

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

3 **CAUSE NO. G354 OF 2013**

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6 **BETWEEN:**

7 **TRACY LAMONT JACOBS**

8 **Plaintiff**

9 **AND**

10 **HSBC BANK CAYMAN LTD.**

11 **Defendant**

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16 **Appearances:**

Mr. James Kennedy of Samson and McGrath for the Plaintiff
Mr. Nick Dunne of Walkers for the Defendant

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19 **Before:**

Hon. Justice Richard Williams

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21 **Heard:**

24 November 2014

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23 **Draft Judgment circulated:**

26 November 2014

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25 **Date of Judgment:**

28 November 2014



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27 **JUDGMENT**

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29 **Application**

30 1. I have before me the Defendant's, HSBC Bank Cayman Ltd., Summons dated 7
31 March 2014 and filed pursuant to GCR O.14 r.12, applying for an order
32 dismissing the Plaintiff's claim as having no prospect of success. An affidavit
33 sworn on 6 March 2014 by Chanda Glidden, in-house Legal Counsel for the
34 Defendant, has been filed in support of the application.

1 2. The Plaintiff, Tracy Lamont Jacobs, opposes the application, and has filed an
2 affidavit in defence of the application which she swore on 4 June 2014.

3

4 **The Procedural Background**

5 3. Proceedings were initiated by a generally endorsed Writ of Summons filed by the
6 Plaintiff's previous attorneys on 17 October 2013. Following the filing on 23
7 October 2013 of the Defendant's Acknowledgement indicating the proceedings
8 were contested, the Plaintiff filed her Statement of Claim on 8 November 2013.
9 The Defence was filed on the 20 November 2013 and the Reply to that Defence
10 was filed on 5 February 2014.

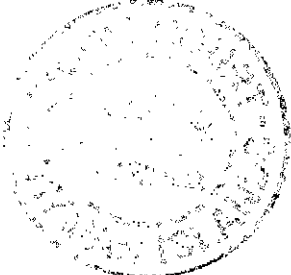
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12 4. On 10 March 2014 the Defendant filed the Summons which is before me today.
13 When the Summons came before the Court on 14 May 2014, the Plaintiff made a
14 successful application for an adjournment to enable her to file an affidavit in
15 opposition to the application.

16

17 5. On 27 May 2014 Samson and McGrath were appointed as the Plaintiff's new
18 attorneys. The hearing of the Summons was further adjourned on 14 August 2014
19 at the request of the Defendant's attorney who informed the Court that the
20 Summons had not been properly served and that the Plaintiff's new attorney was
21 "off-Island."

22



1 6. On 13 November 2014 the Plaintiff filed a Summons for leave to amend the
2 Statement of Claim and her Replies to Request for Further and Better Particulars
3 pursuant to GCR O.20, r.5. The parties agreed that I should hear and rule on that
4 application at the outset of this hearing before I proceeded with the hearing of the
5 Defendant's Summons. I heard the opposed application and gave an Ex Tempore
6 Ruling in which I gave leave to the Plaintiff to amend her Statement of Claim and
7 her Replies to Request for Further and Better Particulars in the manner sought. I
8 do not intend to herein set out the reasons which were contained in the Ex
9 Tempore Ruling, the transcript of which has already been provided to the parties.
10 After I had ruled, Counsel for the Defendant indicated that he was content for me
11 to move on and hear the Defendant's Summons and that he did not require an
12 adjournment as a consequence of the amendments.

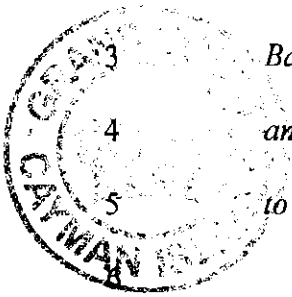
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14 **The Plaintiff's Claim**

15 7. The Plaintiff's claim set out in her Amended Statement of Claim is for damages
16 for personal injuries sustained by her while in the Defendant's banking premises
17 when she was attending as an invitee in order to conduct business there. It is plead
18 that as operator and occupier of the premises the Defendant had a duty to operate
19 the premises in such a manner to ensure that she was reasonably safe when using
20 the premises as a customer of the bank.

21





1 8. The Plaintiff alleges at paragraph 4 of the Amended Statement of Claim that as
2 she *“stepped across the threshold/divider between the lobby’s floor and the*
3 *Bank’s Wood flooring onto the wood flooring inside the bank”* she *“tripped at*
4 *and/or slipped at the raised flooring divide which resulted in the Plaintiff falling*
5 *to the floor.”*

7 9. It is pleaded that there is a height difference between the strip of granite at the
8 threshold of the doorway and the timber covered floor surface of the banking hall
9 and that this created a hazard in the premises. The Plaintiff contends that her
10 identification of the height difference at the flooring divide as the area of accident
11 supports a contention that this is what caused the fall. It is further contended that
12 the Defendant was negligent in allowing this hazardous condition to persist on the
13 premises, and for not adequately warning patrons of its dangers. In the Amended
14 Statement of Claim and the Amended Reply to the Request for Further and Better
15 Particulars the Plaintiff contends that the different height elevation either side of
16 the door is in excess of half an inch and the absence of any bevelling of the slope
17 amount to breaches of the Cayman Islands Standard Building Code sections
18 1012.1.3 and 1012.1.4.

19
20 **Defendant’s Contention**

21 10. The Defendant’s submissions are helpfully set out in Mr. Dunne’s detailed
22 skeleton argument, in which he comments upon both the Statement of Claim and

1 the Amended Statement of Claim. I have considered those written submissions
2 very carefully as well as Mr. Dunne's oral representations.

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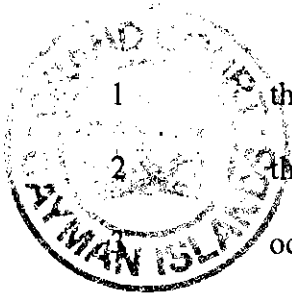
4 11. The Defendant asserts that summary judgment should be granted, contending that
5 the Plaintiff fails to demonstrate a causal link between the injury and any
6 negligence on the part of the Defendant. It is contended that when you consider
7 the case in its entirety it does not amount to a sustainable claim with a real
prospect of succeeding.

9

10 12. It is contended that the Plaintiff, having stated a reliance on the contents of the
11 loss adjuster's report date 30 January 2013 prepared by Mr. Andrew Wilson from
12 Cunningham & Lindsey cannot demonstrate that the premises were hazardous. It
13 is contended that the report concludes that "*there is no defect or design feature of*
14 *the floor in the area in question which poses any tripping hazard whatsoever to a*
15 *person walking through that area.*"

16

17 13. The Defendant also contends that the Plaintiff has given a number of different
18 possible versions of the fall and has shown an inability to identify precisely the
19 cause of her accident. He places weight on the fact that she is unable to decide
20 whether she tripped or slipped. It is contended that pointing only to the general
21 area of the fall, does not mean that negligence should be presumed absent of
22 specific facts. It is submitted that the Plaintiff's negligence claim rests solely on



1 the fact of her injuries, that case is based on mere speculation and that it is not for
2 the Court to carry out an inquisitorial exercise to establish how those injuries
3 occurred.

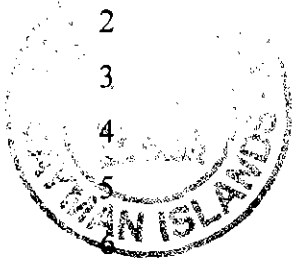
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5 **The Law**

6 14. Although there is not a great deal of local case law concerning the approach to be
7 taken in O.14, r.12 proceedings, I am greatly helped by the approach advocated
8 by Smellie C.J. *In the Matter of Omni Securities Limited (No.3)* [1998 CILR
9 275]. I make no apologies for replicating herein the guidance given by Smellie
10 C.J. and I cannot improve on his exposition.

11
12 15. Smellie C.J. reminded the parties at page 4 that the “*primary objective*” of O. 14
13 is the “*timely disposition of cases which do not deserve to be allowed to go to*
14 *trial either because there is no prospect of a defence (o.14, r.1) or of a claim*
15 *(O.14, r.12).*”

16
17 16. Smellie C.J. cited with approval the following observations of Patterson Ag. J. in
18 ***Cribb v Reid*** 1997 CILR N-5:

19 *“In my view, as I have said earlier, the scope of O.14, r.12 appears*
20 *to be very wide. It gives a defendant the right to terminate*
21 *proceedings against him in a summary manner by showing that the*
22 *plaintiff’s claim has no prospect of success. If the defendant is able*
23 *to show that the plaintiff’s case is clearly unsustainable, then he*
24 *will be entitled to judgment without the necessity of a possible long*



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drawn out trial. If the issue raised by the defence is shown to be sufficient to finally determine the action in his favour without a full scale trial, then in my view, an O.14, r.12 application is appropriate. These are but examples of the scope of the rule and are by no means exhaustive. The application of the procedure not only saves costs but it saves the time of the court.”

17. Smellie C.J. went on to state at page 4 :

“I agree with those statements. I think they properly emphasize the need to show that the plaintiff’s case has no prospect of success.¹ Indeed it is at some risk of pedantry that one would seek further to define the test but it is a risk worth taking. I believe, in order to emphasize that there should be rationalization between the test upon an application by a plaintiff with that upon an application by a defendant. I would therefore only add that in any rational application of the rule, there must be implicit the tests of reasonableness and realness.²

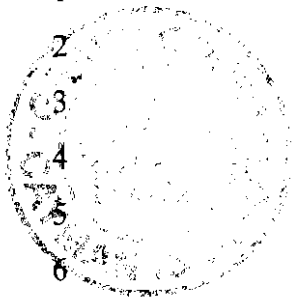
I agree with Mr. Brindle that the rule could not properly be predicated only upon a fanciful or improbable prospect of the plaintiff’s claim succeeding. And the fact that the rule is engrafted upon O.14, allowing also for a defendant’s application for summary dismissal, does to my mind imply the reverse of the test of O.14, r.1 which is applicable where a plaintiff applies for summary judgment. That test, as stated in the headnote to National Westminster Bank PLC v. Daniel (14) in The All England Law Reports ([1994] 1 All E.R. at 156) requires a defendant seeking

¹ My emphasis by underlining.
² My emphasis by underlining.

1 unconditional leave to defend to “satisfy that court that there is a
2 fair or reasonable probability of having a credible defence and not
3 merely that there is a faint possibility that he has a defence.”
4 [Emphasis supplied.] (See also *Argentine Holdings (Cayman) Ltd.*
5 *v. Buenos Aires Hotel Corp. S.A. (1)* (1997 CILR at 97) where that
6 test was applied by this court upon a plaintiff’s application for
7 summary judgment.)
8

9 In applying this test, while one must be mindful of the cautionary
10 words of Danckwerts, L.J. in *Wenlock v. Moloney* (16) ([1965] 1
11 W.L.R. at 1244)—expressed upon an O.18, r.19 application—not
12 to usurp the position of the trial judge by embarking upon “a trial
13 of the case in chambers, on affidavits only, without discovery and
14 without oral evidence tested by cross-examination. . .” there none
15 the less has to be some assessment of the evidence presented in
16 support of the plaintiff’s case to see whether there is a fair and
17 reasonable probability or more than a faint possibility of success.
18 As was observed by Ackner, L.J. in *Banque de Paris et des Pays-*
19 *Bas (Suisse) S.A. v. de Naray* (3) ([1984] 1 Lloyd’s Rep. at 23):

20 “It is of course trite law that O.14 proceedings are
21 not decided by weighing the [opposing] affidavits. It
22 is also trite that the mere assertion in an affidavit of
23 a given situation which is to be the basis of a
24 defence does not, ipso facto, provide leave to
25 defend; the Court must look at the whole situation
26 and ask itself whether the defendant has satisfied
27 the Court that there is a fair or reasonable
28 probability of the defendant’s having a real or bona
29 fide defence.”



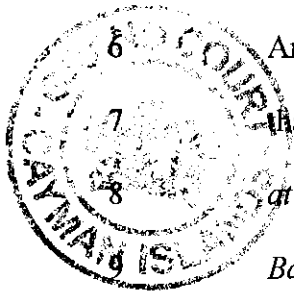
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That, in reverse, is the standard I have adopted in considering whether the plaintiff has shown a fair or reasonable prospect of success. And, contrary to the express prohibition arising upon an O.18 application, I think O.14, r.13 by its terms implies some consideration of the evidence where it expressly invites a plaintiff to show cause against a defendant's application by filing and serving evidence in reply."

18. I endorse Smellie C.J.'s view that a Defendant, to be successful on his application, is required to show that the Plaintiff's claim is unsustainable. I also agree that the test of reasonableness applies and if a Plaintiff is able to show there is a possibility of his claim succeeding then the application will fail.

Conclusions

19. In the Amended Statement of Claim and her Amended Reply to the Request for Further and Better Particulars the Plaintiff identifies the hazard which caused her fall as being the different level of flooring at the doorway, which she also contends fail to comply with the Cayman Islands Standard Building Codes. This is now the basis upon which the Plaintiff grounds her claim. Although there may be questions about how her pleadings were drafted by her previous attorney and although in the past she may have suggested different possible scenarios for the causation of her fall, both being areas that may be explored in cross-examination at trial when she seeks to prove her claim, it does not mean that her claim at this stage can be held to have no prospect of success.



1 20. The Plaintiff's reliance in her pleadings on the loss adjuster's report does not, as
2 the Defendant submits, mean that her claim is fanciful. Mr. Andrew Wilson from
3 Cunningham & Lindsey in his report dated 30 January 2013, when concluding
4 that he did not identify any potential hazard which could have caught or trapped
5 the heel of a shoe, was not advising on the scenario that is now put in the
6 Amended Statement of Claim. However, I note that he said on page 5 of his report
7 that *"There is a high difference of just under an inch between the strip of granite*
8 *at the threshold of the doorway and the timber covered floor service of the*
9 *Banking Hall. The leading edge of the threshold strip, facing the Banking Hall, is*
10 *chamfered to prevent chipping and so as not to present a trip hazard. However, if*
11 *the heel of a shoe were to be placed close to the leading edge of this small step,*
12 *then it could present a hazard as there would be potential for the heel to slip*
13 *forward off the front edge. Such an event could cause the wearer to lose their*
14 *balance and possibly stumble and fall."* He went on to conclude *"The only*
15 *significant hazard that we were able to identify in the area where the Claimant*
16 *fell, is the slight difference in height between the strip of granite across the*
17 *threshold of the doorway and a timber floor of the Banking Hall."*

18
19 21. I am satisfied that there remain genuine issues of material fact in this matter. The
20 Plaintiff now pleads that the threshold was in a hazardous condition and that she
21 fell while crossing the threshold and that this caused her accident. This is not a
22 matter in which I find the Plaintiff's claim to have no prospect of success and that

1 should be prevented. Accordingly I find this is not suitable for resolution by
2 summary judgment and do not order the dismissal of the Plaintiff's claim.

3

4 **Costs**

5 22. Having regard to the late amendments in the Statement of Claim and the Request
6 for Further and Better Particulars, which both formed part of my deliberations, my
7 preliminary view is to reserve the costs in relation to the two Summonses.
8 However, either party may if they deem it appropriate seek to make further
9 submissions on the issue of costs, before the order is perfected.

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.....
18 **The Honourable Mr. Justice Richard Williams**
19 **JUDGE OF THE GRAND COURT**

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