IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. SU 2019 CD 000189

BETWEEN	**FERN ODDMAN**	**CLAIMANT**
AND	**AIRPORTS AUTHORITY OF JAMAICA**	**1st DEFENDANT**
	DELTA AIRLINES	**2nd DEFENDANT**

IN CHAMBERS

Mr Josemar Belnavis instructed by John G Graham & Co., Attorneys-at-Law for the Claimant

Ms Amanda Montague instructed by Myers Fletcher & Gordon, Attorneys-at-Law for the 2nd Defendant

24th July and 26th September 2019

Statutory Interpretation - International carriage - Passenger sustaining injury at airport terminal when descending stairs on way towards aircraft - Whether Montreal Convention 1999 applicable - Carriage by Air (Montreal Convention) Act

Civil procedure - Summary judgment and striking out - Principles to be applied

LAING, J

The Claim

[1] This Claim was commenced by Claim Form and Particulars of Claim filed on 12th April 2017 and on 23rd April 2019, the Claimant filed an Amended Claim Form and an Amended Particulars of Claim. The Claimant alleges that on 10th January 2016, she checked in her luggage, and was walking through the departure lounge of the

Norman Manley International Airport ("NMIA") while on her way to board the 2nd Defendant's flight to Atlanta Georgia, in the united States of America,

[2] The Claimant averred that after the 2nd Defendant issued boarding instructions for its flight, she proceed to exit the departure lounge as instructed. While exiting the departure lounge via a stairway she "*slipped and fell from the top of the stairway and landed at the bottom of the stairway*." She claimed that as a consequence she sustained injuries, and as a result suffered loss, damage and incurred expenses.

[3] The Claimant is relying on the provisions of the Montreal Convention (1999) which was incorporated into Jamaican law by the Carriage by Air (Montreal Convention) Act. She asserted that the contract of carriage was contained in or evidenced by her airline ticket which referred to the Montreal Convention. She averred that her carriage was an "*international carriage*" within the meaning Article 1 of the Montreal Convention and it was an express term of the contract that the 2nd Defendant would take reasonable care, in her carriage to Atlanta, Georgia.

[4] The Claimant is asserting that the incident occurred during the course of one of the operations of embarking on an international flight as outlined in Article 17 of the Montreal Convention and that as a consequence of its beach of the Montreal Convention, the 2nd Defendant is jointly and/or severally liable for her injuries.

The Defendant's Application

[5] The 2nd Defendant's application is made pursuant Rules15.2(a) and 26.3(b)&(c) the Civil Procedure Rules 2002 ("CPR"). The 2nd Defendant has submitted that the claim ought to be struck out against it because it is an abuse of the process of the court and discloses no reasonable grounds for bringing a claim. The 2nd Defendant has also submitted that the Claimant has no real prospect of succeeding on her claim and consequently summary judgment ought to be granted in favour of the 2nd Defendant.

[6] CPR 15.2 Provides as follows:

> *The court may give summary judgment on the claim or on a particular issue if it considers that:*
>
> > *(a) the claimant has no real prospect of succeeding on the claim or the issue;…"*

[7] In ***Swain v Hillman*** [2001] 1 All ER 91 at page 92, Lord Woolf MR said:

> *'Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr Bidder QC [counsel for the defendant] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.'*

[8] CPR 26.3(1) provides that:

> *"In addition to any other powers under these Rules, the court must strike out a statement of case or part of a statement of case if it appears to the court:*
>
> *(a)…*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;"*

[9] On an initial examination it does not appear that this case is one which falls within CPR 26.3(1)(b). The 2nd Defendant's challenge seems to be more forceful in its attempt to strike out the claim relying on CRR 26.3(1)(c), that the statement of claim discloses no reasonable ground for bringing or defending the claim. I adopt the opinion of Batts, J where on examining that provision in **City Properties Limited v New Era Finance Limited** [2013] JMSC Civil 23 he stated as follows:

> *"[9] On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me to be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that*

> *upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*
>
> *[10] Therefore it seems to me that when the rule refers to "reasonable grounds" for bringing a claim, it means nothing more or less than that the claimant has disclosed in the pleadings that he has a reasonable cause of action against the defendant".*

[10] The learned authors of The Caribbean Civil Court Practice 2011 at note 23.24 in discussing the phrase "*discloses no reasonable ground for bringing or defending the claim*" expressed the following view:

> *This provision addresses two situations:*
>
> *(1) where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed: or*
>
> *(2) where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.*

It is primarily on these two limbs that I will approach my analysis of the statement of case.

[11] Mr Belnavis has highlighted the fact that the courts have repeatedly cautioned against the granting of summary judgment in certain kinds of cases. Counsel offered the observations of Lord Mummery in the English Court of Appeal case of **Doncaster Pharmaceuticals Ltd v The Bolton Pharmaceutical Company 100 Ltd** [2006] EWCA Civ 661 as follows:

> *"[17] … The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice…*
>
> *[18] In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."*

[12] I am however, mindful of the guidance offered by Lord Justice Potter in **ED & F Man Liquid Products Ltd v Patel and Anor** [2003] EWCA Civ 472. Although it was an appeal against the refusal of the trial judge to set aside a judgment in default of acknowledgment of service the observations are apposite. In considering the English CPR 13.3 (the English CPR provision dealing with setting aside a default judgment) and CPR 24.2 (the English CPR summary judgment rule),at paragraph 10 Lord Justice Potter commented as follows:

> *"It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in* ***Swain v Hillman*** *[2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save cost and delay of trying an issue the outcome of which is inevitable; see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p467 and* ***Three Rivers DC v Bank of England (No.3)*** *[2001] UKHL/16,[2001 2 All ER 513 per Lord Hope of Craighead at paragraph [95]"*

[13] In the case before me there are no significant differences between the parties as far as factual issues are concerned. The Claimant's case is that she "*slipped and fell*". She has also pleaded that the accident was caused or contributed by the negligent management of the crowd on the stairway but has not pleaded how this amounted to an "*unusual or unexpected event*". I will later in this judgment explain the importance of this issue. The Claimant has also pleaded that there was "*the lack of warning signs or supervision in or around the vicinity of the stairway to warn lawful visitors of the dangers of using the stairway when crowded*." However, in my view, this would not amount to a culpable omission which could be properly classified as an "*unusual or unexpected event*' which would bring this case under the umbrella of section 17 of the Montreal Convention. This is so because the use of stairs is an ordinary means of travelling from one point to another and so too is the presence of persons on stairs, particularly in the context of this case.

[14] In these circumstances, I am of the view that it is wholly appropriate for the Court to hear the 2nd Defendant's application. The Claimant conceded that the cause of action and sole remedy sought against the 2nd Defendant was pursuant to the Montreal Convention. The issues relating to the applicability of the Montreal Convention are patently clear and suitable for determination at this stage since they are capable of determining the Claim. There would be no benefit to be gained by having the determination of these issued deferred for hearing at a later stage in a trial.

[15] It was agreed between the parties that Article 17 of the Montreal Convention is applicable and governs the liability of air carriers for injury to passengers while in international carriage. It provides as follows:

> *"The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."*

[16] Article 29 of the Montreal Convention is also relevant and it provides that:

> *"In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."*

[17] The main point of dispute between the parties had to do largely with whether the incident fell within the scope of the Convention which is dependent on whether the Claimant was in the course of any of the operations of embarking and whether there was an accident as contemplated by the Convention.

Primary issue 1- Was the Claimant embarking

[18] Ms Montague submitted that whether Article 17 of the Montreal Convention applies, will depend upon the circumstances of each individual case. Counsel relied on a number of cases including **McCarthy v. North West Airlines Inc**, US

Court of Appeals, 1st Circuit, May 1995, [1995] 2 ASLR 422) which she submitted held that Article 17 should be narrowly construed and the court held that the airline was not liable for a passenger accident. Relevant to the court's consideration was the fact that that accident occurred a considerable distance from the departure gate and in a part of the terminal not restricted to passengers of the particular airline. In **McCarthy** it was held that:

> *"[4] What is more, the language of Article 17-which speaks to accidents that occur "in the course of any of the operations of embarking"-strongly suggests that there must be a tight tie between an accident and the physical act of entering an aircraft. See* ***Martinez Hernandez****, 545 F.2d at 283-84 (concluding that the drafters of the Warsaw Convention understood embarking "as essentially the physical activity of entering" an airplane); see also* ***Evangelinos****, 550 F.2d at 155. This "tying" concept informs location as well as activity. Consequently, for Article 17 to attach, the passenger must not only do something that, at the particular time, constitutes a necessary step in the boarding process, but also must do it in a place not too remote from the location at which he or she is slated actually to enter the designated aircraft. See* ***Martinez Hernandez****, 545 F.2d at 283; Day, 528 F.2d at 33....*
>
> *In applying these principles to the case at hand, we deem it useful to start by considering specific examples of accidents that have been found to come within the encincture of Article 17. Perhaps the most venturesome of the reported appellate decisions are* ***Day*** *and* ***Evangelinos.*** *When passengers had surrendered their tickets, passed through passport control, entered the area reserved exclusively for those about to depart on international flights, and queued up at the departure gate-a prerequisite to boarding-the Second Circuit ruled that they were engaged in performing a necessary step in the boarding process. Thus, Article 17 applied to an ensuing injury. See* ***Day****, 528 F.2d at 33. Similarly, when passengers "had completed virtually all the activities required as a prerequisite to boarding, and were standing in line at the departure gate ready to proceed to the aircraft" at the time of the accident, the Third Circuit found them to have been engaged in a necessary step in the boarding process. See* ***Evangelinos****, 550 F.2d at 156. Hence, Article 17 applied."*

[19] Ms Montague emphasised the fact that, although the stairway on which the Claimant fell leads from the departure lounge to a hallway, which then leads to the gate, the stairway was not exclusively for the use of the 2nd Defendant's passengers but was utilized by all departing passengers of various airlines using the airport. It was therefore a "*public airport facility*".

[20] Counsel submitted that the Claimant was also some distance from the 2nd Defendant's departure gate, putting her outside of a place exposed to the risks of air navigation. She was not on the tarmac or the apron, or exposed to aviation related risks such as injury from propellers. She relied on the case of **Mache v. Cie Air France** 17 RFDA 353, 20 RFDA 228, (1966); 21 RFDA 343, (1967); 24 RFDA 311, (1970) Court de Cassation, France, in which a passenger fell into a manhole when crossing the apron to customs however the Court held that the accident did not take place in the course of disembarkation. This was because the Court found that that the place of injury was outside the zone affected by aviation-related risks (for example, the risk of injury by propellers).

[21] Ms Montague also relied on the fact that the Claimant was not under the immediate supervision or control of the 2nd Defendant, since she had not yet tendered her boarding pass to the 2nd Defendant's agents and was not about to board the aircraft itself. Furthermore, she was not being escorted by agents of the 2nd Defendant.

The Claimants submissions on the issue of embarkation

[22] Mr Belnavis relied on the line of cases which suggested a less restrictive approach to the issue of the process of embarking. Chief among these was the case of **Phillips v Air New Zealand** [2002] All ER (D) 431 where Morison J considered Article 17 of the Warsaw Convention (which is in the same terms as the Montreal Convention) and at paragraph 16 of the judgment stated that the structure of the Article led him to a number of conclusions including the following:

> *"As to embarkation, I am satisfied that to make a prima facie case that a particular claim is within Article 17 it must be established*
>
> *(1) that the accident to the passenger is related to a specific flight; and (2) that it happened while the latter was actually entering or about to enter the aircraft; or (3) if it happened in the terminal building or otherwise on the airport premises, that the location of the accident is a place where the injured party was obliged to be in the process of embarkation."*

[23] Mr Belnavis also commended the learned Judge's observations at paragraph 17 of the judgment to the Court, where Morrison J observed as follows:

> *"In this case, the accident happened at a time when a specific flight had been called and during a necessary process towards embarkation. Dr Phillips was going upstairs because the airline had called passengers to go to the embarkation point, namely the departure gates. Standing back, it seems to me that going to the embarkation gate after the flight has been called is one of the several processes which passengers must perform in order to embark on their flight. The processes of embarkation will, I think, include the checking-in; the passage through security and passport control and the 'departure routine'; that is, going to the gate to be cleared for embarkation and proceeding thereafter to embark. In the most general sense, these activities are required by the airline of its passengers…*
>
> *The process of embarkation does not have to be a continuous one. In my judgment this makes good sense of the realities of modern air travel. For some of the time a passenger is able to do what he or she wants. for some of the time he or she has to comply with directions and requirements imposed by the carrier. In the light of* ***Sidhu*** *decision, I see no reason to give a restrictive interpretation to Article 17".*

[24] I have noted Ms Montague's submissions that Justice Morrison's reasoning in **Phillips v Air New Zealand** (supra) on the application of Article 17 was *obiter*, as he found that the claimant's right to damages was extinguished on the basis that it was not brought within the 2 years limits set by Article 29 of the Warsaw Convention. Nevertheless, I have found the learned judge's judgment to be logical, well reasoned and sound view of the application of Article 17. I am fortified in my opinion by the numerous references to this authority and a similar sentiment shared by judges in many other cases on the point. I am also unable to accept Ms Montague's submission that the learned Judge's view that the convention applied was primarily influenced by the fact that the claimant was in a wheelchair being assisted by an agent of the airline and as Counsel framed it "*was therefore under the direct supervision of the airline*". The control to which the Judge referred was not the act of wheeling the claimant only but was inextricably linked to the directive given to proceed for boarding. The paramount consideration as expressed by the Judge in reaching his conclusion was that the processes of embarking had begun and the Claimant was *going upstairs because the airline had called passengers to go to the embarkation point, namely the departure gates.* As the Judge expressed

it at paragraph 17 "*…If a passenger is required to take a particular step or go a particular place for boarding then he or she is engaged in the process of embarkation.*"

[25] Mr Belnavis also relied on **Barratt v Trinidad & Tobago Airways Corp**. 1990 WL 127590 to support his submissions that a restrictive interpretation should not be placed on Article 17 and relied on the comments of District Judge Raggi where he stated at paragraph 2 as follows:

> *"Nowhere in Article 17, or any other section of the treaty, is the term "operations of embarking "defined. As the Second Circuit has recently observed, a focus on the term "embarkation" might lead to the conclusion that "only the physical act of enplaning is covered." On the other hand, a focus on "any operations" might result in the inclusion of "almost any transaction between a passenger and an airline relating to the passenger's eventual walk onto the airplane." **Buonocore v. Trans World Airlines, Inc.**, 900 F.2D 8, 10 (2d Cir.1990)"*

[26] Mr Belnavis also relied on the learned Judge's statement at paragraph 3 where he opined that:

> *"Several factors are relevant to whether a passenger's injuries were sustained "in the course of any of the operations of embarking." These are: "(1) the activity of the passenger at the time of the accident; (2) the restrictions, if any, on [her] movement; (3) the imminence of actual boarding; and (4) the physical proximity of the passenger to the gate…*
>
> *Applying these factors to this case, it is clear that plaintiff was "actively engaged in preparations to board the plane" at the time of her accident. **See Buonocore v Trans World Airlines Inc., 900 F.2d at 10.** She had not only checked her luggage and received her boarding pass, but she had cleared security and was in an area reserved exclusively for ticketed passengers. Indeed, she and her fellow passengers had already lined up at their gate and were proceeding down a staircase that would take them directly to their aircraft. In **Buonocore**, the court distinguished between the plaintiff in that case , who had only checked in at the ticket counter and was still in a public area at the time he was killed, and the plaintiffs in **Day**, who had entered a restricted area and who had assembled at their gate, virtually ready to proceed to the aircraft. Id. Plaintiff's situation is on all fours with **Day** in this respect.*
>
> *Moreover, plaintiff's movements were restricted in the sense that, if she wished to make her flight, she was no longer free to roam the airport. She had been "herded in line" with her fellow passengers and clearly "risked missing the flight if [she] strayed." Id. Moreover, it was the airline, not*

> *plaintiff, who chose and controlled the route by which she would get from the departure area to the aircraft. Descent down the staircase at issue was a condition "imposed by the airline" for her embarking on her flight..".*

Analysis

[27] Having examined the cases submitted by Counsel on both sides, I wholly and unreservedly adopt the statement of District Judge Raggi in **Barrat** (supra) as a correctly distilled position of the law, namely that:

> *"Several factors are relevant to whether a passenger's injuries were sustained "in the course of any of the operations of embarking." These are: "(1) the activity of the passenger at the time of the accident; (2) the restrictions, if any, on [her] movement; (3) the imminence of actual boarding; and (4) the physical proximity of the passenger to the gate."*

Both Counsel in their submissions appear to be agreed that these are the most important factors.

[28] What the cases also seem to demonstrate is that in conducting the appropriate analysis one has to consider each of these factors identified in **Barrat**, but in particular cases, one or more of these factors may gain prominence and result in the swinging of the scale in one direction or the other.

A. *The activity of the passenger at the time of the accident*

[29] In my opinion, this head poses no difficulty because the Claimant at the particular time, was clearly doing an activity which constitutes a necessary step in the boarding process, that is to descend the stairs in order to make her way to the boarding gate of the aircraft.

B. *The restrictions, if any, on [her] movement*

[30] Similarly, in my view, this head also poses no difficulty. In this case, the Claimant's flight had been announced and she was making her way to the boarding gate. This was one of the several necessary processes which the Claimant had to perform if she intended to be on that flight. Her movements were restricted in the sense that she was obliged to do so when requested and not at her own leisure. This was not

a time when she was able to do what she wanted. The “free” or “waiting” time that could be used for lounging, shopping or eating and drinking at the places provided for that activity had ended. Restrictions were now imposed on her by the carrier in order for her to make the flight. This was now the time she had to comply with directions and requirements imposed by the carrier.

C. *The imminence of actual boarding*

[31] This is often a question of degree and in some cases this issue will be affected by the physical proximity of the passenger at the time of the incident in relation to the boarding gate. In this case, the flight had been announced and all that remained was for the Claimant to make her way to the gate then to the Air Bridge/Jetway and then on to the aircraft. I find that the actual boarding of the aircraft in such circumstances could reasonably be said to have been imminent.

D. *The physical proximity of the passenger to the gate*

[32] I am attracted to the approach taken in **McCarthy** (supra) that the accident must have occurred “*in a place not too remote from the location at which he or she is slated actually to enter the designated aircraft*.” It appears to me, that most of the cases in which the airline has been held to be liable would satisfy this test. In **McCarthy**, among the reasons which influenced the Court in denying the claim because of the inapplicability of article 17 of the Montreal Convention was the fact that the court found that the accident happened “*at a considerable distance from the departure gate and well before any embarkation was possible*”.

[33] In **Buonocore v. Trans World Airlines**, **Inc** 900 F.2nd 8 (2nd Cir. 1990), the Plaintiff had checked in at the ticket counter but the US Court of Appeal held that Article 17 did not cover an ensuing injury which occurred “*nowhere near the gate*”. In **Kherunisha Adatiav. Air Canada** [1992] P.I.Q.R. P 238 the Court held that the location at which the claimant was injured was “*some distance*” from the aircraft.

[34] I do not find any merit in Ms Montague's submission that the Montreal Convention does not apply because the Claimant was "*outside of a place exposed to the risks of air navigation*" or that she was not on the tarmac or the apron, or exposed to aviation related risks such as injury from propellers. In my view Counsel's reliance on the case of **Mache v Cie Air France** (supra) is unhelpful in the context of modern travel by air where it is unusual for passengers to walk on the tarmac and be exposed to injury form propellers. This is especially so in the context of the NMIA and the Claimant.

[35] The cases are generally agreed that location is a factor but whether the location of the incident falls within Article 17 will depend upon the circumstances of each individual case. Because this is a very fact-specific factor, the cases do not, (and cannot) render much assistance having regard to the differences in the layouts of airports. As far as the NMIA is concerned I am quite comfortable in reaching a conclusion that the stairs at which the incident occurred was not "*some distance*" or "*a considerable distance*" from the gate. It is noted that whereas there was photographic evidence of the stairs where the incident occurred, there was no evidence presented to the Court as to the precise distance of the stairs from the gate. However, I am of the views that I am permitted to properly take judicial notice of the fact that the NMIA is a relatively small airport (certainly as compared to the airports of major cities), and as a consequence, the distance passengers are required to walk to the departure gates without the assistance of a travellator is relatively short. It is therefore, my finding, that the Claimant fell in a place which was not too remote from the location at which she was "*slated actually to enter the designated aircraft.*"

Is it necessary that the location as distinct from the passenger was under the control of the airline?

[36] In **Knoll v Trans World Airlines, Inc.** 610 F. Supp. 844 (D. Colo.1985) District Judge Kane observed that the courts have consistently refused to apply the Warsaw Convention to cases in which injuries occurred within the terminal except

in those case where the passenger was under the direction of the airlines. Presumably this approach is equally applicable to the Montreal Convention. In some airports there is a waiting area at the gate itself where passengers await the boarding announcement of their flight. However, at airports such as NMIA the waiting area and corridor leading to the actual gate is shared space occupied by passengers of various airlines. It would therefore be artificial and unreasonable to place the emphasis only on whether the airline had exclusive control at an airport such as NMIA where there is a considerable amount of shared space. This is because such an approach would limit the passengers' area of claim in the case of an accident to the relevant gate area and beyond. Such an approach would serve to concentrate the analysis on the embarkation element of the Convention, which as Judge Raggi observed in **Barratt** (supra) might lead to the conclusion that "*only the physical act of enplaning is covered*." The concomitant deficiency would be the neglect of the "*any operations*" element of Article 17 of the Convention which is brought to bear when the airline exercises control over the passenger by giving instructions which he or she is obliged to obey.

[37] In the case of **Howells v British Airways Lloyds** [2017] Lloyds Report Plus 71 Vol 2 322 the Claimant Mrs Howells sustained injuries as a result of tripping over a set of luggage scales which had been left unattended on the ground at the departure hall of Toronto Airport. She claimed that this occurred after she had checked in her luggage at the British Airways desk and was walking away with the intention of going to the security check. British Airways contended that the area where she fell was not used by it but by another airline. The learned Judge accepted that the accident occurred shortly after she checked in at the British Airways desk but found on a balance of probabilities that after she checked in she left to look for security "…*possibily missed security as she in deed accepted in evidence, and then passed the security entrance to Westjet's desks where she tripped over the scales*". At paragraph 34 of the judgment Deputy District Judge Jowettt commented as follows:

> *"…I find that the significant, common requirement, is that the accident to the passenger must be related to a specific flight. The security clearance that Miss Howells was approaching was not related to a specific flight. It was a security clearance that all passengers had to go through to get to what is often referred to as airside. It was not a security clearance which occurred at the gate of entry, or embarkation onto the aeroplane. Passengers on all flights had to make their way to that security area. That needs to be seen in the following context. Between checking in and entering security, even though the claimant had chosen to go straight to security, she was not, to use the quote from* ***Adatia****: "Anything other than a free agent roaming at will"*

[38] I do not find this case as being helpful as it relates to the issue of location on the particular facts (and the relative location of competitors kiosks as well as the security gate) which are clearly distinguishable from the instant case. I also do not find it to be an authority capable of supporting the position that the area of the accident must have been under the exclusive control of the airline in order for Article 17 to be engaged. Admittedly, the Claimant in the case before this Court was descending stairs which would be used by passengers from other airlines but the Claimant was more advanced in the boarding process than Mrs Howells was. The Claimant was also responding to a boarding announcement and was for the reason I have addressed elsewhere in this judgement not a free agent roaming at will.

[39] In **McCarthy** (supra) for example, among the reasons for the court finding that the airline was not liable was the fact that the Claimant had not yet "*isolated herself from the throng of other passengers flying to other destinations*." However, for my part I do not consider this to be an important element in this case that I am considering having regard to the layout of the NMIA.

Conclusion on the issue of embarkation

[40] The fact specific nature of the analysis that needs to be adopted means that whereas there is some assistance to be derived from the cases submitted by both counsel, ultimately the facts of this case are not exactly on all fours with any of those cases.

[41] In ***Adatia*** (supra) the plaintiff's mother was wheeled by an employee of the airline from the aircraft on to a moving walkway or travellator. The employee stepped from the travellator and the wheelchair got stuck. At the end of the travellator causing the plaintiff who was close behind to be pulled into the stuck wheelchair causing her injuries. The reasoning of the English Court of Appeal is accurately captured in the headnote which I believe is worth reproducing hereunder:

> *"Held, dismissing the appeal, that the Plaintiff was not engaged upon the operation of disembarking at the time she sustained her injuries. This was so either on the basis of the tripartite test in Day v Trans World Airlines Inc. 528 F.2d 31(2d. Circ., 1975), suggesting that the court should consider the location of the injured passenger, the nature of his activity and whether he was under the control of the carrier at the time of the injury, or the test of location alone as set out in MacDonald v Air Canada 439 F.2d 1402 (1st Cic., 1971); since as regards location she was some distance from the aircraft when the activity occurred; as regards activity, her activity at the relevant time was merely that of proceeding towards immigration in accordance with United kingdom immigration requirements, and she was doing so as a free agent; and as regards control there was no evidence that the defendant had the right to instruct the plaintiff to use the travelator on which the accident occurred. Accordingly the claim was not governed by the provisions of the Convention and was not time barred."*

[42] Although this was a disembarkation as opposed to an embarkation case, this fact was not really material. Nevertheless, the difference in the nature of the activities of that passenger vis a vis those of the Claimant in the case before me makes that case unhelpful, because I have found that Ms Oddman could not be considered to be a "free agent", free to act outside the direction of the 2nd Defendant which was to board the aircraft.

[43] I have made a number of references to **McCarthy** earlier but it should be noted that in that case, although the claimant had checked in and had been issued a boarding pass, she was injured on an escalator accessible to the general public. The Court noted in its analysis at paragraph [5] that:

> *"…We believe it is no mere happenstance that the plaintiff has not cited- and we have been unable to deterrate-a single instance in which Article 17 has been found to cover an accident that occurred within the public area of a terminal facility."*

[44] The Court also found at paragraph 5 as follows:

> *"…The plaintiff here, unlike the plaintiffs in **Day** and **Evangelinos**, had yet to fulfil most of the conditions precedent to boarding; at the time of the accident, she had not left the common area of the terminal, located the bus that would transport her to the vicinity of her assigned aircraft, reached an area restricted to travelers, nor isolated herself from the throng of other passengers flying to other destinations."*

Based on these differences, the case under consideration by this Court is clearly distinguishable because the Claimant herein was in an area not accessible to the general public, albeit that it was shared by passengers of airlines other than the 2nd Defendant.

[45] The facts in the case of **Day v Trans World Airlines. Inc.,** 528 F.2d 31 (1975) are at the other end of the spectrum in that the passengers in that case were assembled at the departure gate. In that case Irving R. Kaufman, Chief Judge stated at paragraph 1 that:

> *"It is clear that Article 17 does not define the period of time before passengers enter the interior of the airplane when the "operations of embarking" commence. It is, nevertheless, appropriate to consider the activities of the plaintiffs in this case as falling within the purview of this somewhat cryptic phrase. The facts disclose that at the time of the terrorist attack, the plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart an international flights. They were assembled at the departure gate, virtually ready to proceed to the aircraft. The passengers were not free agents roaming at will through the terminal. They were required to stand in line at the direction of TWA's agents for the purpose of undergoing a weapons search which was a prerequisite to boarding. Whether one looks to the passengers' activity (which was a condition to embarkation), to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate we are driven to the conclusion that the plaintiffs were "in the course of embarking."*

Conclusion

[46] Having assessed the undisputed facts against the backdrop of the relevant factors to which I have made reference, I find that the Claimant was in the process of embarkation at the time that she fell and consequently she satisfies this limb of the requirement of Article 17 of the Montreal Convention.

Primary issue number 2 - Was the claimant injured in an "accident"

[47] Ms Montague has submitted that Carriers are only liable under Article 17(1) of the Montreal Convention if the injury was caused by an "accident". She relied on the case of **Air France v Saks** 470 US 392 in which the Court held that:

> *"Liability under Article 17 arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft".*

Counsel also submitted that it was further held in **Saks** that: "*the 'accident' requirement . . . involves an inquiry into the nature of the event which caused the injury rather than the care taken by the airline to avert the injury."*

[48] Counsel also relied on a number of other cases to support her position that cases such as the one before the court involving a slip and fall do not come within definition of "*accident*" for the purposes of Article 17. One such case commended to the Court was that of **Brannock v Jetstar Airways Pty Ltd** [2010] QCA 218 in which the plaintiff who was descending the stairs of the terminal building in order to access the tarmac for boarding, lost his footing an fell to the foot of the stairs, and suffered injuries. He had descended the stairs earlier but was unable to find the exit, and ascended the stairs where he met other descending passengers who offered to show him the way at which point he turned and began to descend the stairs once again. The Queensland Court of Appeal held by majority that the plaintiff's claim should be struck out and concluded at paragraph 52 of the judgment as follows:

> *"The accumulation of circumstances as pleaded by Mr Brannock which her Honour likened to the" chain of causes" mentioned in **Saks** cannot, either individually or collectively, create an event external to the passenger. The stairs were an ordinary object of embarkation. Mr Brannock's approach to embarking and using the stairs were peculiar to him. Mr Brannock's pleaded case is no different from the tripping and slipping cases where recovery has been denied…"*

[49] Counsel also relied on **Ugaz v American Airlines** No.07-23205-Civ United States District Court, S.D. Florida, Miami Division. September 4 2008, in which a passenger fell while walking up an inoperable escalator on her journey from the airplane to the customs and immigration area, shortly after her flight arrived at the airport, was not an Article 17 accident. The court granted summary judgment in favour of the airline and held that:

> *"…On the merits, there is simply no evidence whatsoever that an in operable escalator is an "unusual or unexpected event" sufficient to constitute and "accident". The inoperability of an escalator bears more similarity to a case of luggage in the aisle or a slippery plastic bag under a seat than a hypodermic needle protruding from a seat or liquor bottles raining down from an overhead compartment.*
>
> *… In this case, there were no foreign substances on the stairs, jostling passengers or other direct outside influence that caused the Plaintiff's fall apart from her own decision to climb an acknowledged inoperable escalator."*

[50] In highlighting two of the examples used by the Court in **Ugaz,** Ms Montague referred to **Sethy v. Malev-Hungarian Airlines** 2000Wl 204 7610,in which the court found that tripping over luggage left in the aisle during boarding did not qualify as an "accident" because there was nothing "unexpected or unusual" about a bag found in an aisle during the boarding process. Counsel also referred to **Rafailov v El Al Israel Airlines, Ltd** Case No. 06 Civ. 13318 (GBD) (SDNY May 13, 2008), in which a passenger slipped on a plastic blanket bag underneath a seat during a flight. The court held that there was no "accident" because:

> *"after hours in flight, it would seem customary to encounter a certain amount of refuse on an airplane floor, including blanket bags discarded by passengers who had removed the bags contents in order to use the blanket".*

[51] Against the backdrop of these cases Ms Montague submitted that in this case there is no Article 17 "accident" as there was no unusual or unexpected event which was external to the Claimant. She argued that Staircases are a usual and expected feature of not only air travel, but everyday life. Accordingly, since there was no defect in the stairway, no foreign substance or outside influence to cause the

Claimant's fall, she submitted that there was no unusual or unexpected event which operated to invoke Article 17.

The Claimants submission on whether there was an accident

[52] Mr Belnavis sought to challenge the authority of **Saks** on the basis that the intepretation adopted by the Court is not in keeping with the intent of Article 31 of the Vienna Convention on the Law of Treaties which provides that a treaty shall be interpreted:

> *"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

[53] Mr Belnavis relied on the High Court of Australia case of **Povey v Quantas Airways Limited** [2005] HCA 33 in which Judge McHugh disagreed with the **Saks** definition. I note that whereas Judge McHugh was of the view that the order of the Court of Appeal of Victoria should be set aside and an order substituted. The other members of the Court did not share his views and were of the view that the appeal should be dismissed. I have therefore not placed any weight on the learned Judge's judgment which dissented in part.

[54] Mr Belnavis has also relied on the case of **Deep Vein Thrombosis v Air Travel Group Litigation** [2005] UKHL 72 and the statement of Lord Scott of Foscote stated at paragraph 12 that:

> *"**I think at this point a word of caution about the process of interpretation is in order.** It is not the function of any court in any of the Convention countries to try to produce in language different from that used in the convention a comprehensive formulation of the conditions which will lead to article 17 liability, or any of those conditions. The language of the Convention itself must always be the starting point. The function of the court is to apply that language to the facts of the case in issue. In order to do so and to explain its decision, and to provide a guide to other courts that may subsequently be faced with similar facts, the court may well need to try to express in its own language the idea inherent in the language used in the Convention. So, as a judged faced with deciding whether particular facts do or do not constitute an article 17 accident will often describe in his or her own language the characteristics that an event or happening must have in order to qualify as an article 17 accident. But a judicial formulation of the characteristics of an article 17 accident should not, in my opinion,*

> *ever be treated as a substitute for the language used in the Convention. It should be treated for what it is, namely an exposition of the reasons for the decision reached and a guide to the application of the Convention language to facts of a type similar to those of the case in question." (emphasis supplied.)*

[55] It is to be noted that Lord Scott was concerned about the process of statutory interpretation adopted by the courts. This was of importance in the **Deep Vein Thrombosis** case where the facts were unusual and one of the major issues to be determined was whether the onset of deep vein thrombosis during a "*normal an unremarkable flight*" could constitute an "accident". As Lord Scott acknowledged at paragraph 18 of the Judgment:

> *"O'Connor J's opinion in **Saks** has been widely followed both in the United States and in the courts of other signatory states. Both the standing of the court and the reasoning of the opinion justify that reliance. Moreover, as I have already observed, it is of importance that if possible a uniform interpretation of the convention should be applied in all signatory states".*

[56] Baronness Hale at paragraph 49 considered a hypothetical fall by her during a flight to New York resulting in her breaking her arm and suggested a less restrictive interpretation of "*accident*" as an "*untoward event*" but acknowledged that her comments were to use her words "*by the way*". I have not given any weight to these comments in the circumstances.

Analysis and conclusion

[57] Having considered the authorities to which I have been referred by both Counsel, I am convinced that the approach in **Saks** to the interpretation of the Convention is correct and applicable to the case before me. Accordingly, I am of the opinion that the '*accident*' requirement involves an inquiry into the nature of the event which caused the injury and rather than the injury itself. Furthermore, that the event which caused the injury must be something external to the claimant and that the event must have been unusual or unexpected.

[58] I accept the submissions of Ms Montague and find that there was no unusual or unexpected event which was external to the Claimant. The Claimant's use of that

staircases was usual and expected and since there was no defect in the stairway or outside influence which was responsible for the Claimant's fall. In these circumstances, Article 17 of the Montreal Convention cannot be invoked to assist the Claimant.

The negligence issue

[59] Ms Montague has submitted that if the Court finds that Article 17 of the Montreal Convention applies, the Montreal Convention exonerates carriers from liability in cases of contributory negligence of the passenger. Having regard to my earlier findings this issue naturally falls away. In any event, I agree with Mr Belnavis that an examination of whether the Claimant was negligent would cause the court to embark on the procedure of making a finding of fact which would be wholly inappropriate in the limited confines of the application before the Court.

[60] Ms Montague has also complained that the Claimant has also failed to comply with CPR Rule 8.11(3) which requires that in a claim for personal injuries, the medical evidence on which the Claimant intends to rely at trial must be attached to the claim. I also do not find it necessary to make a ruling based on this non-compliance.

Disposition

[61] The Claimant has no real prospect of establishing that she was injured in an accident as contemplated by section 17 of the Montreal Convention and here claim against the 2nd Defendant is bound to fail. In the premises the court makes the following orders:

1. Summary judgment is entered in favour of the 2nd Defendant on the claim.

2. Costs of the claim are awarded to the 2nd Defendant be taxed if not agreed