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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 1997/S-298

BETWEEN	VALORIS SMITH	CLAIMANT
AND	UGI GROUP LIMITED	DEFENDANT

Mrs. Sharon Usim instructed by Robertson & Co. for the claimant.

Ms. Racquel Dunbar for the defendant.

Heard: 13th May 2009 and 11th March 2010

Campbell, J.

(1) The claimant, Mrs. Valoris Smith, Chartered Accountant, was employed at the defendant company as Group Finance Manager.

(2) The defendant was a private holding company, with offices located at 4 - 6 Trafalgar Road. The subsidiaries are also private companies. The group consisted of U.G.I. Insurance Company, International Merchant Bank Ltd., Central Finance Corporation Ltd., Guardian Insurance Brokers Ltd. and Caribbean Loss Adjusters Ltd. Mr. Neville Blythe, executive chairman of the group was able to give directions to any of the subsidiaries.

(3) The premises, 4 – 6 Trafalgar Road, was divided into strata units. The lobby was owned by Central Finance Corporation Limited. The defendant's offices were on the third floor. All the companies on the building were members of the group. The claimant had to use the lobby to access her offices and to exit the building, as does all the other employees and visitors to that building.

(4) On the 28th February 1994, the claimant was walking across the lobby when she slipped on the floor and almost fell. She stated that she had lost her balance and finally steadied herself with her legs in a scissors like position. She said the floor was marble tiles which were polished to a "high degree".

Was the defendant an occupier for the purposes of the Occupiers Liability Act 1969?

(5) On the 16th February 1998, the claimant filed an amended writ of summons and amended Statement of Claim, in which it was pleaded: inter alia.

> "The plaintiff slipped as aforesaid by reason of negligence on the part of the defendant, its servants or agents and/or by reason of the defendant's breach of the common duty of care under section 3 of the **Occupiers Liability Act 1969**."
>
> The Negligence was particularised as follows;
>
> (1) Causing or permitting the floor of the said lobby to be or become or remain in an unsafe and dangerous state.
>
> (2) Causing or permitting the said floor to be polished in such a manner or to such an extent as to be rendered slippery and dangerous.
>
> (3) Failing to take any or any reasonable care to see that the plaintiff would be reasonably safe in using the said premises.
>
> (4) Exposing the plaintiff to the risk of injury or damage from a slippery floor of which the defendant or . . . ought to have known.
>
> (5) Failing to give the plaintiff any or any sufficient warning of the dangerous condition of the floor.
>
> (6) Failing to provide a covering over the said floor or any part thereof or by any other means to enable safe passage across the slippery floor.
>
> (7) In the premises, failing to discharge the common duty of care to the plaintiff in breach of the said Act. The allegations contained in paragraph 4 of the Statement of Claim and the Particulars thereunder and states that the said incident was wholly due to the negligence of the plaintiff.

(6) The defendant, in the Amended Defence, denied the allegations and alleged further that the plaintiff contributed hereto by:

a) Failing to have any or sufficient regard for her safety.

b) Failing to take any or sufficient steps to safeguard her person.

(7) A further Amended Defence alleged at paragraph 1, that the defendant was not the sole occupier of the said premises.

And at para 4;

(4) The defendant avers that at no time did it have any control over the maintenance, cleaning or condition of the said premises, including the floors in the lobby. Further that it was the United General Insurance Company Limited, the co-occupier of the said premises that had full control over and the responsibility of maintaining the said premises at all material time.

(8) On 10th January 2007, on an Order made at Case Management, the claimant's case was struck out. It appeared to have been restored because on the 23rd of October 2007, Case Management Orders were made, among which was an order for an Agreed Statement of Facts and issues to be filed on or before the 2nd day of June 2008 by 4pm.

In accordance with that order, it was agreed inter alia:

(a) U.G.I Group Limited was, at all material times, in occupation of part of the premises situate at 4 - 6 Trafalgar Road, Kingston 5, in the parish of St. Andrew. The said premises were also occupied by other companies, including United General Insurance Company Limited.

(b) An agreed issue was, whether the defendant owed a duty of care under the Occupiers Liability Act to the Claimant. (b) Whether there was a breach of that duty.

Claimant's case

(9) Mrs. Usim argued that the claimant was employed to the UGI Group, and that UGI was one of several occupiers of the building. UGI Group Ltd. was the holding company for several

companies including United General Insurance Company. Mr. Blythe was the executive Managing Director of both companies.

The claim is made under the Occupiers Liability Act 1969 (The Act) and or in Negligence. The Act at S3 imposes a common duty of care on the occupier to all his visitors.

(10) It was further argued by the claimant that the defendant company cannot escape liability. It had direct control over maintenance of building. The floor was in a condition that was dangerous. See Victoria Mutual Building Society v Barbara Berry. There was a duty which was breached.

The Defendant's Case

The Lobby was traversed by everyone as well as UGI Insurance Co. Ltd., who also occupied the building. It doesn't matter who owns that particular area.

The case law on "occupier" under the common law is the person who has care and control of the section. "If tenancy devised, it is the tenant who has the responsibility, not the landowner." (See Lacona & Co. (1966) A.C. 522) The claimant, not a stranger, would deal with the assets that the Company owns, well aware that United General Insurance Co. Ltd. is the proper party. Agree that lobby is common area. It is United General who has care and control of the lobby.

"Mrs. Smith admits that she has traversed the area before and after the incident" VMBS v Barbara Berry found that the customer was contributory negligent where they know the area. There is an issue in dispute. Had the condition of the floor changed? The onus is on the plaintiff to prove that the floor was in a dangerous state.

(11) The claimant exhibits minutes of two management meetings of the 7th and 14th March 1999, of the defendant, at which the state of the flooring in the lobby was discussed and claims

that this evidences that the defendant has direct control for maintenance of the building. It is common ground that the supervision of the cleaning of the lobby floor was done by an employee of the defendant, Ms. Lorna Bernard, the Administrative Assistant to the Executive Chairman.

(12) The defendant contends that UGI Insurance Company was solely responsible for the maintenance of the floors in the lobby. That there was a contract with a cleaning company to see to the proper care of the flooring in the lobby. That the UGI Group Ltd., as a shareholder, did not take responsibility for the day to day running of the companies. A further contention of the defendant is that U.G.I Insurance had made payments to the contracted cleaners of the lobby, which, according to them, demonstrates direct control over the lobby.

Analysis

(13) In Wheat v E. Lacon & Co. (Supra), the defendants were brewers, owners of a public-house, whose maintenance was entrusted to a manager, a licensee. The plaintiff and her husband were paying guests of the manager's wife. The plaintiff's husband had left to purchase drinks at the bar downstairs. He was found dead at the foot of the back staircase. The back stairs were unlit, and the handrails did not extend to the bottom of the staircase.

On the question of who is an occupier, for the purposes of the Act, Lord Denning, after dismissing the assistance that could be derived from the use of "occupier" in other branches of the law, said at page 579a of the judgment, "***If a person has any degree of control over the state of the premises it is enough***." At page 589f, Lord Pearson said, "***The foundation of occupiers' liability is occupational control, i.e. control associated with and arising from the presence in and use of or activity in the premises***."

(14) Did the defendant have a sufficient degree of control over the premises to put them under a common duty to the claimant? The defendant had demonstrated at the meetings of its Board

that it exercised a sufficiency of control, to bring about changes in the condition of the flooring. The Executive Chairman of the Group, Neville Blythe, admitted also that the defendant oversees financial control of its subsidiaries.

(15) There is no denying that the defendant meets Lords Pearson's prescription. The group, although situated on the third floor, clearly has *use of or activity* over the lobby; over which their employees are obliged to traverse each day they come to work. Exclusive control is not necessary to ground a finding of occupancy. See Creed v McGeoch & Sons Ltd. WLR 1955 (Vol. 1) 1005. It is clear that the judgment in Wheat v E. Lacon (supra) proceeds on the basis that there may be joint control. The judgment of Lord Morris at page 585, letter a, places joint control in both the brewers and the manager and says "***The duty was to take such care as in all the circumstances of the case was reasonable to see that Wheat and his party would be reasonably safe in using the premise as guests for reward..***" Lord Denning dictum in Wheat v Lacon, is that *any degree of control over the state of the premises is enough.* I find that the defendant had a duty in these circumstances to take such reasonable care to see that the claimant would be reasonably safe in using the premises as an employee whose offices were situated on those premises.

The Duty of Care

(16) The Act at s3 imposes the duty of care that the occupier owes a visitor to the premises. This is defined at S3 (2) of the Act as, "the common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there." There is no challenge that the claimant's uses of the premises was for the purpose for which she was invited.

(17) The Court of Appeal in the unreported decision of Victoria Mutual Building Society v Barbara Berry, delivered on 31st July 2008 states that the statutorily regulated duty of care is essentially similar to that of the common law. It is a question of fact whether, a defendant, as occupier, failed to take reasonable care for the safety of his visitor. Harris, J.A. page 8, para 14, said;

> "The respondent must demonstrate that her slipping and falling on the step was inconsistent with the appellant exercising due diligence in providing a safe area over which all visitors could have safely traversed its building."

(18) The claimant in her evidence-in-chief stated "I was walking across the lobby of the said premises when I slipped on the floor and almost fell to the ground. The floor of the lobby is made of marble tiles which are polished to a high sheen. I lost my balance with my legs in a scissors like position."

At no time were there any signs erected or posted to warn visitors or employees that the floor may be slippery. The next reference to the circumstances of the fall was by way of cross-examination. Where the claimant testified, "I did not fall totally. It occurred in the lobby area of the ground floor, which all companies on the building should use that lobby."

(19) The claimant had also relied on minutes of two meetings of the Board of the defendant to say that the defendant owed her a duty as occupier and, importantly, to show that the surface of the flooring in the lobby was slippery. These meetings were held on the 7th & 14th March 1994. On the 7th March, the minutes noted: The meeting was informed that the tiles in the lobby area had been cut and polished. It was requested that something be done so that they would no longer be slippery. This supports the claimant's assertion that she had been confronted with a new floor.

(20) The 14th March minutes noted: Miss Bernard informed the meeting that she had been advised that polishing the tiles was necessary to the longevity of the tiles. However, the cleaners had been told not to polish the tiles anymore, but to "wipe them with warm water and vinegar." The change from polishing supports the allegation that the defendant had caused the floor to be rendered slippery and dangerous.

(21) The further description of the surface was elicited in cross-examination, "the surface was very smooth with no grip, it appeared very shine. "Before that, it was flat." The witness testified that Blythe had earlier that month said that the floor should be worked to a shine. The witness said the vinegar and water was to bring the slipperiness down. She was alone at the time of the incident, it was about 10:00am. She had worked at that office for about six years. She would have walked across the lobby twice a day, five days per week for that period. She admits that she had used the lobby earlier that morning. Her unchallenged testimony is that 'she was not familiar with the lobby; that was the first morning it had been polished. Prior to that morning, her evidence is, she had no difficulty navigating the lobby. The notes of the meeting of the 7th March support the claimant's testimony as to the slipperiness of the floor, and that its polishing was recent.

(22) Mr. Blthye in cross-examination said that, all persons doing business on those premises had to use the lobby. He said based on the information he had, he would have expected that a sign would be placed. He said he did not give any such instructions as to signs. He had not noticed any change in the maintenance of the flooring. He had not received any complaint, he did not consider the flooring dangerous, and asserted that the floor had been that way for fifty years; no complaint had come to him about the floor.

(21) The fact that the defendant effected a change in the system of care it administered to the floor subsequent to the incident indicates that the defendant recognize the danger in the replaced system. It is important that the polishing, the subject of the complaint, was a new feature that the claimant was experiencing for the first time. The defendant tendered no evidence to demonstrate that the surface of the floor was of such a nature that in the ordinary course of things, the claimant or any other visitor would not have fallen on it. The defendant ought to have shown that there was no latent or obvious defect in the flooring.

(22) The defendant the .....Court to draw an inference from the fact the claimant was the only complaint, or fall that had been experience. She had been over the floor earlier. Why were the others able to traverse the lobby successfully, as did the claimant earlier that day, yet she failed on her second attempt. She would have been aware of the new state of the flooring. In V.M.B.S v Barbara Berry, Harris, J.A., after citing Lord Denning in Davies v Swan Motor Co. Ltd., said of the claimant/respondent, a customer in the appellant business establishment had slipped and fallen. The court at first instance had found that there was a warning posted but that it was inadequate, and that the claimant, a senior citizen had failed to see it. The Court of Appeal accepted that the claimant had not seen it. The court was of the view that the judge ought to have considered that the claimant, as Mrs. Smith in the instant case, had traversed the area earlier. The court found that the judge should also have considered that there was no accident prior to the date of the incident.

(23) I find that he claimant ought to have taken care for her safety, having passed over that step previously that eventual day. Injury sustained partly due to her negligence. She, being contributory negligent, is 50% responsible for her injury.

Damages

(24) The claimant was taken to Dr. Banbury, whose surgery is situated on adjoining that of the claimant's office. She said she could not walk for two weeks and was referred for physiotherapy to Rehab Plus, it was noted that her back pain was made worse by editing, sitting, rising from sitting and movement. The minutes of the 14th March 1994 starts by welcoming the claimant back to work after her unfortunate accident. The claimant next saw Dr. Emran Ali of Eureka Medical Ltd. on the 3rd January 1995. On examination, Dr. Al noted that she was tender over the lumar spine with pains at the extremes of movement of the spine. X- Rays showed no evidence of bony injury. A CT scan done on January 25, 1995 was reported as a normal study with no evidence of a disc prolapsed.

Dr. Ali opined that the patient sustained injury to the sciatic nerve which is recovering very slowly. She was then assessed at P.P.D of about 15% of the right lower limb.

On 6th June 1995, Dr. Ali again saw the claimant, who was complaining of severe pains in the lower back radiating down to the right thigh. On the 21st June 1994, when Dr. Ali saw her again on 21st 1995, the pains were improved, but had returned with recurrent attacks of lower back pain, which was preventing her from doing her job.

Dr. Dundas saw the patient on 20th February 1996 and on examination of her spine, noted "restrictions of forward flexion and focal tenderness over the right sacroiliac joint. Sensory lunting was noted in the L5 dermatome. Scanseen disc protrusion not of surgical import. Suggested swimming as a form of exercise.

The Claimant was not seen by Dr. C. Rose on 7th February 200 before whom the claimant complains that lower back pains have severely affected her sex life. She is no longer

able to attend the gym Dr. Dundas opined that "she will be plagued with intermittent lower back pain which will be affected by her occasional and vocational activities. Her symptoms will be permanent. Her total permanent partial percentage disability is nine percent of the whole person.

Counsel relied on the case of Wellington Williams v Black River Upper Morass Devolpment Company Ltd. 9th April 1997. In that case, the claimant was hospitalized for six weeks, had decompression laminectomy. He was left with (1) irreversible impotence and permanent damage to left L5/L5. These two injuries place Williams' injury in a more serious category. In the instant case, Dr. Dundas recommended laminectomy and removal of the herniated intervertebral disc. The claimant decided against surgery. There was no need for hospitalisation, although there was a diminution in the frequency of sexual activity damages for pain and suffering. He suffered a ppd of 10%. The Court had awarded pain and suffering and Loss of Amenities. $1,980,000.00 - Loss of Future Earning $2,430,272.00, Total, $4,410,272.00 the updated figure is $6,300,000.00.

Ms Dunbar submitted that Barbara Brady v Barlig Investment Co. Ltd. Vincent Loshusan & Sons 11th November 1998, Claimant had fallen in the supermarket, suffered (1) loss of consciousness (2) Severe lower back pains (3) Marked tenderness along lumbo-sacral spine as well as both sacro-iliac joints, suffered a ppd of 5%.

An award of $300,000.00 was given for General Damages, updated, that figure is $816,058.

The other case, Tasma Henry-Angus v Attorney General, 18th November 1994. PPD 5%, of the whole person. Left sacro-iliac contusion with possible lumbar lumbar disc.

The cases advanced by the defendant are not in the category advanced by the..... I would discount Williams which, as I have pointed out, is much more aggravated. I would discount Williams by a third. I would make an award of $4,500,000.00.

Special Damages

$271,000.00, copies of receipts for medical expenses

$54,115.84

$325,115 84 $600US