

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 2009/0038

BETWEEN:

**CRAIG WALLACE
CODY WALLACE
CAMERON WALLACE**

(Personal Representative of the Estate of Caroleen Wallace, deceased)

Claimants

And

ANGUILLIA DEVELOPMENT CORPORATION LIMITED

(Trading as Cuisinart Resort & Spa)

Defendant

Appearances:

Mr. Gerhard Wallbank and Ms. Merlanih Lim for the Claimants
Mrs. Tara Ruan for the Defendant

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2011: November 14, 28

2012: February 1
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JUDGMENT

[1] **BLENMAN, J:** Mrs. Caroleen Wallace, now deceased, filed a claim against Cuisinart Resort and Spa (Cuisinart) who was her employer in which she claimed special and general damages for negligence on the basis of breach of its common law duty of care, which she said resulted in personal injuries and illness to her. She also alleged that Cuisinart had wrongfully terminated her services while she was ill and was receiving medical attention.

- [2] In the alternative, Mrs. Wallace said that Cuisinart breached an implied term of her contract by not ensuring a safe system of work and terminated her employment unlawfully.
- [3] She therefore sought a number of reliefs from Cuisinart including a number of declarations, general damages and special damages in the sum of US\$759,065.62.
- [4] Cuisinart denies that it was in any way negligent or that it breached its common law duty of care that it owed to Mrs. Wallace.
- [5] Cuisinart says that it did not breach any implied terms of the contract.
- [6] Cuisinart also says that Mrs. Wallace unlawfully and improperly absented herself from duties over long periods of time without submitting medical coverage or obtaining the requisite leave. Accordingly and in accordance with the Cuisinart's employment rules, it treated her as having resigned and subsequently accepted her resignation.
- [7] In the circumstances, Cuisinart maintains that Mrs. Wallace is not entitled to receive any compensation or damages nor is she entitled to receive any declaration.
- [8] Having filed her claim, regretfully, Mrs. Wallace passed away before the trial of the claim. Subsequently, her children obtained Letters of Administration on behalf of her Estate and continued her claim as the personal representatives of her Estate. Her children's names are Craig Wallace, Cody Wallace and Cameron Wallace; collectively they are referred to as the Claimants.

Issues

- [9] The issues that arise for the Court to resolve are as follows:
- (a) Was Cuisinart in any way negligent towards Mrs. Wallace, deceased, and/or did it breach its common law duty of care that it owed to Mrs. Wallace?

- (b) If so, was that breach of duty the cause of the illnesses or injuries from which Mrs. Wallace sustained?
- (c) Did Cuisinart breach an implied term of Mrs. Wallace's contract to provide a safe system of work?
- (d) If so, did the breach cause the illnesses or injuries from which Mrs. Wallace suffered?
- (e) What, if any, is the amount of damages to which Mrs. Wallace and by extension her estate is entitled?
- (f) Whether in the circumstances Cuisinart had improperly or unlawfully terminated Mrs. Wallace's services;
- (g) If so, what is the amount of damages to which she is entitled?

Background

- [10] Mrs. Wallace, deceased, was a former employee of Cuisinart. She worked there for several years. Cuisinart is one of the resorts in Anguilla. Mrs. Wallace said that she worked as a Landscaper/Linesman. Cuisinart, however, says that Mrs. Wallace was an Interior Plant Technician.
- [11] Initially, Mrs. Wallace had filed a claim against Cuisinart in which she sought the declaration that Cuisinart had wrongfully and unlawfully dismissed her.
- [12] Also, she complained that Cuisinart was negligent and failed to provide a safe system of work for her which resulted in the injuries or illnesses from which she suffered.

- [13] She also alleged that Cuisinart had breached its common law duty of care which it owed to her and this resulted in her sustaining personal injuries and illness including injury to her lungs. She also said that she has suffered congestive heart failure.
- [14] Alternatively, Mrs. Wallace said that Cuisinart breached an implied term of the contract to provide a safe place to work and a safe system of working, thereby causing the abovementioned illnesses or injuries. Indeed, she alleged that as a result of coming into close contact with herbicides, insecticides and pesticides during the daily spraying of plants, trees and shrubs throughout the Resort, she fell constantly ill and had to repeatedly seek medical attention.
- [15] Mrs. Wallace's main complaint was that Cuisinart failed to provide a safe place of work and a safe system of working.
- [16] She claimed that it is not true that she was provided with protective masks and boots while spraying. She was not provided with any protective clothing. She therefore had to spray the plants without adequate protective gear. Her main tasks included the watering of plants which she routinely did while not wearing any protective gear. On several occasions other employees sprayed plants in the same vicinity in which she was watering plants. Chemicals got onto her clothes and skin.
- [17] She also alleged that another named employee whose responsibility it was also to spray the plants was provided with full protective gear.
- [18] Mrs. Wallace also contended that Mr. Clarke sprayed the plants with insecticides, herbicides and pesticides without taking the necessary steps to protect her safety or health. She said that she complained on several occasions to him but he took no steps to ensure that corrective measures were put in place to protect her from the chemicals.

- [19] Cuisinart simply did not provide a safe place for her to work or a safe system in which to work. As a consequence of exposure to various chemicals, she became progressively ill over time and visited a number of doctors who she says provided her with medical reports. She also received medical care from various doctors all to no avail and was forced to return to her home from work on a few occasions.
- [20] Throughout this time, she kept Cuisinart informed about her illness and the various medical treatments she was receiving from doctors in Anguilla and abroad. Her condition worsened and she was forced to travel abroad for medical treatment and was as a consequence absent from work on several occasions.
- [21] Mrs. Wallace complained that when she could no longer have worked due to deteriorating health, Cuisinart unlawfully terminated her contract. She said that all times Cuisinart was aware and knew that she was absent from work due to her illnesses. Indeed, Cuisinart was at all times properly notified about her absence.
- [22] Mrs. Wallace had therefore filed the claim against Cuisinart in which she alleged that it was negligent and breached its common law duty of care to her which resulted in her sustaining personal injuries and illnesses.
- [23] Alternatively, she claimed that Cuisinart had breached the implied terms of the contract to ensure that the system of work was safe and not to terminate her employment unlawfully.
- [24] As a consequence she claimed a declaration, general and special damages against Cuisinart. Indeed, she claimed special damages in the sum of US\$759,065.62.
- [25] In defence to her claim, Cuisinart denied that Mrs. Wallace was employed for the entire period in the Landscaping Department. While she worked at Cuisinart for several years she was only transferred to the Landscaping Department in 2001.

- [26] Cuisinart denies that Mrs. Wallace's duty was to spray the plants and says that she merely assisted others, whose duty it was to do so, on a few occasions. Rather, her duties included propagating and pruning plants in the shade house and interior plants. Her main task was to water the interior plants and those that were stored in the shade house.
- [27] Cuisinart also says that the plants and trees were sprayed by other persons with the herbicides, pesticides and insecticides but that those times Mrs. Wallace was not around. On very rare occasions Mrs. Wallace was required to spray some plants. Cuisinart says that she did so to a very small extent and at all times she had access to and was required to wear protective gear. Cuisinart therefore denies that it was negligent as alleged or at all. In addition, Cuisinart denies it breached its common law duty of care which it owed to Mrs. Wallace, neither did it breach any implied terms of her contract to provide a safe system of work and not to terminate her contract of employment unlawfully.
- [28] More importantly, Cuisinart denies that the insecticides, herbicides or pesticides that were used by other employees and mostly when Mrs. Wallace was not at work, in any way caused or contributed to her illness.
- [29] Cuisinart says that it simply has not caused the injuries or illnesses from which Mrs. Wallace suffered.
- [30] Equally, Cuisinart denies that the Claimants are entitled to receive any damages on behalf of Mrs. Wallace's estate.

Evidence

- [31] Mrs. Wallace provided a witness statement in support of her claim. During the case management phase of the claim, unfortunately, Mrs. Wallace took ill. She took a turn for the worst and had to be hospitalized and the Court ordered that her evidence be taken by deposition in hospital. This was done and she was cross-examined. The Court has had the benefit of reading her evidence.

[32] Mr. Bryan Hennis testified on behalf of her estate and he was cross-examined at length.

[33] For the defence, Ms. Carleen Gumbs, Mr. Brian Corbett, Mr. Marino Hodge, Mr. Everette Clarke and Mr. Richard Connor provided the Court with witness statements and they too were cross-examined on length.

[34] The Court also had the benefit of a joint expert report from Dr. Jeffrey Brent who is a toxicologist.

[35] While the parties had agreed to several documents being admitted into evidence, there were a number of medical reports and documents upon which the Claimants sought to rely. These were vigorously objected to by learned counsel Mrs. Ruan. Learned counsel Mr. Wallbank cross-examined Ms. Carleen Gumbs who is Cuisinart's Human Resource Manager on some of these medical reports to which learned counsel Mrs. Ruan vigorously objected.

[36] During the cross-examination of Ms. Carleen Gumbs, learned counsel Mr. Wallbank very skillfully tried to get the documents in. In an effort not to protract the trial, the Court reserved its rulings on the objections that were made by learned counsel Mrs. Ruan and invited both learned counsel to address the objections in their written closing arguments.

Claimants' Submissions

[37] Learned counsel Mr. Wallbank stated that the burden of proof rests with the Claimants to prove their case on a balance of probabilities. The Claimants are therefore required to show to the satisfaction of the Court, on a balance of probabilities, that Cuisinart breached its duty of care owed to the deceased as its employee and that as a result of such breach, the deceased sustained various physical injuries and illnesses that in turn caused her to be unable to continue her employment at Cuisinart and caused her pain, suffering, loss of amenity and financial damage.

Claimants' Evidence

- [38] Learned counsel Mr. Wallbank said that the Claimants relied on the evidence of Mrs. Wallace, whose evidence comprised her witness statement filed on 19th January 2010 and deposition dated 19th November 2010 and filed on 29th November 2010, which records the notes of examination of the deceased by counsel for both parties. The Claimants also relied on the evidence of Mr. Bryan Hennis, an ex-employee of Cuisinart, whose witness statement filed on 25th February 2010, was adopted as his evidence-in-chief. The Claimants further rely upon the expert report of the sole expert, whose evidence was (a) that the various symptoms, including lung failure which the deceased enumerated in paragraph 21 of her witness statement were commensurate with adverse reactions to the various toxic chemicals she had been exposed to at Cuisinart; and (b) that pulmonary (i.e. lung) failure is possible following excessive exposure to the chemicals.
- [39] The Claimants say that Mrs. Wallace was routinely required to carry out various tasks including the watering of plants and spraying of plants with fertilizers and pesticides (collectively referred to as "the Chemicals"). Other employees were also tasked with spraying the chemicals at various locations at Cuisinart, and the spraying would start at around 4 or 5 a.m. in the morning. Although she was in close contact with the chemicals, either due to her spraying duties or from exposure to the chemicals which were being sprayed by the other employees, Cuisinart did not provide her with the requisite protective clothing or gear as a health and safety precaution.
- [40] From early 2006 Mrs. Wallace started to suffer various symptoms including rashes to the body, hot flashes and faster heart beat each time the chemicals were sprayed. These symptoms continued to worsen and she was hospitalized in July 2006. Shortly after the deceased resumed work in September 2006 after a period of leave, she again became unwell after the chemicals were sprayed. She subsequently sought medical attention from

various practitioners in Anguilla and overseas. Medical reports contained within the trial bundles, including that of Dr. Clyde Bryan MD, FACP, dated 19th July 2007 and Dr. Alan Rapoport MD, FACP, dated 22nd January 2008 were referred to by Mr. Wallbank during the trial.

[41] The Claimants' second witness, Mr. Hennis, attested in his witness statement that he was aware of the manner in which the spraying of the chemicals was being carried out at Cuisinart, and that he was also exposed to the chemicals while carrying out his duties as an engineer there. His exposure to the chemicals and potential health risk was one of the reasons which lead to his resignation.

[42] Mrs. Ruan cross-examined Mr. Hennis with reference to a letter of resignation which he had submitted to Cuisinart dated 22nd September 2005. The witness, on being shown a copy of the letter, acknowledged that he was the author of the letter. Learned counsel Mr. Wallbank submitted that that letter is not necessarily inconsistent with the deeper personal reasons the witness had for ending his employment at Cuisinart.

Defendant's Evidence

[43] Turning his attention to Cuisinart's evidence, learned counsel Mr. Wallbank said that Cuisinart relied on the evidence of five (5) witnesses, whose witness statements were admitted as evidence-in-chief.

[44] During the amplification of the evidence given by Cuisinart's witness, Ms. Carleen Gumbs, learned counsel for Cuisinart referred to the medical report dated 2nd November 2007. The report states that during the physical examination of the deceased on 22nd February 2006, her blood examinations were reviewed and found to be within normal limits. During cross-examination, Ms. Gumbs agreed that she was not yet employed by Cuisinart in early 2006 when the deceased started to experience the symptoms as set out in paragraph 21 of her witness statement and therefore was not aware of her complaints. Ms. Gumbs further

agreed that she was similarly not yet employed by Cuisinart in July 2006 at the time when the deceased was admitted to hospital following an illness sustained after the chemicals were sprayed, as she had commenced work at Cuisinart only in September 2006.

- [45] Mr. Clarke, during cross-examination by Mr. Wallbank, agreed that he did from time to time work in the same place that the deceased worked, although no spraying would take place while she was working. He denied that Mrs. Wallace ever told him that the blisters which developed on her body were due to chemicals but said she attributed such blisters to an allergy to corn oil which she had consumed from food. He, however, agreed that she had told him several times about the blisters and showed them to him, “because [they] were very close friends”. Mr. Clarke agreed that she was working with hoses that were about twenty (20) feet long to spray water on the plants and that there were other employees who sprayed the ground plants; but that such spraying was completed at around 3.30 a.m. or 4:00 a.m. before the deceased was in the area. Mr. Clarke, however, agreed that Mrs. Wallace would, from time to time, start work at around 4:00 a.m. He further agreed that there was a possibility that the deceased and other employees could come into contact with the leaves of plants located along the walkways which had been sprayed with the chemicals, and that the deceased could have been exposed to chemicals. Mr. Clarke said that he had given Mrs. Wallace protective gear because she could be directly or indirectly exposed to pesticides. He recalled that she was not required to wear the gear at all times because they “were not always spraying the property”. Mr. Clarke agreed that he had removed her from the job at some point during her employment after she complained of adverse reactions to the chemicals.

Expert Evidence

- [46] Next, learned counsel Mr. Wallbank referred the Court to the report of the jointly-instructed expert toxicologist, Dr. Jeffrey Brent, dated 25th May 2010. Page 7, Paragraph 1(m) of the report states that sufficiently high doses of exposure to Malathion, Sevin, Diazinon and Cygon “can cause a syndrome of excess pulmonary secretions, gastroenteritis, excess urination and excessive perspiration; at even higher doses it can cause pulmonary failure

and seizures,, and at even higher doses can be lethal. These occur with acute exposure”. Dr. Brent also states that “all chemicals cause health risks to human beings at sufficient doses. With particular respect to Malathion, very few patients may develop peripheral neuropathy after a very large dose exposure or high dose cumulative exposure”.

- [47] Dr. Brent stated that the exposure to a combination of the listed chemicals as opposed to just one of them would cause effects that are “additive”. He also opines that “skin irritation is possible from exposure to Malathion, Sevin, Diazinon and Cygon.” Dr. Brent addressed the respective symptoms which Mrs. Wallace had experienced as set out in Paragraph 21 of her witness statement, recognising these as commensurate with exposure to the chemicals in question and notably does not rule out that exposure to those chemicals may be chronic.

Employer’s Duty of Care

- [48] Learned counsel Mr. Wallbank said that the law is clear that an employer owes a duty of care to its employee(s) to provide a reasonably safe place of work. This is particularly so where the employer has control of its own premises or the place of work. This principle is entrenched in cases such as **Cole v. De Trafford** (No. 2) [1918] 2 K.B 535 and **Davidson v. Handley Page** [1945] 1 All E.R.235 at 236 and see *Halsbury’s Laws of England*, 4th Edition, Volume 16, Para 567.
- [49] The employer’s duty further extends to the duty to provide a safe system of work for its employee(s) and that in devising a system of working the employer must take into account the fact that workers are often heedless of their own safety. See the case of **General Cleaning Contractors v. Christmas** [1953] AC 180 at 180-190. The employer must also exercise reasonable care to see that the system of work is complied with by those for whose safety it is instituted and that the necessary safety precautions are observed. See **Clifford v. Charles H. Challen & Son** [1951] 1 KB 495.

- [50] The scope of the employer's duty of care concerns not only the actual work of its employee(s) but also such acts as are normally and reasonably incidental to a day's work. The mere fact that an employee disobeys an order does not necessarily deprive him of the protection of his employer's duty, though he may be liable in contributory negligence. Mr. Wallbank referred the Court to **Davidson v. Handley Page, supra**; **Paris v. Stepney Borough Council** [1951] AC 367; **Rands v. McNeil** [1955] 1 QB 253.
- [51] Learned counsel Mr. Wallbank asserted that inadequate protective gear was provided to Mrs. Wallace by Cuisinart. Mr. Wallbank further said that there was no system implemented in respect of ensuring that the employees were to abide by any health and safety regulations which were in place, if at all. The evidence from Cuisinart's witnesses is contradictory in respect of whether Mrs. Wallace was provided with any protective gear at all and, if so, which items of gear. The evidence from Cuisinart also confirms that none of the individuals employed in a supervisory and/or managerial position in the Landscaping Department held any certification for use or handling of the chemicals. Additionally, no evidence has been tendered by Cuisinart in relation to any health and safety practices, regulations or documentation, which its employees at the Landscaping Department were required to abide by, and which its supervisors and/or manager were required to implement and enforce.
- [52] Learned counsel Mr. Wallbank advocated that, on a balance of probabilities, it is therefore not difficult to conclude that no such system of safe work was implemented by Cuisinart, who similarly breached its duty of care to the deceased to provide a safe place of work. Whilst the evidence given by various Cuisinart witnesses as to the deceased's exposure to the chemicals, whether by direct handling or through spraying of the chemicals, or by exposure from spraying carried out by other employees, it is clear that Mrs. Wallace, regardless of this ambiguity, on a balance of probabilities, was exposed to the chemicals during the course of her employment at Cuisinart and that she was not able to continue in her job as a result.

- [53] Learned counsel Mr. Wallbank said that in respect of the causal link between that exposure to the chemicals and the symptoms and illnesses suffered by Mrs. Wallace, the predominant and serious ailments being heart failure or cardiomyopathy and pulmonary or lung failure, the various medical reports referred to by counsel for Mrs. Wallace are relevant: Dr. Clyde Bryan's dated 19th July 2007, Dr. Alan Rapoport's dated 22nd January 2008, Dr. Guinto's dated 28th October 2007. Each of these certified medical practitioners points to a possible link between the exposure of the deceased to the chemicals at work, to the illnesses which she sustained. The expert report similarly does not negate the possibility of the causal link between such exposure and resulting injuries but goes further to state that the consequences could be "lethal" and "chronic".
- [54] Learned counsel Mr. Wallbank stated that, on a balance of probabilities, therefore, it cannot be ruled out that the deceased's prolonged exposure to the chemicals while she was employed as a Linesman/Landscaper at the Landscaping Department of Cuisinart since 1999 caused the symptoms which she started to suffer in 2006 which subsequently continued to aggravate until her death from cardiomyopathy and other ailments in early 2011.

Admissibility of Evidence

- [55] Learned counsel Mr. Wallbank said that learned counsel Mrs. Ruan raised objection to various documents being put to its first witness, Ms. Gumbs, during cross-examination. These documents were the medical reports and the medical certificates from Dr. Bryan and Dr. Rapoport. Learned counsel Mrs. Ruan raised this objection on the basis that these documents were not agreed to by Cuisinart, that none of these documents were authored by Ms. Gumbs and that she therefore did not have the capacity to comment on their contents and that she was not the proper person to whom these documents should be put for questioning.

- [56] Mr. Wallbank posited that Anguilla statute law by way of the Evidence Act, Revised Statutes of Anguilla, Chapter E65, is silent in this regard. However, the English common law, which applies to Anguilla by virtue of the Common Law (Declaration of Application) Act, Revised Statutes of Anguilla, Chapter C60, clearly provides that in civil proceedings, a statement other than one made by a person while giving oral evidence in those proceedings is admissible as evidence of any fact or opinion stated in it. (*Halsbury's Laws of England, Volume 17, Para 55*).
- [57] Next, Mr. Wallbank said that whereas Dr. Bryan and Dr. Rapoport are medical practitioners, not known to be toxicologists, they did not discount the possibility of poisoning to Mrs. Wallace. Had it been the clear case where, medically speaking, the possibility must have been an impossibility, it is reasonable to assume that the medical doctors would have pointed this out, if it was clear that chemical poisoning suffered by Mrs. Wallace was to be excluded. (The expert report is clear that "permanent lung damage (pulmonary failure) can result" as well as "peripheral neuropathy").
- [58] Mr. Wallbank adverted the Court's attention to the fact that Mrs. Wallace, in her claim filed on 6th April 2009, claims a declaration that she was wrongfully and/or unfairly dismissed, the sum of US\$759,065.62 in special damages, general damages for pain, suffering and loss of amenity to be assessed, interest, and further or other relief as the Court deems just. Mrs. Wallace died on 8th January 2011 at age 47 years and therefore her claim for general damages should reflect this by a reasonable and proportionate reduction in the multiplier, as the Court deems fit in the circumstances.
- [59] Mrs. Wallace was no longer able to fulfill her employment with Cuisinart on the grounds of the harms and over-sensitization to the chemicals while working there. But for the harm which she sustained during her employment, the evidence is that Mrs. Wallace would and could have continued her employment in the Landscaping Department at Cuisinart. Therefore, it is fair that she should continue to be compensated for her inability to work.

Learned counsel Mr. Wallbank submitted that her inability to work is further evidenced by the fact that only some two and a half years after Cuisinart treated Mrs. Wallace as having abandoned her job, she died.

- [60] In conclusion, Mr. Wallbank submitted that the Court should find Cuisinart liable for damages as claimed by Mrs. Wallace during her lifetime, and that her resulting death should also be seen within the context of this claim before the Court.

Costs

- [61] Learned counsel Mr. Wallbank urged the Court to award the estate prescribed costs on the sum claimed for special damages (US\$759,065.62 being the equivalent of EC\$2,040,520.10) with reference to CPR 2000 Rule 65.5 is EC\$126,702.60 (or the equivalent of US\$47,132.88). Craig, Cody and Cameron Wallace claim general damages in such amount as assessed to be fair by the Court.

- [62] Learned counsel Mr. Wallbank stated that the Court should award the sum of EC\$300,000.00 (or the equivalent of US\$115,598.83) in costs against Cuisinart as being fair and reasonable, with reference to CPR 2000, Rule 65.2(3).

Defendant's Submissions

- [63] Learned counsel Mrs. Ruan said that it is necessary for the sake of completeness to provide the Court with authorities and submissions with respect to the legal point she had raised while Ms. Carleen Gumbs was cross-examined by learned counsel Mr. Wallbank. Mrs. Ruan said that the fact that the documents were disclosed as a matter of standard disclosure did not automatically render them admissible or admitted into evidence. Trial Bundle 3B contains the Claimants' documents from tabs 1 – 46 as documents not agreed (save and except tab 37, which document was tendered and marked as exhibit "CG1" through Ms. Carleen Gumbs). Similarly, documents disclosed by Cuisinart and found at

tabs 47 and 48 (pages 133, 133A, 133B and 135) were also properly tendered through Ms. Carleen Gumbs and marked "CG2" and "CG3".

[64] It is the law that documents are entered into evidence either by agreement or by operation of law (being properly tendered through a witness). It is for this reason that Mrs. Ruan argued that there are only five documents properly before the Court as evidence:

- a) Death Certificate
- b) Resignation letter of Bryan Hennis
- c) Letter of Abandonment dated 16th April 2008
- d) Employee Manual excerpt and acknowledgement forms
- e) Hughes Medical Center report dated 2nd November 2007.

[65] Mrs. Ruan told the Court that Mr. Wallbank confirmed with Ms. Carleen Gumbs that the documents to which objection were made, Mrs. Gumbs said were received for her file. Mrs. Ruan said that she has no difficulty with Ms. Gumbs identifying those as the documents she referred to in her statement as having received them for Mrs. Wallace's file. However, Mrs. Ruan objected to the documents being adduced into evidence through Ms. Gumbs as she was not the author of those documents, neither could she verify, confirm or deny the merits of the opinions stated therein. Even if the Court were to consider the reports of Dr. Bryan and Dr. Rapoport, there should be no evidential weight attached to their findings, as they were untested. Neither doctor has put before the Court their qualifications in the pertinent area of medicine (that is, toxicology). Their reports are unclear and inconclusive and they have not put before the Court any evidence to support their assessment. Learned counsel Mrs. Ruan said that the documents ought to be disregarded entirely as being inadmissible. Learned counsel Mrs. Ruan urged the Court to disregard the documents in the disclosure bundle, save and except for those documents that were either agreed or tendered through Ms. Gumbs.

[66] Mrs. Ruan said that Mr. Wallbank has not told the Court why it is that the doctors and makers of the various documents were not before the Court to be cross-examined and tested on their evidence.

Claimants' Evidence

[67] Next, Mrs. Ruan reviewed the evidence adduced on behalf of the Claimants.

Caroleen Wallace

[68] Mrs. Ruan posited that Ms. Wallace's evidence is unreliable and self-serving. Her evidence is contradicted by all of Cuisinart's witnesses the latter who said that Caroleen worked with interior plants which included watering potted plants. Spraying was done at 3:00 a.m. and she was not at work during that time. Mr. Everette Clarke told the Court that spraying would be done by at least 3:30 a.m. Mr. Marino Hodge confirmed that spraying started very early. In her witness statement at paragraph 4, Mrs. Wallace says she sprayed plants with chemicals. In her cross-examination at page 3 of the deposition Mrs. Wallace said she dealt with potted plants, fertilized and watered. She said on page 5 of the deposition that she never mixed chemicals. At page 6, she said her job was to water plants.

[69] Next, learned counsel Mrs. Ruan said that regarding her absence, she admitted on cross-examination (deposition at page 23) that she was too busy going to doctors to remember to submit her sick note. She agreed she was missing from work from July 2007 to January 2008. The evidence of Ms. Carleen Gumbs confirmed this. Ms. Gumbs identified the excerpt from the Employee Handbook which she said are the rules and regulations for employees and she confirmed by the acknowledgement forms that Mrs. Wallace received the handbook on two occasions (first in 1999 and then when it was revised in 2003).

[70] There is no evidence before the Court to substantiate the special damages. The receipts were never put to Mrs. Wallace on examination to confirm their contents and amounts claimed. More fundamentally, neither Mrs. Wallace nor her counsel has adduced any medical evidence to support her claim. Mrs. Ruan said that in paragraph 21 of Mrs. Wallace's statement (at the end of the paragraph) she details the three occasions she was hospitalized for breathing problems, fluid in her lungs and a suspected blood clot in her left foot. Her death certificate lists multiple causes of death, neither of which is attributed to any alleged acts or omissions of the defendant or their agents.

[71] Learned counsel Mrs. Ruan urged the Court to disregard the evidence of Mr. Bryan Hennis since he was proven during cross-examination to be unreliable and not credible.

Defendants' Evidence

[72] Learned counsel Mrs. Ruan next reviewed the evidence that was led on behalf of Cuisinart.

Carleen Gumbs

[73] Mrs. Ruan said that Ms. Gumbs confirmed that Mrs. Wallace knew the policy and procedure for obtaining certified sick leave. She confirms that Carleen disappeared from work for extended periods without sick leave certification, which resulted in her letter of abandonment in accordance with the policy. As regards to an alleged claim to a retirement scheme, Ms. Gumbs confirms that this is a discretionary scheme as to eligibility and she herself did not know the entitlements of staff.

Brian Corbett

[74] Mr. Corbett described the protection measures implemented by the resort for landscapers to avoid any contact with pesticides or any chemicals used to treat plants. He says this was to avoid any allergic reactions. He confirms that Mrs. Wallace worked with interior

plants but was still provided with protective gear. He confirms that work schedules were shifted around to accommodate her complaints. For example, if she were scheduled in a particular area on a particular day, that area would not be sprayed. He denies that spraying of plants would carry on past 7:00 a.m. and confirms that spraying was done at all times very early in the morning from about 3:00 a.m.

Richard Connor

- [75] Mr. Connor told the Court that he did the majority of spraying because of Mrs. Wallace's complaints. At most, he says she would use about 50 gallons (which was the residue from Mr. Clarke's spraying of the exterior).

Marino Hodge

- [76] Indeed, Mr. Hodge confirms that spraying was done very early in the morning from about 3:00 a.m. He says no spraying is ever done past 7:00 a.m.

Everette Clarke

- [77] Mr. Clarke confirmed that spraying is done very early from about 2:00 a.m. or 3:00 a.m. and usually completed by 3:30 a.m. He says that Mrs. Wallace was not at work those times and that he would shift around spraying schedules to accommodate her. He says that after her complaints he insisted that she should not do any spraying. Her job was to water and fertilize plants.

Expert Report

- [78] Mrs. Ruan said that the report of the Court appointed joint expert, Dr. Jeffery Brent, is crucial to this case. It is first important to direct the Court's attention to his statement on page 4: *"The adage that the dose makes the poison is fundamental in toxicology. Therefore, without knowing the dose the potential for harm is unanswerable."* The Court

should prefer the Cuisinart's witnesses where they describe Mrs. Wallace's potential for exposure to chemicals to be remote. There is no cogent evidence before the Court as to levels of exposure, duration of exposure or dosages. Dr. Brent makes reference to the levels of doses on page 7 when asked by Claimants' counsel about the health risks of each chemical. The opinion is that "at sufficiently high doses" and then the opinion is given, and on page 8 he states "for substantially higher concentration." We do not know the concentrations. What we know from Cuisinart's witness, Marino Hodge, is that the chemical was sometimes mixed with water. We also know from each of the landscapers that sometimes two chemicals were mixed depending on the sickness of the plant to be treated. We do not know the concentrations. On pages 11 and 12 Dr. Brent makes reference to "*acute excessive dose-exposure*".

[79] Learned counsel Mrs. Ruan said that the most fundamental opinions in Dr. Brent's report are his findings on pages 18 and 19 where he definitively states that exposure to the chemicals listed do **not** cause dilated hypokinetic cardiomyopathy and they do **not** cause dilated cardiomyopathy. Dr. Brent further finds on pages 21 and 22 that the chemicals do not increase the risk of the conditions complained of by Mrs. Wallace. The only evidence before the Court as to Mrs. Wallace's condition is her cause of death on her death certificate which states cause of death as: Cardiac arrest, dilated non ischemic cardiomyopathy – end stage, obesity, cardiac cirrhosis/acute renal failure normocytic anemia. The evidence of Dr. Brent was not contradicted by any other expert or medical professional.

[80] Insofar as Mrs. Wallace alleges negligence, Mrs. Ruan said that there was no breach of duty and Mrs. Wallace cannot establish causation.

[81] In order to establish negligence, Mrs. Wallace must show the following: That Cuisinart owed a duty of care; that it was negligent or in breach of duty; and that her alleged injuries or damage suffered was caused by Cuisinart's negligence. Mrs. Ruan submitted that Cuisinart had satisfied its duty to Mrs. Wallace and that there was no negligence or breach

of duty. Mrs. Ruan further submitted that the defendant did not cause, either directly or indirectly, the alleged injuries of Mrs. Wallace.

Negligence/Breach the Duty of Care.

- [82] Mrs. Ruan said that Cuisinart maintains their position that they discharged their duty to Mrs. Wallace by providing a safe work environment with accessible safety equipment.
- [83] Mrs. Ruan submitted that Cuisinart did in fact provide Mrs. Wallace with a safe working environment as did a reasonable employer would be expected to do for the safety of its workers having regard to the nature of their work. Cuisinart provided protective gear which included disposable and permanent coveralls, helmets with ear covers, protective gas mask to cover the face (nose and mouth), boots, disposable gloves, latex gloves and rubber gloves.
- [84] Indeed, in addition to the provision of protective gear, Cuisinart's employees (Mr. Clarke in particular) allowed Mrs. Wallace to work further away from where chemicals were being used as she complained of being asthmatic and they reorganized their spraying schedules to accommodate her. Also, Cuisinart ensured that spraying was done during the hours that she was not expected to be working. Furthermore, to ensure employee health and safety, Cuisinart arranged medical examinations for Mrs. Wallace and other employees to be done every six (6) months. Ms. Carleen Gumbs said that Mrs. Wallace's last six-month physical was conducted on 22nd February 2006 and the results found her blood levels to be within normal limits (as per report from Hughes Medical Centre, page 135, Bundle 3B).
- [85] Learned counsel Mrs. Ruan submitted that Mrs. Wallace has failed to provide the Court with evidence to support her allegations, on the balance of probabilities. There is no medical evidence establishing a causal link between Cuisinart's alleged actions or omissions and Mrs. Wallace's alleged injuries.

[86] Mrs. Ruan posited that the expert statement given by the Toxicologist, Dr. Jeffrey Brent, states that the symptoms experienced by Mrs. Wallace are not typical of the chemicals which were used by Cuisinart, those chemicals being: Malathion, Sevin, Diazinon and Cygon. The expert also opined that if those symptoms were to be experienced by anyone with prolonged exposure to the chemicals that any such symptoms experienced would be of a temporary nature and of no lasting effect, even if the person so exposed has a medical history that could be exacerbated by exposure. Learned counsel Mrs. Ruan submitted that the expert opinion further establishes that the Claimants have not proven a causal link between Mrs. Wallace's condition and the alleged actions of Cuisinart.

Unlawful Dismissal

[87] Mrs. Ruan said that Mrs. Wallace has admitted to having taken prolonged absences from her work without submission of a medical certificate or without complying with the procedures of Cuisinart's Employee Manual.

[88] On 15th November 1999, Mrs. Wallace acknowledged receipt of the Employee Manual which contains the terms of the Claimant's employment in lieu of a written contract. She further received a revised copy in 2003, according to Ms. Carleen Gumbs. The Manual stated that absence from the job for more than three consecutive days constituted abandonment of employment if no notice was given to the employee's department head. For the relevant time period, specifically from the month of January to April of 2008, there was no notice or medical certificate given to Cuisinart by Mrs. Wallace to explain her absences.

[89] Learned counsel Mrs. Ruan submitted that the terms and conditions of the employment had been made known to Mrs. Wallace as required by section 4(1) of the *Fair Labour Standards Act* and that Mrs. Wallace accepted those terms and conditions when she acknowledged receipt of the Employee Manual and commenced her employment.

[90] Learned counsel Mrs. Ruan said that Mrs. Wallace was negligent and was responsible for her dismissal as an employee of Cuisinart. Mrs. Wallace neglected and/or failed to:

- i. Adhere to the Employee Handbook and submit a medical certificate for the period of January 2008 to April 2008. Her absence was unexcused and unjustified;
- ii. Notify the Defendant of her supposed inability to attend work from January 2008 to April 2008.

[91] Mrs. Ruan argued that Mrs. Wallace is not entitled to any damages as it relates to her letter of abandonment as it was Mrs. Wallace who breached the contract that existed between Cuisinart and herself.

COSTS

[92] Finally, Mrs. Ruan said that Cuisinart is entitled to its costs of the proceedings to be borne by Mrs. Wallace's personal representatives on a prescribed costs basis.

[93] Learned counsel Mrs. Ruan maintained that Mrs. Wallace was at all material times provided with safety equipment and instructed how to use the equipment and had unrestricted access to the equipment at all times.

[94] Insofar as the Claimants allege negligence, Mrs. Ruan said that there was no breach of duty and the Claimants cannot establish causation.

[95] In order to establish negligence, the Claimants must show the following: that Cuisinart owed a duty of care; that Cuisinart was negligent or in breach of duty; and that Mrs. Wallace's alleged injuries or damage suffered was caused by Cuisinart's negligence. Mrs. Ruan submitted that Cuisinart satisfied its duty to Mrs. Wallace and that there was no negligence or breach of duty. Mrs. Ruan said that the defendant did not cause, either directly or indirectly, the alleged injuries to Mrs. Wallace.

Negligence/ breach the duty of care

- [96] Learned counsel Mrs. Ruan maintained her position that Cuisinart discharged its duty to Mrs. Wallace by providing a safe work environment with accessible safety equipment.
- [97] Learned counsel Mrs. Ruan referred the Court to ***Evans v. Volex Group plc*** in which the Court of Appeal overturned the lower Court's decision and found that in a case alleging injury from inhaling fumes that there was "no evidence that the judge could find that Mrs. Wallace was exposed to dangerous levels of toxic fumes" (paragraph 18).
- [98] Mrs. Ruan reiterated that the death certificate of Mrs. Wallace discloses that her death was caused in part by obesity. Mrs. Wallace also died from cardiac arrest dilated non ischemic cardiomyopathy. The expert evidence is clear that there was no causal link between Mrs. Wallace's development of cardiomyopathy and the nature of her work at Cuisinart.

Court's Analysis and Findings

- [99] The Court has given deliberate consideration to the evidence and has carefully reviewed the very helpful and lucid submissions of learned counsel.

Admissibility of Documentary Evidence

- [100] I propose to first address the admissibility of the medical reports. As stated earlier, during the trial learned counsel Mrs. Ruan objected to several documents being tendered into evidence. More specifically, during the cross-examination of Ms. Carleen Gumbs, learned counsel Mr. Wallbank cross-examined Ms. Gumbs in relation to several medical reports. Mrs. Ruan objected to the line of cross-examination.
- [101] It is therefore appropriate that the Court address this matter straight away.
- [102] A number of documents that appear to be medical reports were disclosed by the Claimants. These are two medical reports from Dr. Clyde Bryan, one medical report that appear to have been sent from Dr. Alan H. Rapport and one Dr. Repath Guinto. These

documents were not agreed by Cuisinart. Learned counsel Mr. Wallbank quite skillfully tried to cross-examine Ms. Carleen Gumbs, the Human Resource Manager, in relation to those medical reports. Mrs. Ruan very strenuously objected and said that the medical reports cannot be tendered through Ms. Gumbs since she was not the author. At the trial, Mrs. Ruan maintained that the most that Ms. Gumbs could tell the Court was that she had received the reports. Learned counsel Mr. Wallbank was forced to concede this point in his written submissions and stated that he had put the medical reports to Ms. Gumbs simply for her to determine whether she had received the documents and had knowledge of them. If these were the only reasons for the line of cross-examination by learned counsel Mr. Wallbank, much time would have been taken up with matters that are of no moment.

[103] It bears stating that that could not be the only reason why Mr. Wallbank questioned Ms. Gumbs on the medical reports that were not admitted into evidence. Indeed, he sought to buttress his closing arguments by referring to the same medical reports that were not admitted into evidence.

[104] The Court is of the view that it should clearly be stated that the documents that were objected to are inadmissible. In fact, in the written closing arguments learned counsel Mr. Wallbank referred to the medical reports from general practitioners who did not provide witness statements. This is impermissible.

[105] Of equal significance is the fact that much of what Ms. Carleen Gumbs had to say in relation to the medical reports is accorded very little weight, if any.

[106] It is very curious how in the face of that concession by learned counsel Mr. Wallbank that he subsequently quite creatively in his written submissions invited the Court to have regard to statements that are contained in the medical reports, (the latter which, as stated above, are clearly inadmissible).

[107] The fact that the medical reports were brought to the Court's attention has given the Court cause to pause. It is interesting that the Claimants are seeking to rely on reports from

persons who are doctors and reside in Anguilla without calling those persons as witnesses. Learned counsel Mrs. Ruan quite properly stated that no reason has been given for the failure to call the doctors as witnesses or even to have a written summons issued for their attendance. In any event, the doctors' reports are equivocal.

- [108] The Court rules that the medical reports from the general practitioners are inadmissible in evidence and cannot be relied on by the Claimants. It must be said that, in any event, none of the named doctors are identified as toxicologists.

Oral and Written Evidence

- [109] The Court places on record its sincere appreciation to Mr. Justice Don Mitchell, QC, as he then was, who very helpfully agreed to act as the examiner in taking the deposition of Mrs. Wallace's evidence while she was hospitalized.

- [110] The Court has reviewed the evidence in its entirety and finds the facts as follows.

- [111] Ms. Wallace was employed by Cuisinart as an Interior Plant Technician for several years. Her main functions included the watering of the interior plants and very seldom she was required to assist with the spraying of plants with insecticides. Her main duties also included fertilizing and propagating the plants.

- [112] There is reliable evidence from which the Court can properly conclude that at the relevant times Cuisinart provided her with goggles for her eyes, rubber boots and face masks. In addition, Cuisinart provided her with a gas mask.

- [113] On the rare occasion when she was required to assist her colleagues with spraying of the pests and insects she used a small container to do so. As a general rule, the plants were sprayed by other persons very early in the morning and not in the presence of Ms. Wallace. There is no doubt that it was on the very rare occasion she assisted in spraying the plants in the early morning. In fact, the Court finds that this only happened when one of her colleagues was away on vacation.

- [114] The Court has no doubt that most of the spraying of the plants were carried out between 3:00 a.m. and 5:00 a.m. Most of the spraying was completed by 5:00 a.m. since guests would usually be up and about by 7:00 a.m.; this was particularly so in relation to the restaurant and other exterior areas. On the odd occasion, the spraying continued beyond 6:00 a.m.
- [115] It is apposite to state that the Court accepts that Cuisinart used insecticides to spray the plants and trees (Malathion, Sevin, Diazinon and Cygon.) The insecticides were used by Cuisinart and by 7:00 a.m. the spraying was completed since by that time guests would have been out and about. On the few occasions on which Mrs. Wallace was required to assist, she did so but not to the same extent as the other workers whose duties it was to do so. In addition, she wore protective gear, namely, mask and gloves.
- [116] While the Court does have some empathy for Mrs. Wallace, with much respect, it must however be stated that much of the evidence which she gave during cross-examination clearly indicates that she deliberately sought to exaggerate the circumstances in which she took ill. In addition, even though the Court as presently constituted was not physically present when Mrs. Wallace testified under cross-examination, it is clear from the record that she deliberately or otherwise sought to convey an impression that did not reflect the correct circumstances as to the manner in which she took ill. She was clearly upset at the fact that she was ill and attributed her illness to the alleged conditions under which she worked.
- [117] The record reflects that on several occasions when she was challenged during the skilful cross-examination of learned counsel Mrs. Ruan she was evasive. Mrs. Ruan, however, persisted in her cross-examination in a very gentle and enquiring manner and was able to obtain much evidence that is supportive of Cuisinart's defence.
- [118] The Court accepts that Mrs. Wallace's hours of work commenced at 5:00 a.m. on a regular basis. On very few occasions, she was required to start work at 4:00 a.m. Her main duties included cleaning, watering and fertilizing all interior plants. This was in addition to

propagating cuttings and seeds in the shade house. At all material times, Mr. Clarke was the manager of the department in which she worked. He was in charge and responsible for spraying the plants, trees and shrubs with insecticides. He was assisted in this regard by Mr. Richard Connor and Mr. Marino Hodge whose duty it was to spray the plants with insecticides, herbicides and pesticides.

[119] Mrs. Wallace clearly began to have heart condition and the Court accepts that this was so since 2006. Her lungs were normal. Indeed, it was put to her that in 2000 Dr. Guinto found nothing about her lungs. However, he found that she had dilated cardiomyopathy, heart failure. She did not deny. Also, it was put to Mrs. Wallace that she consulted Dr. Guinto in 2008 and he did not report anything about the state of her lungs. It was also put to her that she also had visited Dr. Bryan on 19th July, 2007 and he did not state anything about her lungs. Mrs. Wallace did not deny any of those suggestions.

[120] Mrs. Wallace was forced to admit under cross-examination that in January 2008 she weighed 270 pounds. This is consistent with the position advocated by learned counsel Mrs. Ruan, namely, that Mrs. Wallace's obesity was a major cause of the chronic illness she developed. With much respect, the Court notes that Mrs. Wallace's death certificate indicated that one of the causes of her death was the obesity from which she suffered together with the heart condition.

[121] The Court accepts that in 2006 Mrs. Wallace had a reaction or skin irritation when the hose that she used came into contact with some of the chemicals. She suffered irritation to her skin as a result of the direct exposure to the chemicals. She received medical treatment for the skin irritation and the problem abated. She continued to work at Cuisinart until 2009 without any skin irritation. In fact, during cross-examination, Mrs. Wallace was forced to agree that between 2006 and until she left Cuisinart she did not have any difficulty with the skin irritation resurfacing.

Mr. Hennis

- [122] The only other witness who testified in support of Mrs. Wallace was Mr. Hennis. His evidence did not contribute in any way to assist the Claimants in proving their claim. In any event, during cross-examination he was contradicted and forced to resile from a position that he had earlier taken in his witness statement. His credibility was severely shaken. The reliability of his evidence was severely undermined. Very little weight is attached to his evidence since it was shown that contrary to his earlier stated position he had commended Cuisinart when he resigned from its employ.

Defence Witnesses

- [123] The Court has reviewed the evidence that was adduced by the witnesses who testified on behalf of Cuisinart. Even though there may have been slight variations or inconsistencies in their evidence, by and large they corroborated each other. In addition, most of the witnesses struck the Court as being reliable and credible. They simply came to tell the Court the truth. They did not seek to serve the interest of their employer. In particular, the Court attached significant weight to the evidence of Mr. Marino Hodge, Mr. Everette Clarke and Ms. Carleen Gumbs. Despite the very skillful cross-examination of learned counsel Mr. Wallbank, there was consistency in their evidence.
- [124] Learned counsel Mr. Wallbank has quite properly pointed out the inconsistencies in Cuisinart witnesses' evidence. However, the inconsistencies were not major and did not go to the root of the matter.
- [125] The Court did not believe Mr. Corbett who is the Landscaping Manager when he said that spraying would not be done in areas that other employees would be sent to for another 12 hours. While this may be a general policy, the Court has no doubt that on occasions the contrary occurred.

- [126] Mr. Marino Hodge struck the Court as a simple straightforward gentleman who simply came to tell the Court the truth. The Court believes him when he said, in answer to learned counsel Mr. Wallbank, that while spraying of the plants inside were done around 3:00 a.m. the plants located on the outside would be sprayed at a later time. The Court accepts his evidence that sometimes spraying would continue after 5:00 a.m., if spraying had commenced late. In giving his evidence, he clearly conveyed the impression that he had no interest to serve. The Court attached significant weight to his evidence.
- [127] At all material times the safety equipment was available for Mrs. Wallace. She was also instructed to use it while spraying the plants on the few occasions when this occurred. The Court is equally satisfied that on occasion while she was watering the plants other persons would be in the same area spraying insecticides. This caused her to complain to Mr. Clarke about her adverse reaction to spraying of the plants. As a consequence, Mr. Clarke took corrective measures so as to ensure that persons did not spray the area in which she was watering plants. The Court also accepts that steps were taken to ensure that Mrs. Wallace did not work in the area in which the plants had been sprayed. This does not negate the fact that on a few occasions she was exposed to those areas.
- [128] In all of the circumstances therefore, the Court is quite satisfied that Cuisinart took reasonable care to avoid subjecting Mrs. Wallace and other employees to unnecessary risks. Cuisinart indeed took reasonable care to avoid subjecting its employees to any risks which it could reasonably have foreseen and could have guarded against. The Court accepts that at all material times Mr. Clarke, Mr. Connor and Mr. Corbett together with other employees, including Mrs. Wallace, were provided with safety equipment and it was explained to them how to use it. Contrary to what Mrs. Wallace would have the Court believe, there is no doubt that Mrs. Wallace had unrestricted access to the equipment that she was requested to use. I do not for one moment believe that any equipment which was available was only accessible to persons who were spraying as Mrs. Wallace sought to have the Court believe.

Negligence/Breach of Duty of Care

- [129] There is no basis for the Court to conclude that Cuisinart breached its duty and failed to provide a safe place of work. The overwhelming, reliable and credible evidence is consistent with the view that Cuisinart did everything reasonably possible so as to ensure that Mrs. Wallace was provided with a safe place to work. Even on the few rare occasions when she was in the vicinity of other employees who were spraying, the Court is not satisfied that the evidence reaches the threshold required to sustain a plea of negligence.
- [130] On the facts as proven, there is not a scintilla of evidence on which the Court could properly conclude that Cuisinart was negligent or that it breached its common law duty of care to Mrs. Wallace. To the contrary, the overwhelming evidence is that Cuisinart ensured that not only was a safe place of work provided to Mrs. Wallace but in addition, she was provided a safe system of work. In fact, the evidence adduced points to the contrary position, namely, that they did everything possible in order to ensure that they met that common law duty of care.
- [131] Similarly, on the proven facts, the Claimants have not made out a claim that Cuisinart failed to provide an adequate system of working.

Breach of Implied Term of the Contract

- [132] The Court has no doubt that the safeguards that were put in place by Cuisinart were very adequate and reasonable in ensuring that Mrs. Wallace was provided with a safe system of work and a safe place of work. Not only did Cuisinart seek to ensure and ensured that she was not generally in the area in which spraying was ongoing, they also provided the requisite tools (gears) necessary to undertake her assigned tasks.
- [133] Further, there is not a scintilla of evidence on which it can properly be concluded that there was a failure to provide proper supervision. In fact, the Court accepts the evidence of Mr. Everette Clarke and finds that he took reasonable steps to ensure that Mrs. Wallace

was not exposed to the chemicals. As alluded to earlier, the Court accepts and finds as a fact that Mrs. Wallace, being a part of the Landscaping Department, had access to the following gear: disposable and permanent coveralls; helmets with ear covers; protective gas masks to cover the face, nose and mouth; and boots and gloves.

[134] In view of the totality of evidence, the Court is ineluctably driven to conclude that the Claimants have failed to establish that Cuisinart has breached an implied term of the contract.

[135] Even if the Court is wrong to conclude that there was no breach of duty by Cuisinart or any breach of the implied term of the contract, the Claimants are still required to establish that the breaches, as alleged, caused the illnesses from which Mrs. Wallace suffered and eventually succumbed. Alternatively, even if the Court is wrong to conclude that Cuisinart was not negligent, the Claimants are nevertheless required to prove that any negligent act or omission by Cuisinart caused the illnesses from which Mrs. Wallace suffered.

Causation

[136] A critical plank of the claim is the Claimants' allegation that the breaches by Cuisinart caused the illnesses which Mrs. Wallace sustained. It is law that the person who is alleging causation has the onus of proving so. The standard of proof is that of the civil standard, namely, on the balance of probabilities.

[137] On this issue, the Court has reviewed the admissible evidence that has been provided by Mrs. Wallace herself coupled with that of Mr. Hennis, together with the abundance of persuasive evidence that was adduced on behalf of Cuisinart. In the Court's view, there is no doubt that the Claimants have failed to meet the threshold to establish that Mrs. Wallace's exposure to the insecticides though minimal, contributed or caused the illness from which she suffered. The Court is fortified in its view, having reviewed the evidence in its entirety and the joint expert report of Dr. Brent in particular, on which much reliance is placed.

- [138] The Court accepts that every six months employees in the Landscaping Department were sent to Hughes Medical Centre for medical examination in order to ensure that they were not adversely affected by the chemicals. For several years, Mrs. Wallace benefitted from this testing and the results were uneventful. Ms. Gumbs, from whom much of this evidence came, struck the Court as a very truthful, honest and professional witness. I believe her. Accordingly, the Court accepts that Cuisinart ensured that Mrs. Wallace was afforded a routine physical examination every six (6) months in order to ensure that there was no chemical exposure in her blood stream.
- [139] The Court is satisfied that the temporary symptoms that Mrs. Wallace said that she felt such as hot flashes, lethargy, breathing problems and rapid heartbeat may be attributed to the chemicals that were sprayed. In addition, it is clear on the evidence that Mrs. Wallace suffered from pulmonary hypertension and Dilated Hypokinetic Cardiopathy. This is not the end of the matter. Critically, the Court must pay regard to the very helpful forensic evidence of Dr. Brent, the Toxicologist, which clearly indicates that the chemicals could not have caused the significant illnesses/complaints from which Mrs. Wallace suffered. This brings into sharp focus the joint expert report.
- [140] In passing, the Court places on record its appreciation to both learned counsel for the very searching questions that were put to Dr. Brent. The Court is equally grateful for the very candid and detailed way in which the doctor provided his answers. Significantly, Dr. Brent stated that he could not state “with a reasonable degree of medical certainty whether Mrs. Wallace’s dilated cardiomyopathy was causally related to her alleged chemical exposure at the Cuisinart Resort and Spa”.
- [141] Equally, for what it is worth, the Court accepts the evidence from Cuisinart’s witnesses that on several occasions Mr. Clarke had cause to speak to Mrs. Wallace about her diet.
- [142] Perhaps, it is apposite for the Court to state that it has formed the considered view that the answers which Dr. Brent provided in the report are credible and reliable. It is noteworthy

that learned counsel Mr. Wallbank acted quite professionally and did not seek to discredit Dr. Brent's evidence in the absence of any other expert evidence. It is evident that the death certificate lists multiple causes of death, and those causes cannot properly be attributed to the chemicals to which Mrs. Wallace alleged she was exposed. The Court is fortified in this view, having given careful consideration to Dr. Brent's report.

- [143] Indeed, Dr. Brent's opinion, to which the Court attaches significant weight, indicates that the illness which debilitated Mrs. Wallace could not be attributed to the named chemicals to which she was exposed. Learned counsel Mr. Wallbank tried discretely to inject the inadmissible medical reports from the general practitioners to buttress his arguments on causation.
- [144] It is noteworthy that there is not a scintilla of evidence before the Court as to the dosage of chemicals to which Mrs. Wallace was exposed to. The Court has no evidence as to the level of toxicity of the chemicals to which Mrs. Wallace was exposed.
- [145] The Claimants have failed to provide the Court with reliable evidence to support the allegations of the causal link between the alleged acts or omissions of Cuisinart and Mrs. Wallace's illness. It bears reiterating that this is so even though the requirement is on proof on the balance of probabilities. To conclude that there was a causal link would not only require the Court to speculate about the degree of exposure but more critically to go against the very cogent evidence of Dr. Brent. No other toxicologist or medical doctor has questioned or differed from his very clear and objective opinions.
- [146] The toxicology report that was provided by Dr. Brent indicates quite to the contrary. The Court is quite aware that it is not bound to accept the evidence of an expert simply because no other witness has contradicted it, (See *Watt v Tucker* [2005] EWCA (w 1420). However, the Court is of the considered view that Dr. Brent's report should be accorded significant weight.

[147] For the sake of completeness, it is noteworthy that there is no evidence before the Court upon which I could properly conclude that Mrs. Wallace was exposed to high or excessive or dangerous levels of toxic chemicals. Despite learned counsel Mr. Wallbank questioning the witnesses about the mixing of two or more chemicals, the levels of dosage or toxicity was not and could not properly be addressed through the witnesses who clearly are not experts.

[148] There is equally not a scintilla of evidence upon which I could properly conclude that Mrs. Wallace's illnesses, which ultimately led to her demise, were caused by her limited exposure to the named chemicals while at work.

[149] In the circumstances, there is not a scintilla of reliable evidence on which the Court could properly conclude that Mrs. Wallace's exposure to the chemicals caused or even contributed to her illness. Therefore, even if the Court were to assume or conclude that Cuisinart breached its duty of care towards Mrs. Wallace, there is no basis upon which the Court could properly conclude that the breach of duty caused the illnesses from which Mrs. Wallace suffered. To put it simply, it cannot be said that but for Cuisinart's alleged breach, Mrs. Wallace would not have suffered from the illnesses which she did. While the Court has no doubt that for several years prior to her demise Mrs. Wallace has suffered heart failure, the causal connection of that to her job was simply not established.

[150] Taking into account the totality of evidence including the general health of Mrs. Wallace, her weight included, coupled with the expert evidence of Dr. Brent, the Court is unconvinced that it was Mrs. Wallace's exposure to the four named chemicals that caused her to suffer from cardiomyopathy (heart failure) and pulmonary problems.

Joint Expert Witness

[151] It is right that I devote some more time to the joint expert report. It is very clear from Dr. Brent's report that the symptoms which the chemicals would cause are transient in nature. He was adamant that they were not chronic and were easily treatable. Hot flashes,

excessive perspiring, excessive urination, increase in heart rate and dizziness, nauseating feeling, all which can possibly occur from exposure to the chemicals. However, Dr. Brent was clear that the symptoms should be resolved within a few days of onset. Dr. Brent said that the named chemicals are insecticides.

[152] It bears noting that Dr. Brent's report was very comprehensive. The answers given by the doctor appear to be very objective and in keeping with very high professional standards. I found Dr. Brent's answers to be very clear and extremely enlightening. Much of this case would turn on those answers. This is particularly so in relation to whether or not there is a causal link established in the case at bar between the alleged breach of duty by Cuisinart and Mrs. Wallace's illnesses and ultimate demise.

[153] In answer to questions in relation to Malathion, Sevin, Diazinon and Cygon, Dr. Brent further indicated that in relation to all four of the chemicals, if the dose is sufficiently high the chemical reaction of enzymes that it can cause specific toxic effects on the human body. Dr. Brent said that at higher doses it can cause pulmonary failure and seizure. Dr. Brent said that these symptoms can occur with acute exposure.

[154] However, it is apposite that the Court reproduces the pertinent parts of Dr. Jeffery Brent's report which buttresses the Court's view that the report rules out any causal connection between the contact with the chemicals and the resulting illnesses from which Mrs. Wallace suffered and eventually succumbed.

[155] Indeed, Dr. Brent said further that either of the four chemicals, namely, Malathion, Sevin, Diazinon or Cygon "in low concentrations are actually made to be directly applied to the human body for the treatment of lice. For substantially higher concentrations, generally safety glasses, good ventilation, if inside, and gloves are suggested. For higher concentrations, it is also suggested that skin contact be avoided to the extent possible. It should be stored in such a way that it is not a hazard. Beyond that, no special storage requirements are necessary." Critically, Dr. Brent said that the adverse effects to any of the four chemicals will be temporary in nature.

- [156] In relation to all four chemicals, Dr. Brent stated that if the person is exposed to a combination of the chemicals, the effects would be additive. Skin irritation is possible. Dr. Brent stated that it is possible for someone during an acute excessive dose exposure to experience any of the following symptoms: faster beating of heart, abnormal palpitations, erratic breathing, shortness of breath, stomach cramps, dizziness, nausea, fatigue. However, in relation to all of the chemicals, the symptoms should not be chronic. Equally, the doctor stated that the duration on frequency of exposure is not expected to affect the development of symptoms in relation to all four chemicals.
- [157] Dr. Brent's opinion runs counter to the position that is argued for by Mr. Wallbank. There is no doubt, in my view, that Dr. Brent also said that exposure to the four chemicals does not cause dilated hypokinetic cardiomyopathy, neither does it cause dilated cardiomyopathy. Dr. Brent, however, admitted that Malathion, Seven, Diazinon or Cygon could cause transient pulmonary hypertension to occur if a person has developed pulmonary edema from an acute (very high dose) exposure that would resolve once the pulmonary edema resolves, which generally occurs within days. He was clear that exposure to any of the four chemicals does not cause congestive heart failure requiring medical treatment for the remainder of one's life. Dr. Brent also stated that exposure to the chemicals is not known to increase the risk for conditions caused by other factors.
- [158] It is quite interesting that the Claimants could seek to sustain their claim in the face of the overwhelming objective and compelling evidence of the expert witness who has no interest to serve. Dr. Brent's toxicological report and the answers he gave to counsel for both parties clearly told the entire story.
- [159] In the face of Dr. Brent's clear answers in relation to the issue of causation, it is passing strange that the Claimants have asserted that Cuisinart has failed to make any statements which discounts or excludes the possibility, on a balance of probabilities, of the chemical poisoning of the deceased as a result of her exposure to the chemicals during the course of her employment. The burden of proof remains on the Claimants who have failed to lead credible or reliable evidence in relation to the issue of causation.

- [160] The Court is not of the view that the report of Dr. Brent in any way supported the position advocated by learned counsel Mr. Wallbank. In fact, it points to the contrary position. The doctor's evidence was that "for any chemical substance known it is potentially lethal at high doses (one can potentially kill themselves by drinking a very large amount of water) or is not toxic at very low doses (botulinum toxin is the most lethal substance known to mankind yet at sufficiently low doses is used very safely as a treatment for certain diseases)".
- [161] The Court is of the respectful view that Dr. Brent's report was not read as closely as it should since the position that is articulated by the Claimants is untenable in the face of the very clear and objective answers in the report.
- [162] Equally curious is the failure of the Claimants to provide the Court with any conflicting toxicology report which indicates that Mrs. Wallace's tissues were tested, for example, and excessive doses of the chemicals were found therein. The Claimants simply make bald assertions about chemical poisoning and speak about the deceased becoming ill with heart failure after prolonged exposure to chemicals.
- [163] There is no evidential basis on which it could be properly concluded that Mrs. Wallace suffered congestive cardiac failure and the other illnesses as a result of her exposure to the chemicals while she worked at Cuisinart.
- [164] Faced with the overwhelming reliable and credible evidence from Dr. Brent, the Court is convinced that the Claimants have failed to establish causation or any nexus between the alleged acts or omissions of Cuisinart and Mrs. Wallace's illnesses. Accordingly, the Court accepts and agrees with learned counsel Mrs. Ruan when she advocated there is no causal connection between exposure to the chemicals and Mrs. Wallace's illness.
- [165] Further, the death certificate paints a very different picture which is very consistent with Cuisinart's defence and borne out by the expert report of Dr. Brent.

[166] Even if there is any evidence of negligence or breach of duty, which the Court does not find exists, the claim against Cuisinart must fail on the basis of lack of causation.

Unlawful Dismissal

[167] In relation to this issue the evidence before the Court is clear. Mrs. Wallace stayed away from work for several months during the relevant period without submitting a medical certificate to Cuisinart. She was aware and knew that she was required to submit a medical certificate after absences of more than two days. In addition, in so doing, she failed to comply with the procedures as were set out in Cuisinart's Employee's Manual. She had received the Manual and was aware of its contents. In fact, she had on previous occasions submitted medicals when she was absent for more than two days. However, here she was on an extended period of absence and I believe her when she said that she was busy trying to see the doctors.

[168] The Court now has to determine whether, in the circumstances, Cuisinart unlawfully or improperly dismissed Ms. Wallace. While the Court has some compassion for Mrs. Wallace's then situation, the matter before the Court must be resolved objectively and judiciously.

[169] The Employee Handbook clearly states:

"If you are unable to attend work due to illness, you should advise your department head or duty manager as soon as possible. If you are unable to do so, get someone to contact your department head on your behalf."

[170] On the evidence presented by Mrs. Wallace, there is no basis for concluding that she, during the period under review, notified Cuisinart of the reason for her illness in accordance with the terms of the contract.

[171] It was as a consequence of Mrs. Wallace not having reported or submitted a medical certificate for the period 19th January, 2008 to 16th April, 2008 that caused Cuisinart to

write Mrs. Wallace indicating that in accordance with the Employee Handbook, Cuisinart deems that she has abandoned her post and that it had no choice but to accept her resignation.

[172] As stated earlier, Mrs. Wallace was aware of the Company's rules in relation to the submission of medical reports. Also, it is of significance that Mrs. Wallace admitted under cross-examination (in her deposition) that she was too busy going to doctors to remember to submit her sick note. The evidence from Ms. Carleen Gumbs, the Human Resource Manager, confirms that no medical report was submitted.

[173] In view of the totality of evidence, the Court accepts the submissions of learned counsel Mrs. Ruan that Mrs. Wallace's failure to submit a medical report for the period January 2008 to April 2008 amounted to absenting herself from duty without excuse or abandonment of duty. Equally, Mrs. Wallace failed to notify Cuisinart about her inability to attend work from January 2008 to April 2008. While the Court empathizes with Mrs. Wallace's then situation, this does not negate the fact that she clearly did not act in accordance with the terms and conditions of her employment.

[174] Accordingly, the Court is not of the view that Cuisinart either wrongfully or unlawfully terminated Mrs. Wallace's employment.

[175] Accordingly, in the case at bar, insofar as the Claimants have failed to discharge their duty to establish any breach by Cuisinart and they have also failed to satisfy the Court on the issue of causation, they are not entitled to receive any compensation or damages. Equally, they have not succeeded in relation to their unlawful dismissal claim and are therefore not entitled to the declaration sought.

[176] The Claimants have failed to prove their claim against Anguilla Development Corporation Ltd (trading as Cuisinart Resort and Spa). In view of the foregoing, there will be judgment for Anguilla Development Corporation Ltd (trading as Cuisinart Resort and Spa). Insofar, as Anguilla Development Corporation Limited (Trading as Cuisinart Resort and Spa) has

prevailed in its defence against the claim by the Personal Representatives of the Estate of Caroleen Wallace, it is entitled to prescribed costs, unless otherwise agreed.

Conclusion

[177] In view of the premises, Craig Wallace, Cody Wallace and Cameron Wallace's claim as the Personal Representatives of the Estate of Caroleen Wallace against Anguilla Development Corporation Ltd (trading as Cuisinart Resort and Spa) is dismissed.

[178] Anguilla Development Corporation Ltd (trading as Cuisinart Resort and Spa) is entitled to prescribed costs, unless otherwise agreed.

[179] The Court gratefully acknowledges the tremendous assistance of learned counsel.

Louise Esther Blenman

Resident High Court Judge

Anguilla