

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

CAUSE NO: 172 of 2015

BETWEEN:

MICHELLE S. BURKE

PLAINTIFF

AND:

KIRK FREEPORT PLAZA LIMITED

DEFENDANT

IN OPEN COURT

Appearances:

**Mr. Colm Flanagan of Nelson & Co., Attorneys for the
Plaintiff**

Ms. Alice Carver of Priestleys, Attorneys for the Defendant

Before:

Hon. Justice Marlene I. Carter Actg.

Heard:

11 October 2018

Draft Judgment

Circulated:

22 October 2019

Judgment Delivered:

20 November 2019



HEADNOTE

*Employer/Employee – Injury at work - Application to strike Plaintiff's claim-
Summary judgment.*



JUDGMENT

The Defendant filed a Summons on 7th August 2018, seeking, inter alia, orders that the Plaintiff's claim be struck out on the grounds that the Plaintiff has no reasonable prospect of succeeding at trial; or alternatively that the Defendant be granted summary judgment against the Plaintiff in respect of the claim, or such parts thereof as the Court deems fit, and if or where summary judgment is awarded for part of the claim only, that the Plaintiff furnish security for the Defendant's costs.

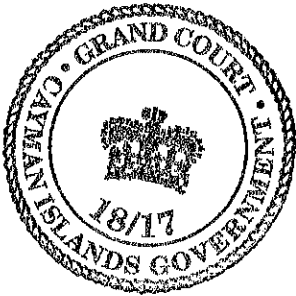
2. The Plaintiff filed a Cross Summons on 23rd August 2018, seeking summary judgment on the issue of liability against the Defendant on the whole of the claim.

Background

3. The Plaintiff was employed as a Store Manager at the Defendant's retail jewellery store. In 2011 a display was installed at the store to showcase TAG Heuer watches (hereinafter referred to as the "Tag Heuer Corner").
4. On 1st May 2014, as the store was being closed down for the day, a duty which involved removing all valuable merchandise from the store to the vault, the Plaintiff went to remove watches from the Tag Heuer Corner when a panel of wood fell and struck the Plaintiff on the head. The Plaintiff attended at Hospital and was discharged the same day.
5. The Plaintiff claims that the impact caused her immediate pain, injury, shock and distress as a result of the Defendant's negligence and/or breach of duty and/or breach of contract of employment.
6. The Plaintiff set out a number of particulars of negligence all of which I will not enumerate here relating to the Defendant's failure to provide a safe system of work, and failure to ensure the safety of the Plaintiff during the course of her performing her duties.

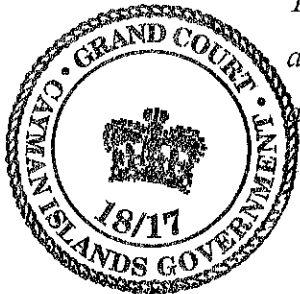
7. Of particular relevance to the Plaintiff's application are those particulars relating to the Tag Heuer Corner, wherein the Plaintiff pleaded that the Defendant:

- "(h) Failed to adequately or at all in time or at all examine, inspect, repair or maintain the plank/shelf;*
- (i) Permitted or suffered the Tag Heur display area to be or to remain in use despite the dangerous condition of the plank/shelf;*
- (j) Failed to devise, institute, operate or ensure the institution or operation of any or an adequate system of routine preventative examination and maintenance of the plank/shelf and/or Tag Heur display area;*
- (k) Failed to warn the Plaintiff of the dangers of working in the above circumstances or otherwise prevent her from so doing;*
- (l) Failed to provide any or adequate measure to prevent the plank/shelf from becoming unsecured and thereby presenting a risk of falling and causing injury to persons below'*
- (m) Failed to take suitable and sufficient steps to prevent the fall of the plank/shelf;"*



8. The Plaintiff's claim also detailed the particulars of injuries and conditions that she claims arose from the accident at the Tag Heuer Corner and the Plaintiff claimed general and special damages as a result thereof.
9. The Defendant's application for summary judgment was against the three aspects of the Plaintiff's claim arising out of negligence, breach of contractual duty and breach of statutory duty.

10. The Plaintiff's application for summary judgment was premised upon the admission by the Defendant that installers of the Tag Hauer Corner were negligent in the installation of the Panel.
11. The issues for determination are:
- (i) Does the Plaintiff's claim fail to disclose a reasonable cause of action in respect of any of the heads of claim set out in the statement of claim?
 - (ii) Is this a plain and obvious case entitling the Defendant's application to succeed?
 - (iii) Is the Defendant entitled to summary judgment?
 - (iv) If either or both of the Defendant's applications for summary judgment or striking out fails, is the Plaintiff entitled to summary judgment or any other relief?
12. The principles applicable on an application to strike a claim are found in Order 18 of the *Grand Court Rules ("GCR")*. Order 18 Rule 19 r 1 states:



"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

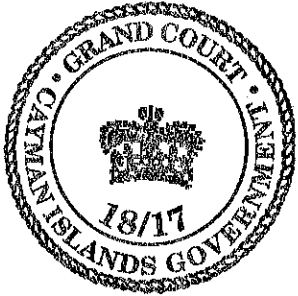
"(a) it discloses no reasonable cause of action or defence, as the case may be;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

13. No evidence shall be admissible on an application under subparagraph (1)(a).¹

¹ Order 19 r 2

14. The Defendant referred the court to the case of *TCB Creditor Recoveries Ltd v Arthur Anderson LLP*² in which McIntosh J. (Ag.) dealt with the matters that the court should consider on an application to strike.



“The rule in striking out applications is that the court must assume that the facts pleaded in the statement of [claim] are true. This means that the Defendant pleads the facts on which he wants to rely and the court simply looks at the pleadings. Order 18, r. 19(1)(a) is expressly designed to deal with a case which has no reasonable chance of succeeding. No evidence is admissible and the court is required to consider the pleaded case and come to a determination as to whether or not the case is sustainable. If it is sustainable, it goes forward. If it is plainly and obviously unsustainable, it is to be struck out.”³

15. On the instant application it is correct to say that the pleaded cases for negligence, breach of contract and breach of Section 58 of the *Labour Law* all rely on the same facts and are pleaded in similar terms. The Plaintiff’s position is that the Defendant failed to take reasonable care to ensure, as far as reasonable practicable, the health, safety and welfare of the Plaintiff.

Common Law Duty – Negligence

16. The Defendant contends that the Plaintiff must prove that the risk of injury complained of was foreseeable. Counsel for the Defendant submits that there is no pleading that there was any visible or obvious defect with the Tag Heuer Corner so as to put the Plaintiff or the Defendant on notice of foreseeable risk to the Plaintiff. Further that the Plaintiff has not pointed to the positive duty on the Defendant to examine, inspect or in any other manner maintain the Panel or the Tag Heuer Corner. The Defendant asserts that “*while there is a bare assertion of such a duty, ...there is no basis provided for it in the factual scenario pleaded in the statement of claim. As such there is no duty identified that the*

² [2008 CILR 486]

³ See also the Sime, *A Practical Approach to Civil Procedure*, 3rd Edition, Chapter 30 pgs 362-364 on this issue.

Defendant failed to undertake and therefore no assertion that had any such duty been complied with, that it would have prevented the accident.”

17. Further the Defendant contends that the fault for the failure of the Panel was not the Defendant's. Instead the Defendant points to the installers of the Tag Heuer Corner. The amended defence states at paragraph 8:

“8. (i) TAG Heuer is a company which make and design watches.

(ii) Dobas is a reputable interior design and architecture firm based in Switzerland.

(iii) Dobas designed the TAG Heuer Corner at the instruction of TAG Heuer.

(iv) Dobas provided the materials to install the TAG Heuer Corner and supplied two persons to carry out the installation which was completed in early 2010.

(v) The Defendant did not instruct Dobas in the design, installation or supply of the TAG Heuer Corner, the Defendant only facilitated the installation at the direction of TAG Heuer.

(vi) The Defendant is not liable for any defect in the design or installation of the TAG Heuer Corner or the materials used for the installation of the TAG Heuer Corner.

(vii) Dobas failed to properly install the Subject Panel in that the two installers failed to insert “biscuits” or dowel into the joints of the Subject Panel to securely hold the Subject Panel in place and failed to use a sufficient amount of glue.

(viii) Up to and including 1 May 2014 the Defendant was not made aware, and had no reasonable cause to be aware, of any defect with the Subject Panel or the TAG Heuer Corner.”

18. The Plaintiff's argument is that the breach of duty lies in the failure of the Defendant to examine, inspect, repair or maintain the plank/shelf, that there was a non-delegable duty



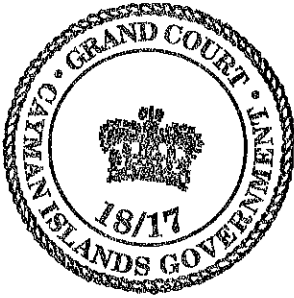
to maintain the Tag Heuer display. The Plaintiff also relies on the doctrine of *res ipsa loquitur* in their pleadings.

19. Further, in the Plaintiff's Reply to the Amended Defence the Plaintiff asserts:

"5. (c) 8 (iv) - (vi) are denied. It is averred that:



- (i) *The individuals who installed the Tag Heuer display area ("the Installation") were employed by the Defendant and were issued work permits in the name of the Defendant on or around 20 April 2010. Furthermore, that they were assisted by a local electrician in and about the Installation.*
- (ii) *Under the terms of the Corner Agreement, the Defendant was responsible for half the costs of the Tag Heuer display area, including those relating to the Installation and the individuals employed for that purpose.*
- (iii) *The individuals referred to at (i) above, as employees of the Defendant which carried out the Installation, were carrying out activities which were integral to the Defendant's obligation to provide a safe place of work and as employees of the Defendant, the said individuals were acting or should have been acting under their supervision, and/or control, and/or instruction of the Defendant.*
- (iv) *It is noted that it is not alleged that anyone from Tag Heuer was present at the Premises during the Installation. It is averred that the Defendant's Visual Merchandising Team were involved with Installation of updated displays and visuals.*
- (v) *In the alternative, if, which is denied, the individuals were employees of Dobas for the purposes of the Installation, they ought to have been acting under the adequate supervision, and/or control, and/or instruction of the Defendant as they*



were carrying out activities which were integral to the Defendant's non-delegable obligation to provide a safe place of work and in any event the Defendant failed in its duty to ensure the workers were competent and that the work was properly done.

(vi) *In the premises the Defendant is liable for negligence in or about the Installation.*

(d) *Dobas' responsibility for the Accident as alleged 8(vii) is denied. For the reasons set out above, the plank/shelf was installed by employees of the Defendant. In the alternative, even if, which is not admitted, it was Dobas who failed to properly install the plank/shelf as alleged, they were carrying out activities which were integral to the Defendant's non-delegable obligation to provide a safe place of work and in any event the Defendant failed in its duty to ensure that Dobas' employees were competent and that the work was properly done."*

20. At issue is whether the Defendant's duty to the Plaintiff to provide a safe place and system of work was breached when the persons who installed the Tag Heuer Corner from Dobas (hereinafter "the installers") "*failed to properly install the Subject Panel*" and further whether this failure results in the Defendant being liable to the Plaintiff.
21. In the cases cited by the Plaintiff, courts have recognized that the duty to provide a safe place of work is one which may be confined to the employer as being of a non-delegable character.⁴
22. From the pleadings it appears that there is an issue to be ventilated on this aspect of the claim.

⁴ See *Paine v Colne Valley Electricity Supply Co Ltd* [1938] 4 All ER 803 and *Sumner v William Henderson & Sons Ltd* 1 All ER 408

Statutory Duty - The Labour Law

23. With regard to the Defendant's duties pursuant to the *Labour Law*, the Defendant does not deny that it owed duties to the Plaintiff in accordance with Sections 58 and 60 of the *Labour Law*.

“58. *Every employer shall ensure so far as is reasonably practicable the health, safety and welfare at work of his employees.*

.....

60. *For the purpose of ensuring the safety of persons employed or performing any duty therein, the operator of every workplace shall ensure that –*



- (a) adequate measures are taken for the prevention of fire therein;*
- (b) adequate means of escape are provided for persons employed therein;*
- (c) machinery used therein is operated and maintained in such a manner as to be safe for all employees; and*
- (d) any and all buildings comprised in the workplace and all parts thereof are of sound construction and properly maintained.”*

24. However, the Defendant argues that because the Tag Heuer corner is a movable display, it does not form part of a building and that Section 60(d) of the *Labour Law* is inapplicable. Counsel referred to the dicta of Smellie C.J. in the case of *In R.E. Rowe and B.T. Rowe v Proprietors, Strata Plan No. 83*⁵ where he concluded that fittings erected as permanent attachments to a building and useable only on that particular site became in law part of the building as fixtures and ceased to be chattels. Counsel sought to distinguish that case from the instant matter where the subject panel was not a building or part thereof.

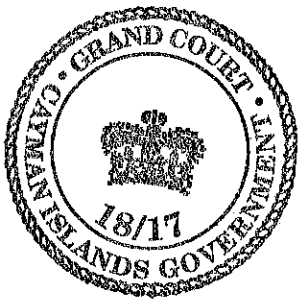
⁵In *R.E. Rowe and B.T. Rowe v Proprietors, Strata Plan No. 83* CILR Note 31

25. The Plaintiff's response to this aspect of the application is to state that this is the crux of the issue between the parties on this aspect of the claim - Was the plank a moveable chattel? For this reason the Plaintiff states that striking out, pursuant to Order 19, of that part of the claim brought under the *Labour Law* cannot be supported as this is a live issue between the parties and the court should only order strike out in a clear case.

Contractual Duties

26. The Defendant asserts that the duties that the Plaintiff seeks to rely upon, under this head of her claim, were not duties which arose from explicit terms of the employment contract between the Plaintiff and the Defendant. As such, the Defendant submits, the Plaintiff must first prove that these terms could be implied into the contract. The Defendant also submits that if any such term may be implied to impose a duty for the Plaintiff's safety, it could only require a reasonable standard and not strict liability.⁶

27. The Relevant pleadings are found at paragraph 3 of the Statement of Claim where the Plaintiff asserts that certain contractual terms govern the relationship between the Plaintiff and Defendant are as follows:



- “(i) That the Defendant take all reasonable precautions for the safety of the Plaintiff while she was employed by the Defendant*
- (ii) That the Defendant was not to expose the Plaintiff to damage or injury of which the Defendant knew or ought to have known*
- (iii) That the Defendant was to provide and maintain a safe and proper system of work at the Premises; and*
- (iv) That the Defendant was to ensure that the Premises and all parts thereof were of sound construction and properly maintained.”*

28. The fact of the Defendant's duty, whether it proceeds from the common law negligence, contract or the statutory duty set out in the *Labour Law* are somewhat interconnected. It

⁶ Panting v Whitbread Plc [1999] C.L.Y.

is obvious to this Court however that this is not a case where it is clear and obvious that there is no cause of action disclosed on the pleadings. Neither is this claim frivolous and vexatious or an abuse of the court. The Defendant's application to strike the Plaintiff's claim or any part of it is dismissed. Similarly, the Defendant's application for summary judgment is dismissed. This Court does not find that this is an action that had no real prospect or no prospect of success.

The Plaintiff's application for summary judgment - GCR Order 14 r 12.

29. In the local authority of *Cribb v Reid*⁷ Patterson Ag. J. stated:

*"In my view, as I have said earlier, the scope of O.14, r.12 appears to be very wide. It gives a Defendant the right to terminate proceedings against him in a summary manner by showing that the Plaintiff's claim has no prospect of success. If the Defendant is able to show that the Plaintiff's case is clearly unsustainable, then he will be entitled to judgment without the necessity of a possible long drawn out trial. If the issue raised by the defence is shown to be sufficient to finally determine the action in his favour without a full-scale trial, then in my view, an O.14, r.12 application is appropriate. These are but examples of the scope of the rule and are by no means exhaustive. The application of the procedure not only saves costs but it saves the time of the court."*²



30. The Plaintiff's application for summary judgment is directed in this case by what the Plaintiff states is an admission on the part of the Defendant of negligence. The Plaintiff referred to that part of the pleading referred to above wherein the Defendant stated:

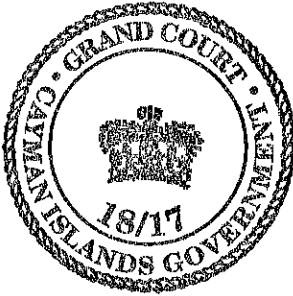
"Dobas failed to properly install the Subject Panel in that the two installers failed to insert "biscuits" or dowel into the joints of the Subject Panel to

⁷ 1997 CILR N-5

securely hold the Subject Panel in place and failed to use a sufficient amount of glue.”

31. The Plaintiff in her Reply to the Amended defence states that:

“(d) Dobas’ responsibility for the Accident as alleged 8(vii) is denied. For the reasons set out above, the plank/shelf was installed by employees of the Defendant. In the alternative, even if, which is not admitted, it was Dobas who failed to properly install the plank/shelf as alleged, they were carrying out activities which were integral to the Defendant’s non-delegable obligation to provide a safe place of work and in any event the Defendant failed in its duty to ensure that Dobas’ employees were competent and that the work was properly done.



(e) As to 8(vii) it is averred the Defendant should have devised, instituted, operated, and/or ensured the institution, or operation of an adequate system of routine preventative examination and maintenance on the plank/shelf and/or Tag Heuer display area. The Defendant was under a duty to inspect for defects in the state of the Premises including the Accident locus. A reactive system to conduct ad hoc repairs was not reasonable in all the circumstances.”

32. On a claim of the sort filed by the Plaintiff it is the case that there are limits to an employer’s duty of care. The law does not require an employer to ensure in all circumstances the safety of employees, and an employer will be deemed to have discharged their duty of care if s/he does what a reasonable and prudent employer would have done in the circumstances. An employer’s duty is not an unlimited one and an employer cannot be reasonably expected to provide a place of work, guaranteed to exclude any potential hazard no matter how remote a possibility, or how unforeseen it is.

33. The affidavits filed in support of the Defendant's application are instructive on this point. The evidence in support of the Defendant's position, that they took all reasonable steps to ensure a safe place of work especially as it related to the Tag Heuer corner, came from the First Affidavit Mr. Christopher Kirkconnell filed on the 3rd October 2018. He deposed that, in relation to the Tag Heuer Corner:



“15. *Kirk Freeport's responsibilities in accordance with these conditions included the regular upkeep of the various elements of the corner. Dobas did not direct that any inspection or maintenance of the unit was required. We've had numerous similar displays installed in Kirk Freeport stores, none of which require inspection or maintenance and none of which we have ever had a problem with. Many of these have been produced by either Obrist under the direction of the executives currently running Dobas and some of these have been produced by Dobas. Both companies have used either the same or similarly skilled installers.*

16. *The Plaintiff, as Store Manager, never reported any issue or concern with the TAG Heuer Corner including any concerns about the condition it was in. No other staff, customers or other individuals had brought any issues to Kirk Freeport's attention. Kirk Freeport had no reason to believe or suspect there was any fault with the TAG Heuer corner or any risk to Kirk Freeport employees or any other person.*

17. *It has since been brought to my attention that Patrick Sinclair, the Maintenance Manager at Kirk Freeport, inspected the Subject Panel after it fell and found that it was missing the discs of wood that should have been used to hold it in place and insufficient glue had been used. There is no way that Kirk Freeport could have*

known or suspected this to be the case. Kirk Freeport relied on the skill and expertise of Dobas who have previously operated at a very high standard. If the Plaintiff has any claim in this case it lies against Dobas. The Plaintiff had sufficient information in its possession to add Dobas as a party to this claim if it so chose."

34. The evidence of the maintenance manager, Patrick Sinclair is also relevant.



"(6) I have worked with biscuit joints before and I am familiar with them. A biscuit joint is a method of joining two pieces of wood together. It involves cutting a crescent shaped hole (called the "Mouth") in the opposite edges of the two pieces of wood that you want to join together. You then insert an oval piece of wood (the "Biscuit") into the Mouth of each piece in order to join the pieces together. You would also use glue in addition to the Biscuits to strengthen the joint. The glue would be spread along the width of the wood at the joining end and also used in the Mouth of each piece of wood. I have been shown a photographic example of biscuits joints, the photograph shows two biscuit joints connecting three pieces of wood together. Three Biscuits are visible in the photograph which I now exhibit at page 3.

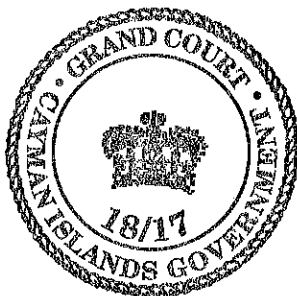
(7) When I examined the Fallen Panel I saw that it should have had one Biscuit at either end. I could tell this because of the Mouth cut out at either end of the Fallen Panel as well as on the adjoining pieces of Protruding Wood. There were no Biscuits in the Fallen Panel or in the Protruding Wood. I could not see any Biscuits in the surrounding area although I did not ask anyone if they had seen or moved the Biscuits.

(8) When I examined the Fallen Panel and the Protruding Wood I saw that there was only a minimal amount of glue on all of the adjoining edges. I would have expected to see the width of the panels covered in glue but they were not, there was just a thin bead of dried glue down the centre. The absence of Biscuits and the minimal amount of glue would not have been visible in any way until the piece of wood fell down. At page 4 I exhibit a further image from the CCTV which captures the Fallen Panel as it falls.

Arrows pointing to the Fallen Panel and to the adjoining pieces of Protruding Wood show where the Biscuits and the glue should have been.”

35. Mr. Sinclair’s evidence highlights that, had there been an inspection, that the failing in the installation would have been fairly obvious.
36. At issue is whether the Defendants having pleaded that “*Dobas failed to properly install the Subject Panel in that the two installers failed to insert “biscuits” or dowel into the joints of the Subject Panel to securely hold the Subject Panel in place and failed to use a sufficient amount of glue.*” can resile from any obligation for the work of the installers.
37. For the Plaintiff, there appear to be two submissions on this point. Firstly, the Plaintiff submits that the installers should be considered employees of the Defendant, therefore making the Defendant liable for their failures. Secondly, the Plaintiff argues that even if the installers could not be considered employees of the Defendant, that the duty to provide the Plaintiff with a safe place of work was a non-delegable duty, which obligation makes the Defendant liable for their failures in the circumstances of this case.
38. In the Affidavit Mr. Christopher Kirkconnell filed on the 3rd October 2018, he deposed that, in relation to the Tag Heuer Corner:

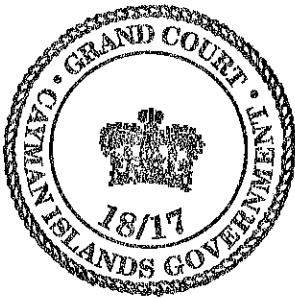
“12. *The designs were provided by TAG Heuer and were designed by a reputable company called Dobas. We have outfitted many of our stores originally through the shop fitting company Obrist. Dobas is owned and run by former executives of the Obrist Company, with full knowledge of our previous stores and of the same quality that Obrist produces. Dobas was also instructed by TAG Heuer to install the TAG Heuer Corner. [The revised quote for the installation and manufacture from Dobas dated 30 October 2009 is at pages 21 to 48 with the associated plans at pages 49 to 51.] Dobas was well known for the high standard and quality of their work and had carried out work for Kirk Freeport previously to an excellent standard. They are more expensive and with a reputation*



for a higher quality of production than many other companies in the industry and are based on (sic) Switzerland which adds additional travel costs but we have utilized them because of their quality workmanship. Kirk Freeport had no reason to doubt the quality of the workmanship.

13. *Dobas provided two of their own workman from Switzerland; Walter Erni and Thomas Doreig. Kirk Freeport employees were not directly engaged in the installation process in any way, other than to perhaps to provide accommodation and refreshments to Mr. Erni and Mr. Doreig and possibly to help with unloading and running errands as required.*

14. *Whilst the cost of the installation of the TAG Heuer Corner was shared, TAG Heuer was entirely responsible for the design of the TAG Heuer Corner and for the instruction and direction of Dobas in the manufacture and installation of the TAG Heuer Corner. The responsibilities of the parties are set out under the heading "General Conditions Regarding use of the Corner" in the Installation Conditions at pages 18 and 19."*



39. This court does not have to examine the minute details of the relationship as detailed in the contract between the Defendant and Dobas. It is accepted that Dobas sent the installers to complete the installation of the Panel as per the contract between the Defendant and Dobas. The installers were allowed into the Cayman Islands on temporary work permits held by the Defendant for the duration of the installation. The installers spent approximately seven weeks in Grand Cayman.

40. The Defendant was responsible for 50% of the costs for the installation of the Panel. These included:

"Fixing costs

- *Working and travelling time of our fixing men according to, by the client signed working report. Rate per hour CHF 89.00*
- *Airline tickets for our fixing men*



- *Hotel and apartment accommodation, food and beverages for our fixing men during stay on site, to be organized and directly paid by the client*
- *Transport of tools after completion of work back to Switzerland to be organized by our men and directly paid by the client.*”

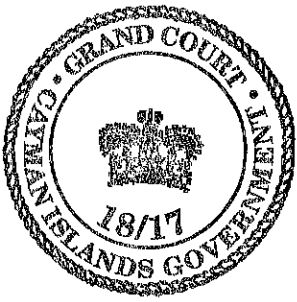
41. In the case of *Cole v Smith and Watler* the Grand Court dealt with this issue of the effect of a person working under a work permit and the court’s considerations in determining whether they are thereby employees or not. In that case, relevant to this issue, the Court had to determine whether to allow a Defendant to amend his defence to plead that the deceased, who was liable for negligence, was not his personal employee but rather an employee of his company. In allowing the amendment, the Learned Chief Justice, held:

“...Though the second Defendant may have been the deceased’s de facto employer, it was clear from his work permit that legally he was only employed by the company. Whether two parties were in a relationship of employment was a question of law to be determined by the court...”

42. Further in his Judgment, Chief Justice Smellie stated:

“23. ...Moreover, in this jurisdiction whatever the factual admissions in proceedings may be, the legal relationship of employment as between an employer and a putative employee who is a foreigner is also a matter to be determined by operation of the Immigration Laws.

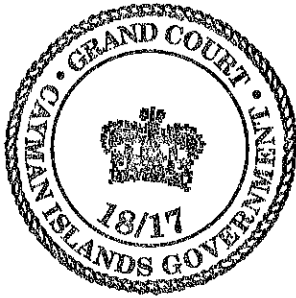
24 A copy of the relevant work permit for Mr. Diedrick is exhibited to Mr. Watler’s affidavit. Issued pursuant to s.38(2) of the Immigration Law (2003 Revision), it authorized Mr. Diedrick “to enter, re-enter and remain in the Cayman Islands and there follow the occupation of labourer in the employment of Watler’s Metal Products Ltd.” The permit stipulates on its face that, among other things, the holder shall not be employed other than by the employer named without prior approval of the Immigration Board. There is no evidence to support any assumption and it is not suggested that the Board granted



approval for Mr. Diedrick to be in the employment of Mr. Watler himself, simultaneously with the company, even if it may be assumed from Mr. Watler's admission that that was the de facto situation. By dint of the Immigration Law, this court is therefore bound to accept that the statutory legal relationship of employment was that as between Mr. Diedrick and the company."

43. Counsel for the Defendant sought to distinguish this authority from the instant case. Counsel submitted that the fact of the work permit does not change the relationship of the parties or shift the liability between employers. She submitted further that the facts were distinguishable because the installers were not being rewarded directly by the Defendant.
44. Counsel for the Defendant went on to argue that even if the court found that the installers were employees of the Defendant, the Defendant could not be vicariously liable for their actions. She argued further that the instant case was instead more akin to that of the liability of an independent contractor.
45. In *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd [2005] EWCA Civ 1151*, the main issue for determination related to the liability for a worker's negligence, whether there could be joint liability between an employer and a sub-contractor. That court held that where there were two employers each entitled to stop the employee's negligent act, they were each found jointly liable in the absence of personal fault, for the negligent act of the employee.
46. It appears to this court that the installers were employees of the Defendant. Present in this case, distinguishable from the facts in *Viasystems*, is the presence of the work permit and the implications which flow from that aspect of the relationship between the Defendant and these two employees. In *Cole* the Court was live to the practical realities of the deceased employee's position, however it found that these could not overtake the operation of the law. As Chief Justice Smellie noted:

"25. The rules of pleading, and specifically those first cited above, do not require or allow the court to overlook the legal reality of the



circumstances of the case when deciding whether to allow a party to amend his pleadings. Even more to the point of the arguments presented based on unfairness or potential prejudice to the Plaintiff's case, I do not think that a party can be allowed to plead to a factual situation that is rendered false by virtue of the operation of law, which would be the situation here were Mr. Watler to be prevented from amending his defence and the Plaintiff allowed to rely on the legally false (even if factually accurate) admission that Mr. Diedrick was Mr. Watler's, but not the company's employee. Nor can denying the Plaintiff the ability to prevent the amendment be regarded as prejudicial to his case, because in law he must be regarded as never having had a case by which he could rely on a legal relationship of employment between Mr. Watler and Mr. Diedrick in the first place."

47. I therefore find that the Defendant shall stand liable to the Plaintiff for the negligence of the installers, Mr. Doreig and Mr. Erni. There is no obligation on the Plaintiff to join Dobas and it may well be that the Defendant would argue as per *Viasystems* that Dobas should be equally liable. However, that is not a matter upon which this court is now called to determine. It is a matter for the Defendant. This is not the Plaintiff's issue and does not affect the Plaintiff's right to bring the claim as she has presented it to this Court. If this court is not correct in its finding on this aspect, I will go on to consider the other limb of the Plaintiff's argument in support of the application for summary judgment.
48. The second plank of the Plaintiff's submission rests on the assertion of the non-delegable nature of the Defendant's duties toward the Plaintiff. In support of this submission, the Plaintiff cited the case of *Woodland v Essex County Council* [2013] UKSC 66. In that case, the appellant suffered severe brain damage after getting into difficulty during the course of a school swimming lesson. She was under the supervision of a swimming teacher and a lifeguard, who were acting as employees of a swimming service with whom Whitmore Junior School had contracted. The appellant brought a claim against a number of parties including the respondent, the local education authority responsible for the school. At issue was whether or not the authority owed the appellant a 'non-delegable' duty of care, meaning that it would be potentially liable to her in negligence even though the school had delegated the provision of the swimming lessons to the swimming service.

49. On appeal to the Supreme Court, Lord Sumption detailed the applicable principle thus:



“The second category of non-delegable duty is, however, directly in point. It comprises cases where the common law imposes a duty upon the Defendant which has three critical characteristics. First, it arises not from the negligent character of the act itself but because of an antecedent relationship between the Defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury. Third, the duty is by virtue of that relationship personal to the Defendant. The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the Defendant’s. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own.”⁸

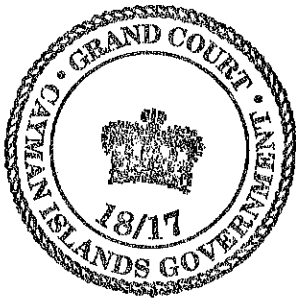
50. The Learned Judge went further to detail the effect on an employer.⁹

*“These matters first arose for consideration in the context of the common law duty of an employer to his workforce. This was an area in which the courts at an early stage of the development of the law of tort, adopted a protective approach to those who were vulnerable and not in a position to defend their own interests. In **Wilson & Clyde Coal Co Ltd v English** [1938] AC 57, [1937] 3 All ER 628, 106 LIPC 117, the House of Lords not only held that the employer had a duty to provide a safe system or work, but also that it was (in the modern terminology) non-delegable. Liability was not therefore excluded on the ground that the breach was due to the negligence of another employee, for which the employer would*

⁸ At paragraph 7 of Lord Sumption’s judgment

⁹ At paragraph 66

not (as the law then stood) have been liable because of the doctrine of common employment. The duty was non-delegable because of its personal character. Lord Macmillan said at p 75:



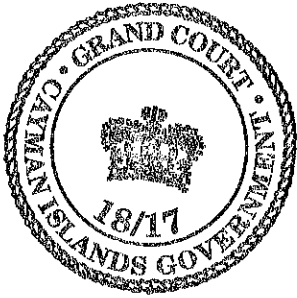
“[The Defendant] cannot divest himself of this duty, though he may – and, if it involves technical management and he is not himself technically qualified, must – perform it through the agency of an employee. It remains the owner’s obligation, and the agent whom the owner appoints to perform it performs it on the owner’s behalf. The owner remains vicariously responsible for the negligence of the person whom he has appointed to perform his obligation for him and cannot escape liability by merely proving that he has appointed a competent agent. If the owner’s duty has not been performed, no matter how competent the agent selected by the owner to perform it for him, the owner is responsible.”

51. Lord Sumption also referred to Lord Wright’s judgment in *Lochgelly Iron and Coal Co v Mc Mullan* [1934] AC 1, and the earlier decision of the House in that case:

“This House held that, on the contrary, the statutory duty was personal to the employer, in this sense that he was bound to perform it by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible.”

52. Lord Sumption also quoted Lord Wright in affirming the extent of the employer’s duty:

“The true question is, what is the extent of the duty attaching to the employer? Such a duty is the employer’s personal duty, whether he performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer’s personal negligence. This was held to be the case



where the duty was statutory, and it is equally so when the duty is one attaching at common law... I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations...

... So far as there was ever any doubt about the application of this principle to the negligence of an independent contractor, it was resolved by the House of Lords in *McDermid v Nash Dredging and Reclamation Co Ltd* [1987] AC 906, [1987] 2 All ER 878, [1987] 3 WLR 212."

53. The Plaintiff therefore submits that having brought these persons unto the place of work where the Plaintiff was employed and carried out her duties, the Defendant's duty toward the Plaintiff was not interrupted even if these installers were not primary employees of the Defendant as the Defendant's liability to the Plaintiff was not thereby diminished and they remained liable for injuries caused as a result.
54. The Defendant referred this court to the authority of *Credit Suisse International v Ramot Plana OOD*¹⁰ for some of the key principles governing applications for summary judgment that are based on *disputed issues of fact*. There is no issue for this Court that those remain relevant principles. However, in this case, the Defendant agrees that the facts are largely, if not wholly, accepted and as such the only issues that remain are whether the Defendant breached a duty and whether such breach caused an injury which was reasonably foreseeable.¹¹ Further, the Defendant acknowledges that in this case the discovery process is complete and all statements relied upon have now been served in accordance with the Court's directions. "The court is therefore in the unusual position of

¹⁰ [2010] WEHC 2759(Comm)

¹¹ See paragraph 54 of the Defendant's skeleton argument

having before it all of the evidence which would be adduced at trial, save, potentially, for expert reports."¹²

55. The Defendant's arguments focused as they were on the reasonableness of imputing a duty on the Defendant for what they argue was not a reasonably foreseeable fault with the Panel, does not defeat the principle of the non-delegable nature of the duty to the Plaintiff referred to in *Woodland* above. I have considered all of the available evidence and pleadings. The Defendant does not have any or any reasonable prospect of success in defending the Plaintiff's claim.

56. Recalling the issues for determination:

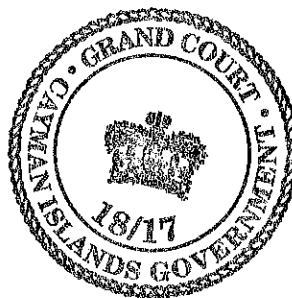
- (i) Does the Plaintiff's claim fail to disclose a reasonable cause of action in respect of any of the heads of claim set out in the statement of claim? - No
- (ii) Is this a plain and obvious case entitling the Defendant's application to succeed? - No
- (iii) Is the Defendant entitled to summary judgment? - No
- (iv) If either or both of the Defendant's applications for summary judgment or striking out fails, is the Plaintiff entitled to summary judgment or any other relief? - Yes.

57. The Plaintiff is awarded summary judgment on liability for her claim. Damages are to be assessed if not agreed.

58. I will hear the parties on the issue of costs.



**HON. JUSTICE MARLENE I. CARTER
JUDGE OF THE GRAND COURT (ACTG.)**



¹² See paragraph 65 of the Defendant's skeleton argument