COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

ADMIRALTY DIVISION

2014/COM/ADM/FP0002

Admiralty Action in Rem Against the Owners and Parties interested in the Motor Vessel "Golden Miller"

BETWEEN

ODEBRECHT AMDIENTAL

Plaintiff

AND

THE OWNERS AND PARTIES INTERESTED IN THE MOTOR VESSEL "GOLDEN MILLER"

Defendants

BEFORE: The Honourable Mrs Justice Estelle Gray Evans

APPEARANCES:

Mr Jacy Whittaker and Mrs A. Kenra Parris-Whittaker for the plaintiff

Mr Charles Mackay and Mrs Joyce Cooper-Bowe for the defendant

HEARING DATES:

2014: 3 June; 5 June; 10 June; 17 June; 24 July

2015: 23 January

Gray Evans, J.

1. On 23 May 2014, the plaintiff, Odebrecht Amdiental, issued a generally indorsed writ of summons in this action claiming "relief for the loss of revenue caused by an explosion which occurred on 17 December 2013 on the Motor Vessel "Golden Miller", a vesselregistered under the flag of The Bahamas,which prevented the plaintiff from offering its services to two vessels waiting to berth and discharge its cargo for processing."

2. The plaintiff alleges that Agincourt Marine Company Limited is the registered owner of the Vessel; that its beneficial owner and commercial operator is Petredec Limited, a company registered in the United Kingdom, andthe "person" who would be liable in personam.

3. By an` ex parte summons filed on 23 May 2014, supported by the affidavit of Arthur K. Parris, Jr. also filed on 23 May 2014, the plaintiff applied for a warrant for the arrest of the Vessel. The warrant of arrest was issued on 27 May 2014.

4. No appearance has been entered by Agincourt Marine Company Limited nor Petredec Limited. However, by summons filed 28 May 2014, on behalf of the defendants, the defendants sought the following relief:

> "an order that the writ of summons be set aside and all subsequent proceedings on the ground that in terms of section 9(4) of the Supreme Court Act the ownership of the vessel had been transferred to Advanced Distribution Company Ltd, hence there was no valid cause of action against the ship, the "Golden Miller" and for the release of the ship Golden Miller now under arrest by virtue of a warrant of arrest issued out of the Registry of the Supreme Court on the 27th day of May 2014."

5. That summons was supported by the affidavits of Joyce Cooper Bowe filed on 28 May 2014, and 2, 3, 5 and 10 June 2014.

6. "The defendants", who for the purpose of this application are Agincourt Marine Company Limited and Petredec Limited, contend that the Vessel has been sold and their interesttherein arises out of their undertaking to be responsible for all debts loans claims liens and liabilities of every description incurred up to the date of delivery of the Vessel to the buyers.

7. Counsel for the plaintiff raised as a "preliminary point" the ability of the defendants to make the aforesaid application as no appearance or application to intervene in these proceedings had been filed by or on their behalf.

8. However, counsel for the defendants submits, and I accept, that the defendants seeking to have the writ and all subsequent proceedings set aside on jurisdictional grounds must apply to do so before entering an unconditional appearance. See The "I Congresso", page 558 col. 2 where the court opined:

> "Section 3 of the Act lays down the circumstances in which an action in rem may be brought: if the case is not within the section, then the Court has no jurisdiction in respect of an action in rem, and the writ and all subsequent proceedings should be set aside. It follows that, if the defendant wishes to have the writ and all subsequent proceedings set aside, he must apply to do so before entering an unconditional appearance".

9. The hearing of the defendants' summons began on 3 June 2014. It was adjourned to 5 June 2014 by which date Agincourt was to have provided certain documents evidencing the sale of the Vessel. That issue having not been resolved by 5 June 2014 the matter was further adjourned to 10 June 2014. On that date, counsel for the plaintiff along with junior counsel

forthe defendants appeared and informed the Court that the parties had agreed to the release of the Vessel upon certain conditions but asked that the Court determine the issues relating to costs and security. They promised to lay over the draft of a consent order later that morning. Instead, that afternoon, counsel again appeared, this time informing the Court that they did not have an agreed position after all and indicated that they would await the Court's determination of the defendants' application.

10. On 17 June 2014 this Court delivered its oral decision ordering the Vessel released and reserved its decision on the remainder of the defendant's application along with the issue of costs on the arrest. The Court also requested further submissions and authorities on the issue of whether the plaintiff's cause of action fell within section 8(1) of the Supreme Court Act. The matter was further adjourned and continued on 24 July 2014 by which date additional evidence, in the form of the first and second supplemental affidavits of Joyce Cooper Bowe,was filed on 22 and 23 July 2014 respectively.

11. The matter was further adjourned for my decision.

12. This is that decision.

13. It is common ground that on 17 December 2013 there was an explosion on board the Vessel while it was berthed and loading cargo alongside the Braskem gas terminal at Aratu, Brazil. The explosion ignited a fire on board the Vessel which burned for approximately 24 hours before it was extinguished in the late afternoon of 18 December 2013. Shortly after the explosion, the Port of Aratu was closed by the local authorities.

14. The plaintiff, who operates a facility in Aratu that processes raw mud purchased from third parties for pre-processing and disposal, claims that as a result of the aforesaid explosion, the plaintiff was unable to receive raw material from two other vessels waiting to berth and discharge their cargo at the time of the incident, resulting in the plaintiff suffering economic losses totalling US$4,215,760.45, made up as shown hereunder:

a. Operational losses amounting to USD1,538,641.36

b. Legal fees at 10% - USD153,864.14

c. Legal costs for processing the claim, expert costs, etc USD1,000,000.00

d. Interest and monetary correction USD1,523,254.95

15. At the date of the explosion,17 December 2013, the Vessel was owned by Agincourt Marine Company ("Agincourt"); and according to Mr Richard Howard Fuller, Fleet Commercial Manager of Petredec Limited ("Petredec"), Petredec was the beneficial owner of Agincourt as well as the commercial manager of the Vessel. However, the defendants say thatthey are no longer the owner of the Vesselas it was sold to Advanced Distribution Company Limited on 28 April 2014 prior to the commencement of this action and the issue of the warrant of arrest.

16. Agincourt challenges the plaintiff's claim on two jurisdictional grounds. Firstly, on the ground that the plaintiff's claim does not fall within section 8(1)of the Supreme Court Act, 1996; and secondly, on the ground that at the date of the commencement of this action and the subsequent arrest of the Vessel, the defendants werethe beneficial owner of the Vessel as required by section 9(4) of the Supreme Court Act to enable the plaintiff to maintain an action in rem against the Vessel.

17. Section 8(1) of the Supreme Court Act provides that the admiralty jurisdiction of the Court shall be to hear and determine any of the questions or claims set out therein and in The "I Congresso" del Partido [1977] Lloyd's Rep. 536, the Court said:

"Jurisdiction in Admiralty actions is statutory and is defined by the Administration of Justice Act, 1956. Section 3 of the Act [section 8 of the Supreme Court Act, 1996] lays down the circumstances in which an action in rem may be brought: if the case is not within the section, then the Court has no jurisdiction in respect of an action in rem and the writ and all subsequent proceedings should be set aside."

18. Section 9(4) of the Supreme Court Act provides as follows:

> (4) In the case of such claim as is mentioned in paragraphs (d) to (q) of subsection (1) of section 8, where—
>
> a. The claim arises in connection with a ship; and
>
> b. Where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of or in possession or in control of the ship,
>
> An action *in rem* may (whether the claim gives rise to a maritime lien on the ship or not) be brought in the court against—
>
> i. That ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or
>
> ii. Any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.

19. Consequently, for the plaintiff to maintain an action in rem against the Vessel it must prove firstly that its claim falls within section 8(1) aforesaid and secondly, that at the date of the commencement of this action and the subsequent arrest of the ship, the owner of the Vessel was the same "person" that owned the Vessel at the date of the incident giving rise to their claim. In other words, the plaintiff must show that Agincourt who owned the Vessel on 17 December 2013 was the owner of the Vessel on 27 May 2014.

20. As indicated the plaintiff's claim as pleaded is for "relief for the loss of revenue".

21. Although there is no allegation in the indorsement on the writ of summons or in the affidavit of Arthur K. Parris, Jr, filed in support of the application for arrest on which of the provisions of section 8(1) of the Supreme Court Act the plaintiff was relying, on its application for the warrant of arrest, counsel for the plaintiff indicated that the plaintiff's claim was made pursuant to section 8(1)(d) of the Supreme Court Act, 1996.

22. That section provides that the admiralty jurisdiction of the Court shall be to hear and determine any claim for damage done by a ship.

23. In that regard, the plaintiff contends that although its claim is for economic loss, it is, nevertheless a claim for "damage done by a ship" within the meaning of those words in section 8(1)(d) aforesaid.

24. In support of that contention counsel for the plaintiff relied on the following cases: The "Dagmara" [1988 1 Lloyd's Rep 431; 432, The "Rama" [1996] 2 Lloyd's Rep 28;The Athelvictor [1946] P. 42; and Mersey Docks and Harbour Board v Turner [1893] A.C. 468.

25. Counsel for Agincourt disagrees with the plaintiff's contention. In his submission, the plaintiff's claim is not a claim for "damage done by a ship", but rather, is a tortuous claim against the owners and or operators of the Vessel for economic loss, and, therefore, does not fall within section 8(1)(d) aforesaid.

26. In support of that submission, counsel for Agincourt relies on The "Dagmara" [1988 1 Lloyd's Rep 431; 432; The "Rama" [1996] 2 Lloyd's Rep 28; and Eschersheim (1976) 2 Lloyds Rep. 1.

27. In the case of The "Rama" [1996] 2 Lloyd's Rep 28, Clarke J. held that for damage to be "damage done by a ship", three criteria must be satisfied, namely: (1) the damage must be caused by something done by those engaged in the navigation or management of the ship in a physical sense; (2) the ship must be the actual or noxious instrument by which the damage is done; and (3) the damage must be sustained by a person or property external to the ship".

28. As indicated, both sides rely on the test set out in The "Rama" to support their position.

29. Counsel for the plaintiff argues that the explosion on the Vessel was as a result of the negligence of the ship's owner and or its agents in the "management" of the Vessel, which was the "actual or noxious instrument" that caused the damage to the Vessel, a "person... external to the ship".Therefore, she submits, the plaintiff's claim satisfies all of the criteria set out in The "Rama".

30. On the other hand, counsel for the defendants argues that even if (which is denied) the explosion and fire on board the Vessel had been caused by the negligent management of the Vessel that could not have been "management of the ship in a physical sense", so as to meet the test in The "Rama". In any event counsel for the defendants submits, there is no evidence that the Vessel was the "actual or noxious instrument" which caused the damage; and although the authorities are clear that whilst a ship need not make physical contact with the thing damaged (The Eschersheim, obiter at p. 8), in his submission, the damage must be done by "some physical act of the ship herself caused by her negligent navigation or management". (The "Rama").

31. In that regard, counsel for the defendants submits that it was not the aforesaid explosion that caused the economic damage which the plaintiff alleges it suffered, sincenot only didthe explosionnot take place at one of the plaintiff's berthing stations, as alleged by the plaintiff, but it was the decision of the authorities in Aratu to close the port which led to the alleged loss suffered by the plaintiff.This, counsel points out, is evidenced by a copy of an email dated 17 December 2013, to various addressees stating, inter alia: "the port is being evacuated by authorities, and also all other ships (at terminals) are also leaving the port." That email is exhibited to the 23 July 2014 affidavit of Joyce Cooper-Bowe.

32. Therefore, in Mr Mackay's submission, given that the explosion took place onboard the Vessel, which was not at one of the plaintiff's berthing stations, the plaintiff has failed to make out even a prima facie case on the facts that it has a claim for "damage done by a ship" so as to trigger the admiralty jurisdiction of the Court through section 8(1)(d) aforesaid.

33. In response counsel for the plaintiff argues thatit is not necessary that the navigation or management of the Vessel was literally the direct physical cause of the damage suffered by the plaintiff but only that the navigation or management of the Vessel logically and foreseeably led to the alleged damage, and that it would be fair to assign causation. For that submission counsel relied on the cases of The Eschersheim1976] 2 Lloyd's Rep 1and Currie v M'Knight [1987] AC 97.

34. Counsel for the plaintiffpoints out that the Court in The Eschersheim expressly contemplated that admiralty jurisdiction could be established under section 8(1)(d) aforesaid not only in cases involving direct damage from physical contact with a ship but also from damage the ship causes more remotely. In that case, the Court said: "physical contact between the ship and whatever object sustains the damages is not essential – a ship may negligently cause a wash."

35. Similarly, in Currie v M'Knight [1987] AC 97, the Court stated that damage giving rise to admiralty jurisdiction need not be 'immediate' but could be 'mediate'.

36. Then in The "Dagmara" and "Ama Antxine" [1988] 1 Lloyd's Rep 431, Sheen J commenting on the submission of counsel for the defendants in that case said:

> "Mr Glennie submitted that the language used by Lord Diplock [in The Eschersheim] clearly suggests that "damage done by a ship" refers to physical damage and does not include financial loss other than consequential loss such as loss of earnings. I accept the submission that the language used shows that Lord Diplock had in mind physical damage.But it does not follow that the phrase in the statute is confined to physical damage because financial loss was not then being considered."[emphasismine]

37. In The "Dagmara" and "Ama Antxine" the plaintiffs' trawler was approached by the defendants' vessel, which began circling her closely. Fearing for the safety of crew, trawler and nets, the plaintiffs' skipper left the fishing grounds. The plaintiffs alleged that the defendants had deliberately driven them away and claimed damages for financial loss being damage done by a ship, within the Supreme Court Act 1981 s 20(2) (e). When, as a consequence, their vessel was arrested, the defendants applied to have the arrest set aside for lack of jurisdiction. The court held that to fall within s 20(2) (e), the damage did not have to be physical damage or caused by direct physical contact. Accordingly, the plaintiffs had a valid claim for the financial loss suffered as a result of the wrongful navigation of the defendants' vessel, and the application to set aside for lack of jurisdiction was dismissed.

38. I gather from the defendants' arguments, that if the explosion onboard the Vessel had occurred while the Vessel was docked at the plaintiff's berthing station,preventing the M/T NT Piquete from offloading its cargo to the plaintiff, then the Vessel could be said to be the "noxious instrument" causing the alleged damage and the plaintiff would have a cause of action within section 8(1)(d) aforesaid; but since it was the closure of the Port by the authorities that caused the alleged damage, the Vessel could not be said to be the noxious instrument.

39. The plaintiff alleges that the explosion onboard the Vessel prevented the plaintiff from offering its services to two vessels waiting to berth and discharge its cargo for processing.

40. It does not appear to be disputed that the closure of the port was as a result of the explosion on board the Vessel.

41. It is not known what caused the explosion on board the Vessel. It is not contended that the explosion was caused by the navigation of the Vessel. However, the plaintiff contends that it was the management of the Vessel by the defendant its servants or agents that started the chain of events that led to the aforesaid damage suffered by the plaintiff: that it was the negligent management of the Vessel that led to the explosion, which led to the closure of the port, which led to the inability of the M/T NT Piquete to berth at the port so that the plaintiff could receive its cargo, which led to the plaintiff's lost business resulting in its economic loss; and were it not for the aforesaid initial negligent management and resulting explosion, the chain leading to the plaintiff's damages would not be completed.

42. To my mind, then, assuming that the facts alleged by the plaintiff to be true and that the plaintiff has a valid cause of action in tort for economic loss resulting from the closure of Port Aratu, which itself resulted from the aforesaid explosion, which resulted from the management of the Vessel,then the plaintiff's claim is, in my judgment, capable of being "damage done by a ship" within the meaning of those words in section 8(1)(d) of the Supreme Court Act, and I so find.

43. As indicated, for the plaintiff to maintain an action in rem against the Vessel it must show not only that its claim falls within section 8(1) aforesaid, but also that at the date of the commencement of this action and the subsequent arrest of the ship, the owner of the Vessel

was the same "person" that owned the Vessel at the date of the incident giving rise to their claim. (See section 9(4) of the Supreme Court Act aforesaid).

44. Or, as succinctly put by James Smith, J, in the case of Bimini Boat Yard of Miami Inc v Lady Marian Aka Zigan (owners), The Lady Marian (No. 433/1969), [1965-1970] 2 LRB 402:

> "To vest in [the Supreme Court] jurisdiction in rem it is necessary that both the liability in personam and beneficial ownership of the whole ship should be vested in the same person."

45. There is no dispute that at the date of the aforesaid collision on 17 December 2013 the Vessel was owned by Agincourt, the shares in which were owned by Petredec, which was also the commercial manager of the Vessel.Therefore, the "person" who would have been liable in personam would have been Agincourt.

46. In his said affidavit, Mr Parris averred at paragraphs 4 and 5 thereof, as follows:

> "(4) I am instructed by the plaintiff that the defendant, the motor tanker "Golden Miller" ("the vessel"), is a motor tanker registered under the flag of The Bahamas and its registered owner is Agincourt Marine Company Limited whose address is 80 Broad Street, Monrovia, Liberia, and its beneficial owner and commercial operator is Petredec Limited whose address is 10 Whittingehame Drive Glasgow G12 OXX, UK.
>
> (5) I am instructed by the plaintiff that the vessel is currently at anchorage off Freeport, on the Island of Grand Bahama. I am also advised by counsel in these proceedings that the vessel is in the process of being sold, however upon an enquiry at the Bahamas Maritime Registry in London Counsel as advised that Agincourt Marine Company Limited and Petredec Limited are still the registered and beneficial owners of the vessel."

47. In support of that latter statement was exhibited to Mr Parris' affidavit a copy of the emails passing between counsel for the plaintiffs and Stacy Davis Tamara at the Bahamas Maritime Authority.

48. On 23 May 2014 Jacy Whittaker wrote to Stacy Davis:

> "Dear Stacy:
>
> How is everything going? I heard youare back in Nassaunow!
>
> I needed your help in confirming the ownership of the MT Golden Miller.
>
> We understand that the vessel is owned by Agin Court Marine Co Ltd and operated by Bernard Schulte Ship Management. Is this still the position?"

49. To which Ms Davis replied:

> "Dear Jacy,
>
> I confirm the details are correct.
>
> Please let me know if there is any way I can assist further."

50. Also exhibited to that affidavit is a "Vessel Report" prepared by Lloyd's List Intelligence with respect to the Golden Miller, downloaded by Library@hfw.com on 29 April 2014, which shows Petredec Limited as the beneficial owner and commercial operator; Agincourt Marine Company Limited as the registered owner; and Bernard Schulte Ship management (Singapore) Private Limited as the technical manager.

51. Consequently, the plaintiff contends that its investigations having revealed that the Vessel was still owned by Agincourt and Petredec, it was entitled to bring this in rem action against the Vessel

52. The defendants contend that at the date of the commencement of this action and the subsequent arrest of the Vessel, Agincourt was no longer beneficial owner of the Vessel, whichthe plaintiff knew or ought to have known, and, therefore, the Vessel should not have been arrested.

53. As evidence of that contention Agincourt relies on the aforesaid affidavits of Joyce Cooper-Bowe and exhibits attached thereto as well as the affidavit of Richard Howard Fullersworn on 3 June 2014.

54. In her said affidavits, Mrs Cooper-Bowe deposes, inter alia, as follows:

a. That Agincourt Marine Company Limited is a company incorporated in the Republic of Liberia. (10 June 2014, paragraph 4).

b. That Petredec Limited is the owner of Agincourt Marine Company Limited.

c. That the affidavit sworn by Arthur Parris, Jr at paragraph 5 thereof is incorrect as the ownership of the Golden Miller has changed. A copy of the bill of sale transferring the ownership is now produced and shown to me... (28 May 2014, paragraph 3).

d. I am advised by Stephenson Harwood the Solicitors in London for the defendants that there was no intimation from the plaintiff's London Solicitors, Holman Fenwick Willan of any claim being made by the plaintiff or a demand for security before the arrest was made and had these steps been taken the defendants would have informed Holman that the vessel had been sold and would have provided a copy of the bill of sale. (28 May 2014, paragraph 4).

e. That there is now produced and shown to me a Transcript of the Register provided by the Bahamas Maritime Authority dated 2 June 2014. (2 June 2014, paragraph 3).

f. That I am advised by Stephenson Harwood the Solicitors in London for the defendants that the vessel was sold on 28 April 2014. (2 June 2014, paragraph 4).

g. That the plaintiff's instructing solicitors Holman, Fenwick, Willan (Holman) knew or ought to have known that the vessel had been sold. This is evidenced by an email from Stephenson Harwood to Holman on 13th May 2014. (2 June 2014, paragraph 5).

h. That according to Richard Howard Fuller, Fleet Commercial Manager of Petredec Limited, owner of Agincourt Marine Company Limited, the previous owners of the Golden Miller, Agincourt Marine Company Limited retains no beneficial ownership in the motor vessel Golden Miller. (2 June 2014, paragraph 7).

i. That shortly after the bill of sale was sent by us to the attorneys for the plaintiff, they acknowledged their receipt of the same and by email requested a list of documents required in order for them to permit the vessel to be released. (2 June 2014, paragraph 8).

j. That the new owners of the motor vessel, Advanced Distribution Company Limited is a company incorporated in the Republic of the Marshall Islands which was in good standing with the Registrar of Corporations in The Republic of the Marshall Islands on the 19th May 2014 and was duly authorised to purchase the motor vessel Golden Miller. (5 June 2014, paragraph 4).

k. Between 28 and 29 May 2014 there was a series of email correspondences between instructing solicitors for the plaintiff Holman Fenwick Willan LLP and solicitors for defendants Stephenson Harwood LLP. The plaintiff's solicitors confirm that they were aware of the sale of the vessel but chose not to give notice to the defendant's solicitor of another claim or that an arrest was imminent. (3 June 2014, paragraph 5).

55. In his said affidavit Richard Howard Fuller avers, inter alia, as follows:

a. I am the Fleet Commercial Manager of Petredec Limited ("Petredec"). I have been asked to swear this affidavit as to the sale of the Liquid Petroleum Gas Carrier "Golden Miller" (the "Vessel") in connection with the arrest of the Vessel by Obedrecht Amdiental at Freeport, Grand Bahama.

b. I should explain the relationship of Petredec to the Vessel. Petredec is the owner of Agincourt Marine Company of Monrovia, Liberia, who were in turn Owners of the Golden Miller. Petredec was also the commercial manager of the vessel. I was tasked with the disposal which is uneconomical to repair following an explosion and fire at Aratu, Brazil on 17 December 2013.

c. On 17 December 2013 the Vessel suffered an explosion in her compressor room, followed by a cargo fire which was not extinguished until the following day. She was able to sail at reduced speed to Freeport, where her cargo was discharged by way of ship to ship transfer between 5 and 12 February 2014. Since completion of discharge of the cargo, the Vessel has been at anchor off Freeport.

d. On or about 8 April 2014 the decision was taken to sell the Vessel.Offers were obtained from potential buyers and an offer of USD2,864,542,60 (USD425.00 per lightweight ton, less 5% commission) was accepted.

e. Petrodec retained no beneficial interest in the Vessel after the same was sold.

56. Included amongst the defendant/Agincourt's documentary evidence are the following documents:

a. Protocol of Delivery and Acceptance dated 19 May 2014 between Agincourt Marine Company Limited (Sellers) and Advanced Distribution Company Ltd (Buyers) which states, inter alia, "that the sellers have sold and do hereby deliver to the buyers the Vessel...pursuant to the terms and conditions of the memorandum of agreement dated 21 April 2014..."

b. A bill of sale dated 28 April 2014 in which Agincourt, in consideration of US$2,864,542.50 paid to it by Advanced Distribution Company Ltd transferred all of the shares in the Ship "the Golden Miller".

c. Transcript of Register (Commonwealth of The Bahamas) dated 2 June 2014 which shows Agincourt as the owner of the Vessel.

d. An email in connection with a previous arrest of the Vessel from Nick Barber of Stephenson Harwood LLP to Paul Dean of...dated 13 May 2014 in which Mr Barber stated, inter alia: "In response to Wagner's queries completion of the same must be by not later than noon tomorrow, but it is essential that the buyers have confirmation today that the arrest is lifted so that they can start to fly their crew and make other arrangements to take delivery."

e. An email from Jacy Whittaker, counsel for the plaintiff, to Charles Mackay, counsel for the defendant, dated 28 May 2014 requesting copies of certain documents "in an effort to attend to the release of the vessel".

f. Lloyd's List Intelligence Vessel Report for Goldendownloaded by dipen.karia@shlegal.com on 05 June 2014, shows the name of the beneficial owner and commercial operator as Petredec Limited; the registered owner as Agincourt Marine Company Limited and Bernard Schulte Ship management (Singapore) Private Limited as the technical manager from "before 24 November 2007 until before 22 May 2014" while the names of the current beneficial owner, commercial operator, registered owner and technical manager are shown as "Unknown Owners".

g. Minutes of a meeting of the directors of Advanced Distribution Company Ltd held on 12 May 2014 in which that ADC had agreed to purchase the Vessel.

h. True copy of the Director's Certificate of Agincourt Marine Company Limited dated 6 June 2014 confirming the directors of Agincourt.

i. A share certificate showing the shares in Agincourt belong to Petredec.

j. Email dated 28 May 2014 from Charles Mackay to Kenra Parris Whittaker forwarding a copy of the bill of sale transferring the ownership of the Golden Miller (22 July affidavit)

57. I am satisfied on the evidence produced by the defendants that the Vessel was sold to Advanced Distribution Company Ltd on 28 April 2014.

58. At the date of the commencement of this action and subsequent arrest of the Vessel that the Vessel had been sold to and was no longer beneficially owned by Agincourt.

59. In the circumstances, I find that at the commencement of this action and the subsequent arrest of the Vessel, it was no longer beneficially owned as respects all the shares therein by the person who would be liable on the claim in an action in personam.

60. Consequently, Ifind that this Court lacks jurisdiction to entertain the action in rem commenced against the Vessel.

61. It was for that reason, on 17 June 2014, that I ordered the Vessel released.

62. The issue now is the costs implications of that order.

63. It is accepted that no party is entitled to recover costs of or incidental to any proceedings except under the authority of the Court, which has sole discretion in granting costs: See Rules of the Supreme Court (RSC) Order 59, rules 3(1) and 3(2), the latter of which also provides

thatin the exercise of its discretion, the Court shall order the costs to follow the event, except it appears to the Court that in the circumstances of the case, some other order should be made as to the whole or any part of the costs.

64. Counsel for the defendants submits that having succeeded in their application for the release of the Vessel, they are entitled to the standard costs order, that is that costs should follow the event and the costs of the application and the arrest should be awarded to the applicant.

65. Counsel for the plaintiff disagrees and submitsthat because the plaintiff, prior to commencing this action, had done its due diligence in seeking to determine whether the Vessel was still beneficially owned by Agincourt, it should not be penalized in costs; that the Court should order the defendants to pay the costs of the arrest as well as the costs of their summons filed on 29 May 2014, or, at a minimum, the costs of the arrest.

66. Further, the plaintiff points out that having been contacted by the defendants after the arrest of the Vessel and being informed that the Vessel had been sold, the plaintiff requested proof of such sale, in response to which the defendants provided certain documents which the plaintiff says were insufficient to prove that the Vessel had in fact been sold and that the beneficial ownership had changed, which documents the plaintiff says it had not received by 3 June 2014, the first date of the hearing for the release of the Vessel.

67. I accept the submissions on behalf of the defendants. The evidence is that the plaintiff was aware that the vessel was in the process of being sold. Mr Parris avers so in his said affidavit filed in support of the application for the warrant of arrest.

68. While I note counsel for the plaintiff's lament that the plaintiff conducted due diligence using the normal methods to determine whether the vessel was still owned by Agincourt and Petredec, the fact is, as averred by Mr Parris, Jr, the plaintiff and or its counsel knew some time before the arrest that the vessel was in the process of being sold and by the aforesaid email from Mr Nick Barber to Mr Paul Dean, the plaintiff and or its counsel were aware on 13 May 2014, the completion of the sale was imminent.

69. Indeed, as contended by the defendant had the defendant been notified of the plaintiff's claim or had a demand for security been made with respect thereto, before the arrest, the defendants could have informed the plaintiff and or its counsel that the Vessel had been sold, thereby avoiding the arrest.

70. In the circumstances I find that the arrest was unlawful and that the plaintiff ought to bear the defendants' costs arising from the arrest of the Vessel as well as the defendants' costs on the application for the release.

71. Further, the writ herein and all subsequent proceedings are set aside on the ground that at the commencement of the action the Vessel was not beneficially owned as respects all the shares therein by the person who would be liable on the claim in an action in personam pursuant to section 9(4) of the Supreme Court Act.

72. The plaintiff is to pay the defendants' costs, to be taxed if not agreed.

DELIVERED this 23rd day of January A.D. 2015

Estelle G. Gray Evans

Justice

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMERCIAL DIVISION
2011/COM/LAB/FP0002

BETWEEN

DAWNDENEZZA SANDS
Plaintiff

AND

HUTCHISON LUCAYA LIMITED
Defendant

BEFORE	The Honourable Mrs Justice Estelle G. Gray Evans
APPEARANCES:	Mr Wayne Munroe, Q.C. with Mr Ernie Wallace for the plaintiff
	Mr Dwayne Fernander for the defendant
HEARD ON:	2015: 29 September; 26 November
	2016: 14 March

JUDGMENT

Gray Evans, J.

1. The plaintiff, Dawndenezza Sands, is a former employee of the defendant, Hutchinson Lucaya Limited, a company incorporated in the Commonwealth of The Bahamas and the owner of premises situate at Our Lucaya Resort, Freeport, Grand Bahama, which carries on business as a Hotel and Beach Resort.

2. The plaintiff commenced this action on 7 January 2011by a generally indorsed writ of summonsin which she claims damages for personal injuries and consequential loss caused by the negligence and or breach of duty of the defendant, its servants or agents, on 19 April 2009, while she was employed by the defendant company at Churchill's Kitchen in the Convention Centre, Freeport, Grand Bahama, together with interest and costs.

3. In her statement of claim filed 24 February 2011, as amended and re-filed on 14 January 2013, the plaintiff alleges, inter alia, as follows:

(1) On or around 17 April 2009 in the course of her employment she was engaged in preparing for a function at the Convention Center. The defendant had booked two functions, one being a large Jewish function that is held at the hotel every year which places a heavy demand on the limited employees and equipment that is available; that due to the shortage of staff and equipment, along with the excessive pressure that was placed on the plaintiff as Banquet Chef, she had to ensure that the Convention Center was set up properly for the said function she was scheduled to work. The plaintiff alleges further that she worked solely to prepare for the function and went to Churchill's kitchen to collect the grocery items needed. As this was not something that she was mandated to do, being the Banquet Chef and as a result of the shortage of staff she did so in order to prepare for the function; that upon returning to the banquet kitchen the plaintiff had to reach abnormally over items that were scattered over the floor to retrieve equipment needed due to the fact that the kitchen was unkept [sic]. As she did so, she experienced aches and discomfort in her mid and lower back.

(2) The following day the plaintiff was scheduled to be off from work and did continue to experience more pain and discomfort.

(3) On or around 19 April 2009, the plaintiff returned to work and in the course of her employment prepared for a function that was scheduled for that day for which she had to deliver food items to Chop Beach by means of a cart. Again there was a shortage of staff available to work the said function. While doing so, several heavy items fell off of an unsteady cart. The plaintiff bent over to collect the items and place them back on the cart. As she did so, the pain in her mid and lower back became more severe.

(4) On the next day the plaintiff reported to her employer that she was injured at work.

(5) The said accident was caused by the negligence and/or breach of duty of the defendant their servants or agents.

4. The plaintiff provided the following particulars of negligence:

(1) Failing to provide the plaintiff with adequate and sufficient staff as requested on the day in question.

(2) Failing to provide the plaintiff with adequate equipment needed for said function.

(3) Failing to do what a reasonable employer would have done by providing the plaintiff with the necessary training needed when considering to re-deploy the plaintiff to a Head Cashier position after the said accident.

(4) Failing in all circumstances to take reasonable care for the safety of the plaintiff.

(5) Exposing the plaintiff to an unnecessary risk of injury.

(6) Failing to set up and implement a safe system of work for the plaintiff; and

(7) Failing to provide the plaintiff with a safe place of work.

5. The plaintiff alleges that she suffered the following injuries:

i. Lumbar Spondylolysis

ii. Thoraco-Lumbar strain

iii. Lumbar disc Herniation

iv. Large central disc extrusion at L4-5 with mild central canal sterosis

v. Hyperflexion/Hyperextensioninjury to the neck and back

vi. Lower truck myofascitis

6. In its defence filed 9 March 2011, the defendant denies or does not admitthe plaintiff's allegations of negligence and or breach of duty, injury and or damage, and puts the plaintiff to strict proof thereof. The defendant pleads in the alternative that the plaintiff contributed to her injuries by her own negligence.

7. Evidence at trial was given by the plaintiff and Dr H. Freeman Lockhart on her behalf. The plaintiff also relied, inter alia, on medical reports by Doctors Valentine Grimes and Greg Schor Haskin. Mr Freddie Smith gave evidence on behalf of the defendant.

8. At the date of her accident the plaintiff held the position of Banquet Chef, the position to which she had been promoted on or about 29 April 2007. The plaintiff's job description included, inter alia, managing all aspects of the banquet kitchen and servicing all outlets with regard to employees, food and product and planning; planning and overseeing the day-to-day banquet culinary operations and giving employees directions regarding the same.

9. The plaintiff's evidence in support of the allegations in her statement of claim as set out in her witness statement filed on 14 May 2015, is that on Friday, 17 April 2009, she began workat about 6:00 a.m. She said it was a very busy time as the defendant company's hotel was hosting a large Jewish Group called "Megan David". She said there was a shortage of staff – 42 employees had been requested but only 33 were provided. Hence she had to work very hard; performing tasks that she ought not to have performed, but which she did because she was the manager. She managed to get through the day and got off duty around 6:45 p.m. The following day, Saturday, 18 April 2009, was her day off and she spent it in bed as she was extremely tired, she says, from having worked almost 60 hours that week.

10. The plaintiff returned to work around 10:00 a.m. the following day, Sunday, 19 April 2009. She said that she along with her junior, Kirk Russell, and two line staff were on duty. They were preparing for a VIP function on Chop Beach. While she and the two line staff were taking food to the function site some of the items fell off the trolley that one of the associates was pulling. After salvaging some of the food, they continued to the function site. The plaintiff said she left her associates to complete setting up for the function and she returned to the area where the food had spilt to clean it up.

11. The plaintiff gave the following account as to what happened next:

(1) As I got back to the area where we had the spill, I got off the tugger and began to clean up the mess. I bent down and started to collect the items that had fallen on the ground. I was able to put the first set of items on the back of the tugger. As I proceeded to pick up the remainder and place it on the tugger I was unable to get up. It felt like my back gave out on me. I was unable to move. I remained in the bending position for at least three (3) to five (5) minutes.

(2) Finally I was able to move a bit and at this time, I was experiencing severe pain in my mid and lower back. I then went back to the banquet kitchen and informed Kirk of my situation. I asked Kirk to assist me in getting the rest of the items to the function site and to keep an eye on the function through its completion. After taking the items there and seeing that everything was in place, I informed Kirk that I was unable to complete the shift due to the severity of the pain that I was experiencing. So I left work at about 7:00 pm that evening. I got home around 7:30 pm, took a bath and went to bed around 8:00 pm.

12. The plaintiff said that although she had much discomfort throughout the night, and had no rest, because the next day was the "final of the group's functions", and because she was "a committed employee", the following morning, 20 April 2009, she went to work "to see the function through to the end despite how much pain [she] was in." After ensuring that everything was in order, she went to the Investigations Department and reported the incident and gave a written statement to Mr Franklyn Gibson. That statement was in similar terms to the plaintiff's evidence-in-chief. The plaintiff said she also requested medical assistance and was provided with the necessary forms to attend the Rand Memorial Hospital, where she was diagnosed with having a lower back muscle strain and given three days off from work.

13. The plaintiff said that at the end of those three days she saw Dr Lockhart, who also diagnosed her with having a muscle strain and he gave her additional time off. The plaintiff was later seen by other doctors who diagnosed her as having suffered the injuries pleaded. The plaintiff also underwent two surgeries.

14. Under cross examination, the plaintiff admitted that she had helped to stock the cart from which the items had fallen. She also agreed with counsel for the defendant that the reason she went back to clean up the food that had spilled was because her job description included performing cleaning tasks, occasionally.

15. The plaintiff also admitted that in addition to being responsible for planning and overseeing the defendant's day-to-day banquet culinary operations, she was also expected, as part of her job description, to be able, inter alia, to:

(1) Lift up to 15 lbs on a regular and continuing basis;

(2) Push and pull carts and equipment weighing up to 250 lbs occasionally;

(3) Bend, stoop, squat and stretch to fulfill cleaning tasks occasionally.

16. However, on re-examination the plaintiff said that the defendant had no system whereby she was taught to "do any of those things" safely. Moreover, the plaintiff said, that although she was required to do those things, she was never asked to demonstrate that she had any of the physical abilities which the position required.

17. As indicated, the defendant's evidence came from Mr Freddie Smith.

18. It is common ground that Mr Smith was not employedby the defendant at the date of the accident. In his witness statement, Mr Smith avers that his statement was made based upon documents withinthe defendant's possession which he verily believed to be the truth.

19. At paragraphs 3 through 12 of his witness statement, Mr Smith avers as follows:

(1) The defendant's personnel file reflects that in 2009 she was employed by the defendant as a Banquet Chef. Her duties included but were not limited to "[m]anage all aspects of the banquet kitchen. Service all outlets with regards to employees, food produce and planning.

(2) The plaintiff's essential functions, which she was aware of, required that 80% of her time be devoted to "[p]lan and oversee day to day banquet culinary

operations and give direction to employees, visually inspect, select other food products of the highest standard in the preparation of items." Ten percent of the plaintiff's time was allocated to "conduct employee training on a regular basis."

(3) The physical requirements of the position that the plaintiff accepted were, among other things, that she had the "[a]bility to physically handle knives, pots, mirrors, or other display items as well as grasp, lift and carry same from shelves and otherwise transport up to 50 pounds to every area of the kitchen. Ability to perform cutting skills on work surfaces, topped with cutting board, 3 to 4 feet in height (banquet kitchen, prep kitchen, bake shop, etc). Proper usage and handling of various kitchen machinery to include slicers, buffalo chopper, grinders, mixers and other kitchen related equipment."

(4) It was also a requirement of the plaintiff that she "[m]ust be able to exert well-paced ability in limited space and to reach other locations of the hotel on a timely basis."

(5) Additionally, as a part of the plaintiff's physical requirements for the position, it was a term that the plaintiff, "[m]ust be able to lift 15 lbs on a regular basis; and must be able to push and pull carts and equipment weighing up to 250 lbs occasionally."

(6) Importantly, the position required that the plaintiff (i) must be able to bend, stoop, squat and stretch to fulfill cleaning tasks occasionally; and required (ii) grasping, writing, standing, sitting, walking, repetitive motions, bending, climbing, listening and hearing ability and visual acuity."

(7) The plaintiff voluntarily accepted this position with all of its requirements and executed the 4th page of the job description.

(8) The plaintiff was rostered to work on 19th April 2009. She stated that there was a shortage of staff on that day. This is incorrect. On the 19th April, the defendant's records indicate that there was no staff shortage as alleged by the plaintiff. In fact, the defendant's records reflect that both kitchen and stewarding, inclusive of the line staff and managers worked banquets that day as per TIME CARD and approved Roster records for 19/4/2009.

(9) There is no report in the defendant's possession that suggests that any concerns were raised to management relative to the staffing levels on 19th April 2009 nor on the 17th April 2009 as alleged by the plaintiff. All staffing concerns would have been addressed prior to the approval of the work roster for that week.

(10) Further, the defendant's records also reveal that there was an investigation conducted by the head of the culinary department, Chef Dwain Clare, which concluded that on the 19th April 2009, there was ample staff on hand to attend to the banquet event for that day. The results of the investigation were settled in a Memo to Renee McKinney-McPherson (HR Director at the time) dated 6th September 2010

20. In that memo, which was included amongst the agreed documentary evidence, Dwain Clare, CEC, Executive Chef, wrote:

"As a follow-up with reference to Dawn Sands legal matters as it relates to her industrial accident on Sunday, April 19th, 2009.

Please find attached information requested by her attorney.

1. Both Banquets Kitchen & Stewarding Schedules as it relates to the day in question. Bear in mind that Ms Sands was responsible for scheduling of staff to work and to order and ensure that all food related products are in place for the staff to prepare accordingly as per the client. Ms Sands having been in the

capacity of Banquets Chef since April 29th, 2007, was solely responsible for the overall Banquets operation; in absolutely no which way was there any interruption in the scheduling of Banquets staff by the Chef's office. Once schedules were completed, they were forwarded to the Chef's Office for signing. Based on the events for the said day, there were adequate staffing for the entire day, both AM & PM shifts and Kitchen & Stewarding there were never any concerns regarding lack of staffing or equipment. Any equipment needed, the request would be forwarded to the Stewarding Dept who would then supply as requested.

2. Based on the numbers for the said day in question, also attached are the Banquet Event Orders (BEOs) which outline all fundamental information as it relates to the client's request and the daily events of all events scheduled. As noted on the BEOs, there were several "small" events.

3. The payroll report time cards for all staff (both Kitchen & Stewarding inclusive of the line staff and managers) who had worked Banquets on the said day. Based on the time cards and schedules, there were sufficient staffing and manpower as there wereboth AM Chef being Ms Sands herself, PM Chef – Kirk Russell and Stewarding Manager – Wayne Fiddler.

Should there be any further information required, please feel free to contact myself directly for clarity.

Sincerely,

Dwain Clare, CEC, Executive Chef."

21. As indicated, the plaintiff, at paragraph 4 of her statement of claim, pleaded that on 17 April 2009, when reaching "abnormally over items that were scattered over the floor to retrieve equipment needed due to the fact that the kitchen was unkept" [sic], she "experienced aches and discomfort in her mid and lower back, and that she "continued to experience more pain and discomfort" the following day, which was her scheduled day off from work.

22. However, I agree with counsel for the defendant that those allegations were not supported by any evidence from the plaintiff or otherwise.

23. The undisputed evidence, however, is that the plaintiff was injured on 19 April 2009. That is what the plaintiff said in her evidence-in-chief and, as appears from the accident/incident report which she filed with the defendant's Risk Management Department on 20 April 2009, that is what she reported to the defendant's investigator, Mr Franklyn Gibson, the day following the incident. According to that report the plaintiff reported that the "incident/accident occurred on Sunday, April 19th, 2009, sometime around 4:45 p.m."

24. Furthermore, both Dr H. Freeman Lockhart and Dr Greg Schor Haskin in their medical reports stated that the injuries suffered by the plaintiff were as a direct result of the accident that occurred at the defendant company's hotel on 19 April 2009. Those medical reports were agreed.

25. I, therefore, find that the plaintiff, on 19 April 2009, in the course of her employment at the defendant company's hotel, while bending down to pick up food items which had fallen to the ground from a cart being pulled by one of the defendant's employees, had an accident which resulted in her suffering the injuries as pleaded.

26. The plaintiff's claim is rooted in common law negligence and it is accepted that in order to prove common law negligence, the plaintiff must establish and prove that (i) she was owed a duty of care by the defendant; (ii) the defendant breached that duty; (iii) as a result of the defendant's breach, she sustained reasonably foreseeable injury and damage. (See Donaghue v Stevenson [1932] A C 562).

27. "Negligence" is defined as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent man and reasonable man would not do." Alderson, B. in the case of Blyth v Birmingham Waterworks (1856)11 Exc 781, 784.

28. In the case of Wilsons & Clyde Coal Company Ltd v English [1938] AC. 57, Lord Wright at page 84 expressed the view that the duty which rests on the employer is personal to him and his failure to perform such duty is his personal negligence. At page 81, His Lordship, quoting from the decision of Lord Cairns in the case of Wilson v Merry & Cunningham L.R. 1 H.L. (Sc) 326, at page 332, said:

> "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work."

29. Lord Wright continued:

> "To this must be added a third head - namely, to provide a proper system of working...By this is meant, not a warranty, but a duty to exercise...all reasonable care."

30. Lord Justice Pearce in Wilson v Tyneside Window Cleaning Co [1958] 2 All ER 265 opined that the three main headings referred to by Lord Wright in Wilsons & Clyde Coal Company Ltd v English*supra* are for convenience of definition and argument "but all three are ultimately one manifestation of the same duty of the master to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk." See also Smith v Baker [1891] AC 325; and Lightbourne v Carnival's Crystal Palace Hotel [1996] BHS J No 63.

31. Swanwick, J, in the case of Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1986] 1 WLR 1776, at page 1783, deduced the following principles from the authorities:

> "...the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognized and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood – of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

32. It is, however, accepted that the employer's duty is not absolute. See, for example, Levesley v Thomas Firth and John Brown Ltd [1953] 2 All ER 866 and Mackey-Bethel and Canadian Imperial Bank of Commerce [1993] BHS J. No. 8. In that latter case, Hall, Jopined: "Employers have no duty to ensure that the workplace is risk free. There are hazards in every workplace as there are in every household, and an employee does have the responsibility to take reasonable care for his own safety." See also Quigley v Complex Tooling and Moulding [2005] IEHC 71.

33. Furthermore, "the mere fact that an injury - even a severe injury - is sustained by an employee while at work does not, without more, establish negligence". See Sturrup v Resorts International (Bahamas) 1984 Ltd [1991] BHS J. No. 103, 1985 No. 83. As Peart J, in Barry McLoughlin v Martin Carr t/a Harloes Bar [2007] 3 IR 496 opined, no matter how appalling the

nature of the accident or its devastating effect on the plaintiff, that is not sufficient in itself to make the defendant liable to compensate the plaintiff for what she has gone through.

34. There is no dispute in this case that, as her employer, the defendant owed the plaintiff a duty of care; and, as Lord MacMillan in Lochgelly Iron and Coal Co. v McMullan [1934] AC 1, said, it is "quite immaterial" whether the duty to take care arose at common law or was imposed by statute. The question is: Did the defendant breach that duty and thereby cause the plaintiff's accident and resulting injuries?

35. In his closing arguments, counsel for the plaintiffabandoned a number of the allegations of negligence on the part of the defendant as pleaded in her statement of claim, but he maintained that the defendant had breached its duty to the plaintiff by failing to:

(1) provide the plaintiff with a safe place of work;

(2) set up a safe system of work for the plaintiff, thereby exposing her to unnecessary risk of injury; and

(3) take reasonable care for the safety of the plaintiff.

36. It is settled law that the onus of proof that the defendant has breached its duty of care owed to the plaintiff is on the plaintiff: See Brown v Rolls-Royce Ltd [1960] 1 WLR 210; Ng Chun Pui v Lee Chuen Tat [1988] RTR 298 PC; and, as pointed out by counsel for the defendant, this must be done by evidence and not simply by pleading. See also the judgment of Adderley, J Hall v The Ruffco Holding Corporation Bahamas Ltd. [2008] 2 BHS J No 15.

37. The plaintiff must, therefore, prove that but for the defendant: (i) failing to provide the plaintiff with a safe place of work: and or (ii) failing to set up a safe system of work for the plaintiff, thereby exposing her to unnecessary risk of injury; and or (iii) failing to take reasonable care for the safety of the plaintiff, shewould not have had the accident and suffered the injuries as aforesaid.

38. In that regard, the plaintiff contends that the defendant failed to provide sufficient staff to work the functions that it had scheduled for the day on which the plaintiff was injured and that such failure made the defendant's workplace unsafe. Further, that while the plaintiff was required, as part of her job description, occasionally, to lift, pull or push, heavy items, the defendant did not provide her with the training and instruction of how to carry out those physical duties and demands. Further, counsel for the plaintiff submits, notwithstanding the physical demands/requirements of her job, the defendant failed to provide her with a back brace for her use when lifting heavy items; andin counsel for the plaintiff's submission, there is no evidence that the defendant informed the plaintiff of its health and safety standards, if any existed, or on how such system should operate. Therefore, counsel for the plaintiff argues, the defendant failed to provide the plaintiff with a safe system of work.

39. Additionally, counsel for the plaintiff submits, the defendant negligently failed in its obligation to devise a reasonably safe system of work to deal with obvious dangers and failed to give the plaintiff instructions to ensure as to how she should carry out her physical duties. In that regard, counsel for the plaintiff submits, the defendant failed to provide adequate staff and equipment on the day in question knowing that this period was a hectic time for the defendant company.

40. In counsel for the plaintiff's submission, in failing to provide a safe system of work, the defendant failed to take reasonable care for the safety of the plaintiff, as was its duty to do, and as a result, the plaintiff sustained injuries to her mid and lower back; which injuries, in his submission, the defendant ought reasonably to have foreseen would be done to persons who may be in its employ if a proper system of work was not in place.

41. In support of his submissions, counsel for the plaintiff relied on the cases of Lightbourne v Carnival's Crystal Palace Hotel supra; Stokes v Guest, Keen and Nettlefold (Bolts and Nuts Ltd supra; Sturrup v Resorts International (Bahamas) 1984 Ltd supra; Levesley v Thomas Firth and John Brown Ltd supra; Harris v Bright Ash Felt Contractors [1953] 1 QB 617; Naismith v London Film Productions Ltd [1939] 1 All ER 794; and McSweeney v Super Value Food Store Ltd, C.L. No. 481 of 1979

42. Counsel for the defendant argues that the plaintiff has failed to prove that heraccident on 19 April 2009 was caused by negligence and or breach of duty on the part of the defendant. Further, that the plaintiff has failed to prove that the defendant did not discharge its duty to have a safe place or system of work as the unchallenged evidence of the defendant is that its workplace is safe and that it provides a safe system of work for its employees.

43. Counsel for the defendant pointed out that the plaintiff had been employed by the defendant for years and was experienced in the culinary department and that she was well aware of her obligations "to fully comply with Starwood rules and regulations for the safe and effective operation of the hotel's facilities." Counsel pointed further that the undisputed medical evidence is that the only cause of the plaintiff's injuries was the fact of bending to pick up prepared food items that spilled off the food trolley that she, along with staff that she had supervised, stacked

44. In support of his submissions, counsel for the defendant relies on the cases of: Wilsons & Clyde Coal Company Ltd v English supra; Wilson v Tyneside Window Cleaning Co supra; Pratt v Cable Beach Resort Limited 2012] 1 BHS J. No. 52; Brown v Rolls-Royce Ltd supra; Ng Chun Pui v Lee Chuen Tat supra; Hall v Ruffco Holding Corporation Bahamas Ltd supra; Rhonda Gaul v Sandals Resorts International Limited 2004/CLE/GEN/00586 (unreported); Bonnington Castings Ltd v Wardlaw[1956] A.C. 613; and Mackey-Bethel v Canadian Imperial Bank of Commerce [1993] BHS J. No. 8.

45. The crux of the plaintiff's case, as I understand it, is that her accident and injuries were caused by the negligence of the defendant in firstly, failing, to provide adequate staff to work the various functions scheduled at its hotel property on 19 April 2019; and secondly, by failing to provide the plaintiff with training in how to carry out her job functions and or, thirdly, in failing to provide the plaintiff with a back brace to assist her with lifting heavy items.

46. Although pleaded at paragraph 6 of her statement of claim that there was a shortage of staff to work the function to which the plaintiff and her co-workers were delivering food items via a cart, I agree with counsel for the defendant there was no such evidence led by the plaintiff or on her behalf at trial.

47. The plaintiff's evidence-in-chief was that on the date of her accident, 19 April 2009, she along with three other staff members were on duty. She does not say that that number was below the number of persons required for the function for which they were scheduled to work; nor does she say how many persons ought to have been there.

48. And while her evidence is that on 17 April 2009, 42 persons were requested but only 33 were provided, the undisputed evidence is that the plaintiff's accident and resulting injuries occurred on 19 April 2009 and not 17 April 2009.

49. Furthermore, not only does the defendant deny that there was a shortage of staff on 19 April 2009, but Mr Smith, stated that from his review of the defendant's records, both kitchen and stewarding inclusive of the line staff and managers worked banquets that day as per time card and approved roster records for that date. According to Mr Smith, there was no record that any concerns were raised to management relative to the staffing levels on 19 April 2009. (See paragraphs 10 and 11 of Mr Smith's witness statement filed 24 September 2015). Under cross

examination, Mr Smith said that when he said there was no shortage of staff, he was speaking about the amount of people rostered to work based on the functions for that date.

50. In the circumstances, I find that the plaintiff has failed to prove the allegation at paragraph 6 of her amended statement of claim that there was a shortage of staff available to work a function that was scheduled for 19 April 2009 and for which she had to deliver food items to Chop Beach. Therefore, I find that the plaintiff has failed to prove that the defendant created an unsafe place of work for the plaintiff by failing to provide adequate staffing to work scheduled functions on 19 April 2009.

51. While Mr Smith at paragraph 22 of his witness statement avers that the defendant's workplace is safe and it provides a safe system of work for its employees, and counsel for the defendant argues that that evidence is undisputed, I note, as counsel for the plaintiff points out, that nowhere in its evidence does the defendant actually say what is its safe system of work. Further, although the plaintiff's job description provides that she must have some working knowledge of certain federal, state and local laws governing aspects of her employment, the plaintiff's evidence is that not only does she not have such knowledge but no such information was provided to her by the defendant.

52. I also note as counsel for the plaintiff pointed out that the defendant did not provide the plaintiff with any training on how to carry out the physical tasks which were a part of her job description or provide her with a back brace for bending and lifting or pushing heavy items, which she may have been required to do occasionally.

53. However, it is clear from the above authorities that while an employer owes a duty to take all reasonable precautions to protect his employee from injury by providing a safe system of work, training, tools and equipment to perform the work, the authorities are also clear that an employer is not obliged to warrant his employee's safety and the employee also has a measure of responsibility for his or her own safety.

54. In this case, the plaintiff says she hurt her back while bending to pick up certain food items that had spilled from a cart being pulled by one of her associates. She does not say what those items were or how much they weighed. She was expected, as part of her job description, to be able to lift up to 15 pounds "on a regular and continuing basis"; she was required to "bend, stoop, squat and stretch" to fulfill cleaning tasks occasionally. The plaintiff does not say that the task of bending to pick up the spilled food items required any particular skill; nor, is there any evidence as to whether the provision of a back brace was a feature of the industry or whether or not a back brace, if provided, would have prevented the accident and resulting injury. Indeed, there is no evidence that the plaintiff requested a back brace to assist her with her lifting duties. As pointed out by counsel for the defendant, while counsel for the plaintiff suggested that the failure to provide a back brace may be considered a failure to provide a safe system of work, the plaintiff provided no evidence that she required such a brace or that there was any other special technique that she required and with which the defendant was obliged to equip her to perform her cleaning task, but failed to do.

55. As opined by Professor John Flemings in the 4th edition of Law of Torts at page 420, "...there is a sphere in which it is legitimate to leave to a skilled workman the decision whether any difficulty [she] may encounter calls for managerial assistance for it would be a mistake to treat the relationship between him and his employer as equivalent to that of imbecile child and nurse."

56. As the authorities bear out, while it is the employer's job to provide a safe system of work, it is impractical to expect an employer to provide for every eventuality or create a procedure for every possible task that an employee has to perform; and as observed in the case

of Rhonda Gaul v Sandals Resorts International Limited supra, not every accident that happens at work is caused by negligence of the employer; or, as I had cause to note in the case of Ferguson v Grand Bahama Power Company[2011] 2 BHS J. No. 2, "just because an employee is injured 'on the job', does not necessarily mean that the employer has been negligent or has breached its statutory duty to the employee."

57. In any event, it seems to me that even if the defendant were in breach of its duty to provide a safe system of work and a safe workplace or to provide training in matters related to the plaintiff's job functions, that would not be the end of the matter. The plaintiff would still have to show that there was a causal link between that breach, if there was one, and the injuries she suffered.

58. To borrow an examplefrom the judgment of Peart J in Barry McLoughlin v Martin Carr trading as Harloes Bar supra at pages 506-507: "It will avail a plaintiff nothing in a road traffic accident case to establish that the defendant's vehicle had a defective brake light in breach of his statutory duty in that regard, if the absence of the brake light in no way caused or contributed to the accident in which the plaintiff suffered injury."

59. Regrettably for the plaintiff in this case, she has, in my judgment, failed to show what the defendant could have done to prevent the occurrence of the accident that resulted in the injuries she suffered on 19 April 2009.

60. In the circumstances, I am unable to find that the defendant was negligent or that it breached any duty it owed to the plaintiff and consequently, I find that the injuries which the plaintiff suffered on 19 April 2009 were not due to the negligence or breach of duty on the part of the defendant; that it was simply an unfortunate accident, for which no one is to blame.

61. Accordingly, the plaintiff's claim is dismissed. Judgment is to be entered for the defendant with costs, to be taxed if not agreed.

DELIVERED this 30th day of June A.D. 2016

Estelle G. Gray Evans

Justice