IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2012HCV03461

BETWEEN	**YVETTE HARRIOT**	**CLAIMANT**
AND	**JAMAICA PROPERTY CO LTD**	**FIRST DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**SECOND DEFENDANT**

IN CHAMBERS

Philmore Scott and Camille Scott instructed by Philmore Scott and Associates for the claimant

John Givans and Lori Ann Givans instructed by Givans and Company for the first defendant

Andre Moulton instructed by the Director of State Proceedings for the second defendant

July 16, 2015 and July 20, 2015

CIVIL PROCEDURE – WITHDRAWAL OF ADMISSIONS – RULE 14 OF CIVIL PROCEDURE RULES – SETTING ASIDE JUDGMENT ON ADMISSIONS

SYKES J

[1] Miss Yvette Harriott was leaving her office on the afternoon of May 10, 2010 when she stumbled over a raised portion of the carpet at property owned by

Jamaica Property Company Ltd ('JPC'). She received serious injuries. She has sued. She sued both defendants. JPC and the Attorney General ('AG') put in defences. The very first sentence of JPC's defence, signed by Mr Steve Sherman, the General Manager, reads:

> *The first defendant admits liability but seeks to defend this matter on the issue of quantum.*

[2] The AG in its defence stated at paragraph 4:

> *…for the purpose of this claim but not otherwise, the 2nd defendant disputes the claim in (sic) as to quantum only.*

[3] So there it is. Both defendants admitted liability and wished to contest damages only. Not only that, Miss Harriott moved to secure a judgment on admissions against both defendants and she was duly granted her request. Nearly three years later JPC wishes to set aside the judgment and withdraw the admission. Miss Harriott and the AG have vigourously opposed this application.

[4] Mr Sherman has sought to say that the allegations made against JPC do not show that JPC is liable in any way. This new found revelation came about in January 2015. What happened between 2012 when the admission was made and January 2015 when the application was filed to cause this about turn? Answer: new attorneys who reviewed the matter and advised that it had a good defence.

[5] It is said that new defence more accurately outlines JPC's case. What is that case? Answer: JPC was not the employer of Miss Harriot and neither was it the occupier of the building where the fall took place.

[6] An intriguing question is, what has caused JPC to see things with such pristine clarity now and not in 2012. Answer: a lease dated October 11, 2010 which says that it governed the arrangement between the lessor (JPC) and its tenants going back to April 1, 2010. Under clause 4 of the First Schedule of the lease dealing with the lessee's obligations there is an explicit term which reads as follows:

> *To repair, keep up and maintain all doors, windows, locks and fasteners and the interior of the leased premises other than the load bearing walls, roof and floor beams but including floor coverings, ceilings and the plaster …*

[7] This clause stated the obligation of the lessee. The court should point out that the parties to the lease were the Commissioner of Lands and JPC. This is so because the Commissioner is authorised to make these kinds of agreements on behalf of the Government of Jamaica in certain circumstances. The Ministry of Tourism is not a legal entity and as such could not be a party to the contract. It is an administrative construct and therefore some entity which had legal personality was needed to execute the lease. Thus the tenant was the Commissioner of Lands but the actual government entity there was a government ministry.

Submissions on behalf JPC

[8] According to Mr Givans floor coverings must necessarily include carpet. Neither defendant contested that interpretation. The court is prepared to proceed on the basis that that interpretation is correct.

[9] Mr Givans also submitted that the pleaded case of Miss Harriot made it clear that she was suing her employers and since JPC was not her employer then she could not recover on that basis. He also said that JPC was the owner but not the occupier of the building at the material time and so Miss Harriot could not fix JPC

liability. Finally he said that the court had the authority to permit the withdrawal of the admission based on rule 14 of the CPR.

Analysis

[10] The court does not accept the proposition that Miss Harriott sued JPC on the basis that it was her employer. What her particulars actually say is that she was employed by the Ministry of Tourism at JPC's premises located at 63 Knutsford Boulevard. She also pleaded that JPC and the AG were aware of the danger posed by the raised carpet because a similar incident had taken place three weeks earlier.

[11] It is known that the AG himself did not occupy the building. It was leased by Government of Jamaica and the administrative offices of the Ministry of Tourism were located there. When Miss Harriott included in her pleadings matters related to safe system of work those pleadings could not have been directed at JPC since at no time did Miss Harriott ever say that JPC was her employer. She pleaded that the Ministry of Tourism was her employer. The joining of the AG has to be on the basis that the AG was the proper party to sue having regard to the employment of Miss Harriott.

[12] The negligence alleged against JPC was direct. Paragraph 7 of the particulars of claim reads:

> *The 1st and 2nd defendants were aware of the danger posed by the raised portion of carpet outside room 69 as a similar incident occurred three to four weeks before the material date when an inventory officer almost fell at the same location.*

[13] Paragraph 8 reads:

Immediately following the first incident the claimant in her capacity as office manager attempted to make contact with the 1st defendant's property manager to advise them of the incident and to request that remedial work be done to minimise the risk. The claimant eventually left a message with a female employee of the 1st defendant, as the property manager was unavailable.

[14] Paragraph 9 has the following:

The accident was caused or contributed to by the negligence of the 1st and 2nd defendants their employees or agents acting in the course of their employment.

PARTICULARS OF NEGLIGENCE

i. ...
ii. ...
iii. ...
iv. ...
v. ...
vi.
vii. *failing in all the circumstances to take reasonable care for the safety of the claimant;*
viii. *exposing the claimant to unnecessary risk of injury of which they knew or ought to have known*

[15] As can be seen, the case against JPC is that it was negligent because there was this carpet that posed a danger to Miss Harriott and other users of the building and it was not remedied by JPC. In addition, Miss Harriott is saying that there was an earlier incident three to four weeks before which JPC was aware of yet nothing was done. The clear implication of these pleadings is that JPC had the duty to repair the known the danger posed by the raised carpet and failed to do so. It is well known that legal ingredients of the tort of negligence are duty owed, breach of duty and injury arising from the breach of duty.

[16] Miss Harriott has strong evidence on which to say that JPC was responsible for the repairs or non-repair to the carpet in question. The following email from a Mr Gary Francis to Miss Harriott has put the matter beyond all doubt. The email was sent ten days after the fall. It reads:

> *We sympathise for the injuries suffered and apologised (sic) for the delay in responding. Note we will do the necessary corrective works on the carpet before Wednesday, May 19. Going forward I am requesting that ALL (emphasis in original) maintenance related matter be e-mail (sic) to Michelle White and a copy send (sic) to me.*

[17] There is no evidence to suggest that Mr Francis did not have the authority to communicate the just-quoted email to Miss Harriot. There is no suggestion that Miss White was not an employee of JPC. This court can safely conclude that Mr Francis' communication was the view of the company and so binds the company. It is true that this admission was made before the claim was filed but that does not matter.

[18] The contemporaneous email shows that JPC regarded itself as responsible for the maintenance, if not of the entire building, certainly for the area where the carpet was laid.

[19] There is this lease executed in October 2010 that states that it governed the relationship between JPC and its tenant as of April 1, 2010. Although the lease purports to cover the period April 1, 2010 onwards the fact of the matter is that there is no documentary evidence or communication showing that JPC ever regarded itself as not being responsible for maintenance at or around May 10, 2010.

[20] If it were the case that JPC was not responsible for the maintenance one would have expected the communication between JPC and Miss Harriott to say something like this: 'We are not liable and all maintenance matters are really for the tenant. Please contact them because that it is the arrangement between JPC and the tenant.' Instead what we have is JPC saying that going forward JPC is to be notified of all maintenance matters. Why? The most reasonable conclusion is that it regarded itself as responsible for maintenance and in particular for repairs to the carpet.

[21] In light of this conclusion there is no need for the court to decide on the precise nature of a judgment on admissions. Mrs Scott contended that a judgment on admissions was in a different category from judgments in default of acknowledgement of service and judgments in default of defence. The soundness of this will have to await another day.

[22] There is no doubt about the court's power to permit a defendant to withdraw admissions. Rule 14.1 (6) reads:

> *The court may allow a party to amend or withdraw an admission.*

[23] The power is stated without any qualification or pre-condition. Surely, though, it cannot mean that the court can act as if deciding the matter by way of a coin toss. There has to be reasons for the exercise of any discretion. In this case, the discretion must be exercised to further the overriding objective. The overriding objective includes dealing with cases justly, economically, expeditiously and fairly. This requires a holistic view of the entire circumstances of the case. A crucial factor is the proposed defence. The court is entitled to look at the proposed defence and determine whether it has a realistic prospect of success. This must be so because dealing with cases justly, economically and expeditiously includes identifying the real issues to be decided and looking down the road see whether the person seeking to withdraw the admission can realistically succeed at trial.

[24] In looking at these matters, the court is not conducting a mini-trial but rather assessing the likelihood of successful outcome for the defendant based on the material presented, which in this case, happens to be beyond dispute having regard to the actual affidavit evidence and the proposed defence. There is no dispute that the carpet was in need of repair. There is no dispute that Miss Harriott tripped because of the defective carpet and there is no dispute that she received injury. There is no dispute that the email was sent by Mr Francis and that there is no challenge to his authority to say the things he said there.

[25] The point is that at the heart of the case management system introduced over a decade ago is the idea that cases that have no real prospect of success should be identified early in the day and dealt with appropriately. It neither just nor fair to have a case lingering when there is no prospect of success. Litigants should not be encouraged to throw more good money after bad.

[26] One the cases relied by Mr Givans is that of **Gale v Superdrug Stores PLC** [1996] 1 WLR 1089. The judgment of interest is that of Millett LJ. There his Lordship spoke the following at page 1098 - 1099:

> *Litigation is slow, cumbersome, beset by technicalities, and expensive. From time to time laudable attempts are made to simplify it, speed it up and make it less expensive. Such endeavours are once again in fashion. But the process is a difficult one which is often frustrated by the overriding needs to ensure that justice is not sacrificed. It is easy to dispense injustice quickly and cheaply, but it is better to do justice even if takes a little longer and costs a little more.*
>
> *The administration of justice is a human activity, and accordingly cannot be made immune from error. When a litigant or his advisor makes a mistake, justice requires that he be allowed to put it right even if this causes delay and expense, provided that it can be done without injustice to the other party.*
>
> *…*
>
> *In my judgment the same principles apply whether or not the amendment involves the withdrawal of an admission previously made in the pleadings. The position of a defendant who belatedly seeks to raise a new defence cannot*

> *sensibly be distinguished from that of a defendant who seeks to withdraw an earlier admission. Each is seeking to raise an issue which cannot be raised without amendment; the amendment will almost invariably cause some delay and expense; and it must come as a disappointment to the plaintiff who did not expect to have to litigate the issue now raised for the first time. Nor is the position of a defendant who pleads a defence which is inconsistent with an admission made before action brought materially different from that of a defendant who seeks to withdraw an admission made in the pleadings. If anything, his position should be easier, since his change of stance is signalled at an earlier stage in the litigation, and is less likely to waste time or costs.*

[27] Building up on this and other cases, Mr Givans submitted that in this case there can be no injustice to Miss Harriott because the fact of her fall is not in dispute. The fact of injury is not in dispute though there may be some dispute about the nature and extent of her injury. Learned counsel submitted that it is not a case that depends on recall of witnesses. It is simply a matter of looking at the lease and the lease makes it clear that the lessee is responsible for the carpet.

[28] This passage from Millett is from the age before the CPR. Economy and expense of litigation is now of greater concern that it was on those long gone days. The court is now in charge of the pace of litigation and so amendments that cannot or do not suggest a real prospect of success should not be encouraged. It is a waste of time and resources. In the view of this court it is just as great an

injustice to give false belief to litigants when the case is going nowhere as it is to be hasty.

[29] It is well established that under the Civil Procedure Rules ('CPR'), there is no point in setting aside a judgment if the defendant has no realistic prospect of successfully defending the claim.

[30] Before going on the court must refer to the case of **Jane Sowerby v Elspeth Charlton** [2006] 1 WLR 568. In that case the issue that arose was whether the then applicable rule on withdrawing admissions applied to admissions made prior to the claim being filed. The court held that the rule did not cover such admissions and therefore the defendant did not need the court's permission to withdraw the admission and so the admission could be withdrawn. Even though no permission was needed to withdraw the admission, the court did not set aside the judgment because on its assessment there was no real prospect of success. Brook LJ (VP) held at paragraphs **[30] – [32]:**

> *The present case, too, would be finely balanced. But in all the circumstances we regard it as inconceivable that any High Court judge would fail to find the Defendant at least partly liable.*
>
> *...*
>
> *In all the circumstances we considered that there was no real prospect of the defendants resisting a finding of primary liability. Summary judgment might therefore be entered against her on this issue, and since Mr Lynagh was not disposed to raise any procedural objections, it seemed to us appropriate to allow the Master's order to stand without overloading the matter with unnecessary procedural complexities.*

[31] This passage points the way in how these matters are looked. Incidentally, **Sowerby** stated that **Gale** should be viewed with caution.

[32] The point being made is that in **Sowerby** that the court looked at the prospects of success and still affirmed the judgment because it was very difficult to see how the defendant could escape a finding of liability having regard to all the material that was before the court including the admission made before action was filed. By parity of reasoning, in the present case, Miss Harriott can rely on the email to prove her case that JPC was in fact responsible for the carpet repairs and maintenance at the material time. Interestingly, after the **Sowerby** decision the English CPR was amended to bring pre-action admissions within the ambit of the rule.

[33] This court wishes to emphasise that some of the CPR provisions are interconnected and do not exist in splendid isolation. If the available information shows that the claimant could make a successful summary judgment application, why should not judgment be affirmed on that ground even if the there was a technical basis for setting aside the judgment on admissions? Acting otherwise would not be in keeping with the overriding objective of dealing with cases justly, fairly, expeditiously and at least cost. Identifying the real issues in the case is always crucial and even more so in a case management system which encourages the court not only to identify the real issues in dispute early in the proceedings but to dispose of those issues which do not need full investigation at a trial. All this points to the necessity of the judge taking a global view of the matter. This is what has happened in this case.

[34] The affidavits of Mr Sherman state that JPC was the owner of the building and the Ministry of Tourism was the occupier at the material time. He states that JPC's new position 'only came about after the 1st defendant's new attorneys-at-law were retained in or around December 2014 and after they reviewed the file

and gave us and our insurers their opinion' (paragraph 8 of affidavit dated January 15, 2015).

[35] In his second affidavit dated June 17, 2015, Mr Sherman states that '[o]ur decision to apply to withdraw the admission is therefore not based on a whim but on a solid legal opinion supported by the terms of the lease itself' (paragraph 11).

[36] Respectfully, Mr Sherman does not address the email and neither does he say what actually the state of affairs 'on the ground' was regarding responsibility for the maintenance of the carpet at material time. That is the crucial question which the email has answered. If the both affidavits do nothing else, they make it plain that the proposed defence rests solely on the relevant clause of the lease executed five months after the incident and not on any refutation of the email or any assertion that JPC in fact was responsible for the repairs. In the absence of any evidence to the contrary, the court is entitled to conclude that Mr Francis' email accurately represents the company's position in May of 2010. Thus even if the lease was in place at the material time despite its words the company was accepting that it was responsible for the maintenance and repairs to the carpet at the material time.

[37] At any trial the judge would be mightily impressed with the email and its implication. What JPC and its tenant wrote some five months later would not affect what the parties actually did in May 2010 when the incident occurred. What they actually did at the material time is usually a true indication of how they understood their responsibilities regarding repairs. Where the conduct departs from what is written then the court is entitled to place more reliance on what is actually done. The reason for this is that this is a private law matter. Parties are free to decide how their legal relationships will be governed and free to depart from it at any point they wish. All is well as long as they act within the general law. Despite the lease there is nothing to prevent the parties acting contrary to the provisions of the lease.

[38] In light of all this there is no real prospect of successfully defending the claim and so no useful purpose would be served by setting aside the judgment. Equally, no useful purpose would be served by permitting JPC to withdraw the admissions made in the defence in light of its acceptance of responsibility for maintenance of the carpet in the email to Miss Harriott which was done when litigation was not contemplated.

[39] The application is dismissed with costs to the claimant to be agreed or taxed. No costs to the second defendant.