

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

SAINT VINCENT AND THE GRENADINES

CLAIM NO: SVGHCV2020/0001

BETWEEN:

**GABRIELLE M. HILL-JUNKE
a Minor, through Her Next Friend Robert Junke**

Claimant

and

SEA GRAPE LIMITED

First Defendant

MUSTIQUE COMPANY LIMITED

Second Defendant

WILLIAM B. MORTON JR.

Third Defendant

LEILA S. MORTON

Fourth Defendant

Appearances:

Mr. Joseph Delves with him Mr. Ron Jenkins for the Claimant
Mr. Stanley John QC with him Mr. Akin John for the 1st Defendant
Mrs. Mandella Peters and Mrs. Cheryl Bailey for the 2nd Defendant
Mr. Sten Sargeant with him Mr. Mikhail Charles for the 3rd and 4th Defendants

2022: February 3, 4;
April 26.

RULING

[1] **GILL, M.:** The court is faced with two applications for summary judgment, one by the 3rd and 4th defendants filed first, and the other by the 1st defendant.

Background

[2] The 3rd and 4th defendants, William B. Morton Jr. and his wife Leila S. Morton (“the Mortons”) are from Alabama, United States of America. They were frequent visitors to the island of Mustique in the State of St. Vincent and the Grenadines. Mustique is owned by the 2nd

Defendant, Mustique Company Limited (“Mustique Company”). The Mortons always travelled to Mustique with their twin children and rented a six-bedroom luxury villa named Sunrise House (“the Villa”) owned by the 1st defendant, Sea Grape Limited (“Sea Grape”). Sea Grape physically occupies the Villa through the presence of its butler, chef, housekeeper and gardener.

- [3] The Mortons invited the claimant’s family (“the Hill-Junkes”) to join them on vacation in February 2017. The Mortons and the Hill-Junkes (the claimant and her parents) arrived at the Villa on 16th February 2017. The claimant was twelve years old at the time.
- [4] The following morning, 17th February 2017, the Hill-Junkes joined Mrs. Morton and the twins for breakfast. After breakfast, the children went into the infinity pool on the premises. The claimant’s parents went to the exercise room on a lower level. Mrs. Morton remained at the breakfast table for a while.
- [5] The claim alleges that the claimant, while in the infinity pool, was lying on a raft in the shape of an alligator, which bumped against the edge of the pool and the claimant rolled off the raft and fell some twelve feet below into a stone retaining wall, thereby causing serious injuries to her face.
- [6] The claim is framed in general negligence and occupiers’ liability against all the defendants, Sea Grape as title owners of the Villa, Mustique Company as owners of the island and the Mortons as occupiers of the Villa and Mrs. Morton, in particular, who was allegedly responsible for supervising the claimant.

The Mortons’ application

- [7] The Mortons apply to the court pursuant to Part 15 and Part 26 of the Civil Procedure Rules as amended (“CPR 2000”). They are asking for summary judgment under CPR 15.2(a) against the claimant on the particular issue of liability, and under CPR 26.1(2)(i), that the claim form and statement of claim be dismissed, and that judgment be entered for them on a preliminary issue. They also claim prescribed costs on judgment.
- [8] The Mortons contend that the claimant’s claim against them has no real prospect of succeeding because on the admitted facts of all parties, they cannot be found in law to be

the occupiers of the Villa to owe a duty of care to the claimant. They say that this court can determine this issue whether or not it brings proceedings to an end as between the claimant and themselves, and on the sole factual issue between the claimant and Mrs. Morton as regards the assumption of supervision of the claimant, there is no real or viable prospect of Mrs. Morton being imposed with a duty of care and liability for the claimant's accident.

Sea Grape's application

- [9] Sea Grape finds it not only necessary to oppose the Mortons' application, but also to launch its own application for summary judgment pursuant to CPR 15.2(a) and for dismissal of the claimant's claim against it. Although title to the Villa is vested in Sea Grape, it contends that the Mortons were tenants with the power and authority to exclude or permit visitors including the Hill-Junkes. Sea Grape seeks an order for summary judgment on the basis that it owed no duty of care to the claimant, neither in occupiers' liability nor in general negligence, and cannot be liable for any such breaches as alleged in the claim, which must therefore fail against it. Sea Grape also seeks costs to be assessed under CPR 65.12.

The claimant's position

- [10] In negligence, the claimant pleads that at all relevant times, all defendants were jointly and severally responsible for her reasonable safety on the premises. As owner, occupier and promoter of, and joint economic participant in, the premises, as the case may be, the claimant says that the defendants and each of them owed a duty of care to her to ensure her reasonable safety.
- [11] On occupation specifically, the claimant's case is that all defendants exercised sufficient control over the Villa to constitute them occupiers. The claimant states that Sea Grape and Mustique Company jointly physically occupied the premises through their employees and agents, the on-site staff, and that the Mortons themselves physically occupied the Villa.
- [12] The Mortons and Sea Grape find common ground in trying to convince the court that the issue as to who is the occupier in law does not need fuller investigation or a trial. The Mortons' application is grounded on the contention that the claim is not a complex claim, and the case law is well settled. The claimant contends that both applications ought not to be granted as a preliminary point because this is a complex claim and as the applications

involve protracted arguments, this will require the court to embark on a mini-trial, and there are disputes of fact.

Issues

[13] The court must decide:

- 1) Whether the issues of occupiers' liability and general negligence in this case are suitable for summary disposition.
- 2) If so, who is/are the occupier(s)?
- 3) Whether the claimant has a real prospect of succeeding on the claim against the Mortons and/or Sea Grape.

The Law – Summary Judgment

[14] By virtue of CPR 15(2)(a) and CPR 15.6 the court may give summary judgment on a claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or on a particular issue of fact or law, whether or not the judgment will bring the proceedings to an end.

[15] The jurisprudence for summary judgment is now well developed and the authorities are numerous. The entering of summary judgment was addressed by George-Creque JA, as she then was, in **Saint Lucia Motor & General Insurance Co. Ltd. v Peterson Modeste**¹ where Her Ladyship opined:

“Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in **Swain v Hillman** is that the claim or the defence has no “real” (i.e. realistic as opposed to fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment.”

¹ SLUHC VAP 2009/0008 at paragraph 21

- [16] In **Dr. Martin G. C. Didier et al v. Royal Caribbean Cruises Ltd; Royal Caribbean Cruises v Medical Associates Ltd et al**,² now Pereira CJ highlighted the important distinction between a strike out application under Part 26 and one for summary judgment under Part 15 of CPR 2000, and held that in disposing of a claim under Part 15, the court is required to consider the legal issues in the case and then determine, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim. Judgment is on the merits.
- [17] Her Ladyship in **Didier**³ noted the Privy Council case of **Jones v The Attorney General**⁴ which approved the decision of the New Zealand Court of Appeal case of **Westpac Banking Corp v M M Kembla New Zealand Ltd**.⁵ Paragraphs 61 and 62 of **Westpac** say that on a summary judgment application the onus is on the defendant to prove on a balance of probabilities that the claimant cannot succeed, and summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues.
- [18] An application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the court and cannot be confidently concluded from affidavits and where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence.⁶
- [19] In **Sagicor Bank Jamaica Ltd v Taylor-Wright**⁷ the Privy Council held that the purpose of the rule in making provision for summary judgment about an issue is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.

² (2016) 89 WIR 277; SLUHC VAP2014/0024 and 2015/0004 at paragraph 23

³ Ibid at paragraph 26

⁴ [2003] UKPC 48, [2004] 2 LRC 194

⁵ [2001] 2 NZLR 298

⁶ Ibid, also at paragraph 62 (reproduced at paragraph 5 of *Jones v The Attorney General*, supra at note 4)

⁷ [2018] UKPC 12; (2018) 93 WIR 573 at paragraph 18

[20] In **Calland v Financial Conduct Authority**⁸ Lewison LJ, cited **Three Rivers District Council v Governor and Company Bank of England (No 3)**⁹ as sound authority for the proposition that the judge (master in this case) must carry out a critical examination of the material, and the fact that some factual and legal questions may be disputed does not absolve the master of his/her duty to assess the prospects of success. Further, **E D & F Man Liquid Products v Patel**¹⁰ is cited as authority for the proposition that in assessing the prospects of success of a claim or defence, the judge (master) is not required to abandon her “critical faculties”.

[21] Mummery LJ in **Doncaster Pharmaceuticals Group Ltd and Others v The Bolton Pharmaceutical Company 100 Ltd**¹¹ issued the following warning:

“It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given...A mini-trial on the facts under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice.

In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.”

[22] Complex claims involving complex issues of fact, as well as cases involving mixed questions of law and fact where the law is complex are inappropriate for summary judgment, so although judges occasionally fully investigate complex applications for summary judgment, the general rule however, is that the court cannot expect a party to bring forward its entire case at an interim hearing such as for summary application.¹²

[23] In **B.B Inc v Lewis Hamilton**¹³ Thom JA offered the following guidance:

“...it must be noted that the Privy Council in **Hallman Holding Ltd v Webster and Another** emphasised that the summary judgment procedure should be employed to

⁸ [2015] EWCA Civ 192, [2015] All ER (D) 158 at paragraphs 28 and 29

⁹ [2003] 2 AC 1 at p. 158

¹⁰ [2003] EWCA Civ 472

¹¹ [2006] EWCA Civ 661 at paragraphs 17 and 18

¹² Blackstone’s Civil Practice 2013 at paragraph 34:12

¹³ GDAHCVAP2015/0035, at para 11

dispose of short points of law and construction of simple contracts where there are no factual issues in dispute so as to necessitate a trial. Where however the legal issues are more complex and there are no factual disputes the court endorsed the view of the Honourable Chief Justice that in such circumstances they should be determined on an application to determine a preliminary issue.”

- [24] Negligence cases are often unsuitable for summary judgment. In the landmark case of **Swain v Hillman**¹⁴, the claimant alleged that he was struck and injured when a plank at a construction site fell on him suddenly without warning. The defendant disputed that he was an occupier and there was evidence that other parties, subcontractors, were on the site. The pleadings and affidavits raised various possibilities and inferences in relation to the issues of negligence and responsibility for the accident. The defendant brought a summary judgment application. The judge below dismissed it, even though he thought the case was “near to the borderline”. Lord Woolf MR, on appeal, stated:

“Those are matters which will have to be carefully considered by the judge at the trial. I am not seeking to indicate what his view should be on those facts. It is a matter to be dealt with by the judge at a trial and not a summary hearing. Useful though the power is under Part 24 it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where those are issues which should be investigated at the trial.”

- [25] On the unsuitability of summary judgment applications to these types of matters, Gilbert Kodilinye¹⁵ states:

“Summary judgment is given mainly in straightforward debt actions where there is clearly no defence and where an unscrupulous defendant would otherwise be able to prolong proceedings until a full trial with the attendant waste of time and costs. On the other hand summary judgment will not normally be appropriate for negligence and personal injury claims where the facts are more likely to be disputed.”

- [26] Similarly, Blackstone¹⁶ sets out the principle on summary applications and negligence claims in the following manner:

“Although there is nothing in principle preventing a claimant from applying for summary judgment in claims seeking damages for negligence, such cases invariably involve disputed factual issues, so it is rare for a court to find there is no real defence once liability is denied. It is unlikely to be appropriate to grant summary judgment to a defendant on the basis there was no duty of care in a novel situation (*Bishara v Sheffield Teaching Hospitals NHS Trust* [2007] EWCA Civ 353, LTL 26

¹⁴ [1999] EWCA Civ 2251

¹⁵ Gilbert Kodilinye, *Commonwealth Caribbean Civil Procedure* (4th ed. at p.7)

¹⁶ Blackstone’s *Civil Practice* 2013 at paragraph 34:18

26/3/2007). The question of whether a duty of care is owed often has to be decided in the light of all the facts and evidence.”

- [27] The submissions on these applications are substantial. However, I am cautious not to take a ‘sterile approach’ and dismiss the applications on that basis alone. On the authorities, a complex issue may be determined as a preliminary issue where there are no factual disputes.

Who is an occupier?

- [28] In this jurisdiction, the rules of common law determine who is an occupier. The meaning of occupier in the Occupiers’ Liability Act 1957 (UK) was set out by Lord Denning in the House of Lords in the leading case of **Wheat v E. Lacon & Co. Ltd.**¹⁷ as being used in the same sense as was used at common law in cases of occupiers’ liability for dangerous premises. “Occupier” is “...simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care to those who come lawfully onto the premises.”¹⁸

- [29] Lord Denning explained the doing away of the distinction between invitees and licensees, and classing them all as visitors, a common law process confirmed by the Act. The occupier owes all visitors, whether invitees or licensees, the same duty of care, which is the common duty of care. This duty in occupiers’ liability “is simply a particular instance of the general duty of care which each man owes to his ‘neighbour’”.¹⁹

- [30] The Law Lord’s exposition is invaluable in the translation of the general principle into its application to occupiers’ liability as to dangerous premises. This court places great reliance on the following passage in the judgment:

“...wherever a person has a significant 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

¹⁷ [1966] AC 552

¹⁸ At page 577 G

¹⁹ At page 578 A, B; also citing *Heaven v Pender* (1883) 11 QBD 503 and *Donoghue v Stevenson* [1932] AC 562 at page 578 B, C

entire control of the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share 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.”²⁰

- [31] Lord Denning considered the definition of “occupier” in *Salmond on Torts* (4th ed. (1965), P. 372) as “he who has the immediate supervision and control and the power of permitting and prohibiting the entry of other persons” and opined:

“There is no doubt that a person who fulfils that test is an “occupier.” He is the person who says “come in.” But I think that test is too narrow by far. There are other people who are “occupiers,” even though they do not say “come in.” If a person has any degree of control over the state of the premises it is enough. The position is best shown by examining the cases in four groups.”²¹

His Lordship then went on to analyse the past cases in four categories.

- [32] The duty owed at common law by an occupier of premises to a visitor as enunciated in ***Indermaur v Dames***²² is that the visitor “using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.”

The Mortons and occupiers’ liability

- [33] The claimant says that because the Mortons invited the Hill-Junkes to vacation with them in Mustique, they owed her a duty of care. The Mortons in their defence plead that they were joint visitors to the Villa. Whereas they paid for the rental for all the guests, there was also an agreement as to how the expenses for food and beverage were to be shared, but they deny that they were the occupiers of the property as a matter of law. Further, as a consequence of not being the “occupier” in law, they assert that they were under no duty to warn the claimant about the use of the pool and the inflatable floats. They state that the float

²⁰ At page 578 C-F

²¹ At pages 578 G – 579 A

²² (1866) LR CP 274, 288 per Willes J

did not constitute a trap or a dangerous and hurtful allurementsuch that there was a duty to warn the claimant from being tempted.

[34] The Mortons submit that the pleadings and affidavit evidence expose the legal issue between the claimant and themselves as to who is the occupier in this case, and that the evidence is uncontroversial and does not need further investigation.

[35] The Mortons contend that averments by Sea Grape that the “premises were occupied exclusively” by the Mortons²³ or were “under exclusive occupation of the premises”²⁴ cannot enjoin the Mortons with being the occupiers of the property at common law. They argue that it is unquestionable that they and their children, and the Hill-Junkes came onto the premises of Sea Grape. They entered onto the premises to fulfill a contract for rental of the Villa as paying guests of the property for a week.

[36] They rely on the case of **Adele Shtern v Monica Cummings**,²⁵ in which the claimant was an American tourist staying at a Jamaican hotel. (Jamaica has legislation on occupier’s liability). She was electrocuted and injured opening a refrigerator within the hotel. She sued the company that ran the hotel, the manager of the hotel and the respondent who owned the land on which the hotel stood, and was the controlling shareholder and director of the company. She lived on the land, but in a house rather than in the hotel itself. She also bought the refrigerator in question. The Jamaican Court of Appeal held that the company who ran the hotel was liable, but the respondent was not. The Privy Council, in dismissing the appeal, held that the respondent had no operational control over the hotel and “the mere fact that she was the owner of the refrigerator did not give any rise any duty of care on her part as an occupier towards the appellant.”²⁶

[37] The Mortons also cite the Antiguan case of **Audrey Barratt v Hawksbill Limited**.²⁷ In that case, Mrs. Barratt and her husband were vacationing at the Hawksbill Hotel operated by the defendant when on the third of her stay, she alleged that after leaving her room for dinner at

²³ Paragraph 3 of Sea Grape’s defence

²⁴ Paragraph 5 (iii) of Mustique Company’s defence

²⁵ [2014] UKPC 18

²⁶ Ibid at paragraph 21-22

²⁷ ANUHCv2009/0343, delivered January 25, 2012

the restaurant of the hotel, while walking in a dark area, she slipped and fell suffering injury to her ankle. Remy J, after a full trial, at paragraph 23 of the judgment, set out that as a paying guest of the hotel, the claimant clearly fell within the definition of an “invitee” based on the leading case of **Indermaur v Dames** where an “invitee” was defined as a person who enters upon business premises which concern the occupier, and upon his invitation express or implied”. The claim was rejected based on the evidence and the claimant's lack of credibility. On the particular facts, the court ruled that the defendant did not fail in its duty of care to Mrs. Barratt but that even if there was a breach of duty, the accident was caused by the claimant's own fault and not that of the defendant.

[38] The Mortons posit that they were not in operational control of the Villa. Operational control was dealt with by Viscount Dilhorne on the facts in **Wheat v Lacon** citing Lord Macnaghten in **Tennant v Smith**.²⁸ The Mortons point out that for one week of rental, they were not entitled to sublet the Villa to anyone else. Bookings could have been done only by the Mustique Company, and as soon as the week's stay was over, the Mortons and indeed all guests likewise had to quit the premises forthwith and leave the island. They submit that the court can draw no other inference than Sea Grape was in operational control of the Villa because it employs a person to manage the property, a butler for food and beverage service, a chef to prepare meals for guests, a housekeeper for chambermaid service and a gardener to tend terraced grounds.

[39] Thus, they submit that the cases of **Shtern** and **Barratt** clearly demonstrate that the question of whether they as paying hotel guests could ever be said to be an occupier of premises for the purposes of occupier's liability ought not to even arise as a question of law to be determined. They are adamant that it would be unsustainable for any party to advance that their physical occupation of the Villa for one week can support a finding in law of them being occupiers.

[40] The Mortons refer to the observations of Lord Nicholls in **Stovin v Wise**²⁹ as very instructive. They posit that if the pool was a danger in and of itself, the Mortons did not create it and the

²⁸ [1892] AC 150,162; *Wheat v Lacon* at 573 G – 574 A

²⁹ Reported at [1996] AC 923, [1996] 3 All ER 801, 806 a-j, 807 a-j, 808 a-j and [1996] 3WLR 388; recently discussed by Sandcroft M [Ag.] in *Shane Avril v The Attorney General of Saint Lucia* SLUHCv2019/0509

common law does not impose a duty to warn a third party of any danger (if there is one). The common law further imposes no duty on the Mortons to take positive action, for example, to place warning signs regarding the pool and carry out risk assessments and the like, regardless of whether they rented the Villa prior to the claimant's fall. Therefore, they submit that the text messages relied on by the claimant between Mrs. Morton and the claimant's mother intimating that they should have warned her about the pool, are without any legal duty.

Sea Grape and occupiers' liability

[41] Sea Grape states that the pivotal question is whether Sea Grape as landlord had a sufficient degree of control of the premises and in particular, the infinity pool, to create the relationship of occupier and so give rise to a duty of care to the claimant who was at all material times the guest of its tenants the Mortons, as alleged, or whether the latter had such control.

[42] In its defence, Sea Grape contends that it employed staff who provided daily service to short-term renters of the Villa including a property manager, chef, housekeeper and gardener, none of whom occupied the premises but that purpose-built accommodation for staff stood erected on Lot 52 but separate and distinct from the Villa and as a result, the staff had no benefit from the rented six-bedroom Villa or the amenities on the premises, which were occupied exclusively by the Mortons and their guests or invitees, pursuant to The Mustique Villa Rentals Terms and Conditions, as set out in a document which was signed by Mrs. Morton dated 16th February, 2017 and upon which it relies, wherein, among other things, she acknowledged and agreed that she would be *"....responsible for all acts of the undersigned guest's family and all other persons invited into the villa...."*. It pleads that it did not invite the Mortons to host guests on the premises nor participated with Mustique Company in a joint enterprise as alleged. It denies that it owed the claimant the duty of care as occupier of the premises and/or in general negligence as alleged in the statement of claim or at all.

[43] Sea Grape contends that: -

- 1) under the rental agreement, the power to admit people to the premises and to exclude people from them during the tenancy, belonged to the Mortons as the tenants and not to Sea Grape;

- 2) because the house staff who are its employees occupy distinct accommodation on the same extensive parcel of land but separate from the premises, this does not transfer these rights to Sea Grape.
- 3) Furthermore, even if it may be entitled as landlord to demand from the Mortons as tenants, admission to the premises for the house staff to carry out the contract under the tenancy, this does not amount to control of the premises for purposes of occupiers' liability.

[44] Sea Grape submits that these issues, that the power to control the admission or exclusion of visitors from the premises resided with the Mortons as tenants and not with Sea Grape, may be decided on the documentary evidence.

[45] Both Sea Grape and the claimant dismiss the Mortons' authorities as not assisting them and insist that the Mortons were occupiers of the Villa for the purposes of occupiers' liability.

[46] Sea Grape argues that **Adele Shtern** is not authority for, nor does it support the proposition that because they were hotel guests, the Mortons could not be said to be occupiers for the purposes of occupiers' liability. Rather, Sea Grape submits, the findings in **Adele Shtern** beg the question as to whether as guests, the Mortons were tenants under the rental agreement or mere licensees and therefore the degree of control which they exercised over the premises, and also whether they or Sea Grape invited the Hill-Junkes unto the premises.

[47] Sea Grape contends that **Barratt** does not support the proposition that the Mortons could not owe the claimant a duty of care as occupiers of the premises because they were hotel guests. On that issue, Sea Grape submits, it was undisputed that the Barratts were paying guests of Hawksbill Hotel, which underscores the importance of the disputed issue of fact to be determined by the court in the instant case, as to whether or not the Mortons were tenants or mere licensees as hotel guests and the degree of control of the premises which they in fact had.

[48] Sea Grape posits that the pivotal question must therefore be, whether those are disputed issues of material fact or material facts which need to be ascertained by the court and cannot confidently be concluded on affidavits. If the court is inclined to be persuaded that judgment can be properly arrived at otherwise than after a full hearing of the evidence, then Sea Grape

seeks a determination as to if it owes the claimant a duty, and submits it does not owe any such duty of care as alleged and that summary judgment should be entered against the claimant on its behalf.

- [49] The claimant bases her claim on allegations that she was at all material times a visitor to the premises as a guest of the Mortons, whom Sea Grape says were its tenants. The Mortons state in their affidavit evidence that they were repeat short-term renters, who paid for a week's stay and the claimant's parents agreed to pay for whatever food and beverage they themselves consumed. Sea Grape contends that these circumstances raise disputes as to whether the claimant was as a matter of fact and law an invitee, to whom Sea Grape as the landlord owed a duty of care under occupiers' liability as alleged.

No pleading and no evidence of a tenancy between Sea Grape and the Mortons

- [50] The Mortons accept that the singular fact that can affix the Mortons with being the occupier at law is if it were found as a fact that they were tenants of Sea Grape. Unfortunately for Sea Grape, the Mortons contend, Sea Grape has two hurdles which it cannot surmount.
- [51] First, the Mortons point out that it was never Sea Grape's pleaded case that a relationship of landlord and tenant existed between the Mortons and themselves. They contend that Sea Grape is not allowed to create issues of fact on affidavit evidence to derail the Mortons' application by relying on facts not pleaded in Sea Grape's defence. They rely on the Privy Council case of **Sagicor Bank Jamaica Limited v Taylor-Wright**³⁰ as clear authority that a party is not allowed to depart from its pleaded case on the hearing of a summary judgment application. At paragraph 19 of the judgment, Lord Briggs stated:

"The court will, of course, be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as it is relevant) provides as follows:

"(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.

...

(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case."

³⁰ [2018] UKPC 12

Para.8.9A further provides:

“The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.”

- [52] The Mortons say that these considerations are applicable in the instant case as our own rules contain identical provisions. Thus, the Mortons submit that the bald statement by Sea Grape’s property manager in his affidavit, that the Mortons were tenants who had exclusive control of the subject premises, cannot be relied upon for not having been foreshadowed by their pleadings.
- [53] Secondly, the Mortons contend that it is well established that a tenancy must be created by a demise, in other words, by a lease for a fixed period or there must be evidence that the parties intended to enter into such a relationship.³¹ They state that the cases clearly demonstrate that an estate in land must be created before a tenancy can be said to exist.³²
- [54] In the present case, the Mortons argue that the only evidence that can be accepted at trial is that the Mortons were renters of the property for a week. They posit that there is no document mentioned or relied upon by the claimant or Sea Grape to suggest that a relationship of landlord and tenant existed between Sea Grape and the Mortons or that there was the intention to do so. They say that there can be no reasonable suggestion on the pleadings nor in the affidavits in response to the Mortons’ application that Sea Grape had all intention of passing an estate in land to the Mortons when their agent, the Mustique Company, quite casually rented them the Villa as known repeat guests.
- [55] According to the Mortons, it is clear on the facts set out in the affidavits of the claimant and Sea Grape that the Mortons fall clearly within the third bracket of Lord Denning’s categorization in **Wheat v Lacon**³³ as licensees with a right to occupy the Villa with other known guests as part of their party for the week. They are of the view that the court is

³¹*Booker v Palmer* [1942] 2 All ER 674

³²*Isaac v Hotel de Paris Limited* (Trinidad and Tobago) [1959] UKPC 28

³³[1966] AC 552 at 579 G

constrained to come to no other conclusion and maintain that there is simply nothing further to investigate on this issue at trial.

[56] Sea Grape formulates questions for the consideration of the court as follows:

- Is the power to admit people to the premises and to exclude people from them during the tenancy a power and right which belonged to the Mortons as the tenants and not to Sea Grape?
- Does the fact that the house staff who are its employees occupying a portion of the premises for their accommodation, transfer these rights to Sea Grape?
- Even if it was entitled as landlord to demand from the tenants, admission to the premises for the servants and workmen required to carry out the contract under the tenancy, does this amount to control?
- Did Sea Grape retain possession and control of the infinity pool?

The claimant's responses

[57] The claimant submits that it is more than arguable that the Mortons were occupiers and points out that significantly, Sea Grape and Mustique Company agree with her. The claimant finds it difficult to understand how the Mortons can be summarily deemed not to be occupiers within the broad and flexible statement of Lord Denning in **Wheat v Lacon**. The claimant and her parents were not the occupiers. The claimant asks, "If the Mortons were not occupiers, nor was the owner, Sea Grape, who then was occupying? The claimant submits that clearly the Mortons, from the time they arrived, had some degree of control sufficient to empower them to allow entry to the claimant and anyone else for that matter. They were the ones who told the claimant and her parents "come in".

[58] The claimant contends that the case of **Kelly v Woolworth & Co**³⁴ negatives the Mortons' contention that were present for a mere week, and this made them co-invitees and not occupiers. In that case, a company in the business of operating a restaurant entered into a

³⁴ [1922] 2 IR 5

contract with a promoter, a Mrs. Cooper, who hired restaurant rooms from the defendants and sold tickets to an evening dance held in the restaurant rooms from 8 pm to midnight. The company was held to occupy the premises, since it had not created a landlord-tenant relationship with the promoter or the dancers, and had installed its own employee on the premises to supervise catering during the dance. The company earned income from sales of beverages. The promoter earned income from ticket sales. The plaintiff, one of the ticket-holders tripped on defective linoleum and sustained injuries. The court below ruled that Mrs. Cotter was an occupier thus “by virtue of the contract with the owner... the plaintiff was a guest of Mrs. Cotter”³⁵. Mrs. Cotter had been in control for those four hours, having sole power to invite or to admit people who purchased tickets from her or through her, and to exclude whom she chose. On appeal, it was held that the plaintiff had a good cause of action against both the company and the promoter, Connor LJ, on the ground that there was a joint venture which made both parties responsible if they failed to take reasonable care for the safety of their guests, and Ronan LJ, on the ground that the restaurateurs had not parted with their estate, possession, or occupation of the rooms, had authorised Mrs. Cotter to invite the plaintiff and that the plaintiff was on the premises by their invitation. The short time for which Mrs. Cotter rented the rooms was, therefore, irrelevant.

[59] Charlesworth³⁶ sets out this interpretation of the **Kelly v Woolworth** case as follows:

“In such a case, the guests are the invitees of the occupiers. But, in addition to the occupiers, the promoters of the dance or other entertainment may be liable as the persons who have given the invitation or license.”

[60] The claimant attacks the Mortons’ core argument that they were not occupiers as being comprehensively rebuffed by the authorities, including the ones they rely on.

[61] In relation to Sea Grape, the claimant seeks to redirect and emphasize focus on Lord Denning’s control test.

[62] In occupiers’ liability law, the claimant explains, one may occupy premises through his direct physical presence, through his indirect physical presence achieved through the physical

³⁵ Ibid, pages 5-6

³⁶ Charlesworth on Negligence, p. 222 (Sweet and Maxwell, 1956).

presence of others including employees and agents, and through other means of retaining possession and/or sufficient control of the premises, even in the absence of physical presence³⁷.

[63] Further, the claimant makes the point that even if a party is not in occupation of premises, it nevertheless may have occupiers' liability if it has been engaged in a joint economic enterprise with respect to the premises, or has promoted the commercial exploitation of the premises. **Kelly v. Woolworth & Co**³⁸ is instructive in this regard. In what the claimant refers to as amounting to a complete response to Sea Grape's arguments on the legal effect of control of, admission to, and exclusion from the premises, Ronan LJ said³⁹:

"If the transaction had been a lease, Mrs Cotter would have had this power as owner in possession pro tem without any grant of it by the defendants; but as it was not, defendants had alone this power. They expressly authorized Mrs Cotter to invite whom she pleased and issue tickets which would admit. Qui facit per alium facit per se. Surely it cannot be contended that Mrs Cotter was the defendant's agent duly authorized to invite and give tickets of admission to their premises, and none the less so because she paid £4 for this authority, which she paid out of moneys she got from the ticket-holders.

The case says the plaintiff was neither a trespasser, a licensee nor an invitee. Does this mean on defendants' premises or on Mrs Cotter's premises - a trespasser as regards the defendants or as regards Mrs Cotter? It plainly must be as regards the defendants. No such question could arise as to Mrs Cotter. Then why was she not a trespasser as regards defendants? The only possible ground is because they had authorized Mrs Cotter to invite her, and therefore she was there in virtue of their invitation, and they had hoped to make a profit out of everyone that came". (*Emphasis added*)

[64] O'Connor LJ emphasised the effect of the commercial relations thus:

"This entertainment, on the clear facts of the case, was, in my opinion, a joint venture of Mrs. Cotter and the defendants, the former taking the dancing fees, and the latter the profits of the refreshments. Both parties were therefore jointly responsible if they failed in reasonable care for the safety of their guests;...."⁴⁰

[65] Charlesworth⁴¹ confirms this interpretation of the case as follows:

³⁷ Clerk and Lindsell on Torts, paragraphs 12-10, 12-11

³⁸ Supra at note 33 (1922 2 IR 5)

³⁹ Ibid at page 10

⁴⁰ Ibid at page 11

⁴¹ Charlesworth on Negligence, p. 222 (Sweet and Maxwell, 1956).

“In such a case, the guests are the invitees of the occupiers. But, in addition to the occupiers, the promoters of the dance or other entertainment may be liable as the persons who have given the invitation or license.”

[66] The claimant submits that the preliminary evidence, yet to be ventilated, supports the allegations of a joint economic enterprise, and contends that in addition to being an occupier via its on-site staff, servants, and/or agents, Sea Grape and Mustique Company were also occupiers because they participated in a joint economic enterprise to commercially exploit the subject premises by generating substantial short-term rental income, and promoted the premises for such short-term rentals.

[67] The claimant further submits that the details of the employment of the on-site staff are critical to the resolution of this sub issue. For example:

- a. The rental terms and conditions posted on Mustique Company’s website state: “The villas are fully staffed by the owners with a cook, maid, and gardener, and in many instances, additional personnel. Members of household staff are employees of the villa’s owner and not of the Company.”
- b. Sea Grape has stated that it employed on-site staff including a property manager, chef, housekeeper and gardener on the premises, but denies that it occupied the premises through these staff⁴².
- c. Mustique Company has alleged “...the staff at Sunrise – the Second Defendant was not the true employers of those persons...”⁴³
- d. However, the Mortons have alleged: “The Second Defendant employs the Villa Staff on the Mustique Island through its Human Resources Department. The Second Defendant pays the Villa Staff’s wages, national insurance and income tax contributions.”⁴⁴

⁴² Paragraph 3 of Sea Grape’s defence

⁴³ Paragraph 2(b)(vii) of Mustique Company’s defence

⁴⁴ Paragraph 7 of the Mortons’ defence

[68] Annexed to the claimant's submissions is a "schedule of disputed facts and mixed fact and law". Although numbered differently here, the list of ninety-five (95) items includes the following (verbatim):

1. *The on-site staff physically occupied the Premises*
2. *The First Defendant exercised control over the Premises through the on-site staff which physically occupied it, and through other representatives of the Mustique Company*
3. *The on-site staff and other representatives of the Mustique Company were the employees and agents of the First Defendant*
4. *The Second Defendant exercised control over the Premises through the on-site staff which physically occupied it, and through other representatives of the Mustique Company*
5. *The on-site staff and other representatives of the Mustique Company were the employees and agents of the Second Defendant*
6. *The Third and Fourth Defendants physically occupied the Premises and exercised control over the Premises*
7. *The Third and Fourth Defendants had the power to allow Claimant and her parents to enter the Premises, and to exclude them from it*
8. *The Third and Fourth Defendants had the power to eject Claimant and her parents from the Premises*
9. *The concealed ultimate beneficial owner ("UBO") of the Premises shared control of the Premises with the other Defendants, and exercised control directly through direct personal intervention and physical presence on the Premises, and indirectly through the on-site staff*
10. *The UBO directed the Property Manager and other on-site staff in the management of the Premises*
11. *The First Defendant, Second Defendant, Third Defendant, Fourth Defendant and the UBO shared control over the Premises, and jointly occupied it*
12. *The First Defendant and the Mangrove Trust and their respective nominee service providers and the agents and alter ego of the UBO*
13. *The First Defendant, Second Defendant and UBO were engaged in a joint economic enterprise to exploit the Premises commercially for profit through regular short-term rentals to high net worth vacationers*
14. *The First Defendant, Second Defendant and UBO shared the profits generated from the Premises.*

Determination – occupiers' liability

[69] In this ruling, I have taken the time and effort to set out a large portion of the parties' submissions, and still run the risk of being accused of not taking certain arguments into consideration. I have done this to illustrate that the issue as to who is the occupier (or who are the occupiers) in this case is clearly not suitable for summary determination. Whereas the question, "Who is the occupier?" on its face appears to be a short point of law, it is by no

means a straightforward issue here, and certainly not “the clearest of cases”.⁴⁵ I bear in mind that summary judgment can be given on complex legal issues where there are no factual disputes. However, I am in agreement with the claimant that several (the claimant actually says ‘multiple’) disputes of fact arise, which makes summary judgment inappropriate in this case. It is not simply a situation that further investigation is not required, but the court’s determination of facts in dispute is not allowed at this stage.

[70] The Mortons appear to be under what in my view is a misapprehension that one is not an occupier if he does not fall within the four categories set out by Lord Denning in **Wheat v Lacon**. To my mind, the test is whether the Mortons had a sufficient degree of control of the Villa at the time the claimant sustained her injuries. It appears that the Mortons had the power to invite or exclude whomever they wanted and did in fact invite the Hill-Junkes. It appears also that the Mortons’ physical occupation of the Villa for a week only is not a bar to a determination of occupation in law.

[71] Even if Sea Grape is not permitted to rely on its affidavit evidence in its application as it did not plead the relationship of landlord and tenant as between itself and the Mortons, in my view, it is still more than arguable that the Mortons exercised a sufficient degree of control over the premises at the material time to constitute them occupiers.

[72] If Sea Grape can somehow be allowed at trial to establish that a tenancy agreement was created, there is authority to show that the control test may nonetheless apply. I note that Lord Briggs in **Sagicor Bank Jamaica Limited v Taylor-Wright**⁴⁶ explained that on a summary judgment application, the court is not confined to the parties’ statements of case and His Lordship acknowledged a defence “(whether pleaded or deployed in evidence) on a summary judgment application....”. There is also the issue as to whether, although Sea Grape in its defence did not use the specific terms of landlord and tenant, the factual matrix reveals such a relationship. Further, Sea Grape denies that there was a joint enterprise with Mustique Company.

⁴⁵ *Flat Point Development Ltd v Canisby Ltd* ANUHCVP 2016/0005 per Blenman JA at paragraph 37

⁴⁶ [2018] UKPC 12 at paragraphs 20 and 21

[73] The disputes on the issue of occupiers' liability, many highlighted by the claimant (at paragraph 68 above) make it unsuitable for summary determination. Further, In the circumstances, I am of the view that the claimant has a real prospect of succeeding on the issue of occupiers' liability by showing that both the Mortons and Sea Grape are occupiers in law. Therefore, I decline to exercise my discretion to grant summary judgment to determine that particular issue in this case.

Negligence (general)

[74] I do not propose to delve into the parties' submissions on this area to the extent I have done on occupiers' liability.

[75] One aspect of the Mortons' application in respect of general negligence relates to Mrs. Morton in particular. As mentioned earlier, the application states that on the sole factual issue between the claimant and Mrs. Morton as regards the assumption of supervision of the claimant, there is no viable prospect of Mrs. Morton being imposed with a duty of care and liability for the claimant's accident. They further assert that the claimant cannot explain how the accident occurred beyond what is pleaded in the statement of claim and there is no reliance on the doctrine of *res ipsa loquitur*. They state that there is no eyewitness and no allegation that any defendant whether by themselves, their servants and/or agents did any act that caused the injury and the claimant's case is based on omissions.

[76] The claim alleges that Mrs. Morton agreed to remain at the breakfast table while the children were swimming and that she told the claimant there were rafts in the closet near the pool and took her to select one. The evidence of the claimant's mother is that Mrs. Morton said she would supervise the children and that without that assurance, she would not have left the claimant to swim in the infinity pool. Mrs. Morton denies that she expressly or impliedly promised to supervise the claimant and swears that no one ever asked her to be responsible and/or supervise the claimant. The Mortons contend that the test in **Caparo Industries Plc v Dickman**⁴⁷ to establish a duty of care in Mrs. Morton has not been satisfied. Even if it is found as a fact that that Mrs. Morton agreed to supervise the claimant, the Mortons submit that to impose a duty of care on her, the claimant must show that she possessed a special

⁴⁷ [1990] UKHL 2

skill and undertook to apply that skill to assist the claimant's parents in supervising her and there was a direct and substantial reliance placed on that skill.⁴⁸

- [77] The Mortons point out that there is no allegation against Mr. Morton in respect of supervision of the claimant. The claimant insists that based on a statement Mrs. Morton allegedly made to the claimant's mother after the accident in relation to the pool, the Mortons knew that the pool was dangerous - "I should have told you about that pool. It's so dangerous. We were so afraid of it when the kids were younger." The claimant submits that "we" includes Mr. Morton. Further, issues of fact arise as to whether the infinity pool was indeed dangerous.
- [78] The Mortons also raise the issue of contributory negligence on the part of the claimant. The claimant contends that the common law position on contributory negligence with respect to a child is not clear.
- [79] The Mortons submit that the claim is based on omissions. It particularizes the failure of the defendants to take any or reasonable care to ensure that the claimant, a minor would be reasonably safe using the premises, in relation to, among several other things, the use of the inflatable raft, markings, warning signs, instructions, clear and conspicuous notices for use of the pool without adult supervision, restrictions and fencing. The claimant submits that omissions can ground claims in negligence, especially on an occupier's omission.⁴⁹ Notwithstanding the Mortons' position on omissions, the claimant notes that it is part of the Mortons' case that Sea Grape and Mustique Company are liable in negligence because those defendants failed or omitted to do various things.
- [80] Sea Grape states that there are conflicting authorities on the point that once the doctrine under **Indermaur v Dames** as regards a visitor on premises applies, this would exclude the application of the general duty of care in negligence under the doctrine in **Donoghue v Stevenson** from also having application. The Mortons are of the view that this argument by Sea Grape holds no sway. The claimant also dismisses this ground as artificial and overly technical.

⁴⁸ Citing *Stovin v Wise* [1996] AC 923, [1996] 3 All ER 801, [1996] 3 WLR 388; *Capital and Counties Plc v Hampshire CC* [1997] QB 1004, [1997] 2 All ER 865, [1997] 3 WLR 331

⁴⁹ *Stovin v Wise* [1996] AC 923, 944 D and 945 F

- [81] Further, Sea Grape avers that there was no danger which may be said to be unusual to the claimant. It refers to the statement of claim where it is pleaded that on arrival at the Villa, Mrs. Morton, having introduced the Hill-Junkes to the villa staff, the butler and Mrs. Morton then gave the Hill-Junkes a tour of the Villa and that they passed by the pool several times. Hence, Sea Grape contends that they had full knowledge of the architecture of the infinity pool, which knowledge was in all the circumstances sufficient to avert the peril arising from the alleged unusual danger about which the claimant complains. Sea Grape also denies knowledge of the storage closet and the rafts therein and that the raft in question was a trap for a twelve-year-old. It alleges that the premises were neither in a hazardous nor dangerous condition.
- [82] The claimant submits that matters such as proximity, liability, extent of duty of care, what amounts to reasonable care and the like are matters for trial.
- [83] Further or alternatively, Sea Grape submits that by reason of the liability clause contained in the Mustique Rental Agreement, the Mortons and/or the claimant's parents at all material times have held harmless, released or otherwise agreed to indemnify Sea Grape from any liability whatsoever arising from any claim in respect of any injury or damage that may be occasioned to the claimant through her use of the premises.
- [84] The claimant finds this contention by Sea Grape to be puzzling. The claimant points out that her parents did not sign any such waiver nor indeed any document related to their stay at the Villa. The subject document, called "*Mustique Villa Rental Terms and Conditions*", is attached to the defence and does not bear the signature of either of the claimant's parents. Likewise, neither does the copy exhibited to the affidavit in support of the summary application. Further, the evidence of both the Mortons⁵⁰ is that the claimant's parents "were not asked to fill out any paperwork".
- [85] The claimant also submits that the persons to whom the benefit of the indemnity clause is directed are "the undersigned". The clause reads as follows:

Neither the company nor the villa owner, nor any employees and agents of either, shall be liable for any injury, death, property loss or damages occurring to any occupant of a villa or user of the island, and the undersigned guest hereby agrees to hold the Company and the villa owners, and all employees and agents thereof, harmless from any and all

⁵⁰ Affidavits of William B. Morton J, and of Leila S. Morton at paragraphs 20 and 19 respectively.

claims, suits, liabilities, damages, and expenses of every kind, including without limitation, attorney's fees and costs of litigation or arbitration, arising out of any claim by or in favor of any person resulting from injury, death or property loss or damage occurring to any person in the undersigned's party or any person using the villa as an invitee of either the undersigned or person in the undersigned's party, whether such injury, death, loss or damage occurs on Mustique, in or upon the surrounding waters, during transit to and/or from Mustique.

[86] The claimant posits that this purported indemnity differentiates between the 'undersigned guest' and 'invitees of guests' or persons in the undersigned's party. It captures only guests and specifically omits persons who were invitees of guests. The claimant asserts that the claimant's parents were not 'the undersigned' nor the 'undersigned guest', but merely 'invitees of guests'. Further, the clause explicitly recognizes that invitees of guests – far from being barred from suing Sea Grape and Mustique Company – may in fact assert claims and bring suits “arising out of any claim by or in favor of any person resulting from injury, death...occurring to.... any person using the villa as an invitee of either the undersigned.”

[87] It is startling that the Mortons and Sea Grape are asking the court for summary judgment on the issue of general negligence in this matter. The claim alleges that Mrs. Morton undertook to look after the claimant, and her parents relied on that undertaking. This is a hotly disputed fact in this case and obviously, a matter for trial. This court is not convinced by the Mortons' argument that for a duty of care to arise, the claimant must show that Mrs. Morton possessed a special skill and the claimant's parents relied on that skill. The claimant contends that the Mortons were very familiar with the premises and knew or ought to have known that the infinity pool presented, at least, some risk. The question of whether the Mortons owed a duty of care has to be decided after the court makes a determination of the disputed facts. If the findings of fact are in favour of the claimant, including the circumstances surrounding Mr. Morton, then in my view, it would be reasonable for the court to affix a duty of care on the Mortons in accordance with the **Caparo** principles. The Mortons' reliance on the case of **Perry & Another v Harris**,⁵¹ on the issue of supervision of children in the context of what positive steps a reasonable parent would take for the safety of a child, is criticized by the claimant as contradicting their arguments on omissions. The claimant highlights the

⁵¹ [2009] WLR 19

statement of Lord Phillips at paragraph 34 which reads, “There is a dearth of case precedent that deals with the duty of care owed by parents to their own children or other children when they are playing together.” It appears that this area of the law is not settled.

[88] Sea Grape’s contention that there is no real substance to the claimant’s allegations in relevant respects is indeed asking this court to make findings that facts on which the claimant relies cannot be substantiated. On the documents before the court, in my view, this is in stark contrast and in direct contravention of the rules and authorities governing summary judgment.

[89] The claimant dismisses Sea Grape’s submission that there was no danger which could be said to be unusual to the claimant given that she and her parents were given a tour of the Villa and passed the infinity pool several times. The claimant disputes that any of these facts diminish the danger, are sufficient basis to impute knowledge of the danger to the claimant or constitute fault on the part of the twelve-year-old child. These are matters for trial. Should Sea Grape succeed in establishing partial fault by the claimant, the claimant argues that it is not enough to cause a summary dismissal of the claim. Contributory negligence is an issue raised by the defendants. The claimant maintains that she did not contribute to the accident in any way. As Denning LJ stated in **Slater v Cross**:

“Where knowledge of a danger is not such as to render the accident solely the fault of the injured party then it is not a bar to an action but only a ground for reducing the damages. So here the knowledge of the Plaintiff of danger is not a complete bar. It is a factor of contributory negligence⁵²”;

Determination – general negligence

[90] I agree with the claimant that it would require a full determination of the facts for the court to find that the instant claimant was wholly at fault. Whether the claimant knew, or ought to have known of the danger, if any, posed by the architecture of the pool by the use of the raft in the pool, whether either the particular construction of the pool, or the combination of the raft and the pool, constituted a hidden danger, an unusual danger, or any other peril are questions of fact for the trial judge.

⁵² [1956] 2 ALL ER 625, at page 628

[91] I find that summary judgment is inappropriate and unsuitable, particularly in light of the disputed issues of material facts in this case. It is more than arguable that a finding of facts alleged by the claimant can reasonably ground a duty of care owed to her in general negligence by both the Mortons and Sea Grape.

[92] Before concluding, I feel constrained to do so and I urge all parties to give serious consideration to explore mediation of this matter. A child was seriously injured while vacationing with her family on the invitation of friends to a luxury villa in the world-renowned island of Mustique. Surely, it must be in the interest of all parties to have an amicable resolution. Apart from further costs being incurred, concerns must be raised as to the implications for all parties of a lengthy, protracted and highly contentious legal process. In furtherance of the overriding objective, this matter cries out for mediation.

Conclusion

[93] Summary judgment is inappropriate in both the Mortons' and Sea Grape's applications and in both aspects of occupiers' liability and general negligence. This matter involves material competing facts and legal issues. On the pleadings and evidence before the court at this stage, I am not satisfied that none of the claims can succeed. To the contrary, I am of the view that the claimant has a real prospect of succeeding against both applicants on both features of the claim. Whereas the submissions of the Mortons and Sea Grape urge this court to determine the matter summarily, especially as to who is the occupier in law, to save time and costs, in my view, this amounts to what Sedley LJ in **Bishara**⁵³ referred to as "a false economy".

Order

[94] Based on the foregoing, it is hereby ordered as follows:

- (1) The Morton's application for summary judgment is dismissed.
- (2) Sea Grape's application for summary judgment is dismissed.
- (3) The Mortons shall pay the claimants costs of the application in the sum of \$2,000.00.
- (4) Sea Grape shall pay the claimant costs of the application in the sum of \$2,000.00.

⁵³ [2007] EWCA Civ 353 at paragraph 14

[95] Finally, I thank Counsel for their most useful submissions in this matter.

Tamara Gill
Master

By the Court

Registrar