COMMONWEALTH OF THE BAHAMAS **2019**

IN THE SUPREME COURT **CLE/gen/FP/00028**

Common Law & Equity Division

BETWEEN

PHILIP HEPBURN

Plaintiff

AND

POLYMERS INTERNATIONAL LIMITED

First Defendant

Before: The Honourable Sir Brian M. Moree Kt.

Appearances: Mr. Harvey Tynes KC with Ms. Shonda Tynes and Ms. Tanisha Tynes for the Plaintiff.
Ms. Ruby Gray for the Defendant.

JUDGMENT

1. On 2 August, 2022 I handed down my decision in this case. At that time I held that the Plaintiff's slip and fall while walking in the Defendant's warehouse on 12 February, 2016 was caused by the negligence of the Defendant. Therefore I granted judgment on liability to the Plaintiff with reasons to follow. I also made an order that costs were to be paid by the Defendant to the Plaintiff. I now set out the reasons for my decision with apologies for the delay in doing so.

2. It had been agreed that the court would only deal with liability at the trial leaving the quantum of damages to be dealt with, if necessary, at a later date. Bearing in mind my decision, I stated at the hearing on 2 August, 2022 that the parties would now have to deal with damages. Obviously, in the absence of agreement, the damages will have to be assessed.

Writ & Pleadings

3. The Plaintiff, Philip Hepburn ("***the Plaintiff'*** or "***Mr. Hepburn***"), commenced this action against the Defendant, Polymers International Limited ("***the Defendant***" or "***Polymers***") by a generally endorsed Writ of Summons filed on 4 February, 2019. In the Writ, the Plaintiff claimed damages for personal injuries caused by the negligence of Polymers, its servants or agents. The Statement of Claim was filed on 14 April, 2021. In that pleading, Mr. Hepburn

averred that on 12 February, 2021 he was a part of a group of persons who were visiting the Manufacturing Plant of Polymers located in Grand Bahama ("***the Plant"***) in connection with a court case. According to the Statement of Claim, Mr. Hepburn, while walking in Polymers' warehouse at the Plant ("***the Warehouse***"), slipped on plastic beads on the floor and fell sustaining personal injuries. He alleged that his injuries were caused by the negligence of Polymers and claimed Damages, Interest and Costs. The Particulars of Negligence were:

> **" i) failing to sweep, mop, vacuum or otherwise clean the warehouse floor or taking any other steps to prevent it being slippery and dangerous;**
> **ii) failing to light the warehouse adequately;**
> **iii) failing to warn the Plaintiff of the plastic beads or that the warehouse floor was slippery and dangerous."**

4. Polymers filed its Defence on 29 April, 2021. It admitted that the Plaintiff was part of a group of persons who visited the Plant in connection with another court case and stated that the attendees were told by Mr. Greg Ebelhar of Polymers to wear tennis shoes. Polymers denied that Mr. Hepburn slipped and fell on the floor of the Warehouse. It further averred that he was a former employee of Polymers and knew of the safety requirements when visiting or entering the Plant.

5. Polymers pleaded in its Defence that Mr. Hepburn was wearing cowboy boots when he visited the Plant in breach of the instructions given by Polymers to wear soft soled shoes. By doing so, Polymers averred that Mr. Hepburn was reckless and that he accepted and assumed the risk occasioned by his refusal to follow its instructions with regard to the appropriate footwear. It denied the alleged negligence and pleaded that:

> "**(i) it has a proper and thorough system of cleaning and maintaining the Plant's floor;**
> **(ii) the warehouse was and at all material times was properly illuminated and visible to the eye;**
> **(iii) the warehouse floor was not slippery."**

6. Polymers also averred in its Defence that Mr. Hepburn was wholly liable for his actions and the resulting fall and in the alternative pleaded contributory negligence. The Particulars of Mr. Hepburn's alleged negligence were that he failed to:

> **"(a) Have regard for his safety by refusing to wear proper footwear when he was advised;**
> **(b) Wearing leather soled cowboy boots in a manufacturing plant when he knew and ought to** [have] **known it was not safe;**
> **(c) Walking in a manner so as not to safeguard his safety;**
> **(d) In all of the circumstances being reckless and careless by and ignoring the safety requirements of the Defendant's plant."**

7. Paragraph 10 of the Defence referred to a pre-existing injury sustained by Mr. Hepburn some years before his fall on 12 February, 2016 and Polymers averred that Mr. Hepburn *"…failed to mitigate his losses by either seeking proper medical attention and/or treatment and/or taking steps to minimize any damages as alleged or at all."*

Evidence

8. The Plaintiff and his wife, Mrs. Katherine Hepburn, gave evidence to support his claim. He also relied on the evidence of Justice Petra Hanna-Adderley and Mr. Clayton Pratt who were both at the Plant when he slipped and fell.

9. Mr. Hepburn relied on his Witness Statement for his evidence in chief. He stated that he visited the Plant on 12 February, 2016 as part of a group of persons involved in a court case being heard in Freeport by Madam Justice Petra Adderley ("***the Tour Group***"). The judge had approved the visit to the Plant as the locus in quo in that case. In his evidence, Mr. Hepburn stated that while visiting the Plant the persons in the Tour Group walked through the Packaging area in the Warehouse. At that time, according to his evidence, Mr. Hepburn was walking with his wife about 15 feet behind the others in the group when, suddenly he "*….slipped and fell backwards as a result of the presence of tiny beads…*" on the floor which he had not seen when he first entered the Warehouse. During his cross examination he stated that after falling he realized that the floor was not cleaned properly as he noticed small beads on the floor when he felt them with his hand after hitting the floor. He said that as he was getting up he could feel the beads on his hands. His evidence was that he dusted the beads off his hands when he was helped to his feet by two employees of Polymers. Mr. Hepburn stated that the small beads were transparent and he did not see the tiny beads on the floor before he slipped and fell. After being helped to his feet and getting his "*…bearings back"* Mr. Hepburn re-joined the others in the Tour Group and completed the tour of the Warehouse. In this regard, the following exchange occurred during his cross examination:

> **"A. ..I said to my wife, I say, "I need to go to the hospital. Let's finish this and let me go to the hospital."**
> **…….**
> **Q. And didn't you also continue with the site visit after Your fall?**
> **A. I used my wife as a crutch. We walked and went in the elevator.**
> **Q. Mr. Hepburn, it is your evidence that you continued the site visit, correct?**
> **A. Right."**

10. According to his evidence, Mr. Hepburn did not report his slip and fall to anyone at Polymers when it occurred and he did not receive any medical treatment at the Plant. It will be recalled that two employees of Polymers had helped to get Mr. Hepburn back on his feet after the fall and so presumably the incident came to the attention of Polymers. He received medical

treatment later on 12 February, 2016 at the Accident & Emergency Department at the Rand Memorial Hospital.

11. Under cross examination, Mr. Hepburn stated that he was wearing cowboy boots and walking with a cane when he slipped and fell in the Warehouse on 12 February, 2016. He could not recall whether the soles on his boots were leather or some other material and he stated that he used a cane or a walking stick when walking. His explanation for that was captured in this exchange"

> **"Q. …Why do you do need a stick to be walk?**
> **A. I have a sciatic nerve that triggers sometime and I become -- it become almost like a style of walking with the cane. And I walk –**
> **……..**
> **Q. What did you say about walking with the cane?**
> **A. It became a style to me because I like walking with the cane. And at my age now I'm a cool guy now, walking with a cane. And my sciatic nerve sometime acts up.**
> **Q. Your sciatic nerve?**
> **A. Yeah.**
> **Q. So, you came on to the premises, you were already walking with a cane. That is your evidence.**
> **A. Yeah, I walk with a cane.**
> **Q. And you had a sciatic nerve issue prior to your fall.**
> **A. Yes. Now and then it bothers me. When I -- it bothers me now and then."**

12. It was put to Mr. Hepburn during his cross examination that when, on 22 January 2016, the judge ordered the site visit, it was stated that persons visiting the Plant should wear soft soled shoes. He denied that and said that he had no recollection of anyone making such a statement.

13. Mr. Hepburn accepted that he had previously worked for Polymers some years ago and that at that time employees of Polymers were required to wear steel toe safety shoes. The Transcript of 9 September, 2021 recorded this statement by Mr. Hepburn during his cross examination:

> **"It** [that is his fall] **didn't have anything to do with me wearing cowboy boots. I work there for 14 years wearing cowboy boots. When we have function, I walk in there with cowboy boots. And when I work there, I work there in safety cowboy boots. And people have slipped down in there with safety shoes on."**

14. Mr. Hepburn also had this exchange with Counsel during his cross examination:

> **"Q. What are the safety protocols relating to the type of shoes on Polymers premises?**

A. My time at Polymers, I wear a cowboy boots. I work there in a cowboy boots. Polymers order me a cowboy boot.
Q. That's not the question. What are the safety protocols relating to the type of shoes worn on Polymers premises?
A. Steel-toe boots, safety shoes.
Q. What are safety shoes?
A. Steel-toe boots, safety shoes. It could be a cowboy –
Q. That sounds like two types of shoes you mentioned.
A. A steel-toe safety boots -- safety shoes.
Q. So, everyone at Polymers were walking around with cowboy boots when you were employed?
A. No. I said steel-toe safety shoes. They have different type of safety shoes."

15. During his cross examination Mr. Hepburn accepted that the floor of the Warehouse on 12 February, 2016 was not wet. He was referred to the Visitors Safety Programme at Tab 3 of the Defendant's Bundle of Documents which, according to the document, was released by Polymers on 13 March, 2009. Mr. Hepburn stated that he was employed by Polymers at that time but that he had never seen that document. He maintained that there were no safety protocols for visitors when he worked for Polymers.[1]

16. In his re-examination Mr. Hepburn stated that during the time when he was employed by Polymers numerous employees had fallen when walking in the Warehouse and in other areas of the Plant while wearing safety shoes.

17. The second witness was Justice Petra Hanna-Adderley who appeared as a fact witness in response to a subpoena.

18. According to her evidence, Justice Hanna-Adderley was at the Plant on 12 February, 2016, together with a number of other persons including the Plaintiff, to view the premises in connection with a court case which she was hearing. When the persons in the Tour Group were walking through the Warehouse, Mr. Hepburn was behind Justice Hanna-Adderley with a few other persons. She described what happened in this exchange during her cross examination:

"Q. You said that you did not see Mr. Hepburn fall, correct?
A. No. I had already left the building because we had basically finished the site. We had finished examining where the incident [relating to the other court case] **had occurred, so I was moving back to the entrance area where the cars were parked.**
……

[1] See Transcript of 9 September, 2021 at lines 17-19 on page 62.

So, my back was to Mr. Hepburn and the others who were walking a little slower.
Q. So, if you didn't see him fall, you can't say to the Court what caused him to fall, correct?
A. No. I wasn't standing next to him.
Q. Right.
A. I heard an uproar behind me and when I turned around, I saw others helping him up from the ground. So, I guess I assumed that he fell at that juncture because they were helping him up.
Q. You assumed that he fell. You couldn't tell if someone had pushed him.
A. No, it was behind me. I didn't see exactly what happened, how he came to be on the ground. I didn't see that."

19. Her evidence was that the floor was not wet or slippery when they were walking through the Warehouse. Justice Hanna-Adderley further addressed the condition of the floor in this exchange with Counsel:

> **"Q. Do you recall the condition of the floor of the warehouse on that day?**
> **A. ……. as I was walking on the floor, I didn't notice immediately anything about the floor. My aide gave me some information. He then bent down, showed me -- picked up something from the floor which turned out to be a little ball, I guess, a non-technical term, a ball that looked like plastic. Clear substance. A ball. And he warned me -- he gave me some information. So, after which, I just walked a little more gingerly but, other than that, I noticed nothing else about the floor; no unevenness or anything like that. I just walked a little gingerly.**
> **Q. So, are you saying that there was one sole ball, as you call it, on the floor?**
> **A. Well, he picked up one and showed it to me. I can't say if there were more. I really didn't look. I just -- and I didn't feel anything under my shoes. I just walked gingerly as we progressed through that building."**

20. Later, when under cross examination, Justice Hanna-Adderley stated that after speaking with her Clerk about the ball on the floor she resumed the tour of the site but "….*proceeded cautiously because of the information…"* she was given by her Clerk.

21. Justice Hanna-Adderley stated that she was wearing shoes with about two inch heels when visiting the Plant on 12 February, 2016. She did not recall anyone saying in court or anywhere else at any time prior to 12 February, 2016 that persons visiting the Plant should wear soft sole shoes or tennis shoes.

22. The third witness for the Plaintiff was his wife, Mrs. Katherine Hepburn. Her Witness Statement stood as her evidence in chief. She was in the Tour Group which included between 10 -15 persons who visited the Plant on 12 February, 2016. When walking through the Warehouse she was beside her husband, Mr. Hepburn. Her evidence was that suddenly he slipped and fell hitting the back of his head first and landed on his back. Mrs. Hepburn's evidence was that immediately before her husband fell she realized that the floor was slippery and she began to walk slowly. She stated that "….*I do not know what was on the floor which made it slippery but I do not think it was the floor itself which was slippery*."

23. Mrs. Hepburn's evidence on the condition of the floor was contained in this exchange during cross examination:

> **"Q. …What was the material like on the floor? .....You say you realized the floor was slippery.**
> **A. There was something on the floor that was slippery.**
> **Q. I want to ask you again: What was the material like on the floor?**
> **A. The floor was concrete. There was something on the floor that made it slippery.**
> **Q. What do you mean by "slippery"?**
> **A. "Slippery" meaning that you had a walk slowly and cautiously.**
> **Q. When did you first notice that the floor was, as you say, slippery?**
> **A. Going into the warehouse, almost leaving the warehouse area.**
> **Q. Did you see any beads or articles on the floor?**
> **A. No, but it felt as though something was on the floor that made it slippery.**
> **Q. Was the entire floor covered with what you say made it slippery, this material or –**
> **A. As we got -- as we were walking it was a bit slippery. We had to walk even slower. I felt as though I was going to fall…**
> **Q. Was the floor wet?**
> **A. No, the floor was not wet."**

24. Mrs. Hepburn stated that when her husband fell, Mr. Ebelhar was in front of the group leading the walking tour through the Warehouse and her group was following him. She noticed that the floor was slippery "*…more than halfway…"* through the tour of the Warehouse. After leaving the Plant on 12 February, 2016 Mrs. Hepburn stated that the Plaintiff returned to court and gave evidence before Justice Hanna-Adderley. He complained of pain to her but did not mention it when giving evidence. Mrs. Hepburn stated that she wore dress shoes when visiting the Plant on 12 February, 2016 and that no one had said that soft soled shoes should be worn.

25. The final witness for the Plaintiff was Mr. Clayton Pratt. He was, at that time, the Clerk to Justice Hanna-Adderley. He was also a part of the Tour Group which visited the Plant on 12 February, 2016. The evidence in chief of Mr. Pratt was given through his Witness Statement.

26. He stated that the persons involved in the court case before Justice Hanna-Adderley met on the morning of 12 February, 2016 at the Garnet Levarity Justice Centre in Freeport. After recording the presence of the persons in the Tour Group at the court, the judge adjourned the proceedings to facilitate a visit to the Plant. He along with the other persons, including Mr. Hepburn, Mrs. Hepburn and Justice Hanna-Adderley, went to the Plant to walk through and view the areas relevant to the court case before Justice Hanna-Adderley.

27. When asked about the fall of Mr. Hepburn while in the Warehouse Mr. Pratt had this exchange with Counsel:

> **"Q. …Who were you walking next to at the site visit?**
> **A. That, I don't recall. But I -- I don't know who I was walking next to, but I know I was behind the Justice.**
> **Q. Okay. And you say in paragraph 5 that you heard a noise behind you.**
> **A. Yes, ma'am.**
> **Q. You said you saw Philip Hepburn being lifted off the ground.**
> **A. Yes, ma'am.**
> **Q. Do you know how he got on the ground?**
> **A. No, ma'am.**
> **Q. So, it's your evidence you didn't see what caused him to be on the ground?**
> **A. No, ma'am. I can't tell you what caused him to be on the ground."**

28. Mr. Pratt's evidence was that he was wearing his normal work shoes on 12 February, 2016 during the visit to the Plant which had soles made of a rubber material. He said that Mr. Hepburn was wearing cowboy boots and was walking with a cane when he was at the Plant. At paragraph 9 of his Witness Statement Mr. Pratt stated:

> **"At no time prior to the visit to the Defendant's plant on the 12th February 2016, did anyone tell me or anyone in my presence that we should wear tennis shoes or softsoled shoes for the purpose of the visit to the Defendant's plant."**

29. When asked about the condition of the floor in the Warehouse, Mr. Pratt had this exchange with Counsel:

> **"Q. ..What was the material like on the floor? Describe it.**

A. It was, like, grainy. Grainy like.
Q. You also say that the floor -- there was material on the floor which caused the floor to be slippery? What do you mean by "slippery".
A. You can easily lose your footing if you don't walk gingerly on it.
Q. Was the floor wet?
A. No, ma'am.
Q. So, when did you notice that the floor was, as you say, slippery?
A. When I walked on it.
Q. I know you would have had to walk on the floor, but when and which part of the site was it?
A. I don't recall.
Q. All right. Did you see any beads or articles on the floor? Beads or bead.
A. No, ma'am.
Q. All right. <u>Was the entire floor covered with the material that you say made it slippery?</u>
<u>A. No, ma'am.</u>
Q. Did you walk the entire floor?
A. No, ma'am.
Q. Did you walk a certain path on the floor?
A. Yes, ma'am.
Q. Did other people walk that certain path who were part of the site visit?
A. Yes, ma'am.
Q. Who was leading the visit prior to Mr. Hepburn's fall?
A. Justice -- madam Justice Adderley.
Q. She was leading the walk. Okay. What did you do when you noticed this so-called slipperiness on the floor?
…….
A. I walked gingerly, with caution.
Q. And you noticed the slipperiness on the floor at the end or early on through your walk-through of the warehouse?
A. Early through.
Q. Did you alert the defendant of this supposed slipperiness on the floor?
A. No, ma'am.
THE COURT: I presume you mean the plaintiff, Mrs. Gray.
MS. GRAY: Sorry. I –
Q. How long was the journey through the warehouse?
A. That's a guess. I can make an estimation of it.
Q. Make an estimation from your recollection.

A. About less than a minute. A minute. Less.
Q. Okay." [My emphasis.]

30. According to Mr. Pratt, he and the others in the Tour Group walked through the Warehouse but they waited for Mr. Hepburn after he fell. He stated that after completing the tour of the Plant he and the others, including the Plaintiff, returned to the Court in the Garnet Levarity building. He did not recall whether the Plaintiff gave evidence in court after returning from the Plant.

31. Two witnesses gave evidence on behalf of Polymers; Mr. Joseph Gregory Ebelhar, III and Mr. Craig Simms. They both gave their evidence in chief through their respective Witness Statements.

32. Mr. Ebelhar was the Chief Operating Officer of Polymers. He explained the product manufactured by Polymers at the Plant in Grand Bahama in this way:

> **".. We manufacture expandable polystyrene that, when you look at it, the sizes -- <u>if you put it on table top or anything it looks like salt or sugar.</u> <u>That's how small it is.</u>**
> **Q. And what is it used for?**
> **A. It is used to make foam cups, like, for coffee, hot or cold drink cups.** [My emphasis]

33. Later in cross examination Mr. Ebelhar had this exchange with Counsel:

> **"Q. You describe, Mr. Ebelhar, that the product you manufacture, you say it is the size of salt or sugar.**
> **A. Yes.**
> **Q. Now, salt or sugar may come in different size grains.**
> **A. Table salt.**
> **Q. Would this be ground salt or ground –**
> **A. Yes. Table salt.**
> **Q. Would it be fair, then, to describe these beads as "grainy"?**
> **A. They are -- yes, they would be -- I mean, if salt and sugar is grainy, yes, it would be similar."**

34. Mr. Ebelhar stated in his Witness Statement that during the court hearing in the case before Justice Hanna-Adderley on 10 February, 2016 he recalled telling all persons in Court to wear "*…proper tennis like shoes or flat shoes with no hard soles…."* when visiting the Plant. Under cross examination it was put to him that there was not a hearing in the case before Justice Hanna-Adderley on 10 February, 2016 and he accepted that he might have the date wrong. In response to another question from Counsel, Mr. Ebelhar said that he speaks in court through his lawyer and the statement about the footwear might have been made by his lawyer.

35. According to his evidence, Mr. Ebelhar led the Tour Group on the morning of 12 February, 2016. Other persons in that group were the Plaintiff, Counsel for the Plaintiff, Polymers' Counsel, Justice Hanna-Adderley and Mr. Craig Simms who was an employee of Polymers.

36. He said that the tour started at around 10:15 a.m. on 12 February, 2016. The persons in the Tour Group, including the Plaintiff, left the front office and went into the warehouse. He then stated in his Witness Statement the following:

> "5. **I was leading the tour and talking to Mr. Rigby and Ms. Gray** [Counsel for Polymers] **with the other participants behind. We crossed the warehouse to exit through an overhead access door to a landing going past the packaging area. As we approached the door, there was a disturbance behind me. Back in the group, Mr. Hepburn had fallen sideways toward the cane that he was using to assist him. Mrs. Hepburn and others were trying to help him up. Mr. Hepburn was wearing cowboy style boots with leather soles as was obvious when he was laying on his side. "**

37. During his cross examination Mr. Ebelhar confirmed that he did not see Mr. Hepburn fall and when he first saw him he was on the ground and being helped to his feet by others. He also accepted that contrary to his Witness Statement he did not see Mr. Hepburn fall sideways toward the cane he was using to assist him. When he turned around he only saw the position that Mr. Hepburn was in after he fell which, according to Mr. Ebelhar, was about ten minutes after the start of the tour. While Mr. Ebelhar stated unequivocally in his Witness Statement that Mr. Hepburn was wearing cowboy boots with leather soles, even saying that it was obvious, he said something quite different during his re-examination in this exchange with Ms. Gray:

> **"Q. All right. Did you see the shoes that Mr. Hepburn was wearing?**
> **A. Very much. Pair of cowboy boots.**
> **Q. Are you able to describe them?**
> **A. No. The only thing that I saw for sure, they were cowboy boots with the -- to the best of what I could see from the distance, that they had leather soles."**

38. In paragraph 9 of his Witness Statement Mr. Ebelhar stated that he *"..did not see any plastic beads on the floor. Certainly, there were no beads covering the floor as Mr. Hepburn alleges."* However, during his cross examination after he said that he heard a disturbance behind him there was this exchange:

> ""**"Q. I don't need to know what you were talking about <u>but immediately before you heard this disturbance, were you looking for beads on the floor?</u>**

A. No.
Q. That's the floor of the warehouse.
A. Correct.
Q. You were not?
A. No.
Q. And you had already passed the area where Mr. Hepburn fell behind you?
A. Correct." [My emphasis]

39. Mr. Ebelhar's evidence was that once Mr. Hepburn was helped to his feet he continued with the others persons in the Tour Group to complete the tour and they then retraced their path through the Warehouse back to the front office. He stated that as Mr. Hepburn was wearing cowboy boots, a maintenance cart was called to pick him up to take him back to the front office to avoid the chance of any further incidents. The tour was completed by 11:15 a.m.

40. In his Witness Statement Mr. Ebelhar stated that Mr. Hepburn had previously worked for Polymers for almost 10 years and he was aware of the protocols for wearing proper shoes. He stated that the Warehouse had a masonry floor and he did not see any plastic beads on the floor of the Warehouse on 12 February, 2016. He said that the floor area was properly cleaned prior to the site visit by the Tour Group.

41. According to Mr. Ebelhar's evidence, Mr. Hepburn did not make any complaints during the tour and that after it was completed he gave evidence in court on the same day without any reference to his fall or alleged injuries.

42. The second witness for Polymers was Mr. Craig Simms. He was the Operations Manager of Polymers and joined the Tour Group in the administration building at the Plant on 12 February, 2016. He said that safety glasses were given to all persons in the Group Tour prior to starting the tour.

43. His evidence was that Mr. Hepburn was in the Tour Group on 12 February, 2016. He was wearing jeans, a blazer and cowboy boots and was walking with a cane. Mr. Ebelhar led the Tour Group out of the administration building to the sidewalk across the yard to the Warehouse towards the control room stairwell. According to his evidence Mr. Simms was a few steps behind Mr. Hepburn. As the group walked through the Warehouse Mr. Hepburn fell on the floor. He was helped to his feet by his wife and Counsel and then he continued with the tour. As the persons in the group made their way back to the administration building a motorized cart was called to take Mr. Hepburn there.

44. Mr. Simms stated in his Witness Statement that the floor in the Warehouse was cleaned on 11 February, 2016 which included thoroughly sweeping the floor. He did not recall any beads on the Warehouse floor on 12 February, 2016. Mr. Simms was not cross examined by Counsel for the Plaintiff.

Submissions for the Plaintiff

45. Counsel for the Plaintiff submitted that the personal injuries sustained by Mr. Hepburn when he fell in the Warehouse on 12 February, 2016 were caused by the negligence of the Defendant.

46. Mr. Tynes KC submitted that when Mr. Hepburn was at the Plant on 12 February, 2016 he was an invitee within the principles established in **Latham v Johnson and Nephew [1913] 1KB 398** and **Indermaur v Dames [(1866) L.R. 1 C.P. 274** in that he was present in the Warehouse on business in which he and Polymers had a common interest. Therefore, it was contended that Polymers owed Mr. Hepburn the duty to take reasonable care to prevent injury from the danger caused by the beads on the floor of the Warehouse which were unknown to Mr. Hepburn.

47. Alternatively, it was submitted that the Plaintiff was lawfully present at the Plant on 12 February, 2016 within the principles of **Dunster v Abbott [1954] 1 WLR 58** and **A.C. Billings and Sons v Riden [1958] AC 240**. On that basis Counsel contended that Polymers owed a duty to take such care as was reasonable in all the circumstances of the case to ensure that Mr. Hepburn was not exposed to the danger of a slippery floor caused by the presence of beads.

48. Mr. Tynes KC submitted that the common law principles relating to the negligence of an occupier/owner of property prior to the enactment of the Occupiers Liability Act, 1957 in England applied to this case. He contended that, under those principles, Polymers failed to discharge the duty of care owed to Mr. Hepburn either as an invitee or as a person lawfully present on the premises of the Plant and specifically in the Warehouse. He contended that the evidence for the Plaintiff clearly showed that there were small clear beads on the floor of the Warehouse on the morning of 12 February, 2016 which could not be seen when entering the Warehouse and that there were areas on the floor which were slippery.

49. With regard to the evidence for Polymers, Counsel submitted that it had not been established that the floor of the Warehouse had been swept or cleaned on the morning of 12 February, 2016. He referred to the evidence of Mr. Ebelhar that Polymers operated the Plant 24 hours a day and while Mr. Ebelhar stated that the floor area was properly cleaned prior to the site visit and as a part of the routine sweeping and cleaning of the area, he did not state the date and time of the last sweeping or cleaning of the floor in the Warehouse. Mr. Tynes KC acknowledged that Mr. Simms stated in his evidence that the floor was cleaned on 11 February, 2016 but emphasized that he had not said when on that date the cleaning was carried out and he had not said that any cleaning of the floor in the Warehouse occurred on 12 February, 2016. Counsel also contended that Mr. Simms was equivocal when he stated that he could not recall whether there were beads on the floor of the Warehouse on the day of the tour.

50. Counsel for the Plaintiff contended that neither of the witnesses who gave evidence for Polymers refuted the evidence of Mr. Hepburn when he said that he slipped and fell backwards as a result of the presence of tiny beads on the floor.

51. On the subjects of contributory negligence and *volenti non fit injuria*, Mr. Tynes submitted that the Defendant had not established that the Plaintiff was aware of the Visitors Safety

Programme and its witnesses had not stated that the document at Tab 3 of the Defendant's Bundle of Documents had ever been given or shown to the Plaintiff. Conversely, the Plaintiff had unequivocally stated in his evidence that he had no knowledge of that document and had never seen it before it was shown to him in this case. Additionally, Counsel contended that the Court should reject the evidence that Mr. Ebelhar or anyone else on behalf of Polymers had told the Plaintiff and other persons in the Tour Group to wear "*…proper tennis like shoes or flat shoes with no hard soles."*

52. Mr. Tynes submitted that there was no contributory negligence in this case and the defence of "*volenti"* was not available to the Defendant on the facts of this case.

Submission for the Defendant

53. Counsel for the Defendant submitted that Polymers was not liable in negligence for the injuries sustained by the Plaintiff in his slip and fall in the Warehouse on 12 February, 2016. Ms. Gray contended that the Plaintiff failed to observe the safety measures, which she maintained he knew about as a former employee of Polymers, and chose to wear cowboy boots with leather soles when visiting the Plant. In those circumstances, she submitted that his fall was caused wholly by his own negligence. She observed that Mr. Hepburn was the only person in the Tour Group to slip and fall in the Warehouse even though the other persons walked *"…the same route as…"* he did in the Warehouse.

54. Ms. Gray contended that the evidence of Mr. Hepburn relating to the presence of beads on the floor was not corroborated by any of the other witnesses. Further, she submitted that there was no evidence that there were small "*balls"* on the floor in the Warehouse other than the one shown to Justice Hanna-Adderley by her Clerk, Mr. Pratt, and she invited the Court to hold that the floor was not wet or slippery.

55. Counsel for Polymers also adverted to the evidence that Mr. Hepburn continued with the tour of the Plant after his fall and returned to Court after leaving the Plant to give evidence. She made the point that Mr. Hepburn had not complained while giving evidence of pain or discomfort or addressed the reason for the fall.

56. Moving to the law, Ms. Gray submitted that the Plaintiff had the burden to prove on a preponderance of the evidence the claims and allegations set out in the Statement of Claim. She cited sections 82 - 84 of the Evidence Act and the case of **Mackey v Island Hotel Company Limited [2005] 5 BHA J No. 549**. That was a negligence case before the Supreme Court of The Bahamas where Lyons J dismissed the case on the basis that the Plaintiff had not proved her case. Ms. Gray referred to the following extract from the Judgment:

> **"37. …. first of all I can say this, as a matter of law, it is the plaintiff who must show on the balance of probabilities that the slip and fall was caused by the defendant's negligence.**
>
> **38. I refer to Lord Cohen in <u>Brown v Rolls Royce Ltd. [1960] 1 WLR 210.</u> His Lordship says:**

> **"It seems to me that the authorities clearly show that it is for the pursuer in an action found in negligence to show that the defendant have been negligent and that the negligence has caused the injuries on which the pursuer complain. As per Lord Denim the legal burden in this case was imposed by law on the pursuer. In order to succeed, he had to prove that the defendants were negligent and that the negligence caused the disease".**

39. (See Pinner v Lex Hotels Ltd. [1975] 1 Lloyds Law Reports 486 and Section 82 of the Evidence Act.

40. It is also important to note that in negligent cases, whilst the question of negligence is decided on the balance of probabilities, the plaintiff must bring more evidence to the court than that which just leaves the case swinging in the balance….

41. Lord Macmillan in Jones v Great Western Railway Co. Times Law Reports 1930 28 November [1930-31] TLR 39 at p 45 said: -

> **"If the evidence establishes only that the accident was possibly due to the negligence to which the plaintiff seeks to assign their case is not proved, to justify the verdict which they have obtained the evidence must be such that the attributions of the accident to that cause may reasonable be inferred. If a case such as this is left in the position that nothing has been proved to render more probably anyone of two or more theories of the accident, then the plaintiff is discharged. Has failed to discharge the burden of proof incumbent upon him. He has left the case in equilibrium and the court is not entitled to incline the balance one way or another."**

57. Counsel for Polymers contended that the Plaintiff had failed to discharge the burden of proof and therefore the action should be dismissed. Additionally she submitted that the Plaintiff had

not adduced any evidence to challenge the evidence of Mr. Simms that the floor of the Warehouse was cleaned on 11 February, 2016. She also submitted that even though Mrs. Hepburn was walking along side of Mr. Hepburn when he fell she did not see any beads on the floor.

58. Apart from whether or not the Plaintiff was told to wear shoes with a soft sole, Ms. Gray contended that as a former employee of Polymers he knew of the safety protocols and the need to wear appropriate shoes when walking around the Plant. She submitted that his decision to wear leather soled cowboy boots was reckless. Counsel contended that Mr. Hepburn gave inconsistent testimony on the safety protocols and requirements which were in place at the Plant when he was working at Polymers. She stated that he eventually accepted that all employees had to wear safety shoes with a steel toe.

59. Ms. Gray submitted that Mr. Hepburn lacked credibility as a witness of fact and invited the Court to reject his evidence with regard to slipping on the beads and falling on the floor of the Warehouse.

60. Counsel referred to the case of **Cox v Chan [1991] BHS J 110** in addressing the duty of care owed by an owner/occupier of premises. In that case Sawyer J (as she then was) stated in paragraph 21:

> **"…..it is clear from the decided cases, including Indermaur v. Dames, that the duty of care which a person like the defendant owes to a person like the plaintiff is not an absolute duty to prevent any damage to the plaintiff but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual danger of which the defendant knew or ought to have known and, I may add, of which the plaintiff did not know or of which he could not have been aware. If it were otherwise then the slightest alleged breach of such a duty would lead to litigation and could, perhaps, hamper the progress of quite lawful and needful business."**

61. Ms. Gray also cited **Hepburn v. Hutchison Lucaya Limited [2012] 3 BHS J. No.271** where Evans J (as he then was) stated:

> **"51. It is clear from the authorities that the duty of care owed by an occupier of premises is not absolute and that not every accident that happens on premises is caused by the negligence of the owner or occupier, his servants or agents. Consequently, it is not enough, in my view, for a plaintiff invitee to say to a defendant occupier: 'I slipped and fell on your premises and injured myself, therefore, you are liable in negligence.' The plaintiff must show that having taken all reasonable care himself to prevent the**

accident, he nevertheless slipped and fell as a result of the defendant's negligence."

62. Counsel reminded the Court that Mr. Hepburn had not at any time made a report of the incident to Polymers. She submitted that on the totality of the evidence it was clear that Polymers was not negligent and that it took adequate and reasonable steps to protect its lawful invitees from any potential or obvious danger by cleaning the Warehouse floor and telling the visitors to wear soft/rubber sole shoes when visiting the Plant.

Findings of fact

63. I considered the evidence of the witnesses and the admitted documents in this case. I also observed the demeanour of the witnesses while they were giving their evidence. Based on the balance of probabilities, I made the findings of fact set out below after assessing the evidence adduced at the trial.

64. Polymers was the owner and occupier of the Plant and the Warehouse was a building on the premises of the Plant.

65. Polymers manufactured expandable polystyrene at the Plant which, if put on a table top or other flat surface, looked like table salt or sugar. I accepted Mr. Ebelhar's evidence that the "*beads"* could be described as "*grainy",* similar to table salt and sugar. Based on the evidence of the witnesses, I accepted that the "*beads"* were clear or transparent and were very small.

66. On 12 February, 2016 a group of persons including Mr. and Mrs. Hepburn, Justice Hanna-Adderley, Mr. Pratt and lawyers for Mr. Hepburn and Polymers arrived at the Plant at around 10:00 a.m. They were there for a site visit to view the control room and the surrounding areas in connection with the issues in a court case between Mr. Hepburn and Polymers which was being heard by Justice Hanna-Adderley. Earlier, the Judge had made an order in that case to visit the Plant. Those persons met Mr. Ebelhar and Mr. Simms in the Conference Room located in the Administration building on the premises of the Plant.

67. There was conflicting evidence on whether Mr. Ebelhar or his lawyer informed all the parties who were to participate in the site visit to wear "*proper tennis like shoes or flat shoes with no hard soles.*" According to Mr. Ebelhar he, or perhaps his lawyer, made that statement to all parties in Court on 10 February, 2016 after the Judge had set the date for the site visit. He accepted during his cross examination that he might have been wrong on the date. Mr. and Mrs. Hepburn stated that they had no recollection of such a statement being made by Mr. Ebelhar or his lawyer at any time prior to the site visit. Mr. Pratt also said that he had no recollection of such a statement. Also, Justice Hanna-Adderley had no recollection of such a statement. I preferred the evidence of Mr. and Mrs. Hepburn, Mr. Pratt and Justice Hanna-Adderley to that of Mr. Ebelhar on this issue and I found on a balance of probabilities that no statement was made to any of those four persons relating to the type of shoes to wear when visiting the Plant.

68. The parties started the site tour at around 10:15 a.m. I accepted the evidence that Mr. Hepburn was wearing cowboy boots at the time and was walking with the aid of a cane. In his evidence Mr. Hepburn could not recall whether the boots which he was wearing on 12 February, 2016 had hard or soft soles. He stated during his cross examination that he had "…..*quite a number of boots and some with rubber soles and some with leather soles.."* As stated in paragraph 37 above, Mr. Ebelhar qualified his statement in his Witness Statement about the leather soles of Mr. Hepburn's boots when he said during his re-examination that "*..to the best of what I could see from the distance…they* [that is the boots which Mr. Hepburn was wearing] *had leather soles*." In his Witness Statement Mr. Simms stated in paragraph 10 that the boots which Mr. Hepburn was wearing on 12 February, 2016 had leather soles. He was not cross examined on that point and there was no direct evidence definitely challenging that evidence. It will be remembered that Mr. Hepburn could not recall whether the soles were leather or rubber. Accordingly, based on the unchallenged evidence of Mr. Simms, I accepted, on a balance of probabilities, that the boots which Mr. Hepburn was wearing on 12 February on the site visit had leather soles.

69. I also accepted the unchallenged evidence of Mr. Simms that the floor of the Warehouse had been cleaned and swept sometime on 11 February, 2016. There was no evidence that anyone at Polymers checked the floor of the Warehouse on the morning of 12 February, 2016 prior to the start of the tour by Mr. Hepburn and the others in the Tour Group. On that basis it seemed to me on a balance of probabilities fair to conclude that the floor had not been checked, cleaned or swept on 12 February, 2016 prior to the slip and fall of the Plaintiff.

70. Mr. Ebelhar led the Tour Party out of the administration building across the yard into the Warehouse. The Warehouse had a masonry floor. As they walked through the Warehouse, Mr. Ebelhar, Justice Hanna-Adderley and Mr. Pratt were in front of Mr. Hepburn. Mr. Simms was a few steps behind Mr. Hepburn and Mrs. Hepburn was walking beside her husband.

71. The condition of the floor of the Warehouse on 12 February, 2016 at the time when the persons in the Tour Group were walking through that building was a critical issue. I accepted the evidence that the floor was not wet. I preferred the evidence of the witnesses for the Plaintiff over the evidence of Mr. Ebelhar and Mr. Simms where there was a direct conflict between them with regard to what happened in the Warehouse and the condition of the floor while the persons in the Tour Group were walking through the Warehouse.

72. I accepted the evidence of Mrs. Hepburn and Mr. Pratt that when they were walking through the Warehouse there were some areas of the floor which were covered with "*material"* which was "*slippery*." I also accepted Mr. Pratt's evidence when he described that material as "*grainy"* which was consistent with how Mr. Ebelhar had described the product manufactured at the Plant. Further, I accepted the evidence of Justice Hanna-Adderley that while walking through the Warehouse her Clerk, Mr. Pratt, "*picked up something from the floor*" and showed it to her and based on what he had told her, she walked "*gingerly*" and "*cautiously"* in the Warehouse. Using "*a non-technical term*", she described the object which was picked up off the floor as "*a little ball*" which looked like clear plastic. I also accepted the evidence of Justice Hanna-Adderley that she had not looked or checked to see if there were any more "*little balls"* on the floor but she *"…didn't feel anything under* [her] *shoes."*

73. I did not agree with counsel for the Defendant that Mr. Hepburn's evidence lacked credibility. In my view, while Mr. Hepburn was at times unnecessarily strident in some of his answers to questions in cross examination, I regarded him as a credible witness. On a balance of probabilities I found that while walking through the Warehouse on 12 February, 2016 Mr. Hepburn slipped on "…*tiny beads"* and fell backwards onto the floor. Based on his evidence, I also found that (i) when Mr. Hepburn hit the floor he felt the beads on his hands which he had not seen when he first entered the Warehouse; and (ii) the *"beads"* were "*transparent*" and could not be seen on the floor. I was satisfied, on a balance of probabilities that the presence of the beads on the floor of the Warehouse caused Mr. Hepburn to slip and fall. There was no evidence suggesting that Mr. Hepburn's fall had anything to do a previous injury or a pre-existing medical condition involving his sciatic nerve.

74. Like the Plaintiff, Mrs. Hepburn and Mr. Pratt both said that they had not seen "*beads"* on the floor of the Warehouse and I attributed that to the small size and clear/transparent nature of the beads which were described as similar to grains of table salt or sugar. Significantly, both Mrs. Hepburn and Mr. Pratt stated in their evidence that there was "*material*" on parts of the floor of the Warehouse which made it slippery. I found that on the evidence, the entire floor itself was not slippery but only those areas which had the "*tiny beads"* or "*slippery material"* on it. In his evidence Mr. Hepburn stated *"I was following the walkway that everyone walked. The same one. Like my lawyers, the judge and everyone in front of me. I was walking behind them."* While I accepted that evidence and the evidence that the persons in the Tour Group followed Mr. Ebelhar on the tour, they clearly did not all walk in his exact footsteps or in the precise footsteps of other persons in the group. Therefore, while they all followed the general route of Mr. Ebelhar through the Warehouse, they would not have all walked on exactly the same areas of the floor. It must be remembered that the beads which I found to be on the floor of the Warehouse on the morning on 12 February, 2016 were very small and transparent and did not cover all areas of the floor. Similarly, the slippery material described by Mrs. Hepburn and Mr. Pratt did not cover the entire area of the floor. It was my view that this accounted for why some of the witnesses stated that areas of the floor were slippery while others did not find that to be the case.

75. I found that Justice Hanna-Adderley, Mr. Pratt and Mr. Ebelhar had their back to Mr. Hepburn when he fell and they did not see him fall. Mr. Simms did not specifically state that he saw Mr. Hepburn fall but I accepted that he was a few steps behind Mr. Hepburn when he fell. As Mrs. Hepburn was beside her husband when he fell I accepted that she would have seen him fall to the floor.

76. I accepted the evidence that after he fell, Mr. Hepburn was helped to his feet by others including persons working at Polymers and then he resumed the site tour with the other persons in the Tour Group. I also found that after completing the tour Mr. Hepburn, and other members of the Tour Group, returned to the Court room in the Garnet Levarity building where Mr. Hepburn gave evidence. I accepted the evidence of Mrs. Hepburn that her husband complained of pain to her but did not mention it when giving his evidence.

77. It was not disputed that Mr. Hepburn had previously worked at Polymers. There was no evidence that the Visitors Safety Programme was ever given or shown to Mr. Hepburn when

he worked at Polymers and I accepted Mr. Hepburn's evidence that he had never seen that document. His evidence that, at times, he wore cowboy boots in the Warehouse when he worked at Polymers was not directly challenged and I accepted that statement as truthful.

78. While I found, on a balance of probabilities that Mr. Hepburn had never seen the Visitors Safety Programme, I noted that section 4.0 of that document provided in part that "[e]*scorted visitors will require safety glasses but do not require safety toe footwear however, appropriate footwear (no slippers, high heels etc) must be worn."* Under that section, visitors were not expected to wear safety shoes and there was no specific reference to shoes with hard or soft soles. Therefore, apart from *"slippers"* and *"high heels"*, there was no guidance as to what was *"appropriate footwear".*

Discussion and Analysis - Liability

79. It is clear that on settled principles of law the burden was on Mr. Hepburn in this case to show on the balance of probabilities that his slip and fall in the Warehouse on 12 February, 2016 was caused by the negligence of Polymers.

80. It appeared from the submissions of Counsel that it was agreed that Mr. Hepburn was an invitee when he was at the Plant on 12 February, 2016. That is stated in paragraph 15 of the Plaintiff's Opening Submissions dated 2 September, 2021 and adopted in paragraph 3 of his Closing Submissions dated 20 September, 2021. Counsel for Polymers directed her submissions in paragraph 14 and 48 of her Closing Submissions dated 20 September, 2021 to lawful invitees thereby seeming to accept that Mr. Hepburn was an invitee when he was at the Plant on 12 February, 2016. If I was wrong in stating that Counsel had agreed that position, I went on to consider for myself the point and concluded that under the relevant common law principles Mr. Hepburn was an invitee when he was at the Plant on 12 February, 2016.

81. In **Pearson v Lambeth Borough Council [1950] 2 KB 366** Asquith LJ stated that "*an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a common interest*…." Mr. Hepburn was at the Plant on 12 February, 2016 with the consent of Polymers in connection with a matter – i.e. the court case before Justice Hanna-Adderley – in which he and Polymers had a common interest.

82. In **Gaul v. Ottershaw Investment Limited and another - [2009] 2 BHS J No. 33** Adderley J (as he then was) considered the duty owed to an invitee. He stated:

> **"7. The plaintiff was an invitee of Sandals. The common law duty which an occupier owes to an invitee is succinctly summarized in Halsbury's Laws of England 1912 Edition Volume XXI at paragraph 656 as follows:**
>
> > **"656. The duty of the occupier of premises on which the invitee comes, is to take reasonable care to prevent injury to the latter from unusual**

> **dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware, or, in other words, to have his premises reasonably safe for the use that is to be made of them. If this duty is neglected, an invitee who is injured thereby can recover damages in respect of his injuries...".**

See for example Indermaur v Dames [1866] L.R. 1 C.P. 274 and Griffiths v London and North-Western Rail. Co. [1866] 14 L.T. 797 cited by the plaintiff.

8. The invitee also has a duty. He cannot recover damages against an invitor if he makes unreasonable use of the premises and thereby suffers injury. In Hillen and Pettigrew v I.C.I. (Alkali), Ltd., [1936] A.C. 65 at p. 69 Lord Atkin (Lords Thankerton and Wright concurring) gave this opinion:

> **"My Lords, in my opinion this duty to the invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited... As Scrutton L J has pointedly said "when you invite a person into your house to use the staircase you do not invite him in to slide down the banister"**

9. In London Graving Dock Co. Ltd. v Horton [1951] A.C. 737 (per Lords Porter, Normand, Oaksey, MacDermott and Reid) the court unanimously accepted the view that an unusual risk is one which is not usually found in carrying out the task which the invitee has in hand. Lord Porter at p.745 went on to say that he was not prepared to accept the view that "unusual" is to be construed subjectively as meaning "unexpected" by the particular invitee concerned.

……"

83. The genius of the common law is that it continues to evolve. That has been the case in this area of the law as over the past 70 years the authorities have moved in the direction of diminishing the importance of the invitee – licensee - trespasser trichotomy in certain cases involving occupier's liabilty. In **Dunster v Abbott [1953] 2 All ER 1572** Lord Denning made this point when he stated:

> **" In this case, however, it does not matter whether the plaintiff was an invitee or a licensee. That distinction is only material in regard to the static condition of the premises. It is concerned with dangers which have been present for some time in the physical structure of the premises. It has no relevance in regard to current operations, that is, to things being done on the premises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or of anyone else…..In regard to current operations, the duty of the occupier—or of the person conducting the operations—is simply to use reasonable care in all the circumstances. This duty is owed alike to all persons lawfully on the premises who may be affected by his activities, and it is the same whether the person injured is an invitee or a licensee, a volunteer or a guest. …….."** [My emphasis]

84. Later in **Slater v Clay Cross Co Ltd [1956] 2 All ER 625 at 627** Lord Denning made the same point again:

> **"The classic distinction was that the invitor was liable for unusual dangers of which he knew or ought to know, whereas the licensor was only liable for concealed dangers of which he actually knew. This distinction has now been reduced to a vanishing point. The decision of this court in Hawkins v Coulsdon & Purley Urban District Council ([1954] 1 All ER 97 shows that a licensor too, as well as an invitor, is liable for unusual dangers of which he knew or ought to have known. The broken step in that case was not a concealed danger, but it was an unusual danger. The local authority did not know that it was a danger, but they ought to have known it, and they were held liable. The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them: and it makes no difference whether they are invitees or licensees. At any rate, the distinction has no relevance to cases such as the present where current operations are being carried out on the land."**

85. Additionally, I considered the cases of **Latham v Johnson and Nephew; Indermaur v Dames** and **A.C. Billings and Sons v Riden** cited by Mr. Tynes KC. I also considered the cases of **Mackey v Island Hotel Company Limited; Cox v Chan** and **Hepburn v. Hutchison Lucaya Limited Hepburn v. Hutchison Lucaya Limited** cited by Ms. Gray. Specifically, I was mindful of the points made in those cases relied on by Ms. Gray that a plaintiff claiming to have been injured as a result of the negligence of an occupier/owner of premises must bring more evidence to the court "*…than that which just leaves the case swinging in the balance*.." and that the duty of care owed by an occupier of premises is not absolute and not every accident that happens on premises is caused by the negligence of the owner or occupier, his servants or agents.

86. In applying the principles established through the relevant authorities, I concluded that as an invitee, or even as a licensee, a volunteer or a guest, Polymers owed a duty to Mr. Hepburn to take reasonable care to ensure that the premises at the Plant, and specifically the Warehouse, were reasonably safe for the purpose of the on site tour on 12 February, 2016. In my view, that included a duty to take reasonable care to ensure that there were no objects or material on any part of the floor of the Warehouse which would be hazardous for persons walking in that building.

87. I held that Polymers, as the owner and occupier of the Plant, had breached that duty causing the Plaintiff to suffer damages. This was based on my findings of fact set out earlier in this Judgment and specifically that on the morning of 12 February, 2016, (i) there were "*tiny beads"* and slippery areas on the floor of the Warehouse; (ii) while walking through the Warehouse on that date Mr. Hepburn slipped on those beads and fell backwards onto the floor; (iii) Mr. Hepburn felt the beads on his hands when he hit the floor which he had not seen when he first entered the Warehouse; and (iv) the *"beads"* were "*transparent*" and could not be seen on the floor. The description of the *"tiny beads"* was similar to the description by Mr. Ebelhar of the product manufactured at the Plant.

88. As stated earlier in this Judgment, I accepted the evidence that the floor of the Warehouse had been cleaned and swept sometime on 11 February, 2016. However, there was no evidence from the Defendant indicating the time when that occurred on 11 February, 2016 or even generally whether it was in the morning, afternoon or evening. Similarly, there was no evidence about the routine cleaning protocols for the Warehouse and specifically how often the floor was checked, swept or cleaned in the course of each day bearing in mind Mr. Ebelhar's evidence that Polymers carried on operations at the Plant 24 hours a day. Additionally, there was no evidence from the Defendant as to whether any operational activities of the Plant had occurred in the Warehouse after the floor was cleaned and swept on 11 February, 2016 (whenever that had taken place) and before the start of the site tour at around 10:15 a.m. on 12 February, 2016.

89. Further, based on my findings of fact, no one at Polymers had checked the floor of the Warehouse on the morning of 12 February, 2016 prior to the start of the tour by Mr. Hepburn and the others in the Tour Group. This was notwithstanding the fact that the site visit had been pre-arranged and Polymers, through its representatives, knew that Mr. Hepburn and the other persons would be touring the Warehouse on the morning of 12 February, 2016.

90. Based on the evidence of the Defendant, there was a time gap – we do not know how long – between the last cleaning of the floor in the Warehouse on 11 February, 2016 and the start of the site tour at 10:15 a.m. on 12 February, 2016. That gap could have been as long as 24 hours (if the last cleaning had taken place at around 10:00 a.m. on 11 February, 2016) or as short as 10 hours (if the last cleaning occurred at midnight on 11 February, 2016). As stated, there was no evidence led by the Defendant as to what activities, if any, had occurred in the Warehouse during that period. On that state of affairs, I did not regard the evidence of Mr. Simms that the floor was cleaned and swept sometime on 11 February, 2016 as probative of the condition of the floor of the Warehouse at 10:15 a.m. on 12 February, 2016. Certainly, given the abovementioned time gap, there was no inconsistency between accepting the evidence that the floor of the Warehouse had been cleaned and swept at an unspecified time on 11 February, 2016 and my finding that there were beads and slippery material in areas of the floor at around 10:15 a.m. on 12 February, 2016.

91. The claim of negligence against the Defendant must be considered in the context of the facts in this case. In that regard, it is important to remember that on 12 February, 2016 the Warehouse was a part of an active manufacturing plant which carried on its daily operations around the clock on a 24 hour basis and that the Defendant knew of the site tour scheduled for around 10:00 a.m. on 12 February, 2016. Bearing those facts in mind I did not accept that, in the circumstances mentioned in paragraph 90 above, the cleaning and sweeping of the floor at an unspecified time on 11 February, 2016 discharged the Defendant's duty to the Plaintiff to take reasonable care to ensure that the premises at the Plant, and specifically the Warehouse, were reasonably safe for the purpose of the site tour. Any number of operational activities involving the expandable polystyrene (which looked like table salt or sugar) could have taken place in the Warehouse since the cleaning/sweeping of the floor at an unspecified time on 11 February, 2016 and the start of the tour at around 10:15 a.m. on 12 February, 2016.

92. The Defendant could have shown that it discharged its duty to the Plaintiff to take reasonable care to ensure that the floor of the Warehouse was reasonably safe for the purpose of the site tour by establishing, first, the time of the cleaning/sweeping on 11 February, 2016 and secondly, that no activities involving the expandable polystyrene took place in the Warehouse between that time and the start of the walking tour by the persons in the Tour Group on 12 February, 2016. Alternatively, the Defendant could have caused the floor of the Warehouse to be swept shortly before the tour started on 12 February, 2016. It did neither.

93. I did not regard the fact that no one else in the Tour Group slipped and fell on the floor of the Warehouse as dispositive of the claim by the Plaintiff. On my findings of fact, based on the balance of probabilities, there was *"material"* in areas of the floor which was slippery and there were *"tiny beads"* on the floor on 12 February, 2016. The slippery material and the beads did not cover the entire floor area in the Warehouse. In those circumstances, and for the reasons stated in paragraph 74 above, the fact that no one else in the group slipped did not in any way undermine the veracity of the Plaintiff's evidence. Based on the evidence which I accepted, there were clearly issues with the condition of the floor in the Warehouse on 12 February, 2016 which caused Justice Hanna-Adderley, Mrs. Hepburn and Mr. Pratt to walk cautiously and carefully in that building.

Contributory negligence & Volenti

94. I considered the pleas of contributory negligence and *volenti non fit injuria* by the Defendant. The Particulars of the alleged negligence of the Plaintiff were that he:

> **(i) failed to have regard for his safety by refusing to wear proper footwear when he was advised;**
> **(ii) elected to wear leather soled cowboy boots in a manufacturing plant when he knew or ought to have known that it was not safe to do so;**
> **(iii) walked in a manner so as not to safeguard his safety; and**
> **(iv) in all of the circumstances was reckless and careless by ignoring the safety requirements of the Defendant's plant.**

95. Polymers also pleaded in paragraph 5 of the "*the actions of the Plaintiff in wearing leather soled cowboy boots meant and was intended to convey that he accepted and assumed the risk occasioned by his refusal to follow the Defendant's instructions."*

96. As stated above, I found, on a balance of probabilities that (i) no statement was made to the Plaintiff by Mr. Ebelhar or anyone else on behalf of the Defendant relating to the type of shoes to wear when visiting the Plant; and (ii) the Plaintiff had not seen the Visitors Safety Program either while working at Polymers or thereafter until he saw it in connection with this case. In any event, that Safety Program had not specifically addressed wearing boots with either leather or soft soles while on the premises of the Plant. I also stated above that I accepted the Plaintiff's evidence that while working at Polymers he, at times, wore cowboy boots in the Warehouse. There was no evidence that Mr. Hepburn, as a visitor, regarded the wearing of boots on the premises of the Plant as unsafe or in any way in breach of the safety requirements of Polymers. In his evidence he stated the contrary position when he said *"I work there* [that is at Polymers] *for 14 years wearing cowboy boots. When we have function, I walk in there with cowboy boots. And when I work there, I work there in safety cowboy boots."* Also, I noted that under section 3.0 of the Personal Protective Equipment Policy safety footwear was not required in certain parts of the Plant including warehouses as defined in that section.

97. Similarly, there was no evidence that when the Plaintiff fell he was walking in a manner without regard for his personal safety. I accepted that the Plaintiff was walking with a cane but that, of and by itself, did not support the claim that he was walking without regard for his safety. In his evidence Mr. Hepburn stated that during the site visit, and prior to slipping and falling, he was walking slowly and carefully, as was his custom. No evidence was led by the Defendant to challenge that statement.

98. In his Witness Statement Mr. Simms stated that Mr. Hepburn and the other persons in the Tour Group met in the conference room in the administration building "*…to be given safety glasses and be briefed about the tour of the plant."* At that time, both Mr. Ebelhar and Mr. Simms would have undoubtedly seen the cowboy boots which Mr. Hepburn was wearing but there

was no suggestion by either of them in their evidence that any comment or objection was made about the appropriateness of wearing boots in the Warehouse or that to do so would be unsafe or contrary to the safety requirements or protocols of Polymers. At that time, Mr. Ebelhar and Mr. Simms would also have seen that Justice Hanna-Adderley was wearing shoes with a 2 inch heel and that Mrs. Hepburn was wearing "*dress shoes*" but, again, the evidence did not show that either of them made any comments about the safety of their footwear for the tour of the Plant. In my view, if the footwear of Mr. Hepburn, Mrs. Hepburn and Justice Adderley breached the safety requirements of Polymers, there was a duty on Mr. Ebelhar and Mr. Simms to raise the issue with them during the briefing in the conference room. If that had occurred, each of those persons could have decided whether or not to proceed with the tour before changing their shoes or boots. This is particularly germane bearing in mind my finding that prior to the start of the tour on 12 February, 2016 Mr. & Mrs. Hepburn and Justice Hanna-Adderley had not been given any directions, advise or recommendations by the representatives of Polymers with regard to the footwear to wear when visiting the Plant.

99. Given the importance placed on the footwear of Mr. Hepburn in the defence advanced by Polymers, it was surprising that Mr. Ebelhar and Mr. Simms, clearly seeing that he was wearing cowboy boots before the tour started, would completely ignore the issue during the briefing in the conference room before the tour started.

100. In all of the above circumstances I concluded that there was no contributory negligence on behalf of the Plaintiff and the defence of *volenti* was not available to Polymers in this case.

Conclusion

101. In the result and for the reasons stated above I held that the Defendant, as the occupier and owner of the Plant, had breached its common law duty owed to the Plaintiff and therefore was negligent and liable in damages to the Plaintiff. As agreed with counsel prior to the trial, the issues of the extent of the Plaintiff's injuries as a result of his slip and fall in the Warehouse on 12 February, 2016 and the quantum of damages were not addressed at all at the trial and I made no findings or expressed any views on those matters. I will only direct that, in the absence of agreement, the damages are to be assessed.

102. I ordered that costs of the action are to be paid by the Defendant to the Plaintiff such costs to be taxed if not agreed.

Dated 2nd day of March, 2023

Sir Brian M. Moree Kt.

COMMONWEALTH OF THE BAHAMAS **2019**

IN THE SUPREME COURT **CLE/gen/FP/00028**

Common Law & Equity Division

BETWEEN

PHILIP HEPBURN

Plaintiff

AND

POLYMERS INTERNATIONAL LIMITED

Defendant

JUDGMENT
