

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2016-01737**

**BETWEEN**

**DARWIN AZAD SAHADATH**

**KAMALAR MOHAMMED SAHADATH**

**Claimants**

**AND**

**THE WATER AND SEWAGE AUTHORITY OF TRINIDAD AND TOBAGO**

**Defendant**

**Before the Honourable Mr. Justice V. Kokaram**

**Date of Delivery: Tuesday 12<sup>th</sup> December 2017**

**Appearances:**

**Mr. Larry N. Lalla instructed by Mr. Vikash Indar Lal for the Claimants**

**Mr. Keston McQuilkin instructed by Ms. Roshni Balkaran for the Defendant**

**JUDGMENT**

**Introduction**

1. The four storey “dream home” of the Claimants, Darwin Sahadath and his wife, Kamalar, is now unfit for occupancy and at risk of imminent collapse. Water had escaped from a leak from an underground water pipeline maintained by the Defendant, the Water and Sewerage Authority of Trinidad and Tobago (WASA) which the couple alleged triggered a landslide causing the road to collapse and eventually their house to sink.
2. The couple’s claim against WASA is for damages for nuisance and/or negligence in failing to maintain its pipeline which caused or substantially caused the damage to their dream home. They seek from WASA approximately \$2,002,000.00 in damages as the cost of reconstructing their home. The main issue in determining liability in this matter is causation. Has the

Claimants proven on a balance of probabilities that this leaking water line caused or substantially caused the damage to their property?

3. The couple, completed building their new home in 2010 at Iere Village Branch Road, Princes Town, an area of Trinidad that was prone to land slippage due to the predominant soil type known as Talparo clay. This type of soil is characterised by large expansion or swelling based on the saturation levels in the soil. The evidence adduced by the Claimants of the cause of the landslide is circumstantial, but allows for a reasonable inference of causation. They deduce that the source of the water which triggered this landslide must be from the Defendant's pipes as it is the only water line in the road at the front of their property. They saw water flowing up from cracks in the road, they saw water pooling to the surface when they dug close to the WASA's pipeline to investigate the problem. The undisputed evidence is of a leak which continued from 2012 to 2014. The pipeline itself was eventually repaired in March 2014 by WASA when it was relocated from a subsurface pipe line to above the ground in a drain along the roadway. By then the house had already undergone considerable stress with the house itself shifting and moving. By March 2015, Mr. Sahadath had moved out of the house with his family since it was deemed unfit for occupancy and he began renting at Nagee Avenue, Iere Village, Princes Town for \$5,000.00 per month.
4. The couple contends that WASA was negligent in the maintenance of their pipe and their failure to effect repairs to the leak within a reasonable period of time especially knowing the nature of the soil in that area which is prone to land slippage with the introduction of subsurface water.
5. Two experts, a geophysicist and an engineering consultant both visited the site in 2014 and 2015. They both cannot conclusively determine that the leaking pipe caused the damage but they have also expressed the opinion that having regard to the topography, the nature of the soil and the terrain, the cause of the slippage of land was not due to rainfall or natural movement but by a human element. There was no other human activity in the area save for the leak of which the Sahadaths' complain.
6. WASA contends that the source of the leak was not from its pipeline and in any event it is not responsible for the Claimants' loss as they built their home on land which is prone to slippage. However, at the trial, there was a dearth of evidence from WASA. There was no explanation

of its inspection regimen. They failed to explain the steps taken to repair and detect the leaks of which Mr. Sahadath complained. There was no expert evidence led by WASA to postulate their theory that the slippage of land was due to another cause unrelated to a leaking pipe. The stance taken ultimately by WASA was that it is for the Sahadaths to prove their case. This of course the couple must do on a balance of probabilities.

7. I am satisfied based on the Sahadaths' evidence and the lack of material evidence from WASA that it is more likely that the land slippage that occurred at the home of the Sahadaths was triggered by a leaking pipeline maintained by WASA. There is no evidence to suggest that another cause such as a landslide unconnected with the leak or heavy rainfall or other sources of water caused either the leaks in the roadway or the resulting damage to the couple's home.
8. Mr. Sahadath himself admitted that the leak was fixed in March 2014 and that rain water penetrated the broken drain to cause further damage to his property. There is no evidence in this case of either the extent of the rainfall or its impact on the already damaged, stressed and sinking house. In any event, it is reasonably foreseeable that the leak once manifested from the WASA line and not repaired within a reasonable time in Talparo soil will cause damage to the roadway and make the sub soil vulnerable without any protection from upper surface drainage or roads.
9. For the reasons set out in this judgment there will be judgment for the Claimants against the Defendant for damages assessed in the sum set out at the end of this judgment.

### **The home of the Sahadaths**

10. The Sahadaths' home is a four storey concrete structure located at LP 52 Iere Village Branch Road, Princes Town. It was constructed on the property between 2004 to 2010. The said property is located to the western side of the Iere Village Branch Road where the land slopes downward. The home faces the Branch road and is a reinforced concrete building. The building is rectangular in nature and comprises of levels inclusive of an open basement. The four levels of the building are as follows<sup>1</sup>:

- a) **Basement Level (1<sup>st</sup> Floor)** - This storey is open and comprised of a concrete floor slab in addition to the columns which provide support for the upper floors.

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<sup>1</sup> Page 5 of the Damage Assessment Report prepared by APR Associates Limited dated 18<sup>th</sup> December 2015.

- b) **Second Floor Level-** This storey is was one level beneath the existing road level. It consists of a retaining wall, external walls, internal walls, windows and doors. The main structural components of this storey are R.C. beams, R.C. columns, R.C. slab and the retaining wall.
- c) **Third Floor Level-** This storey was at the existing road level and consists of external walls, internal walls, windows and doors. The main structural elements of this storey are R.C. beams, R.C. columns and a R.C. slab.
- d) **Fourth Floor Level-** This storey was one level above existing road level and consisted of external walls, internal walls, windows, doors and the roof. This story is comprised of both concrete and wooden components.

11. The house is situated on 9,950 square feet of land. The couple received Town and Country planning approval in 1998. The plans that were submitted, however, revealed a total floor area of 2,520 square feet comprising two floors, a top floor and a ground floor. Some issue was made of this discrepancy in Mr. Sahadath's cross examination but it is of no moment. There is no evidence to suggest first that there was a material departure from the plans or that the construction itself of the house was the cause of the damage. Further, the evidence of the structural engineer suggests that the type of foundation used was consistent with buildings situated on expansive clay soils and was known to have performed adequately.

#### **WASA's leaking pipeline**

12. It will be convenient at this point to set out briefly the picture of WASA's leaking pipeline over the period 2012 to 2014. There is no dispute that the only underground pipeline in the front of the couple's home was that of the Defendant. WASA produced no evidence to contradict this. The Defendant's pipeline was located at the Eastern side of the Iere Branch Road. It runs to the front of the Claimants' property.

13. Pursuant to the Water and Sewerage Act Chapter 54:40 (WASA Act), the Defendant is the only body responsible for the development and control of water supply and sewerage facilities in Trinidad and Tobago and matters of sanitation incidental thereto and the promotion of the conservation and proper use of water resources.

14. There is no contest that WASA's pipeline was leaking in front of the Claimants' home for the period 2012 to 2014. This is borne out by the following evidence.
15. First, the Claimants' unshaken evidence is that around June 2012, Mr. Sahadath noticed that the road in front of their property was beginning to crack and sink holes were beginning to form on the road. There was also water flowing from the cracks and gathering in the sink holes. Mr. Sahadath then discovered that the Defendant's underground pipeline which was located in front of the Claimants' home was leaking. This caused the soil in front of the Claimants' home to become saturated and as such the land in front of the Claimants' home began to slip. Thereafter, he contacted the Defendant's regional office and reported the leak and requested that the Defendant repair the pipeline. The Claimants contend that the Defendant subsequently repaired the pipeline but Mr. Sahadath noticed that water continued to seep through the cracks in the road.
16. At best it was suggested, which was admitted quite plainly by Mr. Sahadath, in cross examination that these were all assumptions made by Mr. Sahadath and that he himself did not have any "pipe inspection equipment" to verify that the leaks were coming from the Defendant's pipes. While this is so the Court is entitled to draw reasonable inferences and in the absence of any evidence to suggest that there was another source of water to cause this type of damage it is only reasonable to infer that WASA's pipes were the cause.
17. From March 2013 to December 2013 the Claimants made reports to the Defendant's Regional Office about the leaking pipeline. Prior to this, between June 2012 to January 2013 the Claimants noticed that the cracks and the sink holes in the road were getting wider and larger. The slipper drain in front of the Claimants' home began to separate from the road and the water from the leaking pipeline began to pool on the road and flow through the cracks on the road and drains causing the front of the Claimants' property to become waterlogged.
18. Around January 2013 the Claimants observed cracks were beginning to appear in the concrete posts of the Claimants' home and their basement floor had begun to raise. Between March 2013 and January 2014, their home continued to slip downhill causing damage to its foundation and structure.

19. Second, from WASA's evidence it supports the view that their pipes were leaking at this time. In March 2014, the Defendant allegedly repaired the leaking pipeline. The records of WASA and the contemporaneous records all acknowledge the leaking WASA pipeline.
20. Earlier, the WASA job card of 11<sup>th</sup> July 2013, the comments indicated that there was a leak in the middle of the road and though a customer stated that the leak was repaired recently on the other side of the road, there was water showing up on the roadway. The WASA job card for 6<sup>th</sup> October 2013 is even more telling. The comment was as follows:
- “Please refer to water loss to source the point of leak. Customers LP 52 (#10 #9) homes are caving in due to water causing landslip. Leak was repaired recently and water is coming from beneath the road and causing slippage.”
21. Further, the job cards fail sufficiently to explain the efforts of WASA to repair the leak. There is no evidence from WASA as to what these job cards mean. Whether it is a contemporaneous record of activities or of reports. The cards themselves have absolutely no information providing any details of the work actually done, by whom, the time and the equipment used. The only information in these “job cards” is a job description and comments, job address, contact names and phone numbers. These job cards are WASA's, yet they give no evidence about its status and meaning and without it is of very little value.
22. Not surprisingly, Counsel for the Defendant has made no submissions in reply on them for good reason. For example, in the said job card dated 11<sup>th</sup> July, 2013 the job description is “pipe repair for 800 Leak”. The comments are “Leak is in the middle of the road. Customer states that a leak was repaired recently on the other side of the road. However there is now water showing up in the roadway.” But there is no further information on whether the leak was repaired or any comments from WASA on the alleged job.
23. Another job card dated 20<sup>th</sup> May 2013 listed the job description as “Comm Pipe repair for 800Leak”. The job address was the Claimants' home. The comments were “Leaking  $\frac{3}{4}$ ” WSC. Verified by: CSA12/E.RAJUE on 16-May-2013. See remarks.” No further details in the card was forthcoming. There are no “remarks.” In job card dated 30<sup>th</sup> September, 2013 the job description is “Comm. Pipe repair for 800Leak.” The job address was the Claimants' address and there were no comments and no further details.

24. Another unexplained extract is at page 421 of the Bundle of agreed and unagreed documents which was as follows:

“REMARKS

CUSTOMERS @LP 52 (#10, #9) HOMES ARE CAVING IN DUE TO WATER CAUSING LANDSLIP. LEAK WAS REPAIRED RECENTLY AND WATER IS COMING FROM BENEATH THE ROAD AND CAUSING SLIPPAGE.

PLEASE REFER TO WATER LOSS TO SOURCE THE POINT OF LEAK.

THE MATTER WAS ALREADY RAISED IN THE MEDIA.

VERIFIED BY: - SRCSA6 / J.ASH ON 28/SEP/13

JOB COMPLETED: INFO FROM WATER LOSS COORDINATOR-K. ROMAIN- JAN 22<sup>ND</sup> 2014”

25. No one from WASA has explained any of this to the Court. The last note suggests WASA identifying a leak in September 2013 but fixing it four months later. Without any further explanation this smacks of carelessness and sloth on the part of WASA. What is worse is that WASA failed to produce its contractors who repaired the pipeline eventually in 2014 to explain the leak or to contradict the Claimants’ story. It simply is a case of WASA accepting the Claimants’ version of the facts that the WASA pipeline was leaking and it was eventually fixed in 2014.

26. Third, there were other independent attempts to investigate the cause for this phenomena and the conclusion was that WASA was more likely the culprit. On 15<sup>th</sup> January 2013, Mr. Nizam Baksh, the Member of Parliament for Naparima at the time, wrote to the Princes Town Regional Corporation (PTRC) indicating that Mr. Sahadath complained to them that because of soil movement the road in front of his home was cracking and sinking. He requested the Technical Officers of the Corporation to visit the road to determine what could have been done to remedy the situation. Subsequently, on the 12<sup>th</sup> March 2013, the PTRC wrote to Mr. Sahadath and stated that their investigation “revealed that the damages caused were due to WASA’s damaged main lines.”

27. Fourth, there was also photographic evidence adduced into evidence by the Claimants at trial to demonstrate the commencement of the leak and extent of the damage to the Iere Branch

Road and their home. In “Exhibit 1- Damage to the Iere Road” the pictures depicted some water on the road through the cracks in the road which were clearly visible. The road appeared to be collapsing and the slipper drain was cracked. One of the photographs showed makeshift steps on the collapsed portion of the road which was used by the Claimants to exit their property onto the road. This demonstrated the extent of the damage to the front of the Claimants’ property. In “Exhibit 2- Damage to the Claimants’ home” the photographic evidence showed that the basement floor was raised and cracked. There were also cracks in the concrete pillars and on the walls in the house. The pillars were damaged to the extent that the portions of the steel inside the pillars were visible. “Exhibit 3-Repairs to WASA’s main pipeline” there is photographic evidence of the pipeline now being placed above ground.

28. Fifth, there is expert evidence which supports the Claimants’ theory of a leaking pipeline even though it is impossible for the experts to so conclude as their examination was done long after the leak was repaired. In March 2014, the Claimants commissioned APR Associates Limited (APR), engineering consultants, to examine the cause and extent of the damage to their home and recommend solutions to same. The report of APR dated 18<sup>th</sup> December 2015 stated inter alia:

- a) The soil in the area of the Claimants’ home and the Defendant’s pipeline is known as the “Talparo Clays” and this soil-type is prone to swelling when exposed to water;
- b) From the subsidence of the roadway as observed by the Claimants in 2012, the subsiding roadway had “evolved” into a landslide that progressed under the Claimants house by the date of APR’s last visit in November 2015;
- c) As a result of the landslide the Claimants’ home had moved downslope by approximately 20 feet;
- d) At the time of construction, two storeys of the Claimants house were above road level but as a result of the landslide one storey of the house was now above road level;
- e) As a result of the landslide the Claimants driveway had sunk approximately 12 feet;
- f) The Claimants’ house had numerous signs of distress (failures) observed in columns located on the lowest (basement) level;
- g) The Claimants’ house had rotated towards the road;



- h) Due to the observed failures, the Claimants' house was at risk for further movement and imminent collapse, hence it was deemed unfit for occupancy;
- i) The cause of the landslide was attributed to the inundation of the soil with water;
- j) Due to the topography, soil properties and location of the landslides, the water could not have been produced by natural processes (e.g. Rainfall);
- k) Upon the initial subsidence of the roadway the drainage infrastructure was damaged which resulted in the unrestricted flow of surface run-off into the land-slide's zone of depletion which further exacerbated the land-slide;
- l) It is reasonable to assume that a leaking pipe was the initial source of this water;
- m) The extent of the structural damage to the Claimants' home, retrofitting was considered both uneconomical and unpractical.

29. In the Geoengineering Consultants Limited report dated 22<sup>nd</sup> August 2015, under the heading "Causes of Landslip" the following was noted:

"A landslip is likely to occur where the bedding plane slopes in the down-dip direction. However, a trigger is still required, such as excessive rain or earthquake. The geology of the area suggests that landslip erosions have occurred in the past, probably induced by rain. However, the topography shown on the 1975 Ordinance Survey Map does not suggest that rain water was being conducted to the landslip site to any significant extent. It is much more likely that domestic activity such as might be associated with a supply leak, was the cause."

### **The Sahadaths' home after the landslide**

30. The Sahadaths' home after the landslide suffered extensive damage. The Valuer's Report dated 12<sup>th</sup> April 2016 estimated the cost of rebuilding and external works including the demolition of the building to be valued at \$2,002,000.00. This included costs for:

- Reinforcing the concrete structure
- Adding a retaining wall
- Frame, Slab and staircases
- Walls and Lintels

- Roof Framing and Covering
- Windows and Doors
- Metal Work
- Fittings and Fixtures
- Plumbing installation
- Electrical installation
- Rainwater installation
- Air-condition installation
- Floor finishing
- Wall finishing
- Painting and Decorating
- Preliminaries such as supervision, setting out of the works, water for the works, transport, plant, tools and tackle, scaffolding, temporary sheds, sanitary conveniences and clearing away on completion of the works.

**The pleaded case of negligence and nuisance**

31. The Claimants contend that their loss and damage was caused by the negligence of the Defendant and they state the particulars of negligence as follows:

- a. Failure of the Defendant to properly or at all consider the characteristics of the soil in the vicinity of the Claimants home when designing the route for its pipeline;
- b. Failure of the Defendant to so construct the said pipeline so as not to pose a threat to the stability of the Claimants' home in the event of leakage;
- c. Failure of the Defendant to institute a proper or adequate system of inspection of the said pipeline for leakage;
- d. Failure of the Defendant to keep the said pipeline in a proper or good state of repair or condition so as to prevent the escape of water therefrom to the soil in the vicinity of and below the Claimants' home;
- e. Failure of the Defendant to respond promptly or adequately to reports of leakage of the said pipeline;

- f. Failure of the Defendant to promptly repair the leaking pipeline;
- g. Failure of the Defendant to install or put in place measures to detect the location of leaks of its pipeline.

32. The Claimants also claim that their loss and damage was the result of the Defendant causing/allowing water from its pipelines to escape to the soils in the vicinity of under their house thereby causing a nuisance.

33. As a result, the Claimants claim declaratory reliefs that the Defendant acted in breach of its statutory duty to repair and maintain in good repair, and to properly manage the underground pipeline under its control, in the vicinity of the Claimants' property by reason of which over time water flowed onto and under the Claimants' property causing the Claimants loss and damage and damages for breach of the Defendant's statutory duty and/or negligence and/or nuisance. The particulars of the Claimants' loss and damages are as follows:

- a) Loss of the Claimants' home values at \$2,002,000.00.
- b) Cost of the Valuation report paid to Welch, Morris and Associates in the sum of \$6,187.50.
- c) Rental of alternative accommodation from April 2015 and continuing at a rate of \$5000.00 per month.
- d) Cost of report dated the 30<sup>th</sup> September 2015 prepared by Geoengineering Consultants Limited in the sum of \$22,000.00
- e) Cost of report dated 18<sup>th</sup> December 2015 prepared by APR Associates Limited in the sum of \$13,225.00.

34. By its Defence<sup>2</sup>, the Defendant denies that any loss or damage which the Claimants contend was caused by its negligence. The Defendant contends that though they investigate and attend to leak complaints within a reasonable time, they are unable to inspect the waterlines regularly since they are located underground. They further state that in February 2014 they replaced and relocated the 4" main located in front of the Claimants' property with a 4" steel main to the other side of the road away from the Claimants' property.

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<sup>2</sup> Filed on 24<sup>th</sup> October 2016.

35. The Defendant further contends that since prior to January 2013 there were no reports of leaks to the Defendant. The Defendant denies that the slippage is influenced by the water from the Defendant's water lines and contends that the Claimants should have been aware of the risk of constructing a four storey house on expansive clay and guard against same.
36. The Defendant stated that in December 2013, Quality Control Department conducted tests on the water which the Claimants identified as water from the Defendant's water lines but the results revealed that the water did not originate from the Defendant's water lines.
37. The Defendant pleaded the following in relation to their denial of liability:
- a. The Defendant at all relevant times employed and/or contracted with persons whose sole function is to repair verified leaks throughout the country at the Defendant's mains and service lines for which it is responsible including the Defendant's mains and service lines in the Claimants' area and/or close proximity to the Claimants' property;
  - b. The Defendant repaired all verified leaks within close proximity to the Claimants' property within a reasonable time;
  - c. The Defendant is not responsible for leaks within the boundaries of the Claimants' property. That is the responsibility of the Claimants and not the Defendant. That the Defendant cannot and is not liable for any leak that the Claimants may prove existed to their service line within the boundaries of the said property.
  - d. The area where the Claimants' four (4) storey building is located is prone to slippage and land movement which during the wet season absorbs water causing swell pressure to be applied to the foundation of houses built thereon. The swell pressure and/or movements of the soil caused by same inter alia tear up walls and destabilize structures beyond repair.
  - e. Any damage that the Claimants may prove was done to their building was as a result of a landslide/ land slippage in the area. That surface runoff flowed unrestricted as a result of the land slide and exacerbated same;
  - f. The land movement / land slide / land slippage damaged the Defendant's pipe lines in the said area.

38. It is to be noted that the Defendant led no evidence on these particulars. Rather at the trial, the Defendant through cross examination of the Claimants' witnesses sought to demonstrate that there was no evidence of causation. It was in effect an all or nothing defence, that is if causation is proven, then subject to any observation on mitigation, WASA is responsible for the whole loss. There were no submissions made to this Court to apportion liability or loss to take into account any other cause for the damage to the couple's home.

### **The issues**

39. At the trial the evidence that was led consisted of the testimony of Mr. Sahadath, Ms. Candace Welch, Mr. Alwyn Wharton, Mr. Tetteh-Kojo Salandy for the Claimants and Mr. Frederick Harris and Mr. Raymond Gittens for the Defendant, agreed documents filed 3<sup>rd</sup> April 2017, photographic evidence, written<sup>3</sup> and oral submissions.

40. The issues for determination are as follows:

- a) Whether the Defendant was negligent in failing to repair the pipeline in a timely manner.
- b) Whether the Claimants have proven on a balance of probabilities that the Defendant's leaking pipeline was the cause of the Claimants' loss.
- c) Whether the expert evidence are of sufficient cogency to assist the Court in a determination of liability and loss.
- d) Whether the principle of **Rylands v Fletcher** is applicable?
- e) What is the extent of the Claimants' loss as the result of the Defendant's breach of duty?

### **The principles**

#### ***Negligence- The duty of care***

41. What amounts to negligence is fact specific. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. See **Halsbury's Laws of England**<sup>4</sup>:

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<sup>3</sup> Claimants' propositions of law filed on 10<sup>th</sup> November 2017 and Defendant's closing submissions filed on 27<sup>th</sup> November 2017.

<sup>4</sup> Halsbury's Laws of England 4<sup>th</sup> Edition [1980] Volume 34 Negligence at P.3.

“An act of negligence may also constitute a nuisance where it occasions dangerous state of affairs and satisfies the other requirements of the tort. Equally it will also be in breach of the rule in *Rylands v Fletcher* if it allows the escape of a dangerous thing which the Defendant has brought onto his land.”

42. Critical in this case is the issue of causation. The “but for” rule is generally the starting point in proving causal connection between the negligent conduct and the damage suffered. See **Charlesworth and Percy on Negligence 12<sup>th</sup> Edition** para 6-11. Generally speaking any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. See **Dingle v Associated Newspapers Ltd and others** [1962] 2 Q.B. 162.

43. In establishing a case which in fact caused a loss the Court must still be alive to any act that may break the chain of causation or some intervening act. No such act was pleaded by the Defendant nor relied upon in its argument. Water no doubt is a powerful element and the scope of the risk created by a leaking pipe is water damage to the surrounding property. See scope of risk paragraph 6-71 **Charlesworth and Percy on Negligence 13<sup>th</sup> Edition** where it was stated:

“A “scope of risk” analysis underlies an example given by Lord Hoffman in **Environment Agency v Empress Car Co (Abertillery) Ltd**:

‘A factory owner carelessly leaves a drum containing highly inflammable vapour in a place where it could easily be accidentally ignited. If a workman, thinking it is only an empty drum, throws in a cigarette butt and causes an explosion, one would have no difficulty in saying that the negligence of the owner caused the explosion. On the other hand, if the workman, knowing exactly what the drum contains, lights a match and ignites it, one would have equally little difficulty in saying that he had caused the explosion and that the carelessness of the owner had merely provided him with an occasion for what he did. One would probably say the same if the drum was struck by lightning. In both cases one would say that although the vapour-filled drum was a necessary condition for the explosion to happen, it was not caused by the owner's negligence. One might add by way of further explanation that the presence of an arsonist workman or lightning happening to strike at that time and place was a coincidence.’

What is the scope of risk created by the factory owner's conduct? Leaving an inflammable drum in a public place very arguable creates a risk of its accidental ignition. But it is harder to see the risk as extending to the drum being deliberately ignited or struck by lightning. Of course, determining the risk or risks contemplated by a particular rule of conduct must to some extent be a matter of impression about which opinions may differ. Even so, the principle can help identify a link between the conduct and the damage in appropriate cases and can provide a satisfactory rationale for many of the cases.”

44. However, there is a duty to mitigate and the Claimant owes a duty to take all reasonable steps to mitigate the loss consequent upon the breach and cannot claim damages which is due to his own neglect. See Lord Wrenbury in **Jamal v Moolla Dawood** [1916] 1 A.C. 175 at 179. The onus of proof however on the issue of mitigation is on the Defendant. If it fails to show that the Claimant ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply. See **McGregor on Damages – Edition Paragraph 9-019** and **Geest Plc v Lansiquot** [2002] UKPC 48.

45. Finally the damage caused must not be too remote to attribute liability on the Defendant:

“the law cannot take account of everything that follows a wrongful act, it regards some subsequent matters as outside the scope of its selection, because ‘it were infinite for the law to judge the cause of causes’ or consequence of consequences... In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.”<sup>5</sup>

46. The critical feature in this assessment is making a causal link to damage. In **Fairchild v Glenhaven Funeral Services Ltd** [2003] 1 A.C 32 at paragraph 54 it was noted:

“The essential point is that the causal requirements are just as much part of the legal conditions for liability as the rules which prescribe the kind of conduct which attracts liability or the rules which limit the scope of that liability. If I may repeat what I have said on another occasion, one is never simply liable, one is always liable *for* something—to make compensation for damage, the nature and extent of which is delimited by the law. The rules which delimit what one is liable for may consist of causal requirements or may

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<sup>5</sup> **Liesbosch Dredger (Owners) v SS Edison** [1933] A.C. 449 at 460.

be rules unrelated to causation, such as the foreseeability requirements in the rule in *Hadley v Baxendale* (1854) 9 Exch 341. But in either case they are rules of law, part and parcel of the conditions of liability. Once it is appreciated that the rules laying down causal requirements are not autonomous expressions of some form of logic or judicial instinct but creatures of the law, part of the conditions of liability, it is possible to explain their content on the grounds of fairness and justice in exactly the same way as the other conditions of liability.”

I address the question of the causal link between the leaking WASA line and the Claimants’ loss in this judgment. It was from the evidence foreseeable that such a leak in Talparo soil can have dangerous consequences for road and property damage.

### *Nuisance*

47. The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. An actionable nuisance is incapable of exact definition, and it may overlap with some other heading of liability in tort such as negligence. Furthermore, recent decisions of the House of Lords have confirmed that the rule in **Rylands v Fletcher**, sometimes treated as a separate head of liability, is to be regarded as coming under the nuisance umbrella. “Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of: (a) a right belonging to him as a member of the public, when it is a public nuisance; or (b) his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land.” See **Clerk & Lindsell on Torts**.<sup>6</sup>

48. The conditions on the land that are created by the Defendant’s leaking pipeline can interfere with the Claimants’ use and enjoyment of their property.

### *The Rule in Rylands v Fletcher*

49. The rule of **Rylands v Fletcher**<sup>7</sup> deals with responsibility on the Defendant for the dangerous use of his property and the escape of anything likely to cause damage unto another property.

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<sup>6</sup> Clerk and Lindsell on Torts 20<sup>th</sup> Edition Chapter 20-1.

<sup>7</sup> (1866) L.R. 1 Ex. 265.



50. The true rule of law is, that the person “who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”

51. In Halsbury’s Laws of England Volume 97 (2015) it is stated that:

“Liability under this rule is a liability in private nuisance, and therefore arises only in respect of damage to interests in land. It is a strict liability in the sense that it is no defence for the defendant to show that the thing escaped independently of any wilful act or default on his part, or despite his exercise of all possible care and precautions to prevent it. Liability, however, will not arise unless damage of the relevant type was foreseeable to the defendant if the things collected on his land were to escape.”

52. In **Transco plc v Stockport Metropolitan Borough Council** [2003] UKHL 61, Bingham LJ stated that in order to establish a claim under this Rule, the Claimant must prove that:

“...the Defendant has done something which he recognised, or judged by the standard appropriate at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be escape.”<sup>8</sup>

53. In **Clerk & Lindsell on Torts**<sup>9</sup>:

“The principle of Rylands v. Fletcher has been termed the “wild beast theory.” It applies in Blackburn J.’s language, to “anything likely to do mischief if it escapes,” and accordingly the basic idea is the escape from the defendant’s control or containment of “things” which have special potential to harm in such an event.”

54. The escape of water from the Defendant’s pipeline causing the initial subsidence of the road way in front of the Claimants’ home can qualify for the application of **Rylands v Fletcher**.

### ***The Statutory Duty***

55. The Defendant is regulated by the **Water and Sewerage Act** Chapter 54:40 of the Laws of the Republic of Trinidad and Tobago (hereinafter “the Act”). The Act provides:

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<sup>8</sup> **Transco plc v Stockport Metropolitan Borough Council** [2003] UKHL 61, paragraph 10.

<sup>9</sup> **Clerk and Lindsell on Torts 15<sup>th</sup> Edition** Chapter 24-02.

“For the development and control of water supply and sewerage facilities in Trinidad and Tobago and matters of sanitation incidental thereto; the promotion of the conservation and proper use of water resources; and for the establishment of an Authority to administer the several purposes aforesaid and matters connected therewith.”

56. Section 2 of the Act, defines “waterworks” as:

“all pipes, mains, canals, weirs, buildings, erections, pumps and machinery, appliances and works, used or intended to be used for or in connection with the supply of water for domestic purposes, but does not include service pipes, within the meaning of section 61(1).”

57. These bodies now concerned with water resources and land drainage operate under statutory powers, and at common law they are exempt from liability except on proof of negligence.<sup>10</sup>

58. In **X(Minors) v Bedfordshire County Council** [1995] 2 A.C. 633 Lord Browne Wilkinson identified the categories of liability arising out of breach of statutory duty in private law claims as follows:

- a) Actions for breach of duty simpliciter (i.e. irrespective of carelessness);
- b) Actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action;
- c) Actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it;
- d) Misfeasance in public office.

59. With regard to the common law duty of care, it was noted in **Charlesworth and Percy on Negligence, 13<sup>th</sup> Edition**, paragraph 12-12:

“A common law duty of care can arise as a result of the statutory duty in two ways; the statutory requirement upon the Defendant to do or refrain from doing a particular act may itself give rise to a common law obligation: alternatively, and perhaps more frequently, in carrying out the statutory duty, the defendant or servants or agents for whom it is

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<sup>10</sup> **Clerk and Lindsell on Torts 15th Edition** 1982 at 24-23 [P.1216].

vicariously liable, may come into a relationship with the Claimant that gives rise to a duty of care.”

60. The learned authors further went on to state at paragraph 12:58 that:

“In **Bonnington Castings Ltd v Wardlaw**, the House of Lords laid down that unless a statute or regulation provided to the contrary, the burden rested on the Claimant to prove on a balance of probabilities that the breach of statutory duty caused or materially contributed to his damage.”

### **Causation- The Evidence**

61. The Claimants’ evidence on causation was adduced by Mr. Sahadath and his two experts, Mr. Tetteh-Kojo Salandy and Mr. Alwyn Wharton. There is also corroborating evidence from the Defendant’s records (to the extent that they are of any value at all).

#### ***Mr. Darwin Azad Sahadath***

62. In his examination in chief<sup>11</sup>, Mr. Sahadath stated that he and his wife began construction on their home in 2004 which was completed in 2010. He contended that his home costs them over two million dollars to build and comprises of four stories.

63. He stated that between 2004 and 2012 he did not notice any problem with the stability on his property. However in June 2012 he noticed that the road in front of his property had begun to crack and sink holes were developing in the road. He then discovered that the Defendant’s underground pipeline in front of his property was leaking and water was flowing up from the cracks in the road and collecting in the sink holes. The land in front of his house also began to sink and slip.

64. He contended that between June 2012 and January 2013 he noticed that the water continued to flow from the cracks in the road which were beginning to widen as well as the sink holes. The slipper drain began to separate from the road and the Defendant’s leaking pipeline began to pool on the road and flow through the cracks on the road and drains. He stated that the soil at the front of his property became waterlogged. He further contended that to his knowledge the only source of water under the road was the Defendant’s pipeline.

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<sup>11</sup> Filed 29<sup>th</sup> August 2017.

65. In January 2013 he noticed that his basement floor had begun to raise and cracks were appearing on the walls and on the concrete posts which supported his home. Thereafter, him and his neighbour, Shameer Ali made a complaint to the Member of Parliament for Naparima and he was aware that a letter dated 27<sup>th</sup> January 2013 was sent to the Defendant to investigate the complaints. He was also aware that a letter dated 15<sup>th</sup> January 2013 was sent from the office of the Member of Parliament to the Princes Town Regional Corporation requesting it to investigate the leak and further that he received two letters from the Princes Town Regional Corporation dated 12<sup>th</sup> March 2013 and 16<sup>th</sup> May 2013 that the Councillor for the area was liaising with the Defendant to have the water lines repaired.
66. However, between January 2013 to March 2013, he continued to observe a lot of water flowing from the cracks in the road and he continued to make reports of the leaks to Defendant's Regional office. He stated that no repairs were carried out on the Defendant's pipeline until March 2014 where they removed the section of the underground pipeline in front of his property and reinstalled it above ground in a drain which runs along the Eastern side of the Iere Branch Road.
67. Thereafter, the water stopped coming up from under the surface of the road but he noticed that there was damage to the road surface and the public drainage in front of his property. This, he contended, caused rain water to continue to penetrate the soil and caused his house to slip even further.
68. In March 2014, he commissioned APR Associates Limited (APR), engineering consultants, to examine the cause and extent of the damage to his property and to recommend solutions for same. He contended that he paid APR \$13,225.00. APR visited his property on three occasions between April 2014 to November 2015 and a report was subsequently prepared which was dated 18<sup>th</sup> December 2015. He contended that the report revealed that the soil in the area of his home and the Defendant's pipeline is known as "Talparo Clays" which is prone to swelling when exposed to water.
69. In July 2015 he commissioned Geoengineering Consultants Limited to carry out a survey of the landslide affecting his home which cost \$32,000.00.
70. He further contended that the Defendant has not investigated nor responded to reports of the leaks to its pipeline within a reasonable time and it has not carried out its duty to properly

manage its pipeline. He stated as a result of the damage caused to his home by the landslide, he and his family were forced to leave their home and rent at an accommodation in Nagee Avenue, Iere Village, Princes Town at \$5,000.00 per month. He further stated that he is unable to occupy his house which had been deemed unfit for occupancy.

71. In his cross examination Mr. Sahadath admitted that he did not see water flowing directly from the Defendant's pipeline and it was an assumption based on his observations. When questioned if some of the waterlogging on his property included rainwater, he stated it was possible. Further, when questioned if his statement that the Defendant did not repair the pipelines is an assumption he agreed that was so.

***Mr. Alwyn Wharton***

72. In his examination in chief<sup>12</sup>, Mr. Wharton indicated that he is a geophysicist and a director of Geoengineering Consultants Ltd (GCL). He stated that in July 2015, the Claimants requested GCL to conduct a survey of a landslip affecting their property. Thereafter, field work was carried out by him and two other persons on 27<sup>th</sup> July 2015, 7<sup>th</sup> August 2015 and 4<sup>th</sup> September 2015. He contended that the objectives of the survey were to map the subsurface layers of the land in the vicinity of and under the Claimants' property to determine the possible causes of the landslides and remedies to same.

73. He stated that upon visiting the Claimants' property he noticed that the Claimants' house had slid down the slope and the road had subsided. There was also ruins of a house adjacent to the Claimants' property which was destroyed as a result of the landslip.

74. He stated that two techniques were used in investigating the landslip:

- (i) Two-dimensional resistivity tomography (2-D Resistivity) also called electrical resistivity tomography (ERT); and
- (ii) One dimensional multichannel analysis of seismic surface waves (1-D MASW).

75. He explained the following at paragraphs 9-11 of his witness statement:

“9. Electrical resistivity is a property of materials which indicates how hard it is for an electric current to flow through them. Resistivity is dependent on the type of rock or

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<sup>12</sup> Filed on 29<sup>th</sup> August 2017.

soil. Resistivity is also affected by other factors such as moisture content, degree of compaction and temperature. Nevertheless, it can be a very useful in demarcating soil layers and the presence of water.

10. To measure the resistivity of a material we need to do three things-: [i] pass an electrical current through a specimen, [ii] measure the voltage across the specimen [iii] make allowance for the size and shape of the specimen. From these data we can calculate its resistivity which is an indicator of the type of material, independent of its size, shape or location. In 2-D resistivity, a large number of electrodes (about 50-100) is placed in the ground with equal spacing along a straight line. The currents and voltages are measured in an ordered sequence along a straight line. From these readings, one is able to calculate the resistivity of the ground in rectangular blocks under the line. It is two dimensional, one of the dimensions being defined by the line, and the other being vertically down. From this array one can identify holes, layers and hard rock in the subsurface.

11. The multichannel analysis of surface waves method (MASW) evaluates the elastic condition of the soil for geotechnical purposes. The method starts with the acquisition of signals from a sledge hammer at an array of 12 or 24 geophones on the surface in the area of interest. The signals are then analysed spectrally to produce frequency-velocity curves, from which the fundamental mode is selected and inverted to produce one-dimensional curves of sheer wave velocity ( $V_s$ ) versus depth. The method is called multichannel because 12 or 24 channels are used. The surface waves are high amplitude seismic waves generated by the impact of the hammer on the ground.”

76. He stated that on 27<sup>th</sup> July 2015 the 2-D resistivity was conducted and on 7<sup>th</sup> August 2015 and 4<sup>th</sup> September 2015, the 1-D MASW survey was conducted. From the survey he determined that the resistivity of the soil was very low in the vicinity of the Claimants’ house even at 17 meters which indicated the presence of clay but no stiffness. The results also indicated the presence of soft moist materials like clay. The results of the MASW test indicated that there was presence of stiff clay up to 4 or 5 meters. He concluded that based on the 1975 Ordinance Survey map, rainwater was not being conducted to the landslip site at any significant extent

and therefore it is more likely that domestic activity associated with a supply leak was the cause.

77. He prepared a report on his investigations dated 30<sup>th</sup> September 2015.

78. In his cross examination, he admitted that he did not review the rainfall statistics of 2012 before preparing his report. He indicated that he was not interested in the Defendant's pipeline but rather he was determining what the source of the water would have been based on the level in the soil. He concluded that the land slip was probably not caused by rainfall because the saturation was extensive since the depth at which the moisture was found which was 17 meters. Also, he stated the topography of the land was such that rain water would not be conducted to the landslide site to any significant extent. Therefore, he stated that if it was not rainfall then leakage could have caused the saturation.

***Mr. Tetteh-Kojo Salandy***

79. In his examination in chief<sup>13</sup>, Mr. Salandy indicated that he is a Civil Structural Engineer employed with APR. He stated that in March 2014, the Claimants approached APR to assess the damage to their property. He visited the Claimants' property on three (3) occasions between March 2014 and November 2015 where he took photographs, measurements and gathered information to assess the damage. He also collected information from the Claimants that the leak began around July 2012 and based on his observations between March 2014 and November 2015 "the subsiding roadway 'evolved' into a landslide which progressed under the Claimants' house by the date of my last visit."

80. He contended that based on his measurements at November 2015 the Claimants' house sank approximately 12-15 feet and the building moves laterally by approximately 15-20 feet. He further contended that at the time of the construction approximately two storeys of the building were above road level but as a result of the landslide one storey is now above road level, the Claimants' driveway sunk approximately 12 feet, there were numerous signs of distress observed in the columns located at the basement level and the house rotated towards the road. He stated that the Claimants' house was unfit for occupancy because it was at risk for further movement and imminent collapse.

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<sup>13</sup> Filed on 29<sup>th</sup> August 2017.

81. In the report, it is stated that:

“The house is located within the same failure plane of the collapsed roadway and hence moved downslope in the direction of the landslide. As a result of the initial landslide the drainage infrastructure was damaged and is now effectively non-existent. As such, water from the roadside drains flowed unrestricted and percolated into the land-slide zone of depletion, which further exacerbated the soil movement.”

82. He states that from his examination of the topography, soil properties and location of the landslide, the landslide could not have been produced by natural processes such as the ingress of surface runoff produced by rainfall. He contended that because of the development of the landslide from 2012 to 2015, he deducted that it occurred due to the soil becoming saturated by the percolation of water into the soil. He indicated that “Due to the location of the landslide on the slope, the type of soil and the topography, it is unlikely that rainwater or surface runoff could have triggered the landslide, especially, as the road drainage infrastructure was adequate before the subsidence of the roadway.”

83. He concluded that it was reasonable to accept that a leaking pipeline was the initial source of water. He stated that during his first visit in April 2014 he noticed the water supply pipeline was recently constructed along the roadside drains which suggested the line within the roadway was faulty. However, it was uncertain to him whether the pipeline was leaking and triggered the landslide or whether the initial subsiding road damaged the pipeline and the leak exacerbated the landslide.

84. He prepared a report on 18<sup>th</sup> December 2015.

85. In cross examination when questioned if the swelling of the soil can occur when rain falls, he admitted that it could. He further admitted that his conclusion was that he was uncertain if the landslide was caused by the leak. He further stated that the swelling of the soil did not cause the landslide.

### **Defendant’s Evidence**

#### ***Mr. Frederick Harris***

86. In his examination in chief, Mr. Harris stated that he was a retired Senior Quality Control Inspector and was employed by the Defendant for the period 1976 to 2016. He stated that in



2013 he received a request for source determination from an engineering technician from the Defendant. He could not recall the day on which he and the technician visited the Claimants' property to conduct the site visit. He stated that he noticed that there were no signs of water leaks on any part of the Claimants' premises though he noticed that the roadway to access the Claimants' property was uneven and broken up.

87. He stated that he also observed a hole in the middle of the flooring on the lower floor of the Claimants' property and there was water in the hole which was clear. He took two samples, one from the hole and one from the Defendant's service connection on the Claimants' property which was a yard tap. Thereafter, he used a hand held meter to check the residual chlorine and the pH in the samples. He stated that the sample from the leak had a pH reading of 7.3 while the WASA supply sample had a reading of 6.9. Additionally, the Residual Free Chlorine in the leak sample was nil which indicated that the leak was not from the Defendant's supply.

***Mr. Raymond Gittens***

88. In his examination in chief<sup>14</sup>, Mr. Gittens stated that he is the Manager, Quality Control of the Defendant. He stated that based on the physical/ chemical report which he received on the tests carried out in the Claimants' property, he noted that there were differences in chloride levels, total iron and aluminium and thus formed the opinion that the sample obtained from the leak did not contain a supply from the Defendant.

**Assessment of the evidence-causation**

89. In the closing submission the Defendant was critical of the Claimants' case that there is no positive case drawing a causative link between the WASA pipeline and the water damage causing the landslide and the home to collapse.

90. I have already examined above critical features of this case to demonstrate that the WASA pipeline was leaking. From my analysis of that evidence the Claimants demonstrated on a balance of probabilities that the pipes caused their loss. I referred to the evidence above that it must be accepted that that the WASA line was leaking over the period 2012-2014. Clearly WASA was either unresponsive or unreasonably slow in responding to the Claimants' complaints. As a monopoly service provider of water they owe a duty to repair the leak in a

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<sup>14</sup> Filed on 20<sup>th</sup> September 2017.

timely manner. One would expect that they would respond to the complaint of the leak within one day of the complaint being made. There is no evidence from WASA to explain any limitation or qualification on such a reasonable expectation of the discharge of their functions. A leaking pipeline and as the experts demonstrate “Talparo” clay soil is particularly dangerous and runs the risk of serious damage to land which is prone to slippage. There is a causal link between the leaking pipeline and the Claimants’ loss based on the evidence of the Claimants, corroborated by WASA’s job cards, the contemporaneous letter from the Princes Town Regional Corporation and the expert evidence. The job cards and the correspondence from the Princes Town Regional Corporation all raised red flags and alarm bells for WASA of the nature of the damage by the escape of water and they simply failed to repair the leak in a proper or timely manner. However, it would be appropriate here to address the Defendant’s criticism that the expert evidence does not assist the Court in determining causation and the “but for” test.

### **The expert evidence**

91. Experts cannot usurp the function of the Judge as the ultimate arbiter of fact. It is for the Court to determine the issue of causation and loss based upon the totality of the evidence. Experts usefully provide assistance to the Court to arrive at its conclusion. They do so by providing the necessary scientific data to assist the Court in arriving at its conclusions. The unsupported scientific opinion of an expert is insufficient to assist a Court in this exercise. The expert evidence must be characterised by reason, logic and impartiality.

92. In **The Ikarian Reefer** [1993] F.S.R 563 Justice Cresswell set out the duties and responsibilities of expert witnesses as follows:

“1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: see *Whitehouse v Jordan* ((1981) 1 WLR 246, 256) per Lord Wilberforce.

2. Independent assistance should be provided to the court by way of objective unbiased opinion regarding matters within the expertise of the expert witness; see *Polivitte Ltd v Commercial Union Assurance Co plc* ((1987) 1 Lloyd’s Rep 379, 386) per Mr Justice Garland, and *Re J* ((1990) FCR 193) per Mr Justice Cazalet. An expert witness in the High Court should never assume the role of advocate.

3. Facts or assumptions upon which the opinion was based should be stated together with material facts which could detract from the concluded opinion.
4. An expert witness should make it clear when a question or issue fell outside his expertise.
5. If the opinion was not properly researched because it was considered that insufficient data was available then that had to be stated with an indication that the opinion was provisional (see Re J). If the witness could not assert that the report contained the truth, the whole truth and nothing but the truth then that qualification should be stated on the report: see *Derby & Co Ltd and Others v Weldon and Others (No 9)* (*The Times*, November 9, 1990) per Lord Justice Staughton.
6. If, after exchange of reports, an expert witness changed his mind on a material matter then the change of view should be communicated to the other side through legal representatives without delay and, when appropriate, to the court.
7. Photographs, plans, survey reports and other documents referred to in the expert evidence had to be provided to the other side at the same time as the exchange of reports.”

93. Expert evidence which lacks the qualities of cogency, usefulness and impartiality are poor resources to assist the Court’s determination of fact.

94. In **Kelsick v Kuruvilla and others** Civil Appeal No. P277 of 2012 Jamadar JA represents our settled law on the utility of expert evidence. Jamadar JA provided the governing principles in the case of expert evidence by the Court in granting an application under Part 33 Civil Proceeding Rules 1998 as amended (CPR).

“8. In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility):

- (i) How cogent the proposed expert evidence will be; and
- (ii) How useful or helpful it will be to resolving the issues that arise for determination.

- (iii) In determining whether this evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess proportionality should also be weighed in the balance:
- (iv) The cost, time and resources involved in obtaining that evidence, proportionate to the quantum involved, the importance of the case, the complexity of the issues, the financial position of each party involved in the litigation, and the court resources likely to be allocated to the matter (in the context of the court's other obligations);
- (v) Depending on the particular circumstances of each case additional factors may also be relevant, as such:
  - (vi) Fairness;
  - (vii) Prejudice;
  - (viii) Bona fides; and
  - (ix) The due administration of justice.

9. Under cogency, the objectivity, impartiality, and independence of the proposed expert, together with the qualifications and experience of the proposed expert, in relation to both the specific subject under consideration and the particular issues to be resolved, are material considerations. At this stage of the proceedings a trial judge is simply required to assess how cogent the expert evidence is likely to be. That is, how convincing and compelling it is likely to be based on the stated considerations. Under usefulness or helpfulness, the technical nature of the evidence to be reconciled and the focus of the issues to be determined, as well as the familiarity of the expert with the areas under scrutiny, are material considerations, especially when that expertise is relevant for necessary fact and/or inferential findings. As with cogency, at this stage of the proceedings the trial judge is only required to assess the likelihood of usefulness or helpfulness.

10. These two factors (of cogency and usefulness/helpfulness) contain some commonalities and there will often be overlap in what one considers under these two heads. Proportionality involves a comparative assessment of the multiple considerations stated in the Overriding

Objective (Part 1.1 CPR). These considerations are not exhaustive and only serve to assist the court in determining what is required to deal with a case justly.

11. In summary, for expert evidence to be appropriate in light of the CPR, and for permission to be granted to use it, that evidence ought to be relevant to matters in dispute, reasonably required to resolve the proceedings and the proposed expert must be impartial and independent and have expertise and experience which is relevant to the issues to be decided. In addition, the use of expert evidence must also be proportionate in light of the factors set out in Part 1.1 CPR. Economic considerations, fairness, prejudice, bona fides and the due administration of justice are always matters that may have to be considered depending on the circumstances of each case.”

95. **Harvey Nichols & Co Ltd v Thames Water Utilities Ltd** - [1999] All ER (D) 1272 demonstrates how elaborate and intricate an exercise of using expert evidence can be. Of course the nature of the expert evidence required is proportionate to the nature of the case and the issues to be determined. **Harvey Nichols** by no means is determinative of what evidence is required by the Sahadaths to make out its case. It is for the Court to assess all the available evidence to draw reasonable inferences and conclusions.

96. I do not agree that the expert’s evidence in this case on causation are lacking in its value. I have had the opportunity to see them in cross examination and I, on my own accord, asked them my own questions about their theories and the basis on which they arrived at their conclusions and assumptions. I was keen to discover from them whether their opinions were properly researched and could be of assistance. I was also keen to ascertain what were as facts/assumptions they made to qualify their opinions. They both appear to me to understand that their duty was to make an independent assessment and they did not appear to be advocates for the Claimants’ cause. Where they drew assumptions based on the Claimants’ instructions they were quite frank in saying so. Indeed, one cannot imagine a circumstance where before the action commenced they would have obtained their instructions from anyone else.

97. It is important to note that during the management of this case I had raised the issue of expert evidence and there was no application to appoint any independent expert under Part 33 of the CPR to address any specific scientific issue which the Defendant is now asserting as lacking in the reports. It was made clear that the reports were commissioned by the Claimant when the

damage occurred and they were preparing their case. It was openly shared with the Defendant. The Defendant elected not to call any experts of their own. The “so called” experts that they did call were employees of the Defendant and were as discussed below hardly of any assistance to this Court. In those circumstances to insist on strict compliance with the Part 33 rules would be pedantic. The Court must be satisfied by the evidence that it is truly an independent product uninfluenced by the shape of the litigation and that the evidence satisfied the **Kuruvilla** principles.

98. I am also satisfied that the extent to which both gentlemen were prepared to say that they cannot conclude that the leaking pipeline caused this damage can only be consistent with the inescapable fact that the investigations were done after the leaks had stopped. This does not affect their credibility nor weight of their evidence. What it does, however, is to put their evidence in the context of the possibilities that existed to cause the water damage and their professional opinion eliminating any possible causes and pointing to leaking water line as the most probable cause.

99. I had earlier set out the nature of the expert evidence and I am satisfied from their evidence that they were prepared, despite their accepted limitations of their observations, that they could not fairly attribute the loss to any cause but pipe borne water. In other words from a fair reasoning of their cross examination and their reports it is likely that a leaking pipe caused this damage.

### **Adverse inferences**

100. In **Karen Tesheira**, this Court, in considering the issue whether adverse inferences may be made against a Defendant in failing to lead evidence which may bolster the case of a Claimant cited the case of **Wisniewski (A Minor) v Central Manchester Health Authority** [1998] EWCA Civ 596 where Brooke LJ enunciated the following principles<sup>15</sup>:

“(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

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<sup>15</sup> Paragraph 17 **Karen Tesheira v Gulf View Medical Centre Ltd** CV2009-02051.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.”

101. The Defendant elected not to lead any evidence in relation to many aspects of its defence. Not one person assisted this Court on the issues of responding to the complaints of the leaking pipeline, the leaking pipe itself and the damage it caused. As the sole provider of water, the expertise on laying pipelines and the only body responsible for repairing pipelines, the Defendant starved this Court with any evidence from which it could assess the Claimants' allegations. Even if the Claimants' case was speculative, as the Defendant contended, it was made stronger by the silence of the Defendant on these material issues. The only evidence led by the Defendant was to the effect that the source of the water which caused the slippage did not emanate from the Defendant's pipeline.

102. The Defendant sought to make that point through the evidence of Mr. Frederick Harris<sup>16</sup> based on one sample obtained from the leak which they alleged demonstrated that the water seepage was not from the WASA pipeline since that sample had a PH reading of 7.3 while the WASA supply sample had a reading of 6.9 and the residual Free Chlorine in the leak sample was nil.

103. However, I cannot accept the evidence of Mr. Harris as proving that either WASA's line was not leaking or that the source of the water causing damage at the couple's home was not that of WASA's for the following reasons:

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<sup>16</sup> Witness statement of Frederick Harris filed 20<sup>th</sup> September 2017.

- a) There was no explanation as to the nature of the sample taken by Mr. Harris whether as a result of rainfall of a pooling of water from under the house of the Claimants.
- b) There was no evidence of the date on which the sample was taken.
- c) There is no evidence of continuous testing of the water seeping from the ground in the vicinity of the pipeline to confirm whether it is from the Defendant's pipeline or another source.
- d) There is no explanation why a sample was not taken closer to the Defendant's pipeline where there was the leak which is not in contest.

104. In my view, from the totality of the evidence led by the Claimants and the corroborating evidence of the Defendant, the leak from the WASA pipeline caused the damage to the road and the land slippage and the caving-in of the Claimants' home. The damage to the roadway, landslide and damage to the neighbouring home was foreseeable consequences of an uncontrolled leak in Talparo soil in that area.

#### **Evidence-Damage**

105. The Claimant described the extent of the damages in his evidence. In Ms. Candice Welch's examination in chief<sup>17</sup>, she stated that she is the director of Welch Morris and Associates. She contended that in March 2016, the Claimants requested Welch Morris and Associates to prepare a valuation report on their property. She thereafter gave instructions to a Quantity Surveying Technician at the company to take measurement, photographs and gather relevant information on the Claimants' property. She contended that at the time of the site visits to the Claimants' property, the conditions were unsafe and as such their notes, measurements and photographs were restricted. Therefore the report did not consider works in stabilizing the slope or construction works on going on the slope.

106. She stated that her findings on the estimated costs on the Claimants' property including external works and demolition is \$2,002,000.00. She prepared a valuation report dated 12<sup>th</sup> April 2016 which costed \$6,187.50.

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<sup>17</sup> Filed on 29<sup>th</sup> August 2017.



107. In her cross examination, when questioned if she did any estimate on what was salvageable on the building, she indicated that she did not and she agreed that there are aspects of the building that would be salvageable.
108. Her evidence demonstrates damage to the house and its quantification.
109. I propose to deal here with the Defendant's submission of the duty to mitigate. The Defendant submitted that it would be unsafe in the absence of other studies being performed to conclude that the Claimants' house should be demolished and reconstructed when there is evidence that a reconstruction of the house would not be necessary. They relied on the case of **British Westinghouse Co v Underground Ry** [1912] A.C. 673 where it was stated that:
- “The fundamental basis is thus compensation for the pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on the Claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.”
110. The Defendant therefore contended that the Claimants failed to mitigate their loss and have not acted reasonably in taking steps to have the investigation and feasibility studies done to determine whether retrofitting works could be performed to save the building from demolition and reconstruction.
111. I agree that at the very least from 2015 there could have been some move by the Claimants to mitigate their loss to put in foundations but there is evidence that they tried and it was not successful. However, the burden of proving a failure to mitigate rests on the Defendant and they have produced nothing save to cross examine the value of what steps would have been taken to mitigate their loss.
112. From an assessment of Ms. Welch's evidence the house has to be reinstated and it is reasonable to do so instead of repair.
113. There was no cross examination on the issue of cost of the rental of alternative premises. It is reasonable for the Claimants to rent alternative accommodations while their home was to be rebuilt.
114. I would not allow for any further rental beyond January 2018.

## **Conclusion**

115. For the reasons set out in this judgment there will be judgment for the Claimants against the Defendant for damages as follows in the sum of \$2,218,960.20:

(a)	Reinstatement of the Claimants' home valued	\$2,002,000.00
(b)	Cost of the Valuation report prepared by Welch, Morris and Associates	\$6,187.50
(c)	Cost of remedial works	\$10,541.79
(d)	Rental of alternative accommodation for thirty-three months at a rate of \$5,000.00 per month.	\$165,000.00
(e)	Cost of report dated the 30 <sup>th</sup> September 2015 prepared by Geoengineering Consultants Limited	\$22,000.00
(f)	Cost of report dated 18 <sup>th</sup> December 2015 prepared by APR Associates Limited	\$13,225.00
	<b>TOTAL AWARD</b>	<b>\$2,218,954.29</b>

116. The Defendant is to pay interest on the said sum of \$2,218 954.29 at the rate of 1.5% per annum from March 2015 to the date of judgment.

117. The Defendant is to pay the Claimant's costs of the Claim on the prescribed scale in the sum of \$164,473.86 together with the costs of the Claimants' expert's fee for attending Court pursuant to Rule 67.7(b) CPR.

**Vasheist Kokaram**  
**Judge**