimant gave evidence on his behalf but he also relied on the evidence of Anne Marie Hodge his sister. The Defendant on the other hand originally relied on four witnesses: Kyle Warrican, Albon Joseph and David Simmonds are employees of the Defendant while Deseree Potter is the current director and co-owner of the Defendant Company. However, at trial, Albon Joseph and Kyle Warrican were not called and their evidence was disregarded by the Court.

The Claimant's evidence

- [22] The Claimant maintained that he was a longtime customer of the Defendant who after having visited the business on a number of occasions to purchase individual bags of cement had developed a certain familiarity with the Defendant's employees such that he would occasionally assist the employees in loading the bags of cement onto the back of his vehicle. He stated that by the end of 2006 – 2007 he was permitted by the employees to retrieve individual bags of cement by manually placing the same in his vehicle. According to the Claimant, on a number of occasions the Defendant's employees would tell him to go ahead and collect the number of bags he needed after he would have paid for the same. By about the middle of 2007 he would receive assistance from employees only when the quantity or the weight of the materials required the use of a forklift, backhoe or other machinery.
- [23] On the day in question, the Claimant states that after he was given his receipt, Mr. Potter told him that as the employees were busy fixing a barrier fence on the premises he would have to collect the cement himself. As was customary, he reversed his vehicle into the yard positioned the same 3 – 4 feet in front of the single pallet of cement which was located to the front of the shed where the pallets of cement were stored. Mr. Potter stood at the door of the store so that he could supervise the number of bags which were being collected. According to the Claimant, Mr. Potter was later joined by his daughter, Deseree Potter.

[24] The Claimant proceeded to manually retrieve the bags of cement from the single pallet loading the bags one by one. At paragraph 21 of his witness statement he described what took place;

“As I continued loading the bags of cement into my vehicle one by one, I saw a shadow coming towards me. When I looked up, I realized that one of the pallets of cement in the stack of pallets that was positioned behind the single pallet was coming towards me. I quickly attempted to run but I was only able to move a few steps before I felt the tremendous impact of being crushed by the number of bags of cement falling on top of me, mainly towards my lower back until the sheer weight of the bags of cement pinned me to the ground. I am still at a loss as to how that pallet of cement could have fallen on me as I had no reason whatsoever to come into contact with the same as I was retrieving individual bags of cement from the single pallet positioned at the front of the shed.”

[25] When he was examined under oath, the Claimant confirmed that he was a fairly regular customer of the Defendant but he testified that he did not see any sign in the main office providing instructions as to the procedure to be followed on purchasing supplies and materials at the Defendant's premises. He denied that there was any signage in the office indicating the responsibilities of the customer and he further denied that any senior employee instructed him to deliver the copy of the invoice to one of the employees in the yard.

[26] The Claimant further testified that while he was initially required to wait to be assisted in retrieving his purchases, this was not always the case. According to him, if he purchasing an entire pallet, (this was impossible to retrieve without assistance) he would be required to wait. However, if he was purchasing individual bags of cement the situation was different. Where the employees were available they would assist, but from time to time he would assist them in retrieving the cement.

[27] Importantly Mr. Grant confirmed that after paying for the cement, he did not ask for an employee to assist him, asserting that he is just as qualified as the employees to retrieve bags of cement. Counsel for the Defendant advanced that the reason why he did not wish to await assistance on that day was because he was in a hurry. However, the Claimant denied that he was pressed for time on that day and he testified that as deputy director he had certain privileges and so he could afford delays.

[28] He reiterated that there was a single pallet of cement placed at the front of the shed where the other pallets of cement were stored and he described it as being next to or right up against the other pallets in the shed. He agreed that he was familiar with the Defendant's premises and that there was nothing unusual about it and he agreed that mishandling of bags of cement could lead to injury and that there is a likelihood that lifting up anything heavy can pose a danger if not done properly. He agreed that if one were to remove bags of cement from the base pallet then the pallets above it would become unstable but he denied that the pallets were stacked in a terraced fashion. He further denied that there was any obvious danger apparent whenever pallets of cement are stacked on top of each other. According to him, if the danger was obvious he would not have gone near the shed on that particular date.

[29] The Claimant's witness Ms. Hodge did not witness the accident. Instead, the main purpose of her evidence is to recount a conversation which she had with Ms. Deseree Potter when she went to visit the Claimant at the hospital. According to Ms. Hodge when they inquired as to the cause of the accident, Ms. Potter told them that the pallets of cement were unbalanced because they were not packed properly and as a result they fell on the Claimant.

[30] When she was examined under oath, Ms. Hodge evidence was succinct and unswerving. She testified that when they were at the hospital, her sister Evadne asked Ms. Potter what happened and she responded that the pallet of cement was unbalanced and not packed properly and that is what caused it to fall on the Claimant. When tasked, she denied that she was biased or otherwise untruthful and she asserted that the evidence in her witness statement was accurate.

The Defendant's evidence

[31] Ms. Deseree Potter was the main witness for the Defendant. She is one of the principals of the Defendant Company and she would have conducted an investigation into the circumstances of the accident which took place on the Defendant's premises. It is important to note that nowhere in Ms. Potter's evidence does she provide a first-hand account of how the accident would have occurred as it is clear that she did not witness the same. However, she described in detail how the pallets of cement are ordinarily stored in the shed and how there are removed by employees. Under oath, she

testified that her father had a system in place whereby the pallets were stored in a terraced manner. This created caused less friction and more stability. Under oath, Ms. Potter repeatedly denied that there was a single pallet of cement located at the front of the shed as asserted by the Claimant. However, when she was cross-examined, she agreed that there was indeed a practice whereby a single pallet would be lifted by a backhoe and deposited in the open storage area of the northern side of the shed. That pallet would be covered with tarpaulin to protect it from the elements. She reiterated however that there were no open pallets at the front of the shed on the day in question.

[32] The latter conclusion was apparently arrived at after she carried out an investigation into the accident. The details of that investigation were not set out in her defence in any great detail. But in answer to CPR Part 34 Request for Further Information, Ms. Potter reveals that she entered the shed shortly after the Claimant was transported to the hospital on that day. She examined the columned pallets of cement and observed that the plastic wrapping on the top of one of the pallets in the first row of the columns had been torn and certain bags had been removed from the top layer of this pallet. When she was cross-examined she surmised that it was the Claimant who had torn the plastic in order to retrieve the bags of cement. However, she could not say what instrument would have been used to cut the industrial grade plastic because no one actually witnessed the Claimant doing this. She testified that she did not look for any cutting instrument. From all accounts none was found.

[33] Ms. Potter detailed the Defendant's operating procedures in place at the time of the incident. According to her, once the purchaser had completed the transaction they would be provided with a white copy of the invoice. A pink copy of the invoice would be kept in the receipt book while a yellow copy of the invoice would be taken by the customer to one of the employees who would be stationed in the vicinity of the shed. Upon receiving the yellow copy of the invoice that employee would then retrieve the quantity of cement set out in the invoice. The customer would then park their vehicle in the vicinity of the shed and wait on the employee to place the purchased cement onto the vehicle. Alternatively, items would be taken to the vehicle via trolley or heavy equipment.

[34] According to Ms. Potter, the Claimant would have been well familiar with this procedure but in addition to that there was a sign outlining this procedure stationed in the main office near the cashier. She described this sign as large and legible and she stated that it could be seen by any customer on

the premises. A copy of the sign was annexed to her witness statement and appeared to be stuck to a notice board which appeared to contain other notices. It read:

ATTENTION

PLEASE NOTE THAT ALL CUSTOMERS ARE ASKED TO GIVE THE YELLOW COPY OF THEIR PURCHASE TO OUR EMPLOYEE SO THAT THEY MAY FILL YOUR ORDER AS YOU WAIT. THIS COPY WILL BE RETAINED FOR ANY ITEMS NOT COLLECTED DURING THE INITIAL PURCHASE.

PLEASE NOTE THAT ANY ITEMS LOADED IN ERROR WILL NOT BE THE RESPONSIBILITY OF TARRIS HILL.

Sgd. Management

- [35] She testified that this sign was present in the office since 2003 when she came to work there. She explained the sign became necessary because the customers were not checking to see what was collected. As a result, she personally made up that sign and employees were required to check the materials to make that it reflected what was on the invoice.
- [36] Ms. Potter asserts that on the day in question, the same procedure was followed. The Claimant was provided with 2 copies of the invoice and he was instructed to deliver one of them to the employees in the yard. This latter evidence presented quite a difficulty during the course of the trial. In her witness statement she stated that on the day in question, she overheard the Claimant being instructed by one of the Company's senior employees who she did not identify to wait for an employee to complete his purchase order. However, when she was cross-examined under oath she testified that the senior employee in question was Craig, her ex-husband.
- [37] Ms. Potter was then referred to the Defendant's answers to the Claimant's Request for Further Information in which the Defendant represented that it was Mr. David Simmons who instructed the Claimant to wait until he was available to load the Claimant's vehicle with the purchased cement. Ms. Potter confirmed that the answers were prepared on her instructions and that she indicated that she came to this determination following her investigations into the accident. When it was put to her that it was her father, Mr. Potter who conducted the entire transaction with the Claimant, she testified that three different persons instructed the Claimant on that day: Mr. Potter, Craig and Mr. Simmonds. However, it is important to note that Mr. Simmonds did not corroborate this either in his written or

oral evidence. The Court was therefore satisfied that this evidence was not truthful. Indeed, vacillation here convinced the Court that the Claimant would not have received instructions from any one of those persons on that date.

[38] During cross-examination, she also confirmed that on the day in question, the employees were otherwise busy repairing cracks in the area where the sand was stored because they were expecting a delivery of sand while others were occupied loading the trucks. It follows from this that the employees were therefore unavailable to assist the Claimant in completing his purchase. Ms. Potter asserted that rather than wait for assistance, the Claimant disregarded instructions and decided to retrieve and load the cement himself. In so doing, she states that he exposed himself to the risk of injury. She stressed that customers are not permitted in the area of the shed as it was solely accessible by employees who were solely responsible for the retrieval of the cement. However, she conceded that there was no signage in the area of the shed.

[39] According to Ms. Potter, she has never known the Claimant to collect and load bags of cement onto his vehicle himself or assist the Defendant's employee in loading individual bags of cement onto his vehicle. She denies that Mr. Potter ever supervised the Claimant in retrieving the cement. In fact, she stated that Mr. Potter was attending to customers in another area of the Defendant's business premises. She also categorically denied that she was present supervising the Claimant in the collection of the cement. According to Ms. Potter she was in her office when she heard someone crying. When she looked out she saw a few bags of cement falling down and it was then that she quickly ran downstairs to investigate. She saw the Claimant on the ground. Close by, there was a pallet of cement that was newly opened. There was a slit on the side and the pallet above it was still tottering. Ms. Potter states that it seemed to her that the Claimant had been removing cement from the bottom pallet.

[40] Ms. Potter recalls later meeting the Claimant's sisters at the hospital but she states that at no point did she accept liability for the accident. When she was examined under oath, Mr. Potter stated instead she told the Claimant's family that he took a bag of cement, which made it unsteady and that many bags of cement fell and hit him and dropped him down to the ground.

- [41] The Defendant's second witness was Mr. David Simmonds who is employed as a driver but also assists customers in the Defendant's yard from time to time. In his witness statement he stated that on the day of the incident, there were hardly any customers present at the premises. Along with some other employees, he was stationed at the gate where they were casting a wall. He stated that the Claimant drove into the yard in his work vehicle which carried the emblem: "Water and Sewerage." Importantly and perhaps critically, Mr. Simmonds did not corroborate Ms. Potter's evidence that he instructed the Claimant to wait for assistance.
- [42] Mr. Simmonds stated that he heard a noise coming from the cement area when he hurried over there with the other workers, he saw the Claimant on the ground with some cement on top of him. Along with one of the other employees he threw the cement off the Claimant. He stated that he then asked the Claimant why he had not asked for help and he replied that he was in a hurry and had to go to a meeting.
- [43] Mr. Simmonds echoes Ms. Potter account of the operating purchase procedures save that he indicates that once the cement is collected by the customer, the employee would sign the yellow copy of the invoice acknowledging that he has collected the items and then the yellow copy is sent to the office to officially confirm that the order had been filled. Mr. Simmonds concluded that where he has seen the Claimant purchase materials, one of the employees has always assisted him. According to Mr. Simmons, this was the first time that he had seen the Claimant retrieve the cement on his own.
- [44] When he was cross-examined, Mr. Simmonds confirmed that the Claimant was a regular customer of the Defendant. He confirmed the evidence in his witness statement reiterating that when he questioned Claimant about why he did not ask for assistance, the Claimant told him that he was in a hurry. He expressed surprise at what had occurred that morning as he had never seen the Claimant lift a bag of cement prior to that day. However, he conceded that over the course of time he could not say that he has witnessed the Claimant on each and every occasion that he came to purchase materials.

THE CLAIMANT'S CASE

- [45] Counsel for the Claimant submitted that the proven and admitted facts of this case point to a clear duty owed by the Defendant to take reasonable care to prevent injury to the Claimant whilst on its premises. She invited the Court to find that the Claimant was injured due to the negligence of the Defendants in failing to take any or any reasonable steps to keep the premises safe whilst he was there as an invitee, being a customer doing business with them. She submitted that improperly packed pallets of cement are capable of being, and in this case did in fact constitute an unusual danger on the Defendant's premises. It was the Defendant's duty to take reasonable steps to protect the Claimant from this unusual danger and no such steps were identified. Counsel pointed to the Ms. Potter's admission that there was no signage in the vicinity of the shed under which the cement was stored as to "Danger," "Employees Only," or such the like or any physical barrier separating the pallets under the open shed from any other part of the yard. She further pointed out that on the Defendant's own case, there were no employees actively monitoring either the relevant area or the customer, since they were busy for various reasons.
- [46] Counsel for the Claimant asserted that the Claimant entered the area where the shed was located openly and with permission and that he has proved so, on the balance of probabilities. Consequently, he did nothing that could be construed as failing to take reasonable care for his own safety and so no issue of contributory negligence arises. Indeed, she submitted that there is nothing on the evidence which would lead a court to conclude that the Claimant failed to have a care for his own safety. According to Counsel, the act of picking up bags of cement requires no special skill. The bags of cement were inert and the Claimant was used to picking them up without incident from that same spot. By itself, an open storage area can be deemed to be a "safe" place to be in the absence of any indication that it contained dangerous goods (for example flammable or hazardous material) or had some other feature about which the person entering should be cautious. There were no warnings in the area by way of signage, by way of personnel preventing his access, or by way of physical barriers to suggest that he was entering a dangerous area of the Defendant's premises.

[47] Counsel commended to the evidence of the Claimant and his witness to the Court. She submitted that the Claimant's viva voce evidence was generally consistent with his witness statement and that the cross-examination did little to change his account. In contrast to the Claimant's straight forward, logical and credible evidence, Counsel submitted that the Defendant has failed to give clear, unambiguous evidence of key points of its defence. First, she pointed to the inconsistencies in the evidence of the Defendant's main witness, Ms. Potter. Counsel pointed to the critical contention advanced by the Defendant that the Claimant was instructed to wait until he could be assisted in retrieving the purchased cement. Counsel noted that the Defendant's evidence in chief did not identify the person who gave the instructions nor were the precise terms made clear.¹¹ In her amplified evidence in chief, she spoke only of the Claimant's interaction with Mr. Potter who instructed the Claimant to take a copy of his receipt and Give it to somebody in the yard. However, later in cross-examination Ms. Potter asserts that he overheard a "Craig" say to the Claimant "I will be right with you, hold on". This account contrasts with the Defendants answers to the Request for Further Information which indicated that it was Mr. Simmonds who instructed the Claimant to wait. Unfortunately, this evidence was not corroborated by Mr. Simmonds who failed to mention it in either his oral or written evidence. Indeed, both his written and oral account of his actions on that day indicate that he was very busy with other tasks on that day and he only interacted with the Claimant after the accident had occurred. When confronted with this conflicting evidence, Ms. Potter chose to adopt all conflicting positions rather than recant any of them!

[48] The varying accounts highlighted the evolving nature of Ms. Potter's evidence which Counsel submitted makes the Defendant's evidence implausible, incredible and unreliable. Counsel further submitted that even if the Defendant's dubious evidence that "Craig" was on backhoe/heavy equipment and that he told the Claimant to "hold on and wait" were accepted, this can in no way be considered a reasonable step to take. According to Counsel, there ought to have been a clear indication to the customer that this area was dangerous to be in, and there was none.

[49] Counsel also pointed to the obvious evidential lacunas in the Defendant's case. She asked the Court to note the fact that the Defendant declined to produce evidence from persons who would have been central to its case. These persons included Mr. Potter who could have completed the purchase

¹¹ Paragraphs 6, 23 and 25 of the Witness Statement of Deseree Potter

transaction and who the Claimant alleges witnessed the incident. Counsel noted that several years elapsed between the date of the incident and the date of Mr. Potter's passing and yet no statement was secured from him. Counsel had the same criticism in regards to the lack of evidence provided by Craig. She submitted that given that both Mr. Potter and Craig were first hand witnesses, the lack of direct evidence as to what actually occurred on that day is perplexing.

[50] Counsel for the Claimant further pointed to the fact that the photographic evidence also directly contradicted Ms. Potter's evidence as to the manner in which the pallets of cement were habitually stored. She noted that the photos presented, clearly depict that the pallets were stored not in a terraced fashion but in straight columned stacks. Ms. Potter's evidence that there was a consistent practice of placing the open pallet in an open storage area on the northern side of the shed was also discounted as the photograph also demonstrated that the open pallet was placed in the front of the shed as claimed by the Claimant. Although the photos were not taken on the day of the incident, Counsel submitted that they contradict Ms. Potter's evidence that this was the norm. The photographs however, clearly depicted that the area was open with no physical barriers which would prevent or restrict access to any category of persons. Counsel submitted that in the face of this evidence, it is inexplicable how Ms. Potter can continue to assert that the area was accessible to workers only.

[51] Counsel asked the Court to disregard Ms. Potter's evidence regarding the sign inside the shop. She submitted that even if there was signage in the shop, this would be of no moment because the signage would have been more impactful if appropriate signage were placed in or near the actual area where the unusual danger was located. Counsel also asked the Court to disregard her evidence as to content of the conversation which she had with the Claimant's family in the hospital later that day. Counsel submitted that Ms. Hodge's account of Ms. Potter's admission at the hospital ought to be accepted because her evidence was not impugned.

[52] Counsel for the Claimant further asked the Court to disregard the Defendant's probable assertion that the accident was caused when the Claimant succeeded in cutting a new pallet and pulling cement from an unauthorized place. She noted that lack of any supporting evidence such as cutting implement and the fact that in all likelihood this would have taken place in full view of the yard and

the Defendant's employees. Counsel noted that this contention was not mentioned in Ms. Potter's witness statement which foreshadowed a lack of candour which marked the Defendant's presentation of evidence in this case. Counsel concluded that the Defendant's witnesses lacked credibility in their account of the incident and particularly in respect to the investigations into the incident as well as any subsequent findings.

- [53] The Claimant therefore asks that the Court find for the Claimant on the matter of liability of the Defendant in negligence and grants the relief prayed.

THE DEFENDANT'S CASE

- [54] Counsel for the Defendant submitted that the distinction between usual danger and unusual danger is of critical importance in this case. This is because the Defendant has no duty regarding usual, apparent or obvious dangers.¹² Unusual danger is described as an unusual risk - one which is not usually found in carrying out the task which the invitee has in hand. The factual question for the Court to consider is, whether the risk of danger posed by stacking pallets of cement is unusual.
- [55] The Defendant relies on the inference that stacking pallets of cement in the fashion that it did presents an obvious danger to all visitors to the premises. The Defendant further submitted that the danger posed in retrieving bags of cement increases whenever one attempts to pull bags of cement from the base pallet. Counsel further submitted that there was no allegation by the Claimant that the conditions of Defendant's premises were materially different from any other business of similar service. He noted that if the conditions of the premises are similar to other businesses of a similar nature *without more*, then the duty shall be to make the place as little dangerous as it could possibly be.
- [56] Counsel for the Defendant also drew the Court's attention to key factors which he contended are sufficient to render the danger as obvious and not unusual. Counsel submitted that the Claimant at the time of the accident, the Claimant was a fit 44 year old man who belongs to a certain class of invitees who possess specialized knowledge of construction. He therefore ought to be aware of how

¹² Indermaur v Dames

cement is stored and the danger posed by the method of storage above that of the average man. Further, Counsel pointed out that the Claimant was familiar with the premises, the Defendant and its employees. His experience spanned 3 years prior to the accident and he was a regular customer who would have known the exact storage techniques used and the amount of cement which a pallet contained and so he ought to be acutely aware of the possible impact of removing cement from a pallet beneath another pallet.

[57] In the event, that the Court finds that the danger posed was unusual, then Counsel submitted that the Court must then go on to consider whether the Claimant had notice or full knowledge of it. This is because **Horton** establishes that an invitee's knowledge of the unusual risk could exonerate the occupier from liability for the damage sustained by him and that it was not essential to their defence to establish that he was *volens*. Counsel submitted that the key factors mentioned above also go towards proving that the Claimant had knowledge of the unusual danger on Defendant's premises. For that reason, the Defendant also contends that the Claimant's claim must fail.

[58] In support of this submission, Counsel relied on the judgment of Sawyer J in **Cox v Chan** where he observed;

“As to whether the ramp was an unusual danger, in my view it was not an unusual danger for it was clearly visible to everyone who visited the shop... I am completely satisfied that the plaintiff had full knowledge of the existence and presence of the ramp for a considerable time before 9th December, 1987 and he never complained about it being slippery nor, apparently did, he ever fall on it before that day... I also find, on the evidence which I believe, that the plaintiff was the author of his own misfortune and the presence or absence of a warning was of no relevance on the facts of the case.”

[59] In **Wilkinson v Fairrie and Another**¹³ the Claimant was non-suited as the court found he was injured due to his own negligence.

“In general, it is the duty of every person to take care of his own safety, and not to walk along a dark passage without a light to disclose to him any danger. As there was no contract, or any public or private duty on the part of the defendants that their premises should be in a different condition from that in which they were, it seems to us that the nonsuit was perfectly right.”

¹³ (1862) 1 H & C 1038

[60] Counsel for the Defendant submitted that the circumstances of this case imposed upon the Claimant a duty to take care to avoid damage.

[61] In the event that the Court holds that there was an unusual danger which the Claimant had no knowledge of, the Counsel for the Defendant submitted that the burden of proving that the Defendant acted reasonably is an evidential one. The Defendant submitted that the relevant judicial authorities make it clear that the use of warnings and signs is sufficient to discharge an occupier's duty. In the case at bar, the Court is therefore obliged to consider whether Defendant's evidence as to the presence of a sign in the office area discharges this burden. Counsel referenced the sign described in Ms. Potter's evidence. He submitted that that sign was sufficient to avert danger to its customers. They were not required to handle any of the goods purchased merely to account for the accuracy of the delivery. He further submitted that if the instructions of the sign had been followed then the Claimant would not have been injured. Instead, the Claimant failed to heed the Defendant employee's instructions and failed to remain in the area of the premises occupied by Defendant to which his invitation is related.

[62] Counsel urged the Court to accept that the sign was present in the Defendant's office area and he commended the evidence of Ms. Potter who testified that:

"There was signage there when I came to work 2003. There was a problem of customers not checking their supplies until after they left. I made a sign personally for customers to check and wait in their car. All customers would check to be sure they had the right thing while they were waiting to be assisted."

[63] In contrast, Counsel for the Defendant noted that the Claimant's pleadings and witness statement do not deny that a sign was present at the Defendant's office. Instead he merely testified that he never once recalled seeing any sign. In fact, he noted that the Claimant's claim has not pleaded that there were no warnings or signs, neither has the claim disputed this instead the Claimant has merely given oral evidence that he never recalled seeing it. It follows that prior to cross-examination; the Claimant never categorically denied the existence of a sign. Counsel described the Claimant's evidence on this point as inconsistent and unreliable.

[64] In regards to the Claimant's contention that he had received permission from diverse employees to help himself to bags of cement, Counsel for the Defendant submitted that this evidence must be treated with little weight as the Claimant did not produce any evidence of the identity or description of these employees notwithstanding his allegation that he became "*accustomed to them and they became accustomed to him.*" Counsel further submitted that no weight should be given to Claimant's account that he was directed by Mr. Potter to remove cement because such a finding as to fact would go against the grain of the evidence. In any event, even if the Claimant had permission, the dangers posed in the carrying out of his action were known or ought to have been known, and so there would be no unusual danger presented.

[65] Counsel further noted that the presence of a single pallet on the outside of the shed is the subject of intense dispute. It is submitted that the finding of fact on either account, would yield the inference, that there was no unusual danger posed and that Claimant willingly left the protection of the assistance of Defendant's employees.

[66] Turning to the issue of causation, Counsel submitted that the Defendant has provided the only sound, credible and realistic evidence about the cause of the accident. Counsel commended to the Court the following evidence of Ms. Potter:

"I saw the Claimant on the ground. I saw Albon, one of our employees lifting some of the bags of cement off him. Close by, there was a pallet of cement that was newly opened. It has a slit in the side. The pallet above it was still tottering. **It seemed to me that the Claimant was removing the cement from the bottom pallet.**"

[67] Counsel submitted that on a balance of probability, the account is more likely than not. He urged the Court to accept this account provides the only proximate and contemporaneous explanation of the cause of the accident which is consistent and not at odds with any other evidence, pleadings, statements or exhibits given by the Parties and moreover, it was never disputed by Claimant.

[68] Whilst Ms. Potter did not actually see Claimant in the act, based on the contemporaneous observation made, the inference is powerful. Counsel urged the Court to accept the explanation provided by Ms. Potter as the cause of the accident and therefore find that the accident was caused by the negligence of Claimant.

[69] Counsel pointed out that the Claimant's attempt to proof of causation depends on the disputed, hearsay and uncorroborated evidence of Ms. Hodge's statement:

"Evadne Grant also asked Ms. Potter what caused the accident and she told us that the pallets of cement were unbalanced because they were not packed properly and as a result, they fell on our brother."

[70] Counsel noted that this was the first time that such an allegation was made by Claimant despite his three pleadings filed and he invited that the Court to reject this account on a balance of probabilities because it was disputed hearsay which is uncorroborated by independent evidence. Counsel noted Ms. Potter's categorical denial of Ms. Hodge's statements.

"I do not agree, I did not say this. It was packed in a particular way. They were terraced. The pallet was in the middle for stability. This was a system I saw in place when I came to the company."

[71] Moreover, he submitted that Ms. Hodge is biased and likely prejudiced because the Claimant is the witness's brother. He concluded that the account is remarkably self-serving and out of touch with all other material evidence pleadings, statements or exhibits before the Court. In the event that the Court does not reject the account, the Defendant submitted that little to no weight should be given to it for the reasons indicated.

ANALYSIS AND CONCLUSION

i. Did the Defendant owe the Claimant a duty of care?

[72] It is settled law that a person who enters premises upon a purpose related to the business of the occupier is an 'invitee.' The duty of care which an occupier owes to an invitee was perhaps best articulated by Willes J in **Indermaur v Dames** where at page 288 he stated:

"The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied."

And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether

there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.” Emphasis mine

[73] In the present case, it is common to the Parties that the Claimant entered the premises as a customer of the Defendant and did in fact complete a purchase transaction to that effect. Applying the principles in **Indermaur v Dames** to the facts of the case, the Court is therefore satisfied that the Claimant fell within the classification of an invitee. However, it is the Defendant’s contention that the Claimant exceeded the scope of his permission whilst on its premises. The argument appears to be that the Claimant breached of the terms of the Defendant’s express or implied invitation to come unto the premises and in so doing became a trespasser thereby losing the protection of the standard and duty of care owed to an invitee.

[74] For the reasons which are hereinafter set out, in the Court’s judgment, the credibility of the Defendant’s evidence on this point is so severely impugned, that such a case cannot be successfully made out on the balance of probabilities. The Court therefore finds that the Defendant owed a duty of care to the Claimant to ensure that he came to no harm as a result of unusual dangers (which the Defendant knew or ought to have known about) whilst he was a visitor to the premises.

[75] Assuming, but not determining that the stacked pallets of cement presented an unusual danger, the Defendant’s duty of care was to use reasonable care to prevent damage to the Claimant from that unusual danger of which the Defendant knew of ought to have known. On the other hand, the duty of care which the Claimant owed to himself was to use reasonable care for his own safety.

ii. How did the accident occur? *Res ipsa loquitar*

[76] The Defendant does not claim direct knowledge of why or how the accident occurred. This is not surprising as none of the Defendant’s witnesses attest to being eyewitnesses. However, on behalf of the Defendant, Ms. Potter indicated that she carried out an investigation shortly after the accident occurred. Surprisingly, no contemporaneous investigation report, statements or photographs were produced into evidence. Instead, the Defendant relied on the nonsynchronous conclusions drawn by Ms. Potter in her evidence before the Court. It is apparent that her investigation concluded that the Claimant breached company policy and the express instructions of its employee when he entered a

prohibited area that was accessible only to employees and attempted to personally load the bags of cement into his motor vehicle.

[77] Ms. Potter asserts that when the Claimant entered there were only terraced pallets which were unopened in the shed. The Defendant contends that at the material time, the shed was fully stocked with cement. She asserts that there was no single pallet of cement at the front of the shed. Most of the columns were stocked three pallets high. One or two columns near the front of the shed were stacked two pallets high and they were stacked in a terraced fashion. She surmised that the Claimant caused the accident by improperly tearing or cutting the protective industrial grade plastic around a new pallet which was at the bottom of one of the stacks, then removing several bags from the cut pallet. According to Ms. Potter, the pallets became unstable when the Claimant began to remove of cement bags from the bottom pallet, thereby causing one of the pallets above to topple and fall on him.

[78] The Claimant however, says that he was retrieving individual bags of cement from the single pallet positioned at the front of the shed and he described it as being next to or right up against the other pallets which were not stacked in a terraced fashion. This evidence is disputed by Defendant. However having reviewed all of the evidence and having observed the demeanor of the witnesses during the course of the trial, this Court prefers the evidence of the Claimant who was consistent and frank in his recount. Moreover, the Court finds this evidence to be entirely plausible especially in light of the albeit nonsynchronous photograph presented by the Claimant which depicted a single pallet position at the front of the shed in the manner described by the Claimant as well as Ms. Potter's oral admission that there was indeed a practice whereby the Defendant would place a covered single pallet of cement to what she described as the "northern side" of the shed. The Court therefore finds on a balance of probability that there was in fact a single pallet of cement position in front of the other pallets which would have been located right up to next to the other pallets in the shed.

[79] According to the Claimant, he began to remove a number of bags of cement from a single pallet at the front of the shed when he saw "*a shadow coming towards him*" which turned out to be one of the columns of cement pallets which was directly behind the single pallet. Several bags of cement then fell on him and seriously injured him. The Claimant was entirely forthright when he said that he is

still at a loss as to how that pallet of cement could have fallen on him because he was retrieving individual bags of cement from the single pallet positioned at the front of the shed and had no reason to come into contact with the same.

[80] Given the state of the Claimant's evidence, it is not surprising that he not only pleads negligence, but also *res ipsa loquitur* in aid, thereby inviting the court to draw an inference as to the Defendant's negligence from the circumstances of the accident. In **Lloyde v West Midlands Gas Board** the English Court of Appeal considered the doctrine of *res ipsa loquitur* and the burden of proof in establishing negligence. Megarry LJ held:

'I doubt whether it is right to describe *res ipsa loquitur* as a 'doctrine'. I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. **It means that a plaintiff prima facie establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.** I have used the words 'evidence as it stands at the relevant time'. I think that this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on the balance of probability is that that cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety? If so, *res ipsa loquitur*. If not, the 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."¹⁴ Emphasis mine

[81] This doctrine therefore permits a court to draw an inference of negligence from circumstantial evidence. It is an aid to claimants who are unable to establish exactly how the accident occurred or what was the relevant act or omission which set in train the events leading to the accident. In order to rely on the doctrine, a claimant must establish that the thing causing the damage was under the management or control of the defendant or his servants and that the accident was of such a kind as would not, in the ordinary course of things have happened without negligence on the defendant's

¹⁴ *Lloyde v West Midlands Gas Board* [1971] 1 WLR 749 at p. 755 as quoted in *Bingham v Berrymans' Personal Injury and Motor Claims Case/Part 2 Liability/chapter 6 Res Ipsa Loquitur* ; see also *Bennett v Chemical Construction (GB) Ltd* [1971] 3 ALL ER 822 and *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596

part. A further critical condition however, is that there must be no evidence as to why or how the incident took place. If there is, then an appeal to *res ipsa loquitar* is inappropriate for the question of the defendant's negligence must be determined on that evidence.¹⁵

[82] Applying that test, this Court is satisfied that the doctrine has some application in the case at bar. Other than the fact that the toppling of the bags of cement occurred, the Claimant was forthright in his evidence that he was unable to articulate or prove precisely how the accident occurred. Indeed, having observed the Claimant's demeanor when he was examined under oath, this Court is satisfied that Claimant provided considered and truthful responses. In submitting that the Claimant is an unreliable witness who lacks credibility, Counsel for the Defendant stressed that the Claimant seemed unfamiliar with the medical terms referenced in his witness statement. However, this Court is not persuaded by this submission. The fact that the Claimant did not comprehend the medical jargon which formed part of his medical diagnosis would not derail his general credibility.

[83] Counsel for the Claimant further argued that the Claimant evidence is not reliable because he could not testify as to the exact amount of cement that fell on him and was inconsistent as to whether it was a pallet or individual bags. However, it is clear that minutes before he collapsed under several heavy bags of cement, the Claimant can only recall seeing a "shadow coming towards him". In such dire circumstances, the Court is not satisfied that the Claimant's inability to testify as to whether it was an entire pallet or individual bags from that pallets or indeed the exact number of bags which fell on him could adversely impact his credibility.

[84] The Court therefore finds that the Claimant was truthful in his evidence that there was a single pallet located at the front of the shed which was right up against the other mounted pallets of cement. Whether these pallets of cement were stacked in a columned or terraced fashion, they were clearly under the management or control of the Defendant or its servants or agents and it is apparent that they were stored in such a way that they toppled onto the Claimant while the Claimant while he was in the process of retrieving the cement from the single pallet located at the front. Having regard to the totality of this evidence, the Court finds that it is more likely than not that the effective cause of

¹⁵ Bolton v Stone [1951] A.C. 185; Barkway v South Wales Transport Co. [1950] A.C. 185; Wilks v Cheltenham Home Guard Motorcycle and Light Car Club [1971] 1 WLR 668 at 674

the accident was Defendant's (or someone for whom the Defendant is responsible) failure to store the pallets of cement in such a way as to ensure the Claimant's safety.

[85] When the Court considers this evidence together with the convincing testimony of Ms. Hodge, who recounted a conversation which she witnessed in which Ms. Potter revealed that the pallets of cement were unbalanced because they were not packed properly and as a result they fell on the Claimant, the Court is fortified in its conclusion on causation. In the Court's judgment, Ms. Hodge was truthful in her testimony. Her evidence was not seriously taxed on cross examination. Indeed it was only in legal submissions that her evidence was challenged on the basis that it was not particularized, that it was general and obscure and not capable of being interpreted to account for the proximate cause of the accident. This Court finds no force in these arguments.

[86] Counsel for the Defendant further argued that there was no independent corroboration of her account when it was clear that there were other witnesses to the conversation who could have but did not provide evidence. The Court finds this a surprising submission, given the equivalent glaring lack of evidence in the Defendant's case from Mr. Potter and the employee Craig. In any event, the Court is satisfied that Ms. Hodge's demeanour during her oral examination and the general consistency of her testimony made her a credible witness. The Court therefore preferred her evidence to that of Ms. Potter, whose internal inconsistencies damaged her credibility.

[87] Indeed, the inconsistencies carried throughout the Defendant's case as it not only provided answers to the Claimant's Request for Further Information which were incompatible with important aspects of Ms. Potter's evidence-in-chief but the Court also had to treat with the inherent conflict between Ms. Potter's evidence and that of Mr. Simmonds. The Court finds that these are relevant factors in its determination of which account is found to be more likely to have happened, since incongruity between the Defendant's statement of case and its evidence suggests a lack of credibility.

iii. Was there an "unusual danger" on the Defendant's premises?

[88] The relevant case law also makes it clear that the Defendant occupier is not liable for "usual" danger, only "unusual" danger. While the term has been said to defy comprehensive definition, it traditionally refers to a hidden or unexpected danger that an occupier of land knows or ought to have known

about - a danger which is not usually found in carrying out the task or fulfilling the function which the invitee is attending to.¹⁶

[89] In the seminal case of **London Graving Dock Co. v Horton** an experienced welder had for a month been carrying out work on a ship as an employee of sub-contractors engaged by ship-repairers in occupation of the ship. He was injured, without negligence on his part, owing to the inadequacy of certain staging, constituting an unusual danger, of which he had full knowledge and which, despite complaints, the ship-repairers had not remedied. The majority of the court found that the welder being an invitee, his knowledge of the unusual risk exonerated the ship-repairers from liability for the damage sustained by him and that it was not essential to their defence to establish that he was *volens* in that he was not under any feeling of constraint in accepting the risk.

[90] In that case, the court had to consider what was meant by the term "unusual danger". The term was defined by Lord Porter in¹⁷ in the following terms:

"I am not conscious that it has been stated in plain terms, but **it is noticeable that what is declared to be the duty is, not to prevent unusual danger, but to prevent damage from unusual danger.** It is in this consideration, as I think, that notice or knowledge becomes important. Either may prevent damage, though the unusual danger admittedly exists. As I take this view, I find the question what is unusual danger of less importance than it might otherwise be considered. **To my mind, danger may be unusual though fully recognised, and I am not prepared to accept the view that the word "unusual" is to be construed subjectively as meaning "unexpected" by the particular invitee concerned.** Moreover, I get little assistance from the alternative word "unexpected", suggested by Phillimore LJ ([1915] 1 KB 596) in *Norman v Great Western Ry Co.* **I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises.**"
Emphasis mine"

[91] That "*objective sense*" must be taken from the view of a reasonable person in the position of an occupier with knowledge he has or ought to have of (a) the capacity of the invitee or (b) the capacity of the class to which he belongs. At page 9 of that same judgment, Lord Normand opined:

"I am of opinion that, **if the persons invited to the premises are a particular class of tradesman, then the test is whether it is unusual danger for that class.** Therefore, if the occupier supplies the sort of gangway which stevedores usually use, he has performed his

¹⁶ Per MacDonald J. in *Rafuse v T. Eaton Co. (Maritimes) Ltd.* (1958), 1957 CanL II 350 (NS SC), 11 D.L.R. (2d) 773 at 777

¹⁷ [1951] 2 ALL E.R. 1, at p. 5

duty so far as stevedores are concerned, and, if a particular stevedore suffers from a defective sense of balance and falls off the gangway, he cannot complain of the occupier's failure of duty. The sufferer knew the danger for him and he must accept the responsibility of using a gangway which might be dangerous for him because of his idiosyncrasy. A gangway, however, which is reasonably safe for stevedores and which is no unusual danger for them, may well be an unusual danger for another class of workman or for members of the public generally. So much for "unusual" in relation to persons. **A danger, however, may also be "usual" or "unusual" in relation to the place.** For example, a quay is dangerous though it is not in daylight an unusual danger for normal adults, but an uneven joint between two stones near the edge of the quay may be an unusual danger to anyone, and is none the less an unusual danger though it is not a concealed danger. **I would not agree that a danger, which is unusual in either of the ways I have suggested, ceases to be an unusual danger because, through frequent visits to the place, it becomes familiar. In such a case another question will arise, whether in fact the invitee had sufficient notice, but the danger, in my opinion, remains an unusual danger.** Though I think it is possible to discriminate in a concrete case between a danger which is unusual and one which is not unusual, no attempt to formulate a definition of unusualness appears to me to be likely to succeed." Emphasis mine

[92] These statements of law have since been adopted in numerous judicial authorities in the Eastern Caribbean and essentially reflect the law in this Territory. The authorities have established that proof of the existence of an unusual danger which caused the damage complained of is an essential ingredient of a claimant's case. In that regard, the Court has noted that there is clear precedent that improperly stacked cargo¹⁸ and improperly stacked lumber¹⁹ may give rise to liability on the part of a Defendant. Accordingly, the question to be answered in this case is: were the stacked pallets containing the bags of cement an "unusual danger" in the circumstances of this case?

[93] Although the judgment is in no way binding on this Court because it originated from Supreme Court of British Columbia, Canada and it applied the Occupier's Liability Act rather than the common law duty of care, this Court has had regard to the reasoning of the court in **Roed v Tahsis Company Limited**²⁰. In that case, the claimant was killed when eight packages of lumber, sixteen feet in height, fell on top of him while he was walking through the premises of the defendant Tahsis Company Limited on his way from the ship to the post office in the town south of the ship. A forklift lumber stacker operated by the defendant McKnight, an employee of the defendant Tahsis, admittedly working in the course of his employment, overtook and passed Mr. Roed, the radio

¹⁸ The Vladimir Timofeyev [1983] 1 Lloyd's Rep 378; Gaffney v The Aviation Shipping Company Ltd [1966] 1 Lloyd's Rep 249

¹⁹ Roed v Tahsis Company Limited (1977), 4 B.C.L.R. 176 (S.C.) (collapse of pile of timber)

²⁰ Roed v Tahsis Company Limited 1977 CanL II 394 (BC SC)

operator having continued walking while Mr. Roed had apparently waited for the stacker-operator to pass him. The stacker-operator turned between the two men, picked up one package of lumber from in front of a pile of lumber eight packages high (a total height of more than sixteen feet), moved south from in front of the place where he had taken the load, and then the eight-package pile fell on top of Mr. Roed, killing him instantly.

[94] The report of the “Accident Investigation” committee inferred that the pile probably toppled because it had not been blocked properly. The Court found that whatever was the cause of the toppling it was well-known by all forklift operators that piles were prone to topple from time to time. Such a danger was indicated in a “Correct Work Procedure” memorandum to forklift operators (Ex. 25) which specified that “unevenly piled loads in yard” were a hazard. The piles were particularly prone to fall when they were high, and when packages in front had been removed. It was noted that the defendant’s employee, knew of the danger of the pile toppling.

[95] The Court found that the Defendant’s employee was negligent when he removed the base package and left the eight-high stack in a potentially unstable condition while Mr. Roed was in the vicinity of the pile. However, the Court also found that the defendant company was not only liable for the negligence of its employee but was also liable on its own account for failing to give any adequate warning to ships’ crews of the danger from toppling piles of lumber, and for permitting them and other persons, without warning of danger, to regularly pass through an area which the defendant knew to be dangerous. The Court found that by so doing, the defendant breached the duty of care imposed on it by s. 3 of The Occupiers’ Liability Act.

[96] As regards the condition of the premises, it is the Defendant’s case that in order to ensure that each column of pallets is properly stabilized, the pallets were stacked in a terraced fashion. According to Ms. Potter, this system was implemented by her father Mr. Potter because it caused less friction and ensured stability. The Court must infer from this evidence that whatever the cause of the accident, it was appreciated that unless they were properly and safely stacked, pallets of cement were prone to topple and would present a danger to persons removing or collecting bags of cement in the vicinity of the shed.

[97] As regards the Claimant, it is common ground that he was a regular patron of the Defendant's business who was somewhat familiar with its premises. It is also clear that he was a mature individual with experience in civil engineering and building construction. However, the Claimant is not an employee of the Defendant and there is no evidence that he had any peculiar experience in the efficient and safe systems of storage of pallets of cement. Moreover, having regularly participated in the collection of cement in the past, the Claimant would not normally expect that pallets would be stacked in such a way as to present a danger to himself and the Defendant's employees. Indeed, during the trial, the Claimant testified that if the danger was obvious one he would not have gone near the shed. This Court does not doubt him.

[98] The Court therefore finds that stacked pallets of cement which were prone to collapse in the event that they were not stacked securely and properly or when the bags of cement in front had been removed would present an unusual danger on the Defendant's premises.

iv. If so, was it one the Defendant knew or ought to know?

[99] In the Court's judgment and for the reasons already indicated the evidence clearly discloses that the principals and servants of the Defendant owned the premises and that there were responsible for and managed and controlled the manner in which the pallets of cement were stacked and stored. On Ms. Potter's evidence there was clearly some appreciation of the risk of harm because a special system of stacking the pallets was implemented. The Court has no doubt that the Defendant fully appreciated that any failure to use care may result in injury to person accessing that area of the premises for the purpose of collecting purchased bags of cement.

v. Did the Defendant use reasonable care to prevent damage from the unusual danger?

[100] At common law, the occupier of premises has to take 'reasonable' care to see that his visitors are 'reasonably safe'. The occupier/defendant is not the insurer of the safety of the customer; he does not guarantee their safety. The duty is a lesser one of using reasonable care to prevent damage to the Claimant from the unusual danger of which the Defendant knew or ought to have known and of which the Claimant did not know or of which he could not have been aware.

[101] The existence of an unusual or hidden danger on the premises may trigger a duty on the occupier to warn visitors that they are entering a situation of danger. In **Singer (Litigation Guardian of) v Hamilton (City)**,²¹ a 78-year old woman fell into a four-foot trench at an unmarked construction zone. The absence of any clear warning sign made it impossible for the claimant to appreciate the risk before she could willingly assume it.

[102] If the unstable pallets presented an unusual danger to the Claimant, then the Defendant's duty was to ensure that the Claimant was aware of that danger either by posting a notice of taking other reasonable steps to let him know of its existence. The occupier/defendant may therefore escape liability by giving an adequate warning of any danger. Such warnings must be specific and such as to enable the visitor to be reasonably safe on the premises in question.

[103] The Defendants have relied on the posting of signage in the office area of the premises. The Defendant's principal witness, Deseree Potter's evidence is that:

"There was signage there when I came to work 2003. There was a problem of customers not checking their supplies until after they left. I made a sign personally for customers to check and wait in their car. All customers would check to be sure they had the right thing while they were waiting to be assisted."

Counsel for the Defendant argued that if the instructions of the sign were followed, then on a plain reading of the sign, the Claimant would not have been injured.

[104] Counsel for the Defendant pointed out that it was only when the Claimant was cross-examined, that he categorically denied having seen the sign. According to Counsel this demonstrates that the Claimant is inconsistent on this point and that his account ought to be regarded as unreliable. Having regard to the circumstances of this case, the Court is not satisfied that this is a reasonable conclusion. Remarkably, this critical issue did not make its way into the Defendant's defence of the claim. Having declined to specifically plead this fact, it should not be surprising that the Claimant did address by way of Reply. Moreover, when it had an opportunity to address the issue in the Answers to the Request for Further Information, they declined to mention it. These omissions were in the Court's view quite telling. In fact, the only reference to the purported signage is found in the evidence

²¹ 2009 ONCA 559

of Ms. Potter which would have been contemporaneously lodged with the Claimant's evidence pursuant to the case management order. As it relates to this contention, the Court has is satisfied that the Claimant was genuine in his evidence.

[105] A copy of a photograph depicting the sign was exhibited to Ms. Potter's witness statement. Moreover, even if the Court were satisfied that the sign was present in the office area as averred, it is clear to the Court that its placement and/or appearance was not sufficiently conspicuous or obvious or remarkable such as to provide an adequate warning to any visitor to the premises and the Court is not at all surprised that Claimant could not recall seeing it.

[106] Further, even if the Court were to accept that the sign was present (which it does not) the Court is also not satisfied that the content of the signage would have made it impossible for the Claimant to appreciate the risk before he could willingly assume it. Ms. Potter's evidence discloses that the true purpose of the sign was not to warn persons of an unusual danger or risk on the premises. Rather, she explained that the sign became necessary because of defects in the collection process. As a result, she personally prepared that sign which reflected that its employees were required to check the purchased materials against the relevant invoice. It is clear to the Court that the purported signage was more intended to regulate the collection process or to ward off pilfering rather to provide any warning of unusual dangers on the premises.

[107] Indeed, from all accounts there were no signs on the premises indicating or warning visitors. Ms. Potter confirmed in cross-examination that there were no signs on any part of the premises including in or near the shed where the cement was kept urging visitors to **Keep Out** or warning visitors of **Danger** or instructing visitors that an area was restricted to **Employees Only**.

[108] The Defendant could also avoid liability by taking reasonable steps to prevent his access to the shed. In the case at bar, the Defendant asserts that the Claimant was in a restricted area accessible only to the Defendant's employees. This contention is surprising as it is not disputed that the Claimant would routinely and freely reverse his vehicle into the yard, position the same 3 – 4 feet in front of the single pallet of cement so that the cement could be deposited into his vehicle. The Court has not doubt that on the day on question, the Claimant followed his usual practice. Moreover, it is clear

that the part of the premises in which the accident occurred and where the cement pallets were located was an open area with no physical barriers which would serve to prevent the Claimant from entering. Ms. Potter confirmed in cross-examination that there were no signs on any part of the premises including in or near the shed where the cement was kept urging visitors to **Keep Out** or warning visitors of **Danger** or instructing visitors that an area was restricted to **Employees Only**. It is therefore unclear to the Court how the Claimant or any lawful visitor would have been prevented from accessing this area.

[109] In the admitted absence of appropriate signage indicating **Keep Out** or **Employees Only** or **Restricted Access**, and where the shed under which the cement was stored was an open area with no physical barrier which would serve to prevent the Claimant from entering thereunder it is doubtful that this could have been conveyed to any visitor to the premises.

[110] The Defendant then asserts that it implemented procedures whereby customers would deliver copies of their invoices to its employees who would then collect the purchased items. According to Defendant, its employees received specific instructions and training from its principals as to the manner in which cement should be stored and retrieved in the course of completing a purchase order. According to it, the purpose of these instructions was to ensure that the cement was stored and retrieved in a manner which minimised the risk of injury to the person invited into the storage area.

[111] The Defendant further asserts that on the material day, the Claimant had been instructed to await assistance once it became clear that the employees were otherwise occupied. Unfortunately, Ms. Potter's vacillating testimony in this regard raised serious doubts as to her veracity and made it clear to the Court that her evidence could not be relied upon. It is clear to the Court that following the Claimant's purchase on that day, there were no employees available to assist with the retrieval of the cement bags as they were all occupied with other tasks on the premises. The Claimant's evidence is that he was instructed to collect the bags himself as the employees were busy. It is apparent that he would have felt comfortable in so doing because of his previous experiences at the premises. According to the Claimant, while he would initially have been assisted by the employees, over the course of time he would occasionally assist the employees in loading the individual bags

onto his vehicle and later he would have been permitted by diverse employees to retrieve individual bags of cement himself and manually place them in his vehicle. On occasion the Claimant would be told to retrieve the cement he required himself. He further stated that on the day in question, Mr. Potter told him to go ahead and take the cement, but stood in such a place and manner as to oversee see the actual collection of cement. This was in order to ensure that the correct number was taken. This oversight to ensure the correct items and quantities was normal. In the Court's judgment the Claimant's testimony was consistent on this issue and in the Court's view his evidence was entirely plausible and persuasive.

[112] The Defendant contends that the Claimant acted outside the terms of his invitation when he disregarded the remit of the invitation and his instructions to await the assistance of one of its employees. It is unclear to the Court how the Defendant could contend that the express terms of the Claimant's invitation upon the premises did not include entry under the shed when it is clear that the Claimant would ordinarily have parked his vehicle in the vicinity of the shed in order to load the cement. The Court has no hesitation in finding that the Claimant was a regular invitee of the Defendant and had doubtless been on the Defendant's premises and in the area of the cement shed on numerous occasions. By his own admission,²² the Claimant had grown accustomed to the staff of the Defendant and he would on occasion assist the employees in loading individual bags of cement on to his vehicle. In fact, he goes further to say that on a number of occasions that he visited the premises he was permitted to retrieve individual bags of cement by himself after having paid for the same and manually place them into the back of the vehicle. This Court finds no reason to doubt this evidence.

[113] The Court further finds no difficulty in accepting the Claimant's evidence that on the day in question he would have been instructed to collect the cement because the Defendant's employees were busy with other tasks and because he would have been sufficiently familiar with the Defendant and its employees and would in fact have developed a practice of assisting in the retrieval of his purchases. Indeed, it is accepted that the Defendant's employees were busy with other tasks and therefore unavailable to assist the Claimant.

²² Paragraphs 9 – 12

[114] The import of this finding is critical when the Court has regard to the Defendant's case made out in its Answer to the Request for Further Information. At paragraph 2 (a) (iii) – (v) of the same, the Defendant states that:

“iii. the Defendant's customers did not receive the special training which was afforded to its employees as the Defendant did not expect any of its customers to perform the duties which they had assigned to its employees;

iv. consequently, they would not have been aware of the methods by which the storage and retrieval of cement and/or other constructions materials could be safely effected;

v. the Defendant's customers were not therefore invited under the shed, this invitations was solely extended to the Defendant's employees.”

It is clear to the Court that the Defendant would have been aware of the potential danger presented at its premises and the likelihood of harm to its customers. It is curious that notwithstanding this, (for the reasons already set out, the court has found) the Claimant was in fact invited to assist himself on that day.

[115] In **Ward v Tesco Stores**²³ the English Court of Appeal provided useful guidance. In that case, the defendants owned and managed a supermarket store. While shopping in the store, the plaintiff slipped on some yoghurt which had been spilt on the floor and was injured. She brought an action against the defendants claiming damages for personal injuries allegedly caused by the defendants' negligence in the maintenance of the floor. The trial judge held that the plaintiff had proved a *prima facie* case and that the defendants were liable for the accident. The defendants appealed, contending that the onus was on the plaintiff to show that the spillage had been on the floor an unduly long time and that there had been opportunities for the management to clear it up which had not been taken, and that unless there was some evidence when the yogurt had been spilt on to the floor no *prima facie* case could be made against the defendants.

[116] Megaw LJ of the English Court of Appeal observed that:

“It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault; and to my mind the learned judge was wholly right in taking that view of the presence of this slippery liquid on the floor of the supermarket in the circumstances of this case: that is that the defendants knew or should have known that it was a not uncommon

²³ [1976] 1 ALL ER 219

occurrence; and that if it should happen, and should not be promptly attended to, it created a serious risk that customers would fall and injure themselves. When the plaintiff has established that, the defendants can still escape from liability. They could escape from liability if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, irrespective of the existence of a proper and adequate system, in relation to the circumstances, to provide for the safety of customers. But, if the defendants wish to put forward such a case, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers. That, in this case, they wholly failed to do.

- [117] In the case at bar, the Defendant had exclusive control of the shed and its contents and so the possibility that the stacks could pose a danger if not properly formed or maintained was reasonably foreseeable. It is clear that the Defendant was keenly aware of the potential danger posed because according to Ms. Potter there were some precautionary measures taken which in the Court's judgment were inadequate. The Court finds that in the wake of such knowledge, reasonable care would have dictated that the Defendant provide clear, adequate and conspicuous warnings of the potential dangers and to implement and maintain tangible measures which would restrict or prevent access to the shed by lawful visitors. The Court has considered the evidence in this case and finds that the Defendant failed to take these steps. Instead, the Court finds that the Defendant permitted the Claimant to regularly access the area which it knew to be dangerous without warning of the danger and that on the day in question when there were no employees available to assist in accessing the purchased bags of cement the Claimant was permitted to enter the shed and personally retrieve his purchases. The Court finds that the Defendant is liable for failing to give any adequate warning to the Claimant of the danger from toppling bags of cement and for permitting the Claimant without warning of the danger to access the shed for the purpose of retrieving his purchased cement in an area which the Defendant knew to be dangerous and in respect of which it is accepted that access should have been restricted or prohibited. In so doing, the Defendant breached its common law duty of care.

WAS THE CLAIMANT CONTRIBUTORILY NEGLIGENT?

- [118] Counsel for the Defendant has argued that in the event that the Court considers the Defendant liable for the loss caused to Claimant, then he asks that the Court also find that the Claimant was

contributory negligent. First, Counsel submitted that the Claimant belongs to a certain class of invitees which possessed specialized knowledge of building construction. He therefore ought to be aware of how cement is stored and the danger posed by the method of storage above that of the average man.

[119] At the time of the accident the Claimant was 44 years old suffered from no disability and appeared quite fit. The Claimant was also familiar with the Defendant's premises with experience spanning 3 years prior to the accident. Counsel also submitted that the Claimant knew the exact storage techniques used and the amount of cement which a pallet contained. Counsel further argued that the Claimant should have been acutely aware of the possible impact of removing cement from a pallet beneath another pallet.

[120] The Defendant posits that the Claimant was operating within a time constraint, thereby giving the reasonable inference that he was in a rush. This may have motivated the Claimant (who well knew the procedures) to depart from it under his own conscious and free will. Counsel argued that the Claimant should therefore be found 100% contributory negligent.

[121] The Claimant in response has submitted that there is nothing in the evidence which demonstrates that the Claimant failed to have a care for his own safety. Counsel for the Claimant submitted that the act of picking up bags of cement requires no special skill. The bags of cement were inert and he was used to picking them up without incident from that same spot. Counsel further argued that in the open storage area there were no alerts in the area by way of signage, by way of personnel preventing his access, or by way of physical barriers to suggest that he was entering a dangerous area of the Defendant's premises. That can be deemed to be a "safe" place in the absence of any indication that it contained dangerous goods (for example flammable or hazardous material) or had some other feature about which the person entering should be cautious.

[122] The Claimant's case is that he has proved on a balance of probabilities that he entered the relevant area openly and with permission. The Claimant therefore asks that the Court find for the Claimant on the matter of liability.

[123] As framed, the Defendant's submissions seem to be more consistent with a *volenti non fit injuria* defence. The contention appears to be that the Claimant was sufficiently familiar with the premises that he ought to be aware of how cement is stored and the danger posed by the method of storage above that of the average man. However, as Lord Shaw noted in **Letang v Ottawa Electric Railway Co.**:²⁴

"... if the defendants desire to succeed on the ground that the maxim "Volenti non fit injuria" is applicable, they must obtain a finding of fact "that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it".

[124] While the Claimant may well have been familiar with the Defendant's premises, the Defendant has failed to demonstrate that the Claimant was aware of the unusual danger present such as to leave the inference that the risk had been voluntarily-encountered. The Defendant however, contends that the Claimant was guilty of contributory negligence because he entered into a restricted or prohibited area, and because he failed to take reasonable care for his own safety while in that area.

[125] It is trite law that where this defence is pleaded, that the Defendant has the legal and evidential burden of proving, on the balance of probabilities, (a) fault and (b) the causative effect of the fault. A finding of contributory negligence is made when the Claimant's own negligence contributed to the damage of which he complains. Therefore, in those cases where the Claimant would have sustained the same injury even if he had taken reasonable care for his safety his damages will not be reduced.

[126] In **Tompkins v Royal Mail Group PLC**²⁵ it was held that the correct way for a judge to consider the issue of contributory negligence is to first assess the parties' causative contributions to the accident and injury and then in light of this finding decide what would be a just and equitable apportionment. The standard of care in contributory negligence cases is judged by what is reasonable in the circumstances. The test of what amounts to reasonable care in the circumstances, and whether or not the Claimant took such care, must be approached broadly and requires an objective assessment.

²⁴ [1926] A.C. 725 at p. 730; and see: *Osborne v. London and North Western Railway Co.* (1888), 21 Q.B.D. 220., per Willes J. at p. 223

²⁵ [2005] EWHC 1902

- [127] The particulars of the negligence set out in the Defendant's defence contends that the Claimant failed to heed or act on the instructions of the Defendant employees, servants or agents and failed to remain within the area of the premises to which his invitations related. The Defendant posits the theory that the Claimant was in a rush to return to work on the day in question and that its staff was unavailable to render immediate assistance to him. The Defendant suggests that this explain why the Claimant ignored specific instructions to wait until he was assisted.
- [128] For the reasons already indicated, the Claimant is not satisfied that the Defendant has proven this contention to the requisite standard. The evidence presented did not persuade the Court that the Defendant warned the Claimant that there was any danger in accessing the area nor was any measures put in place to make the Claimant aware that the route he was using was restricted or prohibited area. Instead, the Court finds that the Defendant allowed the premises to be repetitively accessed by the Claimant who had visited the premises frequently for several years prior to the incident. The Court further finds that on the day in question, the Claimant was again permitted to access the area of the shed in order to collect his purchases.
- [129] The Defendant however also submitted that the Claimant failed to keep any or any proper look out, to heed or act upon the presence and position of the pallets of cement and thus exposed himself to foreseeable risk of injury. Certainly, it is the duty of every person to take reasonable care of his own safety. The pallets of cement were clearly static objects and in and of themselves they did not constitute a risk. By their very nature no one could inadvertently trip over or walk into them.
- [130] The risk arose when the Claimant made the conscious decision albeit permitted by the Defendant, to move or attempt to remove bags of cement without assistance or supervision. In taking this decision, the Claimant was obliged to take heed of the presence and the position of the pallets and to apply reasonable care to ensure that he could complete his task safely. Given the Claimant's general experience, and his familiarity with the Defendant's premises, he ought to have been aware that in collecting bags of cement from the pallet in the manner in which he did, he ran the risk of destabilizing the other pallets of cement.

[131] The Claimant however presented no evidence that he took any steps to secure his safety. Instead, his own evidence indicates to the Court that he was completely consumed with his task when he saw a shadow coming towards him. He was clearly paying little attention to his surroundings, the placement of the pallet, and the potential impact which any removal could have on the pallets which were in vicinity and which would clearly had the potential to collapse and cause him injury. Indeed, had the Claimant paid attention and kept a proper look out, the Court has no doubt that he could and should have insisted that the Defendant's staff carry out the task or at the very least assisted him in collection.

[132] Turning to the question of the just and equitable apportionment, there is no doubt that the Defendant bears the greater share of responsibility. Weighing all of the factors, the Court concludes that Defendant should bear 80% liability, and that the Claimant contributed to his own injuries to the extent of 20%.

[133] Accordingly, the Court's order is as follows:

- i. **Judgment is entered for the Claimant.**
- ii. **The Defendant shall pay damages to the Claimant as assessed by the Master on application made by the Claimant. Such application to be made within one (1) month of the date of this judgment.**

The Defendant shall pay interest on the assessed damages from the date of assessment at the prescribed legal rate to the date of payment.

- iii. **The Defendant will have its costs to be quantified on a prescribed basis, if not agreed.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar