[2021] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 27/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**VETERAN SECURITY LIMITED**	**APPELLANT/ RESPONDENT TO COUNTER-APPEAL**
AND	**DONNA GREENWOOD-WALKER**	**RESPONDENT/COUNTER-APPELLANT**

AND

BETWEEN	**DONNA GREENWOOD-WALKER**	**APPELLANT**
AND	**THE PROPRIETORS STRATA PLAN NO 580**	**RESPONDENT**

Andrew Irving for Veteran Security Limited

Lorenzo Eccleston instructed by Jacqueline Samuels Brown QC for Donna Greenwood-Walker

Mrs Pauline Brown-Rose for The Proprietors Strata Plan No 580

4 April 2019 and 22 January 2021

BROOKS JA

[1] I have had the privilege of reading, in draft, the comprehensive judgment of my learned brother, Fraser JA (Ag). Except for one small issue, I agree with his reasoning

and conclusion and have nothing to add. I, however, am not in agreement that Veteran Security Limited (VSL) was an occupier of the premises for the purposes of the Occupiers' Liability Act. It is unnecessary to expand on the point, however, for, as Fraser JA (Ag) has pointed out, the finding he has made makes no practical difference to VSL's liability to Ms Donna Greenwood-Walker.

FOSTER-PUSEY JA

[2] I, too, have had the privilege of reading, in draft, the very detailed judgment of my learned brother, Fraser JA (Ag). In so far as the issue as to whether VSL was an occupier of the premises is concerned, I reserve my view, as it will not make a difference to the disposal of the appeal. Otherwise, I agree with the reasoning and conclusion of my learned brother, and have nothing to add.

FRASER JA (AG)

Introduction

[3] The matter before the court consists of two appeals and a counter-appeal filed against the judgment of Her Honour Mrs S Jackson-Haisley, then Resident Magistrate for the Corporate Area, delivered on 30 October 2015 in respect of a claim for negligence, nuisance and breach of duty under the Occupiers' Liability Act (OLA) and Registration (Strata Titles) Act R(ST)A. The claim was brought by Mrs Donna Greenwood-Walker (DGW), the respondent/counter-appellant in the first appeal and the appellant in the second appeal, in respect of injuries she sustained when, on her case, she was struck on the head by a metal barrier at York Plaza on Hagley Park Road, in the parish of Saint Andrew.

[4] The appellant in the 1st appeal, and respondent to the counter-appeal, Veteran Security Limited (VSL), (the 3rd defendant in the court below), is a security company duly incorporated under the laws of Jamaica. At the material time, VSL was hired by Proprietor's Strata Plan No 580 (PSP580), a body corporate established under Section 4 of the R(ST)A, to manage the security of its premises at York Plaza. PSP580 is the respondent in the second appeal (the 1st defendant in the court below). The security management entrusted to VSL by PSP580, included the control of vehicular entry and exit to and from the plaza.

Preliminary considerations

The second appeal

[5] Prior to the hearing, pursuant to an application made by DGW seeking an extension of time for her to file the notice of appeal in the second appeal, the court granted the extension sought on 3 March 2016. The extension having been granted, DGW filed the second appeal on 7 March 2016.

[6] During the hearing of these conjoined appeals, it was queried whether DGW had satisfied the requirements of section 256 of the Judicature (Resident Magistrates) Act (J(RM)A) (now the Judicature (Parish Court) Act (J(PC)A)), by paying into court the sums of $5000.00 as security for the due prosecution of her appeal and $15,000.00 as security for any costs that may be awarded against her. At page 94 of the record of proceedings, it is indicated that the $5000.00 security for the due prosecution of her appeal was paid into court. There was however no receipt exhibited. There was also no indication that the

$15,000.00 security for costs was paid. Arguments in both appeals concluded on 4 April 2019.

[7] By letter to the Registrar of the Court of Appeal dated 24 April 2019, copied to opposing counsel, Mr Eccleston, counsel for DGW, forwarded to the court a copy of a receipt dated 7 March 2016. That receipt referred to the sum of $5000.00, "being amnt paid for the appeal Donna Greenwood-Walker vs Sherriff Tyndale & The Proprietors Strata plan." There was however still no indication that the sum of $15,000.00 had been paid.

[8] DGW having filed an application on 12 June 2020 for extension of time for payment of security for costs, that application was granted on 24 June 2020 when she was permitted until 1 July 2020 to make the payment and file an affidavit exhibiting proof of payment. An affidavit of Demoy Williams was filed on 29 June 2020, duly exhibiting the receipt in proof of payment of the $15,000.00 for security for costs. That payment having been made, in keeping with the decisions in **Welds v Montego Bay Ice Co Ltd and Smith** (1962) 5 WIR 56 and **Gordon (Ralford) v Russell (Angene)** [2012] JMCA App 6, the second appeal is now properly before the court.

The counter notice of appeal in the first appeal

[9] By letters dated 16 and 30 June 2020, Mr Andrew Irving, counsel for VSL, submitted that, as DGW had filed a notice of counter-appeal on 17 November 2015 but failed to produce any receipts to the court showing payments to the Parish Court of the sums of $5,000.00 for the due prosecution of the appeal and $15,000.00 as security for

costs, and had made no application for extension of time to pay those sums, her notice of counter-appeal and the reliefs it sought, should be dismissed.

[10] Mr Eccleston, counsel for DGW, in a letter in response submitted that the notion that sums had to be paid for the due prosecution and security for costs in the counter appeal was misconceived for the following reasons:

a) The respondent's counter-notice of appeal was, in effect, simply that of alerting the appellant of her intention to seek to invoke the court's power under section 251 of the J(PC)A);

b) While section 256 of the J(PC)A) sets out the mandatory fees to be paid on the filing of an "appeal" for due prosecution and security for costs, there is no such provision for a counter-notice of appeal. If it was intended for a respondent, on the filing of a counter notice of appeal, to pay a specified sum for due prosecution and security for costs that would have been set out in clear and unequivocal language in the J(PC)A);

c) The filing of the counter-notice falls under rule 2.3 of the Court of Appeal Rules which sets out the procedure to be used by a respondent seeking to invoke section 251 of the J(PC)A). It however does not speak to or require the payment into court for due prosecution and security for costs upon the filing of a counter notice of appeal within the time stipulated.

[11] Mr Irving in submissions in reply, forwarded by letter dated 6 July 2020, argued that:

a) the fees payable for the filing of a notice of appeal from the Supreme Court are the same as in the case of the filing of a counter-notice of appeal from the Supreme Court. A counter-notice of appeal is an appeal whether it originates from the Parish Court or the Supreme Court and is treated in the same manner as a notice of appeal;

b) any party who seeks to invoke the powers of the Court of Appeal to make orders under section 251 of the J(PC)A is an appellant, whether in the case of a notice of appeal or a counter-notice of appeal;

c) The party appealing under section 256 of the J(PC)A is the party invoking the power of the Court of Appeal under section 251 of the Act. Accordingly, in the case of the counter-notice of appeal filed in this matter, the respondent is the party appealing and should have paid the mandatory fees for due prosecution and security for costs under section 256 of the J(PC)A. Those fees not having been paid and no extension of time having been sought to pay them, the counter-notice of appeal should be dismissed.

Analysis

[12] Section 251 of the J(PC)A provides in part:

> "Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree, or order of a Court in all civil proceedings...
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> And the Court of Appeal may either affirm, reverse, or amend the judgment, decree, or order of the Court; or order a nonsuit to be entered; or order the judgment, decree or order to be entered for either party as the case may require; may assess damages and enter judgment for the amount which a party is entitled to, or increase or reduce the amount directed to be paid by the judgment, decree or order or remit the cause to the court with instructions, or for rehearing generally; and may also make such order as to costs in the court, and as to costs of the appeal, as the Court of Appeal shall think proper, and such order shall be final..."

[13] Section 256 of the J(PC)A provides in part that:

> "The appeal may be taken and minuted in open Court at the time of pronouncing judgment, but if not so taken then a written notice of appeal shall be lodged with the Clerk of the Courts, and a copy of it shall be served upon the opposite party personally, or at his place of dwelling or upon his solicitor, within fourteen days after the date of the judgment; and the party appealing shall, at the time of taking or lodging the appeal, deposit in the Court the sum of five thousand dollars as security for the due prosecution of the appeal, and shall further within fourteen days after the taking or lodging of the appeal give security, to the extent of fifteen thousand dollars for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Court of Appeal.
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> …
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> On the appellant complying with the foregoing requirements, the Magistrate shall draw up, for the information of the Court of Appeal,

a statement of his reasons for the judgment, decree, or order appealed against.

Such statement shall be lodged with the Clerk of the Courts, who shall give notice thereof to the parties, and allow them to peruse and keep a copy of the same.

The appellant shall, within twenty-one days after the day on which he received such notice as aforesaid, draw up and serve on the respondent, and file with the Clerk of Courts, the grounds of appeal, and on his failure to do so his right to appeal shall, subject to the provisions of section 266, cease and determine.

..."

[14] Section 266 of the J(PC)A provides that:

"The provisions of this Act conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right; and in case any of the formalities prescribed by this Act shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear to so require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from."

[15] Section 12 of the Judicature (Appellate Jurisdiction) Act J(AJ)A provides:

"12. (1) Subject to the provisions of this Act, to the provisions of the Judicature (Resident Magistrates) Act, regulating appeals from Resident Magistrates' Courts in civil proceedings, and to rules made under that Act, an appeal shall lie to the Court from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings.

(2) Notwithstanding anything to the contrary the time within which—

(a) notice of appeal may be given, or served;
(b) security for the costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given;
(c) grounds of appeal may be filed or served,

in relation to appeals under this section may, upon application made in such manner as may be prescribed by rules of court, be extended by the Court at any time."

[16] Rule 2.1 of the Court of Appeal Rules (CAR) provides in part that:

> "2.1 (1) This Section sets out special rules which, together with the rules in Section 1 govern civil appeals to the Court of Appeal from -
>
> (a) …;
> (b) Resident Magistrate's Courts; or
> (c) …,"

[17] Rule 2.3 of the CAR provides that:

> "2.3 (1) Any party upon whom a notice of appeal is served may file a counter-notice form A2.
> (2) The counter-notice must comply with rule 2.2.
> (3) A respondent who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court must file a counter-notice in form A3 setting out such grounds.
> (4) The counter-notice must be filed at the registry in accordance with rule 1.11 within 14 days of service of the notice of appeal.
> (5) The party filing a counter-notice must serve a copy on all other parties to the proceedings in the court below who may be directly affected by the appeal."

[18] Rule 2.15 of the CAR states that:

> "2.15 In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition -
>
> (a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and
> (b) power to -

(a) affirm, set aside or vary any judgment made or given by the court below;

(b) give any judgment or make any order which, in its opinion, ought to have been made by the court below;

(c) remit the matter for determination by the court below;

(d) order a new trial or hearing by the same or a different court or tribunal;

(e) order the payment of interest for any period during which the recovery of money is delayed by the appeal;

(f) make an order for the costs of the appeal and the proceedings in the court below;

(g) make any incidental decision pending the determination of an appeal or an application for permission to appeal; and

(h) make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal.

(3) The court may reduce or increase the amount of any damages awarded by a jury.

(4) The court may exercise its powers in relation to the whole or any part of an order of the court below."

[19] The seminal case of recent times, which addressed the issue of the effect on an appeal from the Resident Magistrates' Court (now Parish Court) of the non-payment of fees pursuant to section 256 of the J(PC)A, is **Gordon (Ralford) v Russell (Angene)**. That case decided that, where a notice of appeal is filed within the time stipulated in section 256, but the fee for due prosecution of the appeal payable under that section has not been paid, time cannot be extended to allow for its payment and the appeal necessarily fails. However, where the appeal has not been filed within time, an extension of time may be granted to both file the notice of appeal and pay the requisite fees under section 256. That authority has been cited with approval in a number of succeeding cases

including **Richards (Paulette) v Appleby (Orville)** [2016] JMCA App 20, **Smith (Shawn Marie) v Pinnock (Winston)** [2016] JMCA Civ 37 and **Davis (Ceford) v Roper (Oneil) and Roper (Kenora)** [2017] JMCA App 6.

[20] It is also important to note that in **Smith (Shawn Marie) v Pinnock (Winston)** Edwards JA (AG), (as she then was), stated at paragraph [38] that:

> "It had also been held that the payment of the sum for the security for costs of the appeal was also a condition precedent as well as, interestingly, the preparation and lodging of the written reasons for judgment by the magistrate. See **Willocks v Wilson** (1944) 4 JLR 217, **Welds v Montego Bay Ice Co Ltd and Smith** (1962) 5 WIR 56 for the former proposition and **Lorna Morgan v Gloria Reid and Richard Brown** (1991) 28 JLR 239 for the latter."

[21] It has not been disputed that no fees were paid by DGW pursuant to section 256 of the J(PC)A. DGW's contention is that no such fees are payable in respect of a counter-appeal. The court therefore has to resolve whether fees are in fact payable under section 256 of the J(PC)A for a counter-notice of appeal. That would be the case if a counter-appellant is subject to the same regime as an appellant under section 256. If so, as the cases cited show, the counter-notice of appeal would have to be dismissed as not being properly before the court.

[22] I have not come across, nor been made aware, of any authority that has directly considered this point. I have also consulted The Resident Magistrates' Court Rules, 1933 which contain no reference to a counter-appellant. The logical place to commence the search for the answer is with a look at section 256 of the J(PC)A. That section indicates

that the appeal may be taken and minuted in open court at the time of the judgment, or a written notice of appeal should be lodged with the clerk of the courts and served within 14 days after the date of the judgment. The section also requires that at the time of lodging the appeal the fees for due prosecution of the appeal should be deposited, and fourteen days after the taking or lodging of the appeal, security for costs should be given. The time frame for action to commence the appeal process (taking or lodging the appeal and paying the fee for due prosecution of the appeal), is therefore counted from the time or date of judgment, while the time frame for calculating when the payment of security for costs is due, is reckoned from the time of the taking or lodging of the appeal.

[23] Section 256 also provides that once the appellant has filed the notice of appeal, and paid the requisite fees for the due prosecution of the appeal and security for costs, the Magistrate (now Judge of the Parish Court) is required to draw up a statement of the reasons for the judgment appealed against, for the information of the Court of Appeal. Those reasons should be lodged with the clerk of the courts who should notify the parties. The section then requires the appellant, within 21 days after the day he receives such notice from the clerk of the courts, to draw up and serve on the respondent and file with the clerk of the courts the grounds of appeal, failing which, subject to section 266, his right of appeal shall cease and determine.

[24] Where an appellant has failed to meet the timelines as prescribed by section 256, as noted in **Gordon (Ralford) v Russell (Angene)**, under section 12(2) of the J(AJ)A, the Court of Appeal may extend the time for: (a) giving or serving the notice of appeal;

(b) giving security for the costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal; and (c) filing or serving grounds of appeal. However, nothing in section 12(1) or (2) of the J(AJ)A answers the question whether a counter-appeal is subject to the regime set out under section 256 of the J(RM)A.

[25] If section 256 applies to counter-appeals, then as a practical matter, the counter-appellant is subject to the vagaries of when the appellant decides to file the appeal, since the inflexible reference point for when time starts to run, is the date of judgment. Unless the appellant gives verbal notice of appeal and it is minuted in open court, all counter-appellants would therefore have less than the 14 days stipulated in section 256 to lodge their appeal. Further, it would also mean that if the appellant failed to lodge the appeal within the fourteen-day period and had to file an application for extension of time to lodge the appeal and pay the sums for due prosecution of the appeal and security for costs, the counter-appellant would likewise have to make a similar application. The counter-appellant would also have to observe the time lines for the filing of grounds of appeal triggered by the provision by the Judge of the Parish Court of the reasons for judgment, even though it would not have been the counter-appellant's payment of sums for the due prosecution of the appeal and security for costs, that would have required the Judge of the Parish Court to produce those reasons.

[26] The scenarios being considered are not just "hypotheticals" for the sake of argument. In the instant case the judgment having been delivered on 30 October 2015,

the notice of appeal was filed by VSL on 12 November 2015. The counter-notice of appeal was filed on 17 November 2015. Therefore, if section 256 applies to DGW's counter-notice her counter-appeal was not filed within 14 days of judgment and neither has she paid the fees for due prosecution of the appeal and security for costs.

[27] Mr Eccleston has argued that there is no reference within section 256 to the term "counter notice of appeal", which if it was required would have been clearly stated. He has posited that rule 2.3 of the CAR is what applies to DGW's counter-notice of appeal. A number of things are noteworthy about that rule. Firstly, it indicates that a party on whom a notice of appeal has been served may file a counter-notice of appeal that conforms with the requirements of a notice of appeal, within 14 days of such service: (see rule 2.3(1)(2) & (4) and rule 2.2 of the CAR). Secondly, it references two different forms to be filed depending on the intention of the counter-appellant, namely forms A2 and A3. Form A2 is used by a respondent who wishes to challenge any aspect(s) of the order of the court at first instance. In form A2 the respondent is required to set out the details of the order appealed, the findings of fact and law challenged, the grounds of appeal, the order sought and any specific power the court is being asked to exercise: (see rule 2.3(1) and form A2). Form A3 should be utilised when a respondent wishes the court to affirm the decision of the court below on grounds other than those relied on by that court. In form A3 all that is required of the respondent, is to set out the grounds on which the decision of the judge, master or Judge of the Parish Court should be affirmed: (see rule 2.3(3) and form A3).

[28] Though arising in a context different from this one, the nature of a counter-appeal was considered in the case of **Exclusive Holiday of Elegance Ltd v ASE Metals NV** [2013] JMCA App 20, an appeal from the Supreme Court. In that matter, the appellant appealed against the refusal of its application for summary judgment. The time for the filing of a counter-notice of appeal having expired while the respondent was awaiting a response to its preliminary objection to the appeal, the respondent filed an application for extension of time to file a counter-notice of appeal. The respondent wished to argue that there were two additional or alternate bases upon which the judge at first instance could have refused the application. It will be useful to quote paragraphs [7] – [8] and [11] – [12] of the judgment of this court.

> "[7] Mr Nigel Jones for the respondent resisted the application for extension of time on a single basis, that is, that a counter-notice of appeal is required by rule 2.3(2) of the CAR to comply with rule 2.2(3), which provides that '[w]here permission to appeal is required a copy of the order giving permission to appeal must be attached to the notice of appeal'. This being an appeal from an interlocutory order, so the argument ran, permission to appeal is required by section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act. Mr Jones therefore submitted that permission to appeal is also required before a counter-notice of appeal can be filed and, in its absence, the application for extension of time within which to file a counter-notice must be refused.
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> [8] In response, Mrs Gibson-Henlin submitted that a counter-notice of appeal under rule 2.3(3) is not an appeal and therefore requires no permission to appeal. This is made clear, Mrs Gibson-Henlin submitted further, by the prescribed form A3 in the CAR which demonstrates that a counter-notice of appeal filed under that rule does not in fact seek to overturn the decision appealed from.
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> …
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> [11] In my view, the reference in rule 2.3(3) to a 'respondent' plainly relates to a respondent in an existing appeal. What the rule provides is a

> mechanism whereby that respondent may seek to defend the judgment of the court below in his favour on grounds not relied on by the trial judge. Both in form and substance, even if not in nomenclature, the counter-notice of appeal referred to in rule 2.3(3) performs the identical function as that performed by the 'respondent's notice', which was provided for by rule 14(2) of the now repealed Court of Appeal Rules, 1962, in the following terms:
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> > 'A respondent who desires to contend on the appeal that the decision of the Court below should be affirmed on grounds other than those relied upon by that Court shall give notice to the effect specifying the grounds of that contention.'
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> [12] In A Practical Approach to Civil Procedure (10th edn, para. 46.59), Mr Sime observes in relation to the equivalent English rule (CPR rule 52.5(2)), that '[s]uch a respondent is not appealing as such, so there is no question of seeking permission to cross-appeal'. I regard and adopt this statement as equally applicable to a respondent who files a cross-appeal pursuant to rule 2.3(3) of the CAR and I would therefore hold that the applicant in the instant case does not require permission to appeal as a precondition to the filing of a counter-notice of appeal. It accordingly follows that Mr Jones' primary objection to this application must be dismissed."

[29] Therefore, in **Exclusive Holiday of Elegance Ltd v ASE Metals NV** the view was endorsed that where the counter-notice of appeal seeks to affirm the ruling of the lower court, albeit on different or additional bases that was not "appealing" as such. That analysis and the differences in forms A2 and A3 of the CAR demonstrate that it may need to be considered in the instant case what "type" of counter-notice of appeal was launched by DGW. Was she seeking to overturn aspects of the judgment or to have it affirmed on different grounds? An examination of the notice of counter-appeal filed 17 November 2015 shows that it is in the format of form A2. Under the details of the order appealed, the sums awarded for damages as well as the finding of 25% contributory negligence of DGW were challenged. Particular findings of fact — that the injuries suffered by DGW

were not serious; and of law — that DGW was 25% contributorily negligent were also challenged.

[30] The grounds of appeal complained that i) the learned magistrate erred in finding that VSL was not liable in nuisance and/or the tort of nuisance was not established by DGW (this ground was abandoned at the hearing); ii) the sum of $375,000.00 for General Damages was inordinately low and unreasonable; and iii) DGW was entitled to interest on the award of damages and the learned magistrate erred in not awarding interest to DGW. The orders sought in the grounds of appeal are i) that VSL is liable to DGW in nuisance as well as in negligence (abandoned at the hearing); ii) the award for general damages be increased; iii) DGW be paid interest on both the special and general damages; and iv) costs of the appeal and below should be awarded to DGW. It is manifest therefore that DGW seeks to overturn aspects of the judgment.

[31] There are other judgments from this court apart from **Exclusive Holiday of Elegance Ltd v ASE Metals NV** that have addressed counter-notices of appeal, but those have also been matters appealed from the Supreme Court where the counter-notice of appeal clearly fell to be considered under rule 2.3 of the CAR and not under statute. See for example **Yee (Lloyd Robert) et al v Stanigar-Reid (Sonia)** [2014] JMCA App 18, **Banton (Clive) & Banton (Sadie) v Jamaica Redevelopment Foundation Inc** [2016] JMCA App 2 and **Al-Tec Inc Limited v Hogan (James) et al** [2019] JMCA Civ 9.

[32] Though **Banton (Clive) & Banton (Sadie) v Jamaica Redevelopment Foundation Inc** concerns an appeal from the Supreme Court, dicta from the judgment of Brooks JA (as he then was) in that case will prove useful for my final analysis on this point. At paragraphs [20] – [21] he stated:

> [20] [A]ny party, who is dissatisfied with a final judgment of the Supreme Court, in a civil case, may appeal from that judgment. Either the victor or the unsuccessful party may appeal. Based on rule 1.11(1) of the CAR, the time for filing a notice of appeal, for any dissatisfied party, is 42 days.
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> [21] The CAR dub, as a 'counter-notice', the alternative that it provides to a party who has not appealed, but who has been served with a notice of appeal. Rule 2.3 governs the procedure that that party should adopt…

[33] After setting out rule 2.3 of the CAR at paragraph [21] he continued as follows in paragraphs [22] and [23]:

> [22] Rule 2.3 applies to that party (party R) who was pre-empted by another party (party A) who files a notice of appeal first. If party R, for any reason, does not agree with the decision of the court below and wishes to appeal from that decision, party R must file a form A2 notice. If party R agrees with the decision but wishes to support it on grounds other than those used in the judgment, party R must file a form A3 notice. In either case, party R must file its notice under rule 2.3 within 14 days of being served with the notice of appeal. The question of whether party R is still entitled to file an original appeal after the 14 days has expired, but within the 42 days allowed by rule 1.11(1), is one which must abide until another day, when full arguments have been placed before the court. It is rule 2.3 that will be used as guidance for this analysis.
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> [23] In this case, the Bantons are party R. They were served with JRF's notice of appeal on 8 April 2015. They were, themselves, dissatisfied with the decision in the court below. They should have filed their counter-notice of appeal, using form

A2, on or before 22 April 2015, in accordance with rule 2.3(1) of the CAR."

[34] Just before embarking on the final analysis of this preliminary consideration, it is worth noting that the conundrum affecting counter appeals to the Court of Appeal from the Parish Courts does not manifest in similar types of appeals in England. As is widely known, the court in England that possesses broadly comparable civil jurisdiction to that exercised by the Parish Court in Jamaica is the County Court. By section 77 of the County Court Act, appeals from the County Court to the Court of Appeal for England and Wales, proceed under the Civil Procedure Rules. With few exceptions, the Civil Procedure Rules govern civil procedure in the Court of Appeal, High Court of Justice, and County Courts, in civil cases in England and Wales: see rule 2.1 of the Civil Procedure Rules for England and Wales. They apply to all cases commenced after 26 April 1999, and largely replace the Rules of the Supreme Court and the County Court Rules.

[35] Rule 52.5 of the Civil Procedure Rules for England and Wales operates quite similarly to rule 2.3 of the CAR, which was reviewed in the case of **Banton (Clive) & Banton (Sadie) v Jamaica Redevelopment Foundation Inc**, referred to above. It provides for a "Respondents notice" whereby the respondent can seek to appeal the whole or part of the decision of the lower court, or ask the appeal court to uphold the decision of the lower court, for reasons different from or additional to those given by the lower court.

[36] Having conducted a review of the available guidance on the point under consideration, it appears the answer must emerge from a primary consideration of the

J(PC)A. The main point made by Mr Irving is that a party who seeks to invoke the powers of the court under section 251 of the J(PC)A, is an appellant and would thus be "the party appealing" under section 256 and subject to all its provisions. Support for that view can be found in a context such as the instant case where the relief sought on the counter-appeal seeks to vary or overturn aspects of the judgment appealed from. The counter-appeal is therefore independent of and separate from the appeal and can stand on its own and in appropriate circumstances continue, even if the appeal is discontinued or dismissed. It is in that context that the question of whether section 256 applies to "true" counter-notices of appeal or cross-appeals must be considered. Mr Irving also seeks to derive some support from his submission that in the Supreme Court the fees payable for appeals and counter-appeals are the same.

[37] On the other hand, as Mr Eccleston submitted, section 256 does not refer to a "counter-notice of appeal". Also, based on the analysis conducted, the procedural difficulties identified make the application of section 256 to counter-notices of appeal at the very least problematic. Of note is also the fact that I have not unearthed any authority that has considered this point. All the cases that have come to my attention and been reviewed above, which addressed the effect of the regime outlined in section 256, have done so from the perspective of an appeal and not a counter-notice of appeal.

[38] Having given the matter careful consideration, I am impelled to hold that section 256 of the J(PC)A does not apply to counter-notices of appeal, even those which are in effect cross-appeals. I make this determination conscious of the way in which the word

"appeal" has been used in section 251 of the J(PC)A and the wide powers given to the Court of Appeal under section 266 of the J(PC)A, to facilitate appeals which may be meritorious, even where certain formalities have not been fulfilled.

[39] An examination of the scheme of section 256 discloses that it guides and manages the process from the perspective of the filing of an appeal, but not a counter-notice of appeal. This is seen from the following:

a) An appellant must either give verbal notice of appeal in open court or lodge a written notice of appeal with the clerk of the courts and serve a copy on the opposite party within 14 days after the date of the judgment;

b) At the time of taking or lodging the appeal the appellant must deposit in the court $5,000.00 for the due prosecution of the appeal;

c) Within 14 days after taking or lodging the appeal the appellant shall give security of $15,000.00 for the payment of any costs awarded against the appellant and for the due and faithful performance of the judgment and orders of the Court of Appeal;

d) On the appellant complying with a – c, the Judge of the Parish Court shall draw up for the information of the Court of Appeal, a statement of his reasons for the judgment, decree or order appealed against;

e) Such statement shall be lodged with the clerk of the courts who shall give notice to the parties and allow them to keep a copy of it; and

f) Within 21 days of receiving the notice at e) the appellant shall draw up and serve on the respondent and file with the clerk of the courts the grounds of appeal, failing which his right to appeal shall, subject to section 266, cease and determine.

[40] It should be remembered here that, as outlined in the earlier analysis, compliance with the steps at b), c) and d) have been held to be conditions precedent for the appeal to proceed. Further, by definition, a "counter-appellant" can only emerge where there is already an "appellant". It does appear that absurd and unintended outcomes would result if section 256 were said to apply to a counter-appellant who would be subject to, but have no control over his ability to comply with the time frames reflected in the steps delineated at a) – d) and f). Even having regard to the wide powers granted to the Court of Appeal under section 266 of the J(PC)A, it cannot be that a counter-appellant should be forced to apply to the Court of Appeal pursuant to section 266 of the J(PC)A and section 12 of the J(AJ)A for a range of extensions of time, in order to comply with section 256, not as a result of any dilatory inaction on his part, but because based on when the appellant initiated his appeal, he is unable to comply with any time frame stipulated under section 256 of the J(PC)A.

[41] In **Banton (Clive) & Banton (Sadie) v Jamaica Redevelopment Foundation Inc**, in the context of a counter-notice of appeal from the Supreme Court,

Brooks JA reserved the question whether an original appeal could be filed by the counter-appellant outside of the stipulated time for an appeal to be filed. In the context of section 256 of the J(PC)A and in light of the holding in **Gordon (Ralford) v Russell (Angene)** and subsequent cases, it would seem that such a possibility might exist. However, some of the same procedural absurdities and need for applications for extensions before the Court of Appeal highlighted by the discussion in relation to the application of section 256 to a counter-notice of appeal would also assail a second "original" appeal under section 256. That would be the case given that the delivery of the judgment is the initial triggering event and the possibility that the time frames in relation to other steps in the process such as the notice given by the clerk of the courts to the parties of the lodging of the statement of reasons of the Judge of the Parish Court, may likely already have begun to run based on the initial appeal.

[42] Also, the fact that the fees payable to file a notice of appeal and a counter- notice of appeal from the Supreme Court to the Court of Appeal are the same (see the Court of Appeal Rules (Fees) 2002, amended 2016), does not assist Mr Irving's argument as i) the Parish Court is entirely a creature of statute and the application or otherwise of section 256 to counter-notices of appeal is ultimately a matter of statutory interpretation; ii) there is no indication that the non-payment of fees has the determinative effect on the appeal as occurs in the Parish Court; and iii) the process applicable to those counter-notices of appeal are not subject to the absurdities highlighted, were section 256 to be held to apply to counter-notices of appeal emanating from the Parish Court.

[43] In the absence of any reference to a counter-appellant in the J(PC)A, rule 2.3 of the CAR would seem to apply. In this case DGW's "Notice of Counter-Appeal" does appear to have been drafted pursuant to rule 2.3 as it followed form A2 of the CAR, referred to at rule 2.3(1), and complies with rule 2.3(2). The only cosmetic difference is that form A2 is actually headed "Counter-Notice of Appeal" not "Notice of Counter-Appeal". Pursuant to the Court of Appeal Rules (Fees) 2002 (CARF), promulgated under the Judicature (Rules of Court) Act, that notice was also stamped. Further, no point was taken that this "Notice of Counter-Appeal" was not filed within the time stipulated in rule 2.3(4) or served in compliance with rule 2.3(5).

[44] There however remains one sticking point concerning the filing of that notice on 17 November 2015 in the Civil Division of the Resident Magistrate's Court for the Corporate Area. Rule 2.3(4) of the CAR requires compliance with rule 1.11, by virtue of which, appeals that are not governed by section 256 should be filed in the registry of the Court of Appeal. Undoubtedly and quite understandably counsel for DGW was following the route prescribed by section 256 that requires documents relating to an appeal from the parish courts to be filed in the Parish Court. That being the established practice up to this point, the court will not retrospectively invalidate the counter-notice of appeal on the basis of the procedural irregularity of it being incorrectly filed. The parties were fully aware of the issues joined in the counter-appeal and they were fully argued before the court.

[45] Accordingly, I hold that DGW's "Notice of Counter-Appeal" is not governed by section 256 of the J(PC)A). I also hold that it is properly before the court for determination, being in substantial compliance with rule 2.3 of the CAR, except for rule 2.3(4). The best resolution available given the current provisions of the J(PC)A and the CAR rules has to be embraced by the court. So long as those provisions remain, the steps taken by DGW, modified in respect of the court where the counter-notice should be filed, would appear to be the approach to be adopted when a counter appeal is being pursued from the parish courts. These steps are — proceeding by following rule 2.3 of the CAR, including filing the counter-notice (form A2 or form A3) in the Court of Appeal and serving it in keeping with the rule. It should of course be stamped pursuant to the CARF, prior to being filed.

[46] It is however, at best, an unhappy and ill-fitting solution. Two examples suffice to illustrate this. The first is immediately obvious. Given that, unlike all the other documents relevant to the appeal process, the counter-notice of appeal should be filed in the Court of Appeal, the Parish Court preparing the appeal would not be notified of the fact of a counter-appeal; a situation which may likely create administrative and logistical problems for both the parish and appeal courts. Perhaps this could be addressed by the registrar of the Court of Appeal remitting the filed counter-notice to the relevant Parish Court for inclusion in the record of proceedings to be sent to the Court of Appeal. An untidy but seeming necessary system at this point. Secondly, by virtue of the CARF, a counter-notice of appeal filed pursuant to the CAR, needs to be stamped. Though pursuant to Order 2 rule 24 of the Resident Magistrates' Court Rules 1933, a notice of appeal filed under

section 256 should be stamped, the stamping fee is very small compared to the fees payable under the CARF, and in practice it seems that requirement is not enforced. In these circumstances, the court observes that Parliament and the Rules Committee of the Parish Court, may wish to address this unsatisfactory state of affairs, as deemed appropriate.

[47] I will now turn to deal with the substantive appeals and counter-appeal.

Background

[48] On 20 July 2014, DGW filed a plaint in the court below, amended 18 August 2014, against the VSL, PSP580 and Sheriff Tyndale (the managing director of VSL but not a party to these appeals), for injury, loss and damage she allegedly suffered, when, on 13 March 2013, whilst at the entrance to York Plaza, she was allegedly struck on the head by a metal barrier, which is used to control vehicular entrance to the plaza. She claimed that the incident had occurred as a result of the actions of security personnel employed by VSL who were stationed on duty at the entrance of the plaza, and allowed and/or caused the barrier to descend and hit her in the head. Included in DGW's particulars of claim, were allegations that:

i. Sheriff Tyndale had accepted full responsibility and liability for her injuries;

ii. the barrier struck DGW due to the negligence of the person operating it and/or an inherent defect.

iii. the defective barrier constituted a nuisance to all passers-by and/or visitors to the premises in particular the plaintiff.

iv. the accident was caused by a breach of statutory duty by PSP580 and VSL under the Occupiers' Liability Act.

[49] The doctrine of *res ipsa loquitur* was relied on in relation to all three defendants.

[50] PSP580 resisted the claim on the basis that Mr Tyndale and VSL were not its agents. PSP580 contended that pursuant to a service agreement between itself and VSL, VSL was an independent contractor responsible for the control of vehicular entry to and exit from the premises, and that it acted reasonably in entrusting the management and security of the premises to VSL. PSP580 further maintained that the metal barrier was not defective.

[51] Mr Tyndale resisted the claim on the basis that he was the managing director and a shareholder of VSL, and as such was a distinct person in law from VSL and should not have been joined in the claim.

[52] VSL maintained that DGW was a trespasser to the premises to whom no duty of care was owed, and therefore, if DGW was in fact struck by the barrier, which was denied, she would have willingly accepted the risks, having walked under the barrier.

[53] All the defendants alleged contributory negligence on the part of DGW.

The hearing and decision of the court below

[54] The matter commenced on 14 September 2015. At the close of DGW's case, counsel for Mr Tyndale made a no-case submission on the bases that DGW had admitted that Mr Tyndale was not the one who lifted the barrier; there was no evidence that he was responsible for the security officer who was managing the barrier; and that there was no evidence led that he was a director or shareholder of VSL. The learned magistrate, upheld the no-case submission, ruling that a prima facie case had not been made out against Mr Tyndale, no evidence having been led concerning the role played by Mr Tyndale, or indicating his position in VSL. That decision has not been appealed.

[55] Counsel for DGW subsequently sought permission for Mr Tyndale to be called as a witness based on a letter of undertaking by him, that was permitted to be tendered as exhibit 6. However, this application was denied, on the basis that no exceptional circumstances had been shown, as is required, for the court to permit DGW to reopen her case.

[56] After a number of intermittent days of hearing, judgment was handed down on 30 October 2015. The learned magistrate gave judgment for DGW against VSL, awarding her damages and costs. She gave judgment for PSP580 and Mr Tyndale against DGW with costs.

The issues

[57] The issues that arise for consideration from VSL's appeal (the first appeal), DGW's counter-appeal (the counter-appeal) and DGW's appeal (the second appeal) are distinct and therefore must be considered separately.

[58] From the first appeal the issues that arise for consideration are:

1. Whether the judgment of the learned magistrate is supported by the evidence.

2. Whether the learned magistrate erred in finding that DGW was positioned either under the barrier or to the side of the barrier when she was hit.

3. Whether the learned magistrate erred in finding that DGW was only 25% contributorily negligent.

[59] From the counter-appeal the following issues arise for consideration:

1. Whether the award for general damages was inordinately low and unreasonable in all the circumstances.

2. Whether DGW is entitled to interest on the award of damages.

3. Whether the learned magistrate erred in not awarding interest to DGW.

[60] The issues arising from the second appeal are as follows:

1. Whether the learned magistrate made a finding that section 3(6) of the OLA was applicable and relieved VSL of liability, and if so whether she erred in so doing.

2. Whether the learned magistrate erred in finding that VSL and the PSP580 were not jointly liable for negligence and/or pursuant to the OLA.

3. Whether the learned magistrate erred in ordering DGW to pay the costs of PSP580.

4. Whether the learned magistrate found that section 5(1)(f) of the R(ST)A does not apply to PSP580, and if so, whether she erred in so doing.

5. Whether the learned magistrate accepted PSP580's evidence that it had divested its statutory duty to control, manage and administer the common property under the R(ST)A, and if so, whether she erred in so doing.

The evidence

The case for DGW

Evidence of DGW

[61] DGW's evidence was that, on 13 March 2013 at 3:00 pm, she was walking from Half Way Tree along the sidewalk on Hagley Park Road, in the direction of Three Miles, when, on reaching the vicinity of the gate to the York Plaza, she felt something hit her on the left side of her head. She glanced over her shoulder and saw "one of those metal bars that they lift when [a] vehicle is entering the compound" (pages 29-30 of the record of proceedings), moving away from her. The metal "container that holds the metal bar" (page 30 of the record of proceedings), was protruding into the road. She could touch it as she walked along the sidewalk. However, she could not touch the one that hit her from where she was. She did not see any signs in the area. It was a bright day and she was very familiar with the area which was busy. However, she could not say whether the plaza itself was empty or busy.

[62] When she was hit she almost fell to the ground. She felt dizzy. It took her almost two minutes before she could walk over to the security guard that was manning the pole. The security guard, who gave his surname as Townsend, was wearing a shirt bearing the Veteran Security Logo. She enquired who was responsible for security and was instructed to go to Optical Zone inside the plaza. This she did. She spoke to someone and got a number for a Mrs Vaz, who turned out to be unavailable. She then travelled home by bus while feeling dizzy and in a lot of pain.

[63] The following day she got through to Mrs Vaz who directed her to speak to Mr Tyndale who was responsible for security. She spoke with Mr Tyndale, telling him of the incident and that she needed medical attention. He advised her to go ahead and obtain medical treatment and then get back in touch with him. She reported the incident at the Half Way Tree Police Station and went to the Medical Associates Hospital to see the doctor.

[64] Under cross-examination, DGW agreed that the barrier opens up and down and is lifted to facilitate the exit and entrance of vehicular traffic. She denied that she was under the barrier when she was hit by it, and that she was wrongly using the exit/entrance to the Plaza. However, she stated that there is a tiny way for persons to walk in. She didn't see any vehicle enter the plaza before she was hit, and she was about 4 feet away from the barrier. Although she didn't observe it at the material time, she agreed that from the photograph of the scene, the barrier was painted red and white and is clearly visible, as they normally are. She agreed that there were metal things that surround the barrier, but disagreed that these things limited it from moving sideways. Her evidence was that the barrier did swing out and hit her, even if it was not 4 feet as she estimated.

Evidence of Dr Barbara Chang

[65] The evidence of Dr Chang, the general practitioner who examined DGW on 14 March 2013 at the Medical Associates Hospital, was that she collected the patient's history from the patient, including what had happened. The patient presented with complaints of headaches, discomfort in the neck and slight blurred vision in the left eye. She had a small swelling to the area to the left of the head, mild tenderness with palpitations to the

neck and posterior neck tenderness to the back of the neck. On that occasion, she was sent to do a skull x-ray. Her main injury was a soft tissue injury and neck spasms. She had no bone injury. In the doctor's opinion, the injury was consistent with blunt force trauma to the head.

[66] On cross-examination, Dr Chang admitted that she had seen DGW before for other illnesses, but that she couldn't recall when and if she had treated her for a head injury before. She stated that in her experience blunt force trauma could cause neck spasms, and that the swelling on DGW's head was around 1 cm. She agreed that the injury was not serious, there would not have been any permanent impairment, and that the CT Scan had ruled out any abnormalities.

[67] Dr Chang agreed she could not say when the injury had occurred, but stated it would have happened recently, even the same day, but not longer than a day.

The case for PSP580

Evidence of Patrice Marie Josephs

[68] Ms Josephs gave evidence that she was the manager at Leeward Management, the company contracted by PSP580 to manage the plaza. VSL is contracted by PSP580 to provide security for the property, including patrolling the plaza, protecting assets and life on the plaza and controlling access to the plaza. VSL is responsible for manning the gate and controlling the barriers for entrance and exit to the plaza. The purpose of the barriers is to control vehicular access to and from the property. They do not control pedestrian access.

[69] Two men employed to VSL are usually at the front of the plaza controlling these barriers. No one else controls the barriers. The day-to-day operations of the gate are controlled by VSL. VSL is the only security company that provides security for PSP580. They don't really control access by pedestrians, but there are walkways for pedestrians, and there is a sidewalk along Hagley Park road for pedestrians.

[70] The barrier is lifted by the guard when he pushes down lightly on the weight for the barrier. Ms. Josephs gave evidence that the barriers work properly and as they should. They move up and down. She received no report on the day of the incident about the gate. PSP580 became aware of the incident when someone from the Optical Zone store mentioned it to her. She then called VSL. She did not do anything else because she did not receive a report from DGW or VSL and the incident did not happen in the plaza.

[71] PSP580 received a claim from DGW's attorney, and she asked Mr Tyndale, who she knew to be the owner of VSL, what he was doing about it. Mr Tyndale advised her that he was waiting to hear back from DGW and he agreed to indemnify PSP580 in relation to any claims dealing with the incident. It is to be noted that Ms Josephs produced a letter dated 6 September 2013 and signed by both her and Mr Tyndale, that reduced into writing the contents of her telephone conversation with Mr Tyndale. This letter, after much objection, was admitted into evidence by the learned magistrate.

[72] On cross-examination, Ms Josephs agreed that PSP580 had the duty to manage and administer the common property of the plaza, and to ensure that the premises was kept in good repair and all fixtures and fittings were in good condition. She also admitted

that if the barrier was defective it would be PSP580's responsibility to fix it, as it is not owned by VSL. Their responsibility would be to maintain it. She denied that on the day of the incident the barrier was defective, and stated that she had no report that it was defective. She stated that there are hundreds of cars coming in and out, and so if it was defective the guard or one of the other representatives who visit the property daily would have told her. There is someone on the property 24 hours a day. However, she admitted that she couldn't say for sure what the status of the barrier was on that day.

[73] She agreed that 21 feet 10 inches long seemed to be an accurate measurement of the barrier, and that the diameter could possibly be 7 inches. She also agreed that a pole of that length and with a diameter or 5 to 6 inches could be dangerous if defective; but stated that it would have been impossible for it to hit DGW where she said it hit her, as the barrier would have to be almost broken off. She clarified that the pole was hollow and not iron.

[74] Significantly, in relation to the assurances she had stated were made by Mr Tyndale, Ms Josephs admitted that at no time did he say that VSL was responsible and that Mr Tyndale said the matter would be dealt with in court.

[75] In relation to exhibit 5, the photograph of the incident area, Ms Joseph's evidence is that to the left of the barrier there is a post shaped like a "U" that anchors the barrier arm when it is lowered. The bushing that goes through the barrier anchors it and restricts its movement and prevents it from swinging sideways. There is a guard house very near to the barrier. In response to the question whether the barrier would run into the guard

house if it were to move sideways, she stated that maybe the weight would hit the guard (referring to the cubed structure). She stated that she had been at Leeward Management since April 2012 and during that time she has never received a report of a barrier going sideways. At either end of the exit barrier there is some kind of bolt. She agreed they could become loose as a result of continuous use and if the parts were broken off the weight could swing towards the guardhouse, or swing either way.

[76] However, she stated the parts have never been broken or the bolts loosened since she has been there. She did not receive any report of bolts being loose on the day or after. For the barrier to swing the entire barrier would have to be defective and they would not be able to use it from that day. It would not have been able to go up and down. Although she agreed no repairs were done to the barrier after 13 March 2013, she stated sometime after the incident it was fixed after a car ran into it.

The case for VSL

Evidence of Grieme Townsend

[77] Mr Townsend gave evidence that he worked for VSL and was the security officer on duty at the material time and place. He had worked there for about nine years at the date of the incident, and 11 years by the date of trial. On 13 March 2013, at 3:00 pm, he was at the security post at the plaza, in the process of allowing a vehicle to exit. There is an entrance and an exit to the plaza. On exhibit 5, the photograph of the entrance and exit, the witness pointed out that the entrance is to the left and the exit over to 'this' side. He stated that there is a handle bar for the guard's hands to allow vehicles to exit.

[78] At the material time, he lifted the barrier at the exit to allow the vehicle to pass. The barrier at the entrance was at a fixed position as in the photo. As the vehicle exited, he looked at the entrance and exit and it was clear to close the barrier. He began closing the barrier. He could clearly see a lady coming down the road with two small bags in her hand. He proceeded to close the barrier and he heard a female voice saying "security, you never see me". He closed the barrier and saw the same lady who was coming down the road standing right next to the exit. She said, "security, the barrier catch me. Boy me no know how you make it swing out and hit me". To which he replied, "No ma'am, the gate cannot swing out, so it couldn't have caught you". She was saying it could have caught her "same way". He stated that after he had lifted the barrier, he had used the same handle bar to bring it back in place. He had looked through the window and had seen the barrier. The barrier came down in the normal manner, in an up and down position. He did not see the barrier hit the plaintiff.

[79] When he first saw her, she was somewhere near where the man pictured in exhibit 5 is standing. No vehicle entered the compound at that time, and the entrance barrier was in a fixed position in the anchor. He was not aware of any defect to the barrier or its attachment up to that day since being there.

[80] Upon being shown exhibit 7, a close-up photograph of the barrier, Mr Townsend pointed out a section of the barrier where it is hinged to facilitate movement up and down, and also weights attached to the barrier that would anchor it. He did not notice

anything peculiar or different about DGW's head, nor did he see any swelling. He indicated she said she was frightened but did not say she was dizzy or having headaches.

[81] In relation to the photographic exhibit of the front of the plaza, on cross-examination, Mr Townsend indicated that the photograph represented what the area looked like in 2013. When he was lifting the barrier, he was inside the guard house. The barrier was not inside the guard house but he would not have needed to come outside to lift the barrier. He would have lifted the barrier by placing his hand on the handle with a little force, causing it to go up. He could look in any direction from inside the guardhouse even though it had walls. It has two doors and two windows, so there is a clear view from either side of the sidewalk. At the time, he was allowing the vehicle to exit, he had a clear view all around. He disagreed that at the time DGW was hit he was manning the barrier on the entrance side, but later admitted that, on that day, he was the person manning both the entrance and the exit. Whilst he was raising the barrier for a vehicle to exit he would be facing Hagley Park Road.

[82] He first saw DGW coming down the street, and the next time he saw her she was right behind the guard house. He did not at any point see her underneath the barrier, and he did not drop the barrier on her head. DGW was not holding her head when she came over to him, and she did not appear to be in distress. He did not recommend that she go to Optical Zone. He stated that the barrier could catch someone in the head if they were standing underneath it when it was going up or down, but not if they were standing 4 feet from it. He agreed that the barrier could be about 21 feet 10 inches in

length, but could not say whether it could swing out and hit a passer-by if it were defective, as he has never seen it defective. Since he has been working at York Plaza, he has never seen it swing out or experience any problems. He agreed that on the day of the incident he made a written report to VSL. He is only required to make a report when an incident occurs, and he saw fit to make the report because DGW claimed she was hit. On 13 March 2013, he did not make any report to the management of PSP580 regarding any defect as there wasn't any.

The reasons and judgment of the Resident Magistrate

[83] In coming to her decision, the learned magistrate made the following findings of fact:

i. DGW was a credible witness, whose evidence was supported by the medical evidence of Dr Chang;

ii. DGW was in fact hit by the barrier;

iii. the barrier was not defective;

iv. without any severe defect the barrier could not have swung out four feet to hit her;

v. DGW must have been positioned either under the barrier or to the side of the barrier for it to hit the left side of her head;

vi. Mr Townsend was the one operating the barrier on the day of the incident;

vii. Mr Townsend was employed to VSL.

[84] The learned magistrate determined that VSL was vicariously liable for negligence, since its employee, Mr Townsend, who was operating the barrier at the material time, failed to carry out his duty of care toward all users of the road in that vicinity to ensure that his operation of the barrier did not endanger them. She accepted that this failure to take reasonable care resulted in injury to DGW.

[85] Further, that PSP580 could not be vicariously liable for the actions of VSL since the task of securing the property and manning the entrance had been delegated to VSL as an independent contractor engaged by PSP580.

[86] With respect to liability under the OLA, the learned magistrate found that PSP580 was the 'occupier' of the premises within the meaning of the OLA, and not VSL to whom the property did not belong, and who was merely responsible for securing the premises. Therefore, VSL could not be liable under the OLA. In respect of PSP580, it was found that DGW was to be considered a lawful visitor, to whom PSP580 as occupier owed a 'common duty of care' to ensure safe premises, since, even though it was accepted that DGW did not enter the premises, she was within reach of the barrier. The learned magistrate, however, found that there was no evidence that PSP580 had breached this duty, since there was no evidence that PSP580 was aware of any defect with the barrier, or that a defect actually existed.

[87] With regard to contributory negligence, the learned magistrate found that the plaintiff was 25 % contributorily negligent as from the evidence it appeared that she had not been paying attention to what was ahead of her and as such had failed to take due care for her own safety.

[88] In respect of the claim for nuisance, the learned magistrate found that no evidence was led to substantiate that claim; there being no evidence that there was an interference with the plaintiff's use of land or some right over land or in connection with it, to support a claim for private nuisance. Neither was there any evidence that "the placement of the barrier materially affected the reasonable comfort and convenience of the life of a class of the public who come within the sphere or neighbourhood of its operation to support a claim in Public Nuisance".

[89] In respect of general damages, whilst the learned magistrate found guidance from all the cases submitted, she relied on the case of **Verta Scott & Ashborn Scott v Tankweld Equipment Ltd** (unreported), Supreme Court, Jamaica, Suit No CL/1990/S 267, judgment delivered 17 January 1992, which she found to be most similar to the case at hand.

[90] In handing down judgment, the learned magistrate ordered as follows:

> "1. Judgment for the 1st Defendant against the Plaintiff
>
> 2. Costs to the 1st Defendant in the sum of $21,000.00 to be paid by the Plaintiff
>
> 3. Judgment for the 2nd Defendant against the Plaintiff

4. Costs to the 2nd Defendant to be taxed if not agreed to be paid by the Plaintiff

5. Judgment for the Plaintiff against the 3rd Defendant as follows:

   a) General Damages - $375,000.00

   b) Special Damages - $26,836.00

   c) Costs - $47,016.00"

Notice of appeal (The first appeal)

[91] On 12 November 2015, VSL filed a notice of appeal against the decision made in favour of DGW, seeking the following orders:

> "i. The appeal is allowed;
>
> ii. The order of Her Honour Ms. S. Jackson-Haisley made on the 30th day of October, 2015 in favour of [DGW] against the [VSL] is set aside and Judgment is entered for [VSL];
>
> iii. Costs to [VSL]."

[92] The grounds of appeal, as amended on 29 October 2018, are that:

> "a) The judgment of the learned Resident Magistrate cannot be supported by the evidence and was wholly against the weight of the evidence.
>
> b) The learned Resident Magistrate erred when she found that the barrier must have hit [DGW] when she was positioned either under the barrier or to the side of the barrier although there was no evidence from any witnesses that this was where [DGW] was positioned at the time she was allegedly hit.
>
> c) The learned Resident Magistrate erred in finding that [DGW] was only twenty five percent contributory negligent."

Analysis of the first appeal

Issues 1 & 2

Whether the decision of the learned magistrate is supported by the evidence (ground a)

Whether the learned magistrate erred in finding that [DGW] was positioned either under the barrier or to the side of the barrier when she was hit (ground b)

Submissions on behalf of VSL

[93] VSL challenged the decision of the learned magistrate on two bases. Firstly, it was submitted that the learned magistrate erred in finding that DGW was under or to the side of the barrier when she was hit, as there was no evidence before the court to support such a finding. It was argued that the learned magistrate's finding was therefore speculative and plainly wrong, and should be rejected in accordance with the third principle set out in Lord Thankerton's decision in **Watt (or Thomas) v Thomas** [1947] AC 484; [1947] 1 All ER 582, in that, the learned magistrate did not take proper advantage of seeing and hearing the witnesses. Counsel also relied on the cases of **LC McKenzie Construction Co Ltd & Aston Davis v George Corrie** [1970] 12 JLR 137 and **Victoria Mutual Building Society v Barbara Berry** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 54/2007, judgment delivered 31 July 2008, in which **Watt v Thomas** was approved and applied by this court.

[94] Secondly, it was submitted that VSL could not properly be held liable to DGW in the claim, as, based on the learned magistrate's finding that there was no severe defect to the barrier to allow it to swing out 4 feet to hit DGW, and DGW's evidence as to where

she was positioned when she was allegedly hit, she could not have been hit or injured by the barrier.

Submissions on behalf of DGW

[95] It was submitted by counsel for DGW that, in assessing the appeal the court must have regard to the limited review function of an appellate court as set out by Lord Diplock in **Hadmor Productions Limited & Ors v Hamilton & Ors** [1983] 1 AC 191, which has been accepted and applied by this court, for example, in the case of **Phillip Hamilton (Executor in the Estate of Arthur Roy Hutchinson, Deceased, testate) v Frederick Flemmings & Ors** [2010] JMCA Civ 19. Counsel's submissions emphasised that the appellate court is not called upon to hear the case *de novo* nor to decide whether it might have arrived at a different decision from the learned magistrate, but was conducting a "reviewing function". Counsel cited dicta from Coleridge J in the case of **T v M** [2013] EWHC 1585 (Fam) in support of that submission.

[96] Counsel submitted that, the learned magistrate having observed the plaintiff's demeanour and composure whilst giving evidence and accepting the plaintiff as a credible witness, should not be faulted for concluding that the plaintiff was mistaken as to where she was, at the time she was hit by the barrier.

Discussion

[97] In assessing the issues for determination, this court is mindful of its limited role and the approach it should take in these proceedings. It has long been accepted that the court will not lightly disturb the findings of fact of a trial judge, unless it is satisfied that

the judge was plainly wrong. Lord Thankerton in **Watt v Thomas**, relied on by the 3rd defendant/appellant, stated the now oft quoted principle that where there has been no misdirection as to the law, an appellate court is only entitled to come to a different conclusion than the trial judge based on the printed evidence, where it is satisfied that any advantage to be had by the trial judge of having seen and heard the witnesses, is not sufficient to justify the judge's reasons and conclusion. The fundamental principles circumscribing the functions of an appellate court outlined in **Watt v Thomas** have been repeatedly applied by this court, including in the cases of **LC McKenzie Construction Co Ltd & Aston Davis v George Corrie** and **Victoria Mutual Building Society v Barbara Berry** relied on by counsel for the appellant.

[98] DGW's case against VSL was one of negligence by way of vicarious liability and occupier's liability. The learned magistrate found the company liable for the former, based on what she found to be the negligence of the company's agent.

[99] It is important to note that there has been no dispute that VSL had been contracted by PSP580 to provide the plaza with security, which included controlling entry and exit by the manning of the barriers. It was also not disputed that Mr Townsend was an agent of VSL, and that, at the material time, he was the one operating the barrier. There can, therefore, be no doubt, that the learned magistrate was within her right to accept the evidence that this was so.

[100] Also, VSL has not challenged the learned magistrate's finding that Mr Townsend, in carrying out his duty to operate the barrier, had a duty of care to all road users within the vicinity to ensure that he did not endanger them.

[101] VSL's main challenge to the determination of liability by the learned magistrate was that, DGW could not have been hit or injured by the barrier, considering her evidence that she was positioned 4 feet away from the barrier when she was allegedly hit, and the learned magistrate's finding that there was no evidence that the barrier had a severe defect, to allow it to swing out 4 feet. As a result, it was contended, the company cannot be held liable to DGW in negligence.

[102] In assessing DGW's evidence, the learned magistrate found her to be a credible witness. However, having considered whether, in light of all the evidence, it was possible for the accident to have occurred in the manner DGW recounted, she found that DGW was mistaken. In so doing, she bore in mind DGW's evidence that she did not see when she was being hit, and that it was only after she was hit that she realized what had hit her. She therefore concluded that DGW was not taking note of where she was at the time she was hit. This, along with the learned magistrate's finding that the barrier was not defective and did not swing out 4 feet sideways, caused her to reject DGW's version of how the incident occurred.

[103] The question therefore is, was there sufficient evidence before the court for the learned magistrate to properly conclude that DGW had in fact been injured by the barrier? It is true that the only direct evidence before the court concerning where DGW was

positioned at the time of the incident came from DGW and Mr Townsend, both of whom stated that DGW was not standing under the barrier. However, it is a trite but fundamental principle of the common law, that the tribunal of fact can accept or reject all or a part of the evidence of a witness or witnesses, which is inconsistent with other evidence that is accepted by the tribunal. This is the main point of distinction between the case of **Victoria Mutual Building Society v Barbara Berry**, relied on by VSL and the instant case. In **Victoria Mutual Building Society v Barbara Berry** the finding by the learned judge that the relevant sign was higher than 6 feet from the ground was held by the Court of Appeal to be speculative and erroneous as there was no other evidence in the case other than that of the witnesses who estimated the height as approximately 6 feet. However, in the instant case, there was evidence other than the direct evidence of the plaintiff and Mr Townsend, on the basis of which the learned magistrate could properly find as she did.

[104] That other evidence came from Dr Chang whose medical findings the learned magistrate accepted as supportive of the plaintiff. Having received that evidence, and Dr Chang not having been discredited in any way, the learned magistrate was entitled to find that, due to the nature and position of the main injury, on a balance of probabilities, it was caused by DGW having been struck in the head by the barrier. Acceptance of that evidence together with her finding that the barrier was not defective and hence could not have swung 4 feet sideways, provided a sufficient basis for the learned magistrate to reject the evidence of both DGW and Mr Townsend, as to the positioning of DGW at the time of the incident; but nevertheless to find that the barrier had struck and injured DGW.

[105] Further, though not specifically relied on by the learned magistrate as supporting DGW's evidence that she was hit by the barrier, the learned magistrate recounted in her reasons the evidence of a conversation between DGW and Mr Thompson at the time of the incident, that was effectively part and parcel of the incident. In that conversation, Mr Townsend indicated that DGW said to him that "…the barrier catch me…" Although Mr Townsend did not agree with DGW's assertion, it is evidence that from the time of the alleged incident, DGW stated that she was hit by the barrier, in a context where, there is no indication of any other manner in which she could have suffered injury at that time, and in that location. Accordingly, there was ample evidence to support the learned magistrate's finding that DGW was under the barrier when she was hit. Considering the third principle set out in Lord Thankerton's decision in **Watt v Thomas**, relied on in **L C McKenzie Construction Co Ltd & Aston Davis v George Corrie**, on the evidence that was before the learned magistrate, there is no basis for this court to conclude that the learned magistrate did not take proper advantage of having seen and heard the witnesses or was plainly wrong in her findings. This ground fails.

Issue 3 – Whether the learned magistrate erred in finding that [DGW] was only twenty-five percent (25%) contributorily negligent (ground c)

Submissions on behalf of VSL

[106] VSL has put forward as an alternative argument that if DGW was positioned under the barrier at the time she was hit, she would have failed to take reasonable or any care for her own safety and have been 'substantially the author of her own injury'. VSL relied on the fact that DGW admitted her prior knowledge of the area and of the barriers that

go up and down at the entrance and exit of the plaza, to allow for the passage of vehicles. VSL also submitted that since there is a specific area for pedestrians to enter and exit the plaza, pedestrians should not use the area where the barrier is. VSL argued further that DGW should in those circumstances be adjudged 75% responsible for her injury. The cases of **Davis v Swan Motor Co Ltd** [1949] 1 All ER 620 and **Victoria Mutual Building Society v Barbara Berry** were relied on.

Submissions on behalf of DGW

[107] Despite the fact that in her notice of counter-appeal it was indicated that DGW was challenging the finding of law that she was 25% contributorily negligent, in argument, counsel for DGW submitted that that finding should not be disturbed. He relied on **Davies v Swan Motor Company Ltd.** He also cited the case of **Wayne Ann Holdings Limited (T/A Superplus Food Stores) v Sandra Morgan** [2011] JMCA Civ 44, where this court declined to disturb the apportionment of liability in circumstances where it could not be said that the learned judge was plainly wrong. He argued that on that basis, neither should the apportionment be disturbed in the instant case.

Discussion

[108] Having found that it was open to the learned magistrate, based on the evidence, to find that the agent of VSL caused injury to DGW by his act, the question arises as to whether DGW's own actions contributed to her injury in a proportion greater than the 25% awarded by the magistrate.

[109] The **Law Reform (Contributory Negligence) Act**, provides at section 3, that:

> "3. – (1) **Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person** or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but **the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage**..." (Emphasis supplied)

[110] 'Fault' means "negligence, breach of statutory duty of [sic] other act or omission which gives rise to a liability in tort, or would, apart from the Act, give rise to the defence of contributory negligence". Damage is defined to include personal injury (section 2).

[111] The effect of this section is such that, a plaintiff who fails to take reasonable care for her own safety, resulting in that want of care being one of the causes of her injury, will have any award of damages in her favour reduced to the extent of her negligent contribution. The reduction is to be made based on the exercise of the court's discretion as to what "it thinks just and equitable having regard to the claimant's share in the responsibility for the damage".

[112] Despite the fact that in her notice of counter-appeal it was indicated that DGW was challenging the finding of law that she was 25% contributorily negligent, counsel for DGW in argument submitted that that finding should not be disturbed. He pointed to the fact that in **Davies v Swan Motor Company Ltd** although the deceased was deemed to have seen three notices proscribing the conduct which contributed to his death, he was only adjudged to be 20% contributorily negligent. Counsel asked the court to

consider in the plaintiff's favour, that there was no evidence of any notice in the instant case advising that the plaintiff should not have walked where she did.

[113] In **Davies v Swan Motor Company Ltd** Denning LJ (as he then was), while distilling the essence of contributory negligence based on a definition of 'fault' in the United Kingdom's Law Reform (Contributory Negligence) Act, identical to its definition in the **Law Reform (Contributory Negligence) Act**, stated at page 631 that, '[t]he real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a reasonable man and with reasonable care".

[114] The behaviour which was proscribed in that case which contributed to the death of the deceased, was riding on lorry steps. Regarding the approach to the reduction of damages, Denning LJ went on to say, at page 632 that:

> "While causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. **The amount of the reduction is such an amount as may be found by the court to be "just and equitable," having regard to the claimant's "share in the responsibility" for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness**." (My emphasis)

[115] Interestingly, at page 633 Denning LJ commented that he thought, "the deceased man was very considerably to blame", but he was not prepared to differ from the proportion suggested by Bucknill LJ and concurred in by Evershed LJ.

[116] **Davies v Swan Motor Company Ltd** was applied by this court in **Victoria Mutual Building Society v Barbara Berry**, in which the respondent who suffered injuries after slipping on a step was adjudged 50% responsible for her injury, on the basis that she had not kept a good lookout as she had previously passed over that same step earlier that day. The court found that the respondent ought to have reasonably foreseen that if she did not 'pay attention' she might injure herself.

[117] In **Wayne Ann Holdings Limited (T/A Superplus Food Stores) v Sandra Morgan**, relied on by [DGW], at paragraph [16], this court described the test in the following way:

> "In this case contributory negligence was raised as a defence. When such a defense [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In **Nance v British Columbia Electric Rly** [1951] AC 601, at page 611, Lord Simon said:
>
> > '…When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove…. that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.'"

[118] In the instant case, the learned magistrate, on the penultimate page of her reasons for judgment, found DGW to be 25% responsible for her injury, "as based on the evidence it appears that she was not paying attention to what was ahead of her".

[119] In light of the contending positions on the appropriate percentage of contributory negligence that should be attributed to DGW, how should the court approach the question of whether the determination of the learned magistrate should be adjusted? In **Wayne Ann Holdings Limited (T/A Superplus Food Stores) v Sandra Morgan** the court declined to disturb the trial judge's findings on contributory negligence on the basis that "in all the circumstances, it could not be said that the learned judge was plainly wrong". What is the situation in the instant case?

[120] From the perspective of VSL there are some significant points in its favour. The evidence disclosed that DGW was familiar with the area as well as with the operation of the barriers to allow cars entry and egress. However, as she was not going into or out of the plaza, the fact that there was a special area for pedestrians to access and leave the plaza is not of particular significance in the assessment of the level of DGW's personal responsibility.

[121] What is of additional significance is the learned magistrate's finding that DGW was where she did not think she was, that is, under the barrier. Does that however mean that, like the respondent in the **Victoria Mutual Building Society v Barbara Berry** case, DGW did not keep a proper lookout? Should DGW bear a great percentage responsibility for her accident? In the **Victoria Mutual Building Society v Barbara**

Berry case there was no contention, as in this one, that Ms Berry was in an area she should not have been. The crux of the finding of contributory negligence was that Ms Berry, having previously that day passed over the step where she fell, was aware of the danger and hence should have taken care for her safety.

[122] In the instant case, unlike in the **Victoria Mutual Building Society v Barbara Berry** case, there was no warning sign in the area. However perhaps the major difference between the two situations, is that, in the **Victoria Mutual Building Society v Barbara Berry** case, only the respondent was in motion. In the instant case both DGW and Mr Townsend were active. While DGW was walking by the exit, it was Mr Townsend who controlled the movement and speed of the barrier. While the barrier is in the air, a pedestrian walking across the exit, would not likely have a precise awareness of the barrier's plane of movement. Therefore it is easy to envisage how DGW could wander closer to the barrier than she would have, if it had been lowered.

[123] Mr Townsend clearly had a responsibility to keep a proper look-out as he lowered the barrier, to ensure that there was no vehicle or person, within its path that could be struck by it. It is manifest that Mr Townsend failed to keep a proper lookout, as he never saw DGW under or near to the barrier, nor was he aware that the barrier had hit her.

[124] In all the circumstances therefore, it appears that, while, as the learned magistrate found, DGW "was not paying attention to what was ahead of her", a greater share of responsibility for the barrier striking DGW rests with Mr Townsend. The apportionment of the learned magistrate was therefore not plainly wrong, but rather eminently

understandable; it being supported by the evidence she accepted and findings she made. This ground fails.

The counter-appeal of DGW

[125] On 17 November 2015, DGW filed a counter-appeal against VSL, seeking the following orders:

> "a) [VSL] is liable to [DGW] in nuisance as well as in negligence.
>
> b) The award for general damages be increased.
>
> c) [DGW] be paid interest on the award for special damages at the rate of 3% from March 13, 2014 to October 30, 2015 and on the award for General Damages at the rate of 3% from September 23, 2014 to October 30, 2015.
>
> d) The costs of this appeal and the costs below be awarded to the [DGW]; and
>
> e) There be such further or other relief as may be just."

[126] The counter-appeal is based on the following grounds:

> "a. The learned Resident Magistrate erred in law in finding that [VSL] was not liable for nuisance and/or that the tort of nuisance was not established by [DGW].
>
> b. The sum of $375,000.00 for general damages is inordinately low and unreasonable.
>
> c. The [DGW] is entitled to interest on the award of damages and the learned resident magistrate erred in not awarding or making any order in relation to interest in favour of [DGW]."

[127] It should be noted that, at the hearing, counsel for DGW indicated he was not proceeding with the first ground relating to nuisance.

Issue 1 – Whether the award for general damages was inordinately low and unreasonable in all the circumstances (ground b)

Submissions on behalf of DGW

[128] DGW challenged the award for general damages on the basis that it was inordinately low and unreasonable, having regard to the authorities relied on in support of her claim. It was submitted that the case of **Henry Bryan v Noel Hoshue and others** (unreported), Supreme Court, Jamaica, Suit No CL 1996 B 219, judgment delivered September 30, 1997; Khan Vol 5 pg. 177 should have been the proper starting point used by the learned magistrate for the quantification of damages, as the injuries in that case are similar to the ones suffered by DGW. However, counsel contended that there should be a higher award in this case, as DGW suffered greater injuries than those suffered by the plaintiff in that case.

[129] The award is further challenged on the basis that the learned magistrate erred in relying on the case of **Verta Scott & Ashborn Scott v Tankweld Equipment Ltd** (unreported), Supreme Court, Jamaica, Suit No CL/1990/S 267, judgment delivered 17 January 1992 to quantify damages, as the injuries of the plaintiff in that case were less severe than those suffered by DGW; there being no evidence of soft tissue injuries or spasms, severe headaches, dizziness, excruciating pain or pain lasting six months being suffered by that plaintiff.

[130] Consequently, it was submitted on behalf of DGW that the award for pain and suffering and loss of amenities should be increased to $1,000,000.00.

Submissions on behalf of VSL

[131] Counsel for VSL contended in response that, as there was no wound in the instant case, the matter of **Verta Scott & Ashborn Scott v Tankweld Equipment Ltd** was more relevant than the case of **Henry Bryan v Noel Hoshue and others** being relied on by DGW. Counsel argued that the award was not unreasonable, especially given that the full award without the deduction to take account of DGW's assessed contributory negligence, was $500,000.00.

Discussion

[132] It has long been accepted that, as in in the case of liability, the court will only disturb an award of damages made by a lower court in limited circumstances. The approach that has been often applied by this court is that set out by Greer LJ in the seminal authority of **Flint v Lovell** [1935] 1 KB 354.

[133] In the recent decision of the court in **Jamaican Redevelopment Foundation, Inc v Clive Banton and Sadie Banton**, McDonald-Bishop JA applied dicta from the decision of the Judicial Committee of the Privy Council in the Bahamian case of **Cadet's Car Rentals and another v Pinder** [2019] UKPC 4, which she indicated provided the most recent guidance concerning how an appellate court should approach an appeal from an assessment of damages. At paragraph [108], she quoted from that decision as follows:

> "7. An appellate court will not, in general, interfere with an award of damages unless the award is shown to be the result of an error of law or so inordinately disproportionate as to be plainly wrong. In **Flint v Lovell** [1935] 1 KB 354 Greer LJ referred (at p 360) to the power of an appellate court to reverse a decision on quantum of damages in the following terms:

> '[T]his Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.'

Similarly, in **Nance v British Columbia Electric Railway Co Ltd** [1951] AC 601 the Board observed (at pp 613-614):

> '… before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v Lovell [1935] 1 KB 354, approved by the House of Lords in Davies v Powell Duffryn Associated Collieries Ltd [1942] AC 601).'"

[134] In **Verta Scott & Ashborn Scott v Tankweld Equipment Ltd** the plaintiff, who was injured due to a blow and wound to the head, suffered from pain in the head and the neck. He was awarded a sum of $9,000.00 in January 1992 for pain and suffering and loss of amenities. It seems the learned magistrate updated the award using the Consumer Price Index (CPI), to arrive at the sum of $157,088.48. She then increased that figure to arrive at the final award to compensate for the fact that DGW had experienced pain for six months, whilst there had been no indication how long the plaintiff in **Verta Scott & Ashborn Scott v Tankweld Equipment Ltd** had suffered pain.

[135] In **Henry Bryan v Noel Hoshue & Wilbert Marriat-Blake** the plaintiff, who was injured in a motor vehicle accident, suffered shock, excruciating pain including in the

back, dizzy spells, abrasions over the frontal region of the scalp and severe headaches consistent with blunt force injury. It was found that his condition was also due to an aggravation of a pre-existing peptic ulcer disease caused by the stress of the accident. However, the conclusion was that his injuries did not appear serious and were unlikely to cause permanent impairment. He was awarded a sum of $350,000.00 in September 1997. Using the CPIs of 45.13 for September 1997 and 230.7 for October 2015, that figure updates to $1,789,164.64.

[136] I agree with the learned magistrate that the injuries suffered by the plaintiff in the case of **Verta Scott & Ashborn Scott v Tankweld Equipment Ltd** appear to be more similar to the injuries suffered by DGW in the instant case than those suffered by the plaintiff in **Henry Bryan v Noel Hoshue & Wilbert Marriat-Blake**, albeit Ms Scott suffered a wound whilst DGW did not.

[137] It is also clear that the injuries suffered by Mr Bryan in **Henry Bryan v Noel Hoshue & Wilbert Marriat-Blake** were more serious than those suffered by DGW as he had abrasions over the frontal region of his scalp and suffered shock. Also, although like Mr Bryan, DGW suffered headaches, hers were not considered to be serious. His headaches, however, were described as severe, and he experienced additional excruciating pain in his back.

[138] Having assessed the cases relied on by each party in the context of the injuries suffered by DGW in the instant case, I find no basis to conclude that the award for damages made by the learned magistrate represented an 'entirely erroneous estimate of

the damage' suffered by DGW and was plainly wrong. The award should therefore not be disturbed.

Issues 2 and 3 – Whether [DGW] is entitled to interest on the award of damages and whether the learned magistrate erred in not awarding same (ground c)

[139] It was initially submitted by DGW that she should have been awarded interest having regard to the fact that she had claimed interest in her particulars of claim, based on section 210(1) of the J(PC)A which provides that:

> "Every judgment of a Court (including any judgment which may have been given before the passing of this Act, and which shall not at the time of the passing of this Act have been fully paid or satisfied), shall bear interest at the rate of six *per centum* or such other rate per annum as the Minister may by order from time to time prescribe in lieu thereof, to be computed on what shall for the time being be due on such judgment from the day of the date of such judgment until payment. And such interest shall be deemed to be incorporated with the principal money due on such judgment, and execution may issue thereon accordingly."

[140] Mr Irving pointed out in his response that section 210 deals with the rate of interest to be paid on a judgment debt that remains unpaid. He submitted that the applicable statute was the Law Reform (Miscellaneous Provisions) Act (LR(MP)A. He further submitted that, since interest is a discretionary matter for the trial judge, the learned judge did nothing wrong in not awarding interest. Therefore, the award cannot be contested. In his reply, Mr Eccleston agreed with Mr Irving's response, as to the applicable statute, but maintained that the learned magistrate erred in not awarding interest which was claimed.

Analysis

[141] I agree with both counsel that section 210(1) of the J(PC)A is inapplicable in this situation, as it addresses the rate of interest payable on a judgment debt that remains unpaid, which is not the position here. The situation in this case is that, in her amended plaint note, DGW had in fact claimed interest pursuant to section 3 of the LR(MP)A, at such rate and for such period as the court deemed just. Section 3 of the LR(MP)A provides:

> "In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section -
>
> a) shall authorize the giving of interest upon interest; or
>
> b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> c) shall affect the damages recoverable for the dishonour of a bill of exchange."

[142] Section 3 of the LR(MP)A therefore confers on a Judge of the Parish Court (designated as a Court of Record by section 10 of the J(PC)A), a wide discretion concerning the award of interest. This discretion covers firstly whether interest should be awarded at all and then, if so, also addresses the rate of interest, and the period to which it should be applied.

[143] Whilst that discretion, as far as I am aware, is not fettered by any other legislation or rules of court, it is well established that a judge or magistrate must exercise any discretion bestowed on him judicially (see **Hadmor** and **Central Soya of Jamaica Ltd v Junior Freeman** (1985) 22 JLR 152 (CA)).

[144] The learned magistrate made no award as to interest, and gave no indication in her reasons why this was so, or whether she had addressed her mind to the issue of interest at all. This court not being apprised of the learned magistrate's reason for not awarding interest, or whether it was considered at all, cannot therefore conclude that the discretion was exercised judicially. Whilst, it is clear from section 3 of the LR(MP)A, that there is no entitlement to interest, DGW having sought interest in her claim, the learned magistrate ought to have demonstrated that she considered whether interest should be awarded and given cogent reasons for her decision. Not having done so, the learned magistrate erred.

[145] Consequently, the court will go on to consider whether it should exercise its discretion to award interest to DGW (see rule 2.15(a) and (b)(b) of the CAR). Ordinarily, in personal injury matters, it has become the practice that interest will be awarded to a successful claimant, unless some special reason dictates otherwise. In the seminal case of **Central Soya of Jamaica Ltd v Junior Freeman**, this court, in addressing the issue as to whether the trial judge had failed to properly exercise his discretion to award interest, considered that the basis upon which an award for interest is to be made is to compensate the claimant for being kept out of the use of his money. The court found

that whilst the literal interpretation of section 3 of the LR(MP)A appeared to be unfettered, as with all discretions vested in a court, the court ought to exercise it judicially. In view of the need to have predictable rules of assessment in personal injury cases, the court suggested as a guideline, that a judicial exercise of the discretion to award interest in a typical case of personal injury would be that of 3% on special damages from the date of the loss to the date of judgment, and 3% on general damages from the date of the service of the claim form to the date of judgment.

[146] DGW has been kept out of the use of her money for several years, the incident having occurred in 2013, and the plaint being filed in 2014. There is no evidence of unreasonable delay or other failing on her part to warrant a departure from the general practice. I am therefore of the view that interest should be awarded on the sums awarded by the learned magistrate for both special and general damages, in accordance with the guidelines outlined in **Central Soya of Jamaica Ltd v Junior Freeman**.

The appeal of DGW against PSP580

[147] On 7 March 2016, DGW filed a notice of appeal against PSP580 on the following grounds:

> "a. The learned Resident Magistrate erred in finding that section 3(6) of the Occupiers' Liability Act applies and has the effect of relieving [PSP580] of liability. The said section is only applicable where work of construction or repair or maintenance is being carried out on premises. On the evidence, no such work of construction was being carried out by [VSL] and neither was there any contract between them for such work.

b. The learned Resident Magistrate erred in finding that [PSP580] and [VSL] were not jointly liable in negligence and/or pursuant to the Occupiers' Liability Act.

c. The learned Resident Magistrate erred in law in finding that [PSP580] was not liable for nuisance and/or that the tort of nuisance was not established by [DGW].

d. The learned Resident Magistrate erred in ordering that [DGW] pay the costs of [PSP580].

e. The learned Resident Magistrate erred in holding that section 5(1)(f) of the Registration (Strata Titles) act does not apply to [PSP580].

f. The learned Resident Magistrate erred in accepting [PSP580's] evidence that it had divested itself of its statutory duty imposed by the Registration (Strata Titles) Act to control, manage and administer the common property to [VSL]."

[148] Based on the foregoing, she seeks the following orders:

"a) That the judgment and/or orders of the learned Resident Magistrate dated the 30th day of October, 2015 in favour of the First Defendant/Respondent be set aside;

b) That the costs of this appeal and the costs below be awarded to the Appellant; and

c) That there be such further or other relief as may be just."

[149] It should be noted that, at the hearing, as he did in relation to the counter-appeal, counsel for DGW abandoned the ground relating to nuisance.

Issue 1 – Whether the learned magistrate made a finding that section 3(6) of the Occupiers Liability Act (OLA) was applicable and relieved PSP580 of liability, and if so whether she erred in so doing (ground a)

Submissions on behalf of the Plaintiff /Appellant

[150] DGW has submitted that the learned magistrate's conclusion that no responsibility could be attributed to PSP580 arising from VSL's negligence because (1) it was not aware

of any defects, and (2) it had delegated the responsibility of manning the entrance of the premises to VSL, is contrary to section 3(6) of the OLA. This is so, the submission continued, because, exemption from liability on the grounds of delegation to an independent contractor, requires evidence of "execution of any work of construction, maintenance or repair", and there is no such evidence. The case of **Woodward and another v Mayor of Hastings and others** (1944) 2 All ER 565 was relied on.

Submissions on behalf of PSP580

[151] PSP580's position is that the learned magistrate did not make a finding that section 3(6) of the OLA had the effect of relieving PSP580 of liability. Rather, PSP580 argued, having accepted PSP580's unchallenged evidence that it had hired VSL to provide security as an independent contractor, the learned magistrate correctly made a finding that PSP580 was not vicariously liable for the actions of VSL.

Discussion

[152] Section 3(1) of the OLA imposes a "common duty of care" on an 'occupier of premises' to all his visitors, to take such care as is reasonable in the particular circumstances to see that the visitor will be reasonably safe in using his premises for the purposes for which he was invited or permitted. Subsection 6 relieves an occupier from such duty in circumstances where, without more, the damage caused to the visitor is due to the faulty execution of construction, maintenance or repair work by an independent contractor, and, the occupier acted reasonably in entrusting the work to the contractor, and took reasonable steps to satisfy himself both that the contractor was competent and that the work had been done properly.

[153] The learned magistrate made no explicit reference to section 3(6) in her reasons. However, she did consider the 'common duty of care' under the Act owed by an occupier of premises to all his visitors. The learned magistrate found that PSP580 was the occupier of the premises, and that DGW qualified as a visitor to whom a duty was owed, notwithstanding that she had not entered the premises, as she was within reach of the barrier on the property. The learned magistrate then went on to consider whether in all the circumstances, PSP580 had failed in its duty to ensure that its premises were safe. She found that, on a balance of probabilities, there was no evidence that PSP580 had breached that duty, as there was no evidence that they had been aware of a defect with the barrier or that it had any defect at all.

[154] It is clear that in coming to her decision the learned magistrate did not have regard or satisfy herself as to the circumstances set out in subsection 6. However, it is equally clear that the section does not apply, the damage having been caused by the negligence of a company contracted to provide security to the plaza, and not by the 'faulty execution of any work of construction, maintenance or repair'.

[155] It cannot be said, therefore, that the learned judge erred in this respect.

Issue 2 - Whether the learned magistrate erred in finding that PSP580 and VSL were not jointly liable for negligence and/or pursuant to the OLA (ground b)

Submissions on behalf of DGW

[156] DGW has submitted that, PSP580 was in 'occupation and control' of the premises along with VSL at the material time, and as such, owed 'a common duty of care' to her pursuant to section 3 of the OLA. In this regard, it was submitted that the 'control' of

PSP580 had never ceased. The authorities of **Woodward and another v Mayor of Hastings and others** and **Bunker v Charles Brand & Son Ltd** (1969) 2 All ER 59 were relied on.

[157] It was further argued that PSP580 had sufficient control over the premises to be deemed an 'occupier' within the meaning of the OLA, based on the test set out in **Valoris Smith v UGI Group Limited** (unreported), Supreme Court, Jamaica, Claim no CL 1997/ S 298, judgment delivered 11 March 2010, in that, at all material times PSP580 was 'clothed with the powers of supervision and control over the premises'. This was also the case, it was argued, since the evidence before the court is that PSP580 had responsibility for the common areas including the area where the barrier is located.

Submissions on behalf of PSP580

[158] It was submitted that, having accepted PSP580's unchallenged evidence that it had hired VSL to provide security as an independent contractor, the learned magistrate correctly made a finding that PSP580 was not vicariously liable for the actions of VSL.

[159] It was further contended that the learned magistrate also correctly found that PSP580 and VSL were not jointly liable in negligence and/or pursuant to the OLA, in that VSL had control over the operation of the barrier and there was no evidence that PSP580 controlled or supervised VSL or its servants on how to operate the barrier. Section 3(2) of the OLA was relied on for the duty of care that is owed by an occupier under the Act, as well as section 3(6) for the stipulation that an occupier will be exempted from liability where a visitor is injured due to danger caused by the 'faulty execution of construction

work, maintenance or repair' of an independent contractor employed by the occupier, where the occupier acted reasonably in entrusting the work to the contractor, and took reasonable steps to satisfy himself that the contractor was competent and that the work had been properly done. Counsel also argued that an 'occupier' includes a person having possession or control of premises, and that, based on the authority of **Wheat v E Lacon and Co Ltd** [1966] AC 552, this includes a person having responsibility for and control over the condition of premises, activities carried on there, or access to the premises. Counsel additionally indicated that PSP580 accepted that there may be more than one occupier of the same premises.

[160] PSP580 relied on several authorities which show that an employer will not be held vicariously liable for the negligent acts of an independent contractor, except in exceptional circumstances where the employer owed a direct duty to the injured person such as where the act the independent contractor is commissioned to do is very hazardous in character. These include: Clerk and Lindsell on Torts (19th Ed, pages 352-353 para 652); **Salsbury v Woodland** [1970] 1 QB 324; **Honeywill and Stein Ltd v Larkin Bros (London Commercial Photographers) Ltd** [1934] 1 KB 191; and **Rylands and Another v Fletcher** (1868) LR 3 HL 330. Counsel maintained that there was no evidence that the operation of the barrier was so dangerous that an obligation would be imposed on PSP580 to see that care was taken on how the barrier was operated.

Discussion

[161] The unchallenged evidence, which was accepted by the magistrate, was that VSL had been contracted by PSP580 to provide security for the plaza, which included the

access to the premises by the operation of the barriers. There was no challenge in the court below concerning whether VSL was to be considered an independent contractor. Indeed, the learned magistrate accepted PSP580's case that this was so. The learned magistrate also found in her reasons that the actions of Mr Townsend as an employee of VSL, an independent contractor, could only be attributed to VSL. Therefore, PSP580 could not be held liable for the actions of anyone employed to VSL.

[162] Specifically, in relation to whether the OLA applied to either or both PSP580 and VSL, the learned magistrate found that, PSP580 was the occupier of the premises, and VSL was not, because the premises did not belong to them and they were only there to provide security services. Thus, it was found that the OLA was not applicable to VSL. The learned magistrate also found that, although PSP580 was the occupier of the premises, and DGW was a visitor within the meaning of the OLA, PSP580 had not breached its duty as there was no evidence of any defect with the barrier. Based on the challenge to the learned magistrate's findings this court needs to consider two questions: (1) whether both VSL and PSP580 were to be considered 'occupiers' of the Plaza owing a duty of care under the OLA to DGW, and (2) whether either or both breached that or any related duty.

Should both VSL and PSP580 be considered 'occupiers'?

[163] Section 3 of the OLA provides in part:

> "3. - (1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

> (2) 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.
>
> ...
>
> (6) Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done."

[164] Under the OLA, an 'occupier of premises' will be liable for a breach of duty under section 3 of the OLA, where he has failed to discharge his common duty of care as outlined under s. 3(2) of the OLA. The OLA does not define an 'occupier', but provides in section 2 that 'persons who are to be treated as an occupier are the same persons who would at common law be treated as such'.

[165] In **Wheat v E Lacon & Co Ltd** the House of Lords gave guidance on the interpretation of who should be viewed as an "occupier". In that case Lacon owned a public-house which operated on the ground floor of the building. The company permitted the manager of the public-house and his wife to enjoy the use of the first floor rent free for their private dwelling, so long as he remained manager of the public-house. His wife was permitted to take in guests for private profit. The appellant HW and her husband were paying guests of the manager's wife. One night, the appellant's husband was descending a back staircase from the first floor when he fell, suffering a fatal injury. HW brought an action against Lacon and the manager and his wife for damages for negligence

and breach of the Occupiers' Liability Act 1967. The trial judge found that the cause of the accident was that the staircase had been dimly lit, and also that there was a handrail that stopped short before the foot of the stairs. Neither Lacon nor the manager and his wife were found liable. HW only appealed against the finding in favour of Lacon. That appeal was dismissed by the Court of Appeal.

[166] On appeal to the House of Lords, their Lordships found that Lacon was not liable, as, although it was the occupier of the premises for the purposes of the Occupiers' Liability Act 1967 and owed HW and her husband a common duty of care, there had been no evidence that it had breached this duty. In finding that it was the 'occupier', the court considered that the contract between the manager and Lacon provided that the latter would retain the duty of inspection and repair of the entire premises, and that the manager's occupation of the premises was required for his employment, rather than by a charitable offering or tenancy. This meant that Lacon had a duty to ensure that the premises were reasonably safe. However, the court additionally held, that the manager and his wife were also occupiers, being licensees with a degree of control over the private area in which they stayed and let to guests. This area included the particular staircase.

[167] In finding that Lacon did not breach its duty, the House of Lords considered that although it was responsible to ensure that the structure, including the handrail was reasonably safe and that the lighting was efficient, it had been entitled to leave the day-to-day matters, such as changing bulbs, to the manager and his wife. The evidence was insufficient to suggest that the staircase was inherently dangerous and there was

evidence to show that a stranger had removed the bulb shortly before the accident. There was also evidence of contributory negligence.

[168] In **Wheat v E Lacon & Co Ltd** Lord Denning, having assessed a number of authorities, at page 578 described an occupier at common law as follows:

> "...[W]herever **a person has a sufficient degree of control over premises that he ought to realise that any failure on his part 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. **In order to be an "occupier" it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation**. **Suffice it that he has some degree of control. He may share the control with others. Two or more may be 'occupiers.'** And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other." (My emphasis)

[169] What is therefore apparent, is that, an 'occupier' is a person having a sufficient degree of control over a premises to owe his lawful visitor 'the common duty of care', and also that there may be more than one such occupier. The case of **Wheat v E Lacon & Co Ltd**, including the explanation of the meaning of "occupier", was approved and applied by the Judicial Committee of the Privy Council in **Adele Shtern v Monica Cummings** [2014] UKPC 18, affirming the decision of this court in **Adele Shtern v Villa Mora Cottages Ltd and Monica Cummings** [2012] JMCA Civ 20.

[170] In the instant case, there is no doubt that the learned magistrate was correct in finding that PSP580 was an occupier of the premises owing a duty of care to DGW.

PSP580 by its own evidence, retained the responsibility of maintaining and keeping in good repair the common areas of the plaza, including the barriers. This was not challenged. In relation to VSL, however, the question is whether the magistrate was wrong in finding that VSL, being merely an independent contractor providing security services and not owning the premises, was not also an occupier?

[171] Concerning cases involving an independent contractor, in **Wheat v E Lacon & Co Ltd** Lord Denning had this to say at page 580:

> "…**where an owner employed an indepedent [sic] contractor to do work on premises or a structure, the owner was usually still regarded as sufficiently in control of the place as to be under a duty towards all those who might lawfully come there**. In some eases [sic] he might fulfil that duty by entrusting the work to the independent contractor: see *Haseldine v. C. A. Daw & Son*44 and section 2 (4) of the Act of 1957. In other cases he might only be able to fulfil it by exercising proper supervision himself over the contractor's work, using due diligence himself to prevent damage from unusual danger: see *Thomson v. Cremin*, 45 as explained by Lord Reid in *Davie v. New Merton Board Mills Ltd*.46 **But in addition to the owner, the courts regarded the independent contractor as himself being sufficiently in control of the place where he worked as to owe a duty of care towards all persons coming lawfully there**. He was said to be an 'occupier' also: see *Hartwell's case* 47; but this is only a particular instance of his general duty of care: see *Billings (A.C.) & Sons Ltd. v. Riden*, 48 *per* Lord Reid." (My emphasis)

[172] Accordingly, it is accepted, that, in particular circumstances, an independent contractor can be held to be an occupier owing a common duty of care under the Occupiers' Liability Act.

[173] DGW did not join VSL in this second appeal. She has not directly challenged the finding that VSL was not an occupier. Her contention is that PSP580 was also liable for

the injury she suffered by virtue of being an occupier and cannot be shielded by the finding that VSL is an independent contractor or that there was no defect in the barrier. In **Wheat v E Lacon & Co Ltd** the finding by the trial judge that the manager and his wife were not liable based on there having been the intervening action of a stranger removing the lightbulb for the stairs, was not appealed. Notwithstanding their absolution not being appealed, the Law Lords in their analyses all found that the manager and his wife were also occupiers for the purposes of the Occupiers' Liability Act.

[174] The present situation is dissimilar, in that VSL has been found liable for the injury suffered to DGW, however not under and pursuant to the OLA. I will however adopt the approach in **Wheat v E Lacon & Co Ltd** to discuss whether VSL qualifies as an occupier, given that any possible liability to be attached to PSP580 would have to be vicarious. VSL not having been made a party to this appeal would not however be in jeopardy regarding any such finding.

[175] That having been said, in the passage extracted from Lord Denning's speech in **Wheat v E Lacon & Co Ltd** at page 580 it is made clear that an independent contractor can be an occupier of "the place where he worked" where he was "sufficiently in control of that place as to owe a duty of care towards all persons coming lawfully there". It is manifest that VSL had practical and operational control of the area of the premises where the barrier is. As such I find the learned magistrate erred when she found that VSL was not an "occupier."

Was the occupier's duty of care breached?

[176] The cases cited by DGW in relation to this ground were all geared towards supporting the contention that PSP580 retained sufficient control over the barrier; thereby causing PSP580 to owe a common duty of care to DGW that was breached, and for which it should be liable. **Woodward and another v Mayor of Hastings and others** was a case in which a child was injured after slipping and falling on a snowy school step. The maintenance of that step was entrusted to a caretaker. The United Kingdom (UK) Court of Appeal found that, even if the caretaker had been an independent contractor hired by the school's governors, which it found she was not, the governors would still be liable for negligence as they retained an obligation to take reasonable care to prevent damage to their invitees.

[177] That obligation was not extinguished by their delegation to an independent contractor to perform a duty that was incumbent upon them. That could only be so if, based on **Haseldine v CA Daw & Son, Ltd** [1941] 2 KB 343, the contractor was reasonably hired in respect of a technical area of expertise in respect of their safety, which in the circumstances, was not the case. Whomever they had entrusted to clean the step had a duty to ensure it was not left in a dangerous condition. That person having failed to do so, their negligence would mean negligence on the part of the defendants.

[178] **Woodward's** case is however distinguishable from the instant matter in that, in **Woodward**, the governors retained control over the step and could ensure that it was properly cleaned, even when the caretaker had failed to do so. The negligence of the caretaker was therefore imputed to them. In the instant case, the function of regulating

the barrier had been exclusively delegated to VSL under contract and PSP580 was not in a position to ensure that each time the agent of VSL raised or lowered the barrier it was safe to do so.

[179] In **Bunker v Charles Brand & Son, Ltd** the defendants were the main contractors responsible for the digging of a tunnel on the London Underground. They used a digging machine owned by London Transport. The machine required some modifications. The plaintiff's employers were engaged to do the modifications one weekend, when no tunnelling was ongoing. The plaintiff had seen the machine before the weekend in question. To carry out the modifications, it was necessary for someone to cross free running rollers to get to the front of the machine, because the defendants had previously removed the timber walkway. The plaintiff in crossing the rollers fell and suffered injuries. The method of getting to the front of the machine had been confirmed by a senior representative of the defendants shortly before the plaintiff suffered the accident. No one had previously suffered such injuries. It was held that the defendants were the occupiers of the tunnel and the machine, since, despite the employment of the plaintiff's employer's as specialist contractors, they retained control of the tunnel and the machine and accordingly owed the common duty of care under the Occupiers' Liability Act 1967.

[180] **Bunker v Charles Brand & Son, Ltd** can also be distinguished on its facts. The defendants were at the very least partially responsible for the injury to the plaintiff as they contributed to the unsafe place of work by removing the timber walkway. Further,

the confirmation from a senior representative of the defendant that the unsafe route should be utilised just prior to the plaintiff suffering his injury, meant that the liability of the defendants under the Occupiers' Liability Act 1967 could not be avoided. In the instant case there is no indication that there was anything inherently unsafe about the barrier or the way it could be operated.

[181] In **Valoris Smith v UGI Group Limited** the claimant was employed at the defendant company. The defendant was a private holding company, with subsidiaries which were also private companies. All the companies were housed at premises located at 4 – 6 Trafalgar Road. These premises were divided into strata units. The lobby was owned by one of the subsidiary companies and the defendant's offices were on the 3rd floor. The claimant slipped and fell on the polished lobby floor and suffered injury. One issue was whether the defendant was an occupier of the lobby. The learned judge found that the defendant had demonstrated at the meetings of its Board, that it exercised sufficient control to bring about changes in the condition of the flooring. There was also evidence accepted by the court, that the defendant oversaw financial control over its subsidiaries. In those circumstances the court found that the defendant fell within the definition of occupier.

[182] **Valoris Smith v UGI Group Limited** is clearly distinguishable from the instant case under consideration. Thinly veiled Chinese walls of separation were easily demolished to show that the defendant company had a directing hand in both the company that owned the lobby and over what happened in the lobby space itself. No

such scenario exists in the instant matter. VSL, an entirely different company from PSP580, was contracted to monitor and regulate entry and egress to and from the plaza using the barriers. There is no indication that PSP580 directed or controlled in anyway how VSL, a security company, discharged that function.

[183] The cases relied on by PSP580 were cited in support of the proposition that PSP580 could not be held liable for any injury to DGW arising from the negligent operation of the barrier by an agent of VSL. In **Salsbury v Woodland** it was held that an employer who commissions work to be done near, but not on, a highway which if done with ordinary care by a skilled workman presents no hazard to anyone and does not constitute a nuisance, but which if done negligently may endanger users of the highway, and who employs an apparently competent independent contractor to do the work, is not liable for the negligence of that contractor in doing it. Counsel for PSP580 relies on this case to say they should not be liable for any negligence of the agent of VSL as the operation of the barrier was not inherently dangerous.

[184] In **Honeywill and Stein Ltd v Larkin Bros (London Commercial Photographers) Ltd** it was decided that where a person employs an independent contractor to do work that involves special danger to another's premises, he must take reasonable precautions to see that the work does not cause damage to the premises. Where, therefore, the plaintiffs had procured the defendants, as independent contractors, to take photographs of the interior of a cinematograph theatre, and owing to the defendants' negligence the premises were damaged by fire, it was held in the court of appeal reversing the first instance judge that the plaintiffs were liable to the owners of

the theatre for the damage caused by the negligence of the defendants, and therefore were entitled to recover damages from the defendants for breach of contract or negligence in taking the photographs. Here again PSP580 relies on this case by way of contrast contending that the operation of the barrier by VSL unlike the photography in **Honeywill** was not inherently dangerous.

[185] The effect of the authorities relied on by both DGW and PSP580, is summarised by the statement of Lord Denning in **Wheat v E Lacon & Co Ltd** at page 586, where he indicated that, the nature and extent of the duty of each 'occupier' may often depend on the extent of the particular control exercised in each case. The authorities seem to make clear that where the employer is responsible for the hazard, or retains control of the relevant part of the premises even when the independent contractor is engaged, or the nature of the work that the independent contractor is employed to execute is inherently dangerous, any negligence of the independent contractor resulting in injury loss or damage to lawful visitors will be imputed to the employer. Where however the employer is not responsible for the hazard, full control of the relevant part of the premises has been given to the independent contractor and the work that the independent contractor is employed to do is not inherently dangerous, negligence of the independent contractor resulting in in injury loss or damage to lawful visitors will not be imputed to the employer.

[186] There is no evidence that PSP580 had failed to keep the premises reasonably safe. There being no evidence that the barrier had been defective, there was no evidence of it

being an inherent danger on the premises. The dangerous situation was caused by the negligent actions of an agent of the independent contractor. In those circumstances the learned magistrate was correct in finding that PSP580 was not liable for the injury suffered by DGW.

[187] As indicated in the previous section in which it was determined that the learned magistrate should have found that VSL was an occupier, VSL not having been made a party to this appeal would not be in jeopardy regarding any such finding. However, it should be noted under this section which addresses whether there was breach of the occupiers' duty of care that, as noted by Campbell J in **Valoris Smith v UGI Group Limited**, at page 7, this court in **Victoria Mutual Building Society v Barbara Berry** (para 7), stated that, "The statutorily regulated duty of care is essentially similar to that of the common law". In practical terms therefore DGW has not been prejudiced by the error made by the learned magistrate in holding that VSL was not an "occupier" under the OLA.

Issue 3 - Whether the learned magistrate erred in ordering DGW to pay the costs of PSP580 (ground d)

Submissions on behalf of DGW

[188] It was submitted that the learned magistrate erred in failing to make a **Sanderson** or **Bullock** order for the unsuccessful VSL to pay the costs of the successful PSP580 to DGW. It was argued that this error was occasioned by the failure of the learned magistrate to appreciate that these types of orders were accepted in this jurisdiction, as evidenced by the case of **Desmond Clarence Bennett v Jamaica Public Service**

Company Limited and Clarence Bailey [2013] JMCA Civ 28. It was further contended that, the learned magistrate having concluded that PSP580 and VSL were in occupation of the common areas, it was appropriate for DGW to have brought the claim against both parties. Therefore, VSL should indemnify DGW for any costs awarded against her, and be ordered to pay those costs directly to PSP580.

Submissions on behalf of PSP580

[189] Counsel for PSP580, on the other hand, submitted that it is trite that the losing party should pay the costs of the successful party; and since DGW was the loser as between the parties, the learned judge was correct in ordering DGW to pay the costs of PSP580. Counsel sought to distinguish the case of **Desmond Clarence Bennett v Jamaica Public Service Company Limited and Clarence Bailey** from the instant case involving PSP580 on the basis that it involved a ruling in favour of a defendant who had brought ancillary defendants into the case, whereas, in this case, all the defendants were brought into the case by DGW. Hence, counsel contended that DGW should pay the costs of any defendant to whom she lost.

Submissions on behalf of VSL

[190] Counsel for VSL mounted a two-pronged challenge to the position advanced on behalf of DGW. Firstly, counsel submitted that this ground had no merit, having regard to the fact that VSL was not named as a party in this appeal, nor did DGW challenge the award of costs in her counter-appeal against it. Hence, it was argued that VSL cannot be asked to pay costs. Secondly, counsel also adopted the submissions made on behalf of PSP580 in respect of this ground.

Analysis

[191] It is interesting to note that, in the court below, the issue regarding the making of a **Sanderson** or **Bullock** order was raised on behalf of Mr Tyndale, who is not before this court, but not on behalf of DGW.

[192] The submissions made on behalf of VSL have merit. It would be improper and unfair in these circumstances for the court to make an order adverse to VSL which was not named as a respondent to the appeal. Therefore, whilst the order challenged is one made as between DGW and PSP580, and the court is within its right to assess the propriety of that order, the order DGW now seeks is not one that should properly be granted by the court. DGW had the opportunity to challenge the award of costs in her counter-appeal against VSL, but failed so to do.

[193] Turning from that procedural consideration to the substantive matter of the appropriateness or otherwise of the costs order that was actually made, it is important to first set out section 203 of the J(PC)A which governs a magistrate's power to award costs. It provides:

> "In all cases in which any party recovers any judgment against any other, such party shall have judgment for the court fees properly payable under this Act in order to obtain such judgment.
>
> Where in any proceeding in a Court, a solicitor has been employed, or other costs or charges have been incurred, then, in the absence of express provision to the contrary, the awarding of such costs and charges shall be in the discretion of the Magistrate, who may by his judgment award them to the successful party; and where the Magistrate shall award to any party the costs of employing a solicitor, such costs shall, according to the nature of the proceeding, be

> calculated according to the scale set forth in the tariff of fees payable under this Act..."

[194] Pursuant to section 203 the award of costs is within the discretion of the magistrate, who may, as she thinks fit, award costs to the successful party. The discretion to make cost orders has not been fettered by the section. However as with any other discretion it must be exercised judicially. The established practice based on precedent and rules is that "costs follow the event". Therefore, the discretion would ordinarily be exercised to order an unsuccessful party to pay the costs of the successful party, unless some other course is fair and just in all the circumstances.

[195] In making the award for costs, the learned magistrate considered the submissions of counsel for Mr Tyndale, that, on the basis of **Desmond Clarence Bennett v Jamaica Public Service Company Limited and Clarence Bailey**, the unsuccessful defendant should pay the costs of the successful defendant. Whilst it is clear that she rejected these submissions, having regard to her order that DGW, the unsuccessful claimant against PSP580 should pay PSP580's costs, she did not indicate her reasons for so doing.

[196] In **Desmond Clarence Bennett v Jamaica Public Service Company Limited and Clarence Bailey** at paragraphs [79] – [80] Brooks JA (as he then was), writing on behalf of the court, accepted that in 'third party proceedings' a trial judge in our jurisdiction is entitled to make what has become widely known as a **Sanderson** order (based on the case of **Sanderson v Blyth Theatre Company** [1903] 2 KB 533), or a **Bullock** order (named after **Bullock v The London General Omnibus Company and Others** [1907] 1 KB 264). The **Sanderson** order is an order for the unsuccessful

defendant to pay the costs of the successful defendant, and the **Bullock** order is an order for the plaintiff to pay the costs of the successful defendant on the basis that the plaintiff can recoup those costs from the unsuccessful defendant.

[197] Having looked at the authorities, Brooks JA made it clear that it is open to the trial judge to consider the issue of costs of ancillary proceedings separately from the main proceedings. In fact, he indicated that, ordinarily in such cases, the starting point is that the issue of costs as between the main claim and ancillary claim is to be dealt with separately, unless there are peculiar circumstances which make it prudent in the interests of justice, that a different order should be made (see **Arken v Borchard Lines Ltd and Others** [2005] EWCA Civ 655, as cited at paragraph [81] of **Desmond Clarence Bennett**).

[198] The submissions made on behalf of PSP580 raise the question whether the above principles are equally applicable to a case such as this, which involves both a successful and an unsuccessful defendant in the same claim as opposed to a case involving parties in a main claim and ancillary proceedings. That question was answered, in the **Sanderson** case, where defendants were brought into the matter by the plaintiff, though the 2nd defendant was added after the filing of the claim, based on allegations made by the 1st defendant in its defence. The court made it clear that the trial judge had the jurisdiction to make such orders as between co-defendants (see page 538-539 per Romer LJ; and page 542-543 per Stirling LJ).

[199] Therefore, in the instant case, in deciding what order to make in respect of costs, it would have been open to the learned magistrate to make the order she made in line with the general rule, or to make some other order, including a **Sanderson** or **Bullock** order, once she was satisfied that it was fair and just in the circumstances. Whilst it cannot be said that she 'failed to appreciate the acceptance of these types of orders in this jurisdiction', since she gave no reasons for her order, the learned magistrate, failed to explain the basis on which she rejected the submissions of the 2nd defendant and instead chose the order she made.

[200] The question this court now has to determine therefore is, can it be said that the order the learned magistrate made was plainly wrong? The authorities reviewed disclose that the orders proposed by the plaintiff are normally only made in exceptional cases, when in all the circumstances it is just so to do. These circumstances include whether the costs were 'reasonably and properly incurred' by the plaintiff against the successful defendant for instance where it was reasonable to have joined the successful defendant (**Sanderson**, page 539 per Romer LJ), or considering whether the claimant is impecunious, as well as the level of culpability of the unsuccessful or successful defendant (see **Desmond Clarence Bennett v Jamaica Public Service Company Limited and Clarence Bailey,** paragraphs [81] and [85]).

[201] In **Desmond Clarence Bennett v Jamaica Public Service Company Limited and Clarence Bailey** this court found that the trial judge had erred in the exercise of his discretion in making a **Sanderson** order, as, having considered the relevant

authorities and concluded that the successful defendant had reasonably brought the ancillary defendant into the matter and kept him there, the learned judge failed to make the order (**Bullock** order) that accorded with such reasoning.

[202] Since the learned judge did not explain the basis of his choice, the court was of the view that his discretion had not been exercised judicially (paragraphs [82] and [83]). Consequently, looking at the matter afresh as it was entitled to do, this court, further found that the correct order ought to have been that the claimant pay the successful ancillary defendant's costs (as against the ancillary claimant), on the basis that the ancillary defendant had been reasonably joined owing to his level of culpability and that considering the claimant's impecuniosity, it would be unjust to cause the successful defendant to bear the risk of possibly not being able to recoup its costs.

[203] The outcome of **Desmond Clarence Bennett v Jamaica Public Service Company Limited and others** does not particularly assist DGW in the instant case. Whilst it could be said that it was reasonable for DGW to have joined PSP580 in this case, it being the owner and operator of the premises, it could not be said that, in all the circumstances, it would be unjust for DGW to pay costs to the party in respect of whom she was unsuccessful, considering her own culpability in the incident, as well as, her having advanced unsuccessful claims for occupier's liability and nuisance.

[204] The circumstances of this case do not make it compelling that either a **Sanderson** or a **Bullock** order ought to have been made. Accordingly, it cannot be said that the

learned judge was plainly wrong in seemingly applying the general rule that costs follow the event.

Issues 4 & 5:

Whether the learned judge found that section 5(1)(f) of the Registration (Strata Titles) Act R(ST)A does not apply to PSP580, and if so whether she erred in so finding (ground e)

Whether the learned judge accepted PSP580's evidence that it had divested its statutory duty to control, manage and administer the common property under the, R(ST)A and if so, whether she erred in so doing (grounds f)

Submissions on behalf of DGW

[205] In respect of grounds e and f, counsel for DGW submitted that the learned magistrate erred in finding that the relevant sections of the R(ST)A were inapplicable, as the evidence of PSP580 was that it had delegated its statutory duties of control, management and administration to VSL, which, it is submitted are strict and non-delegable duties.

Submissions on behalf of PSP580

[206] Counsel for PSP580, argued in response that the learned magistrate did not, in her reasons, directly refer to PSP580's submissions in the court below that section 5(1) of the R(ST)A was inapplicable. However, DGW had given no evidence that PSP580 had failed to keep the common property in good repair. It was therefore submitted, that the learned magistrate was correct in finding that there was no evidence the barrier was defective.

Discussion

[207] Section 5(1)(f) of the R(ST)A provides that a strata corporation has the duty to keep the common property in a state of good and serviceable repair, and to properly maintain it.

[208] In her reasons, the learned magistrate made no mention whatsoever of section 5(1)(f) or the R(ST)A for that matter. Nor can it be inferred that any of her findings were based on that provision or Act. Rather she expressly addressed and made findings in relation to the torts of negligence, nuisance and occupier's liability.

[209] However, the ground has been argued and DGW had pleaded in her claim that PSP580 had acted in breach of its statutory duty. It is therefore important to make the point in any event, that, the mere fact that a section of a statute refers to a duty does not mean it is intended that a cause of action may be embarked upon pursuant to the section. It must first be shown that it was intended that a private cause of action can be pursued for breach of statutory duty, consequent on a failure to comply with the requirements of that section. As noted at paragraph 500 of Halsbury's Laws of England/Tort (Volume 97 (2015))/2:

> "Breach of statutory duty is an independent tort recognised at common law. In order to succeed the claimant must establish a breach of a statutory obligation which, on the proper construction of the statute, was intended to confer private rights of action upon a class of persons of whom he is one; he must establish an injury or damage of a kind against which the statute was designed to give protection; and he must establish that the breach of statutory obligation caused, or materially contributed to, that injury or damage, or (exceptionally) to the risk of that injury or damage."

[210] Then at paragraph 502 it is further stated that:

> "The civil right of action for breach of statutory duty is a claim in tort arising under the common law but must be distinguished from the cause of action for negligence, including negligence in the exercise of a statutory power. In some cases, the same injury may give rise to both types of liability but this is not invariably the case. A claimant may fail to establish breach of statutory duty but establish liability in negligence, for example, because the common law duty of care goes beyond what is required by the statute. Alternatively, a claimant may establish breach of statutory duty but fail to establish liability in negligence, for example, because the statute was breached without fault..."

[211] The nature of the cause of action for breach of statutory duty and the ingredients required for proof where it exists, was also examined in some detail by Edwards J (Ag) (as she then was), in the case of **D & L H Services Limited et al v The Attorney General of Jamaica and the Commissioner of the Jamaica Fire Brigade** (unreported), Supreme Court, Jamaica, Claim No CL 1997/D-141, judgment delivered 22 October 2010, at paragraphs 139 et seq. That issue was not pursued on appeal in the unsuccessful appeal with neutral citation number [2015] JMCA Civ 65.

[212] Contrary to the grounds and submissions advanced on behalf of DGW the learned magistrate made no finding that the R(ST)A was either applicable or inapplicable. Also, there is nothing in the learned magistrate's reasons to substantiate the contention that she "accepted PSP580's evidence that it had divested its statutory duty to control, manage and administer the common property under the Registration (Strata Titles) Act". DGW has not advanced any material in law or fact to substantiate her contention that breach 5(1)(f) of the R(ST)A would vest a cause of action in her for breach or statutory duty and if so whether there was in fact such a breach. Accordingly, grounds e and f fail.

Costs

[213] Mr Irving, counsel for VSL, submitted that as DGW had been in breach of the CAR by filing skeleton arguments and the authorities on which she relied, out of time on 29 March 2019, she ought to be responsible for the costs in any event.

[214] Mr Eccleston, counsel for DGW, argued that in the event his client was successful costs should be awarded to her in the court below and also in the appeal. Concerning the late filing of documents, counsel asked that the court exercise its discretion not to impose a sanction, and further that if there was a sanction it should only take the form of a reduction in the percentage of costs. Counsel also advanced that in the event VSL was successful, owing to the impecuniosity of DGW, no award for costs should be made, or in the worst-case scenario, each party should be responsible for their own costs. Counsel further submitted that if PSP580 was successful against DGW each party should be responsible for their own costs and if costs were to be awarded against DGW, PSP580 should only be awarded 50% or less of its costs, as DGW thought it necessary to include PSP580 in the action, believing that both PSP580 and VSL should be liable.

[215] In the letter to the registrar of the Court of Appeal dated 24 April 2019, copied to opposing counsel referred to earlier under the heading "Preliminary Considerations" Mr Eccleston also directed the court's attention to the cases of **Leroy Powell and Beverley Henry v Donald Brooks and Deta Brooks** [2013] JMCA App 8 and **Shawn Marie Smith v Winston Pinnock** [2016] JMCA Civ 37.

[216] Mrs Brown Rose, counsel for PSP580, adopted the submissions made by Mr Irving concerning the tardiness of filing by DGW, noting that even at that point at the end of the hearing, she had still not received the bundles or index. Counsel contended that a defence was filed and DGW always knew that VSL was an independent contractor, a position which was never challenged. Hence, counsel maintained, it was clear that DGW had no chance of success against PSP580. Accordingly, counsel advanced that should PSP580 be successful, it should be awarded full costs to be agreed or taxed.

Discussion

[217] In **Leroy Powell and Beverley Henry v Donald Brooks and Deta Brooks** the appellants' application for an extension of time was refused, the respondents' application to strike out the appeal was granted and they were awarded costs. In **Shawn Marie Smith v Winston Pinnock** each party was ordered to bear their own costs, as the respondent was entitled to costs in the successful application of the appellant for extension of time to file notice of appeal, but the appellant was entitled to the costs of the appeal in which she was successful.

[218] The order made in **Leroy Powell and Beverley Henry v Donald Brooks and Deta Brooks** therefore reflected the faithful application of the general principle that "costs follow the event"; while in addition to that principle, the order made in **Shawn Marie Smith v Winston Pinnock** followed the regular practice that where a party's default necessitates an application to seek the exercise of the court's discretion to permit that party's case to proceed, that party is often required to pay the costs of the application even if successful.

[219] In the first appeal VSL did not succeed in overturning the learned magistrate's determination that it was liable to DGW. Neither was it successful in its efforts to increase the percentage of contributory negligence attributed to DGW.

[220] In the counter-appeal DGW did not succeed in having the general damages increased and also abandoned the ground on nuisance, which VSL would have had to prepare to meet, prior to its abandonment. The court however agreed that she is entitled to interest on the sums awarded. Also, to be considered, is the complaint about DGW's tardy filing of bundles. In all the circumstances, I find it appropriate that in respect of the first appeal and counter-appeal, DGW should be awarded a global sum of $85,000.00 costs in those proceedings, to be paid by VSL.

[221] In the second appeal, I agree with the submission of counsel for PSP580 that after the hearing in the court below the position that VSL was an independent contractor was clear. The ground on nuisance was also not pursued against PSP580 which it would have had to prepare to meet, before it was abandoned. Additionally, DGW was attempting to obtain an order that would adversely affect VSL without having included VSL in this appeal. There was therefore little prospect of success and there is no basis to depart from the general principle that costs follow the event. Costs should therefore be awarded to PSP580 in the sum of $75,000.00 to be paid by DGW.

Conclusion

[222] Based on the above discussion and analysis I propose that the following orders should be made:

a) In respect of:

i) the first appeal – VSL against DGW:

(1) The appeal against the decision on liability is dismissed and the judgment that VSL is liable to DGW is affirmed.

(2) The appeal against the decision on contributory negligence is dismissed and the finding that DGW is 25% contributorily negligent is affirmed.

ii) the counter-appeal – DGW against VSL, the appeal is allowed in part:

(1) DGW is awarded interest at 3% per annum on 75% special damages ($26,836.00) being the sum of $20,127.00, from the date of the accident to the date of judgment, and at 3% per annum on 75% general damages being the sum of $375,000.00, from the date of the service of the writ to the date of this judgment.

(2) The appeal against the award of damages is dismissed and the damages awarded by the learned magistrate are affirmed.

iii) costs:

DGW is awarded costs in the total sum of $85,000.00 for the proceedings in the appeal and counter-appeal, to be paid by VSL.

b) In respect of:

i) the second appeal – DGW against PSP580:

(1) Appeal dismissed.

(2) The judgment and orders of the learned magistrate are affirmed.

(3) Costs in the sum of $75,000.00 awarded to PSP580, to be paid by DGW.

[223] I cannot end without expressing sincere apologies to the parties and counsel, for the undoubted inconvenience caused, due to the delay in the delivery of this judgment.

BROOKS JA

ORDER

a) In respect of:

i) the first appeal – Veteran Security Limited against Donna Greenwood-Walker:

(1) The appeal against the decision on liability is dismissed and the judgment that Veteran Security Limited is liable to Donna Greenwood-Walker is affirmed.

(2) The appeal against the decision on contributory negligence is dismissed and the finding that Donna Greenwood-Walker is 25% contributorily negligent is affirmed.

ii) the counter-appeal – Donna Greenwood-Walker against Veteran Security Limited, the appeal is allowed in part:

(1) Donna Greenwood-Walker is awarded interest at 3% per annum on 75% special damages ($26,836.00) being the sum of $20,127.00, from the date of the accident to the date of judgment, and at 3% per annum on 75% general damages being the sum of $375,000.00, from the date of the service of the writ to the date of this judgment.

(2) The appeal against the award of damages is dismissed and the damages awarded by the learned magistrate are affirmed.

iii) costs:

Donna Greenwood-Walker is awarded costs in the total sum of $85,000.00 for the proceedings in the appeal and counter-appeal, to be paid by Veteran Security Limited;

b) In respect of:

i) the second appeal – Donna Greenwood-Walker against The Proprietors Strata Plan No 580:

(1) Appeal dismissed.

(2) The judgment and orders of the learned magistrate are affirmed.

(3) Costs in the sum of $75,000.00 awarded to The Proprietors Strata Plan No 580, to be paid by Donna Greenwood-Walker.