**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2015-00229**

**BETWEEN**

**RYAN SINGH**
**CHANDRA MATTHEW** **CLAIMANTS**

**AND**

**WATER AND SEWERAGE AUTHORITY**
**OF TRINIDAD AND TOBAGO**
**(improperly sued as WATER AND SEWAGE AUTHORITY**
**OF TRINIDAD AND TOBAGO)** **FIRST DEFENDANT**

**AND**

**THE ATTORNEY GENERAL OF**
**TRINIDAD AND TOBAGO** **SECOND DEFENDANT**

**Before the Honourable Madame Justice Margaret Y. Mohammed**

**Delivery the 20th September, 2018**

**APPEARANCES:**
Mr. Riad Ramsaran Attorney at law for the Claimant.
Mr. Rajiv Rickhi Attorney at law for the First Defendant.

## RULING-SUMMARY JUDGMENT

1. The First Defendant filed an application ("the application") seeking the Court to strike out the Claim against it pursuant to Rule 26. 2(1)(b) Civil Proceedings Rules ("CPR") or alternatively for an order for summary judgment pursuant to Part 15 of the CPR against the Claimant. The application was filed at the Pre-Trial Review after witness statements were filed and evidential objections concluded. The next step is to schedule the trial in the matter.

2. To place the application in context it is necessary to set out the respective pleaded case of the Claimant and the First Defendant.

The Claimants' case

3. The Claimants claim against the First Defendant is for damages caused by the negligence of the First Defendant, its servants and agents which they suffered when their house ("the house") situated on a parcel of land comprising six thousand square feet (6,000 sq feet) at 413 Mundo Nuevo Talparo ("the Subject Property") collapsed. They also claim interest and costs. The Second Claimant is the First Claimant's mother.

4. The First Defendant is a body corporate under the **Water and Sewerage Act**[1] and it was responsible for the installation, maintenance and repair of the subterranean water pipeline ("the pipeline") on the roadway north of the Subject Lands. The Second Defendant, was sued pursuant to the provisions of the **State Liability and Civil Proceedings Act**[2] in its capacity as the owner of lands adjoining the Subject Lands to the West, upon and under which the First Defendant's water pipeline was installed. The State through the Ministry of Works and Infrastructure is also responsible for the repair and maintenance of all public highways and or roadways within the jurisdiction and particularly the Mundo Nuevo Road, Talparo abutting the Subject Lands.

[1] Chapter 54:40
[2] Chapter 8:02

5. The Claimants state that they are the statutory tenants of the Subject Lands since the First Claimant's great grandfather, the late Edward Matthew, first constructed a house upon the Subject Lands after he arrived in Trinidad as an indentured Indian labourer and that the rights, interests and estate to the house and the tenancy of the Subject Lands were passed down over time and eventually to the Claimants.

6. In or about the 1983 and then subsequently in 2003, the Claimants rebuilt the house at their own expense. The house consisted of an upper floor made of tapana hard wood, marine construction ply and pitch pine with french doors, galvanize steel and porcelain fixtures supported on concrete and steel reinforced pillars. There were four rooms on the upper floor: two (2) bedrooms, a kitchen and a living/dining room whereas the lower levels consists of one (1) bedroom and indoor porcelain toilet and bath. The house was wired for electricity and internet. There was running water and there were two parallel drains along the Northern and Southern boundaries.

7. On or about January 2007, the First Defendant installed the pipeline along the Mundo Nuevo Road, Talparo ("the Mundo Nuevo Road") abutting the Subject Lands to the West. The said road was serviced by a drain parallel to it on its Western side. It was repaired and paved by an agent of the Ministry of Works and Infrastructure. The drain was condemned causing the excess wastewater and or rainfall runoff to seep or flow unto the Subject Lands.

8. In January 2008, the Claimants first observed two (2) small streams of water emerging from the Mundo Nuevo Road and flowing onto the Subject Lands. The first was directly west of the house on the Subject Lands (next to a fire hydrant) and the other was about twenty five (25) feet to the North of the first and on the North Western boundary of the Subject Lands. The First Claimant reported the two streams of water to the First Defendant's head office and he was promised that it would be investigated.

9. For the next six (6) years, the leaks increased in size and volume and the water flow created natural trails or drainages. The water caused the concrete to the front and under the house on the Subject Lands and the soil to the North and rear of the yard to be damp. The Claimants made several more reports/complaints to the First Defendant.

10. On more than fifteen (15) occasions between 2008 and to 2015, the First and/or Second Defendants through their agents and/or servants excavated the pipeline and unsuccessfully attempted to repair it. Each time, the leaks returned and gradually increased in intensity. The water caused the soil, block work and concrete floor of the house to remain perpetually moist. Water collected as puddles at the supporting pillars and ground floor rooms before draining underneath the concrete foundation of the house. The leak at the North-Western boundary kept the soil of the Northern and Eastern portions of the Subject Land damp.

11. Sometime in 2008, the First Defendant condemned a nearby fire hydrant along the Mundo Nuevo Road and shortly thereafter the leaks re-emerged and the front wall on the Western boundary of the Subject Lands collapsed. In 2009, the First Defendant replaced the said wall with a retaining wall. However, the leaks again re-emerged and cracks appeared along the foundation of the house. The Claimants again brought it to the First Defendant's attention.

12. On or about May 2009, some of the pillars including the North Eastern post of the house sunk while others moved off their alignment causing the entire house to shift. This caused the main electrical connection to the house to be adversely affected. The Claimants incurred additional expense to have the house rewired and repaired before it could be inspected by the Electrical Inspectorate and electricity reconnected. Additionally, cracks emerged in the concrete foundation of the house whilst the entire concrete driveway and foundation of the garage became loose and were swept under the house.

13. On or about September 2009, the water erosion caused a landslide on the Northern and Southern portions of the Subject Lands wherein various trees including mango, lemon, bamboo and cedar tree over thirty (30) years of age were swept down to a ravine east of the Subject Lands. The First Claimant's personal garden on the Northern side and fruit trees of banana and coconut on the Eastern side of the house including a two (2) storey tank stand all collapsed due to the continuous leaks.

14. The Defendants continued to repair the pipeline and to stop the water flow onto the Subject Lands but all proved futile as the leaks re-emerged shortly after the repairs.

15. In 2010 while the First Claimant and his family were asleep the house again shifted, causing the electrical supply to be disconnected. Upon inspection, the Claimant and his family discovered that the entire upper floor of the house shifted since some of its supporting pillars had sunk and leaned. The Claimants and their family were forced to abandon the Subject Lands in January 2010. The Claimants reported the matter to the First Defendant and sometime thereafter its servants and/or agents excavated the pipeline on the lands abutting the Subject Lands and relocated it to the opposite side of the Mundo Nuevo Road. At the time of filing of the instant action, a slow but consistent stream of water continued to escape from the adjacent Mundo Nuevo Road, through the retaining wall and onto the Subject Lands and continued to cause landslides/movements and damage to the house. The retaining wall constructed by the First Defendant and/or Second Defendant has continued to lean.

16. The Claimants contended that despite their continued complaints and the ongoing damage to the Subject Lands and the house, from January 2011 they have received no further assistance or communication from either the First or Second Defendants. As a result of the First and/or Second Defendant, their agents and/or servants' negligence the Claimants were made to incur substantial loss and damage.

17. The Claimants contended that the First Defendant was negligent by:

    a) Failing to properly maintain and or monitor and/or conduct routine preventative maintenance of the pipeline;
    b) Failing to install a pipeline that is suitably durable and fit for purpose in the lands adjacent to the house;
    c) Failing to replace the pipeline and or adequately repair same after the leaks were reported;
    d) Failing to adequately investigate and or repair and or replace the pipeline after subsequent reports of continued leakage were made;
    e) Failing to provide competent workmen to conduct and or supervise the said repairs.

18. The Claimants contended that as a result of the Second Defendant's negligence and/or nuisance and/or the doctrine of Rylands and Fletcher, the Claimants were made to incur

substantial loss and damage. The Claimants contended that the Second Defendant, as owner of the adjacent lands, was negligent by:

a) Permitting the First Defendant to install a pipeline that is not suitably durable and/or fit for the purpose in the lands adjacent to the house;
b) Failing to properly maintain and or monitor and/or conduct routine maintenance of the pipeline situated upon its lands;
c) Failing to replace the pipeline and or adequately repair it after a leak was reported;
d) Failing to construct an adequate retaining wall;
e) Failing to construct proper drainage for runoff from the said roadway and possible leaks from the pipeline;
f) Failing to provide competent workmen to conduct and or supervise the said repairs; and/or
g) Failing to prevent water runoff from the roadway or leakage from the pipeline on its land from eroding and or damaging the Subject Lands and or the house.

19. The Claimants also contended that the State, as owner of the adjacent lands created a nuisance and or hampered the Claimants' enjoyment of the Subject Lands by:

a) Causing wastewater runoff from the roadway to drain directly into the Subject Lands without adequate provision for same;
b) Failing to prevent wastewater runoff from the roadway draining directly into the Subject Lands;
c) Storing up water in the pipeline upon the State's lands and permitting same to escape onto the Subject Lands thereby causing damage; and/or
d) Failing to prevent the continued escape of water from the said pipeline on the Subject Lands.

20. The Claimants claimed special damages for: (i) replacement of the house in the sum of $497,223.00; (ii) loss of support in the sum of $250,000.00; and (iii) rental expenses in the amount of $120,000.00.

The Defence of the First Defendant:

21. The First Defendant denied that the Claimants are entitled to the reliefs claimed in the Statement of Case or to any relief against it. The First Defendant's defence is based on four limbs. First, the Claimants have no locus standi to bring the action since they were not the owners or Statutory Tenants of the Subject Lands. The First Defendant admitted that there existed a house on the Subject Lands and that it serviced it with a standard water supply. However, they put the Claimants to strict proof that they occupied the Subject Lands as statutory tenants.

22. The second limb is that any purported loss or damage suffered by the Claimants was caused either wholly or in part by their own negligence since they failed to make reasonable enquiries from Town and Country Planning Division or a suitable engineer or specialist about whether the Subject Lands were suitable or appropriate for the construction of the house. The Claimants built the house upon the Subject Lands even though it was not suitable and they failed to relocate to a different location prior to the purported loss or damage given the unsuitability of the Subject Lands upon which the house was built. The First Defendant averred that the house on the Subject Lands was constructed, maintained and repaired in a manner which was contrary to prudent building standards and in any event without the express planning permissions and approvals required from the **Town and Country Planning Act**. As such, the Subject Lands upon which the house was constructed were not suitable, appropriate or fit for such purpose since there existed unstable soil conditions which led to continued movement and slippage of the Subject Lands. The First Defendant further averred that the Claimants acted to their detriment by building, maintaining and repairing the house on the Subject Lands.

23. The third limb is that the Claimants' claim against it is statute barred by virtue of the **Limitation of Certain Actions Act**[3]**.** It stated that its records did not reveal that the Claimants made complaints at the time which they alleged. According to the First Defendant's records, the Claimants made certain complaints over the period 2008 to 2013

[3] Chapter 7:09

and there were thirteen (13) complaints. The First Defendant utilized a categorized complaints system whereby complaints made by persons such as the Claimants fall into one of three categories: (i) main repair, (ii) communication pipe repair and (iii) customer complaints. According to the records of the First Defendant, the Claimants made two (2) main repair complaints, eight (8) communication pipe repair complaints and three (3) customer complaints over the period 2008 to 2015 with respect to the Subject Lands. The First Defendant stated that the main repair and communication pipe repair complaints related to actual leaks and pipe repairs, while the customer care complaints were not limited in scope and related to a variety of areas including but not limited to issues such as low pressure, no or poor supply.

24. The First Defendant averred that it adhered to a standard practice whereby each time a complaint of any leak in its pipelines is made, such complaint along with the comments of the customer are officially recorded/logged and verified by internal staff of the First Defendant and then assigned to operational crews (repair teams) through a job card system. The First Defendant further contended that such job cards and its records reveal that any complaints made by the Claimants were addressed by remedial works in a timely and efficient manner.

25. On two occasions in the said customer reports, the Second Claimant stated that the said leak was causing the house on the Subject Land to move. However, the First Defendant averred that the entire area including the Subject Lands is prone to land slippage and that while there may have been intermittent leaks from the said pipeline, it was promptly repaired by competent staff and agents of the First Defendant and that in any event, no such loss or damage as alleged could have resulted therefrom.

26. The First Defendant maintained that its records did not reveal receiving any complaints from the Claimants in 2008 and in 2009, there was one repair done with respect to the leaking of a communication repair pipe in the area. The First Defendant denied replacing and or erecting a retaining wall as alleged by the Claimants or at all and further stated that this was outside its legislative and public mandate.

27. The First Defendant denied that the Claimants made the complaints in 2009 as they alleged. According to the First Defendant's records there were two occasions when similar allegations of damage were made in 2011. The First Defendant averred that it effectively repaired any reported pipe line leaks in the area and did so in a timely and expeditious manner. The First Defendant admitted that the pipeline was excavated and relocated to the opposite side of the roadway. The First Defendant averred that there was no slow but consistent stream of water escaping from the adjacent roadway, that the said pipeline currently has no leaks and there have been no complaints lodged. The First Defendant denied erecting a retaining wall as alleged by the Claimants or at all as this was outside of its mandate.

28. The First Defendant stated that the Claimants made an injury/property damage claim to it for purported damages suffered by them on the 19th January 2012. The First Defendant caused an investigation into it. The details of the investigation were compiled in a report dated the 9th July 2012, which concluded that the First Defendant was not liable and that the damage to the Subject Lands and the house was the result of the unstable soil conditions in the entire area compounded by its lack of drainage.

29. The First Defendant also sent instructions to its Insurance Company, Risk Management Services Ltd for further investigation in accordance with its Public Liability Policy. A Second Investigator's report was prepared dated the 31st October 2012 by Anthony Lewis of General Adjusters Limited which concluded that the First Defendant was not liable for the damage to the Subject Lands and that the cause was the continued movement of the said lands.

30. The First Defendant averred that the particulars of special damages under "Replacement of home", "Loss of support" and certain items under "rental expenses" are statute barred by virtue of the **Limitation of Certain Actions Act**.

31. Fourthly, the facts pleaded by the Claimants do not support a case of negligence by the First Defendant's servants and/or agents.The First Defendant admitted that it installed the pipeline along the Mundo Nuevo Road but it was unable to confirm the date of its

installation. The pipeline was durable and fit for the purpose in the lands which was adjacent to the Subject Lands. It was properly maintained and monitored and the First Defendant carried out routine preventative maintenance. The First Defendant maintained that there were occasional leaks of the pipeline. Its records revealed that each time a leak was fixed its servants and/or agents classified it as a completed job. Therefore, the short duration of leaks of the pipeline could not have adversely affected the entire foundation of the house situated on the Subject Lands as alleged by the Claimants. The First Defendant pleaded that the Subject Lands were situated in area which was prone to heavy rainfall which contributed to the soil being constantly damp.

32. The First Defendant admitted that it received three correspondence from the Claimants after which it conducted certain investigations which resulted in the reports mentioned above.

33. Based on the pleadings the following issues arise for determination:

a) Have the Claimants demonstrated that as occupiers of the Subject Lands they can bring an action in negligence?
b) If the answer to (a) is yes, is the Claimants' action in negligence statute barred?
c) If the action is not statute barred, have the Claimants established that the Subject Lands was suitable for constructing the house?
d) If the answer to (c) is yes, was the Claimants' loss due to the negligence of the servants and/or agents of the First Defendant?
e) If the answer to (d) is yes, have the Claimants proven their loss?

**The grounds in the application**

34. The application for the striking out the claim under Rule 26. 2 (1) CPR and/or summary judgment application under Part 15 is based on four grounds namely:

(a) The Claimants have no proper locus standi to bring this action since they not shown a proper title and/or a proper legal nexus to the Subject Lands.

(b) The Claimants action has risen ex turpi cause since it has arisen from a dishonorable cause as no appropriate approvals were granted to them under the Town and Country Panning Act to construct the house.

(c) Large portions or the entire case is statute barred by virtue of the Limitation of Certain Actions Act.

(d) The claim against the First Defendant is an abuse of process.

**The striking out of the claim**

35. A court is always anxious not to strike out a claim prematurely without giving the parties ample opportunity to present their evidence through witness statements, the process of disclosure and further information[4].

36. The Court's power to strike out a statement of case is set out in Rule 26.2 (1) of the CPR which states:

> "The court may strike out a statement of case or part of a statement of case if it appears to the court:
>
> a. that there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings;
> b. that the statement of case or the part to be struck out is an abuse of the process of the court;
> c. that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim; or
> d. that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

37. Abdulai Contej C.J. in **Belize Telemedia Limited v Magistrate Usher**[5] considered the interaction between striking out under the court's case management powers under Part 26 as:

[4] Per Kokaram J in CV 2013 -00212 UTT v Professor Kenneth Julien and Ors.
[5] (2008) 75 WIR 138

"15. An objective of litigation is the resolution of disputes by the courts through trial and admissible evidence. Rules of Court control the process. These provide for pre-trial and trial itself. The rules therefore provide that where a party advances a groundless claim or defence or no defence it would be pointless and wasteful to put the particular case through such processes, since the outcome is a foregone conclusion.

16. An appropriate response in such a case is to move to strike out the groundless claim or defence at the outset.

17. Part 26 of the powers of the Court at case management contains provisions for just such an eventuality. The case management powers conferred upon the Court are meant to ensure the orderly and proper disposal of cases. These in my view, are central to the efficient administration of civil justice in consonance with the overriding objective of the Rules to deal with cases justly as provided in Part 1.1 and Part 25 on the objective of case management."

38. In the English Court of Appeal case of **Partco Group Lyd v Wragg**[6] Potter LJ considered the Court's powers to strike out a claim under the equivalent UK rule and stated that cases should only be struck out: (a) where the statement of case raises an unwinnable case where continuing the proceedings is without any possible benefit to the respondent and would waste resources on both sides: and (b) where the statement of case does not raise a valid claim or defence or a matter of law.

39. In **Tawney Assets Limited v East Pine Management Limited and Ors**[7] a Court of Appeal decision of the Eastern Caribbean Supreme Court Mitchell JA provided guidance on the approach to be taken by the court in applications to strike out a claim form and statement of claim under the equivalent provision of the CPR as:

[6] [2002] EWCA Civ 594
[7] Civ Appeal HCVAP 2012/007 at paragraph 22

"The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. The proper approach to be taken in striking out a statement of case as disclosing no facts upon which the court can proceed has been described by Pereira CJ [Ag.], in her judgment in the interlocutory appeal in **Ian Peters v Robert George Spencer**[8] where she found that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence."

40. In this jurisdiction Kokaram J opined at paragraph 21 in **UTT v Professor Kenneth Julien and ors**[9] that:

"21…..A striking out application is a draconian remedy only to employed in clear and obvious cases where it is possible to demonstrate at an early stage before further management of the claim for the trial that the allegations are incapable of being proceed or the Claimant is advancing a hopeless case, either accepting the facts as pleaded as proven or as a matter of law. See Caribbean Court Civil Practice 2011, **Mc Donald Corporation v Steel** [1995] 3 AER 615. Zuckerman on Civil Procedure, A Zuckerman p 279"

41. Under a Rule 26.1(1) application, all the Claimants have to do is to demonstrate reasonable grounds for the claim. The Claimants have grounded their claim for damages against the First Defendant in negligence.

[8] Antigua and Barbuda High Court Civil Appeal No. 16 of 2009 (delivered 22nd December 2009, unreported) following Citco Global NV v Y2K Finance Inc Territory of the Virgin Islands High Court Civil Appeal No 22 of 2008 (delivered 19th October 2009, unreported)
[9] CV 2013-00212

42. According to **Clerk & Lindsell on Torts**[10] there are four requirements for the tort of negligence: (a) the existence of a duty of care; (b) the breach of the duty of care by the Defendant; (c) a causal connection between the Defendant's careless conduct and the damage; and (d) the particular kind of damage to the Claimant is not so unforeseeable as to be too remote.[11]

43. At paragraph 8-33 of **Clerk & Lindsell** the authors stated that where a claimant's own wrongdoing is intimately connected with his negligence claim against the defendant, he may be denied recovery on the basis of the defence of illegality which is also referred to the maxim of ex turpi causa no ocitur action. The illegality of the claimant's conduct may also be a reason for denying a duty in the first place thus obviating the need to plead it as a defence.

44. Section 3 of the **Limitations of Certain Actions Act** provide that any claim in tort cannot be brought after the expiry of four (4) years from the date the cause of action accrued.

45. The onus is on the Claimants to demonstrate from their pleaded case that they sustained damage as a result of the negligent acts of the First Defendant within four (4) years of the date of the claim and that their loss was not as a result of their own wrongdoing.

46. The particulars of the acts of negligence pleaded by the Claimants against the First Defendant included failing to install a pipeline that was suitably durable and fit for the purpose in the lands adjacent to the Subject Lands; failing to properly maintain and/or monitor and/or conduct routine maintenance of the pipeline; failing to replace the pipeline or adequately repair it after leaks were reported; failing to adequately investigate and/or repair and/or replace the pipeline after subsequent reports of continued leakage were made and; failing to provide competent workmen to conduct and/or supervise the repairs.

[10] 19th ed
[11] Supra paragraph 8-04

47. The particulars of damage which the Claimants pleaded against both Defendants were the same. They were special damages for: (i) replacement of the home in the amount of $497,223.00 (ii) loss of support in the amount of $250,000.00; and (iii) rental expenses in the amount of $120,000.00.

48. The instant action was filed in January 2015. Based on the Statement of Case, the Claimants abandoned the house in January 2010. They filed a Reply to the Second Defendant's Defence to state that they abandoned the house in July 2011. But they did not file a Reply to the First Defendant's defence. Therefore, their claim against the First Defendant is that they abandoned the house in January 2010. The facts to support the claim for loss of support which is described as *"refilling of land, compacting and stabilization*" relate to events which took place prior to January 2010 and there are no pleaded facts with any dates after January 2010 with respect to the claim against the First Defendant. Therefore, based on the Claimants' pleaded facts, they have not met the statutory requirement of filing the claim within four (4) years of the cause of action accruing since the cause of action arose in January 2010. As such their action against the First Defendant is statute barred.

49. I now turn to the nature of the pleaded case against the First Defendant. It was submitted on behalf of the First Defendant it cannot be sued in either negligence or nuisance since any loss suffered by any party when the First Defendant, its servant and/or agent is exercising its statutory function must be commenced in Arbitration. It was also argued that the Claimants have only pleaded negligence against the First Defendant and not a claim in nuisance in relation to the works done under its statutory duty. As such, that even if the Claimants are successful in proving negligence with respect to the repair to the pipe they would still have to prove that the water which leaked from the pipe caused damage to the Subject Lands and the house but they have failed to plead any particulars of nuisance against the First Defendant.

50. Counsel for the Claimants maintained that the action is grounded in negligence and not nuisance. I will deal with the submission that the claim ought to have been brought by arbitration proceedings.

51. In Part III of the Schedule III of the **Water and Sewerage Authority Act**[12] provides:

> "Breaking Open Streets, etc.
>
> 17. (1) Subject to this Part, the undertakers may-
>
> (a) within their limits of supply for the purpose of laying, constructing, inspecting, repairing, renewing or removing mains (within the meaning of the Fourth schedule) service pipes, plant or other works; and
>
> (b) outside those limits for the purpose- (i) of laying any mains as aforesaid which they are authorised to lay; and (ii) of inspecting, repairing, renewing or removing the said mains; and
>
> (c) for the purpose of laying, constructing, inspecting, repairing, renewing or removing any sewerage works.
>
> Break open the roadway and footpaths of any street, and of any bridge carrying a street, and any sewer, drain or tunnel in or under any such roadway or footpath, and may remove and use the sol or other materials in or under any such roadway or footpath.
>
> (2) The undertakers shall in the exercise of the powers conferred by this paragraph cause as little inconvenience and do as little damage as may be, and for any damage done shall pay compensation to be determined, in case of dispute, by arbitration".

52. Regulation 4(1) of Part II Fourth Schedule of the **Water and Sewerage Authority Act** provides:

> "4. (1) The undertakers may in any street within their limits of supply lay such service pipes with such stop cock sand other fittings as they deem necessary for supplying water to premises within the said limits, and may from time to time inspect, repair, alter or renew, and may at any time remove, any service pipes laid in a street whether by virtue of this paragraph or otherwise.

[12] Chapter 54:40

(2) Where a service pipe has been lawfully laid in, on or over any land not forming part of a street, the undertakers may from time to time enter upon that land and inspect, repair, alter, renew or remove the pipe or lay anew pipe in substitution therefor, but shall pay compensation for any damage done by them.

Any dispute as to the amount of compensation to be paid under this subparagraph shall be determined by Arbitration."

53. Counsel for the First Defendant referred the Court to the reasoning of Charles J in **Vishnu Gyan v Water and Sewerage Authority**[13] where the Court stated the following at paragraphs 66 to 69:

"[66] I note that the Furth Schedule of the Water and Sewage Act provides for compensation to a land owner where any damage is caused to his property by reason of the laying or repair of such main by an undertaker licensed by the Water and Sewage Authority. Where there is a dispute as to the amount of compensation to be paid, the action provides that this issue shall be referred to arbitration.

[67] I agree with the submission of the Defendant that the fact that Parliament made provision for compensation where damage was caused to a landowner by the existence of a main on its premises, indicates that Parliament foresaw that damage could arise from the statutory duty given the Defendant to lay, inspect or repair mains where those mains were laid over privately owned land. The legislature thereby provided for compensation where a possible nuisance could arise from the execution of its statutory duty imposed upon the Defendant. In such circumstances, the Claimant could not pursue a claim for negligence against the Defendant.

**"Does the rule in Rylands v Fletcher apply?**

[68] The Authors of Halburys Laws of England 17 describes the rule in **Rylands v Fletcher** thus:

[13] CV 2011-04675

*"A person who, for his own purposes, brings onto his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape."*

The Authors opined further that the occurrence of damage as a result of the escape should have been reasonably foreseeable before liability can be imposed. It should be noted that the rule applies only to a non-natural user of land. It does not apply in cases where there is statutory authority. As notes earlier, clear terms must be used in a statute in order to impose strict liability for nuisance.

[69] The Act under consideration in this case, the Water and Sewerage Act, does not impose liability for nuisance against the Defendant in giving effect to its statutory obligations. In the circumstances I hold that the Defendant is not liable in nuisance for any alleged damage occasioned the Claimant*."*

54. Based on the said learning Counsel for the First Defendant argued that Parliament intended that any dispute in relation to damages caused by statutory works done by the First Defendant would have been for arbitration and that the court cannot arrogate powers unto itself with the instant action since the legislation is clear and unequivocal.

55. In my opinion, the legislation contemplates arbitration as the course to be adopted, as Charles J stated, where the loss to the claimant occurs when the First Defendant is engaged in laying, inspecting and repairing pipes over privately owned land. In such circumstances, the First Defendant has accepted liability and the only issue to be referred to arbitration is the quantum of the loss or compensation to be paid to the Claimant. The legislation does not state that where there is a dispute on liability and the amount of compensation that arbitration is to be the method of dispute resolution. In the instant case, the Claimants are entitled to approach the Court to determine liability and quantum since the pipeline was not laid on private lands but along the roadway.

56. With respect to the Claimants' pleading for loss based on negligence and nuisance, **Clerk & Lindsell on Torts** describes a nuisance as:

> "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) right belonging to him as a member of the public, when it is a public annoyance, or (b) his ownership or occupation of land, or of some easement, profit, or other right used or enjoyed in connection with land, when it is a private nuisance."[14]

57. The particulars of negligence pleaded against the First Defendant are related to its failure to install, maintain and repair the pipeline properly. There is no specific pleading against the First Defendant that the water ran off from the pipeline and caused the resulting damage to the house for which the Claimants seek damages. At paragraph 7 of the Statement of Case, the Claimants pleaded details of nuisance but they pleaded that the water was not from the pipeline but from the roadway.

> "7. On or about January 2008, the Claimants first observed two (2) small streams of water **streaming from the adjacent roadway** (Mundo Nuevo road, Talparo) **and flowing onto the Subject Lands**. The First being directly west of their home (next to a fire hydrant and another 25 feet to the North of the first on the North Western boundary of the Subject Lands. The 1st Claimant reported same to the 1st Defendant's head office and was promised that the leaks would be investigated."

58. In my opinion, even if the Claimants succeed with their particulars of negligence against the First Defendant, their pleaded loss is from the flow of water. They have not pleaded that the water flowed from the pipe and they have not pleaded any claim for damages for nuisance. As such, based on their own pleading, the Claimants' action against the First Defendant cannot succeed.

59. I have concluded that I can strike out the claim against the First Defendant on the basis that it was statute barred and even if the Claimants succeed with their particulars of negligence against the First Defendant they claim cannot go further in proving loss against it since they have not pleaded that the water flowed from the pipe and they have not pleaded any

[14] 19th ed at paragraph 20-01

claim for damages for nuisance. In the event that I am wrong on my assessment on the striking out application, I now turn to the summary judgment application.

**Summary judgment**

60. On a summary judgment application the Court must be satisfied that there is no realistic prospect of success based on the facts that are presently available or realistically forthcoming either in documentary or oral evidence if the case is further managed to trial.[15]

61. The test which the Court is to consider in determining a summary judgment application is well settled. In **Western Union Credit Union Co-operative Society Limited v Corrine Amman**[16] Kangaloo JA was dealing with an application for summary judgment by the Claimant. The learned Judge applied the English approach on applications for summary judgment and gave the following guidance:

> "The court must consider whether the Defendant has a realistic as opposed to fanciful prospect of success: **Swain v Hillman** [2001] 2 AER 91.
>
> A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: **ED &F Man Liquid Products and Patel** [2003] EWCA Civ 472 at 8.
>
> In reaching its conclusion the Court must not conduct a mini trial: **Swain v Hillman** [2001] 2 AER 91.
>
> This does not mean that the court must take at face value and without analysis everything the Defendant says in his statements before the court. In some cases it may be clear there is no real substance in the factual assertion made, particularly if contradicted by contemporaneous documents: **ED & F Man Liquid Products v Patel** EWHC 122.
>
> However in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also

[15] Kokaram J at paragraph 22 of UTT v Professor Kenneth Julien and Ors.
[16] CA 103/2006 Kangaloo JA

the evidence which can reasonably be expected to be available at trial **Royal Brompton NHS Trust v Hammond** (No 5) [2001] EWCA Cave 550.

Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where 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: **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd** [2007] FSR 63."

62. In **UTT v Professor Kenneth Julien** Kokaram J at paragraph 35 set out the extent the Court must examine the case as it stand at the time the summary application is made. He stated that:

"On a summary judgment application however the assessment is more robust which I refer to as the " robust approach". It now calls upon a more thorough examination of the available facts and the law even if there are difficult issues. See **Trinidad Home Developers Ltd v IMH Investments Limited** [2003] UKPC 85. It will call for the resolution of discrepancies in the evidence where possible without conducting a mini trial. It calls for an assessment of the possibility and plausibility of evidence to support a claim in an assessment of whether there is a real prospect of succeeding or defending the claim. Lord Woolf MR in Swain v Hillman observed that the words no real prospect of being successful do not need amplification, they speak for themselves. "The word real directs the court to the need to see whether there is a "realistic" as opposed to a "fanciful;" prospect of success". The chances of success should not be speculative nor all surmise and Micawberism. Whether a party has a real prospect of success depends generally on an assessment of two matters, whether the party has a real prospect of success on the basis of the facts that are known at the time and second on whether there is a real prospect that some

additional support for the party's case would emerge if the case followed the normal procedural route."

63. The onus is on the Claimants to demonstrate that its claim has a realistic prospect of success. Based on the pleaded facts and the issues which have arisen from the pleadings, the onus on the Claimants to demonstrate that they have a realistic prospect of succeeding on the following matters:

a) They have a proprietary interest in the Subject Lands as statutory tenants or otherwise.
b) Their action in negligence is not statute barred.
c) The Subject Lands was suitable for constructing a house and they had obtained planning permission to do so.
d) The Claimants loss was as a result of the negligence of the First Defendant.

64. In examining the realistic prospect of the Claimants succeeding with the claim the Court is required to go further than simply examine the pleadings but to examine in greater detail the facts, the documents and any other proposed evidence which it seeks to support its Defence. In the instant action the Court has the benefit of the evidence which the Claimants seek to rely to prove their case. I will now examine each limb of the Claimants' claim.

**The Claimants interest in the Subject Lands**

65. The Claimants asserted that their interest in the Subject Lands was as statutory tenants. In the submissions Counsel for the Claimants argued that the Claimants had an interest as adverse possessors. The First Defendant maintained that the Claimants have no realistic prospect of succeeding with their claim since they lack locus standi to bring the action as they are not statutory tenants, they are not the owners of the Subject Lands and their case is not ownership based on adverse possession and even if it was so, it would still fail.

66. The evidence of the Claimants in their respective witness statements is that their family has lived on the Subject Lands since their forefather, the late Edward Matthew, arrived in

Trinidad as an indentured labourer. He built a home on the Subject Lands and he passed on his rights and interest in the house and tenancy of the Subject lands over time eventually to the Claimants. The Claimants have since continued renting the Subject Lands from one Dolly Boodoo whom they believe to be the owner. In or about 2010 they issued the notice for renewal of the statutory tenancy for another thirty (30) years pursuant to the **Land Tenants Security of Tenure Act**[17] and they attached copies of the notice for renewal and documents purporting to be receipts for rent to their respective witness statements. The Claimants have not produced any title document to their respective statements to show that Dolly Boodoo is the owner of the Subject Lands and they have not filed any witness statement on behalf of Dolly Boodoo to speak about her ownership of the Subject Lands. Therefore, there is no evidence from the Claimants that Dolly Boodoo is the owner of the Subject Lands

67. The evidence from Mr. Clyde Watche, Acting Director of Town and Country Planning Division, Ministry of Planning and Development ("the Division"), a witness for the Second Defendant, is that according to the Division's records the Subject Lands is part of a larger piece of land comprising 1.9 hectares and that outline planning permission was given to one Dolly Boodoo for its development on the 28th February 2013. Mr. Watche attached a copy of the document from the Division addressed to Ms. Boodoo indicating the approval. Mr. Watche's evidence does not assist in proving that Dolly Boodoo is the owner of the Subject Lands since he too did not produce any title document as proof of Ms. Boodoo's ownership.

68. Section 4 of the **Land Tenants Security of Tenure Act** provides for the conversion of tenancies existing at the time before its commencement which was 1st June 1981 to statutory tenancies. It provides that:

> "4 (1) Notwithstanding any law or agreement to the contrary but subject to this Act, every tenancy to which this Act applies subsisting immediately before the appointed day shall as from the appointed day become a statutory lease for the purposes of this Act.

[17] Chapter 59:54

(2) A statutory lease shall be a lease for thirty years commencing from the appointed day and, subject to subsection (3), renewable by the tenant for a further period of thirty years.

(3) In order to exercise the right of renewal on or before the expiration of the original term of the statutory lease.

(4) Upon service of the notice by the tenant under subsection (3), the statutory lease shall be deemed to be renewed for a period of thirty years subject to the same terms and conditions and to the same covenants, if any, as the original term of the statutory lease but excluding the option for renewal."

69. The Notice of Renewal which was annexed to the Claimants' respective witness statements was dated the 29th November 2010 and it was signed by the Second Claimant. On the face of this document, the notice of renewal complied with section 4 (3) of the **Land Tenants Security of Tenure Act** since the right of renewal was exercised before the expiration of the original statutory lease which was May 2011. However, this document still does not assist the Claimants in proving the renewal of any alleged statutory tenancy for two reasons. There is no evidence from the Claimants that Ms. Dolly Boodoo is the Landlady and owner of the Subject Lands and there is no evidence that the alleged receipt was received by Ms. Dolly Boodoo to give effect to any alleged renewal. In my opinion, the lack of any evidence from Ms. Dolly Boodoo is critical since the Claimants' case is that the house is a concrete structure which is attached to the Subject Lands. If Ms. Dolly Boodoo is the owner of the Subject Lands the presumption is that she too is the owner of the house. In my opinion only Ms. Dolly Boodoo, the alleged owner of the Subject Lands can testify that she rented the Subject Lands to the Claimants or their predecessors and that the house is not hers but the Claimants. In the absence of any evidence from Ms. Dolly Boodoo on ownership of the Subject Lands, and if she is, that she received the notice of renewal for the statutory tenancy, the Claimants have no realistic prospect in proving that they are the owner of the house.

70. In my opinion it would be dangerous for the Court to make a pronouncement of any alleged statutory tenancy which the Claimants assert over the Subject Lands without any title documents evidencing title of the Subject Lands and without the person who they alleged to be the owner not being aware of the instant proceedings and the impact of the Claimants assertion of their rights to the Subject Lands.

71. In any event, any assertion by the Claimants that their proprietary right to the Subject Lands is based on adverse possession must fail. They have not pleaded their case as one of adverse possession since they have not joined the owner of the Subject Lands to the instant proceedings. Therefore the owner is not bound by any orders in the instant action. Further, the Claimants assertion of adverse possessory title to the Subject Lands is inconsistent with their claim as being statutory tenants since their case is that they paid rent and renewed the statutory tenancy. They acknowledged another person as the owner of the Subject Lands, in this case, Ms. Dolly Boodoo, therefore they did not have the intention to possess the Subject Lands exclusively for the requisite statutory period of sixteen (16) years prior to the instant action.

72. Therefore, on the evidence before the Court, the Claimants have failed to demonstrate a realistic prospect of success with respect to having an interest in the Subject Lands as statutory tenants or as adverse possessors.

**The limitation period**

73. I have already discussed aforesaid that based on the Claimants pleaded facts they have failed to demonstrate that they instituted the action within the statutory period of four (4) years from when their cause of action in negligence arose.

74. In any event, the evidence from the Claimants does not assist them in crossing the limitation period hurdle. The Claimants' evidence is that the pipeline was installed in January 2007. In January 2008 they observed two small streams of water merging from the road next to the Subject Lands. They reported it to the First Defendant. During the period of January

2008 to January 2015 they made complaints to the First Defendant about leaks from the pipeline. During the period between 2008 to January 2015 on more than fifteen (15) occasions the First Defendant made repairs to the pipeline. The damage to the Claimants' house started in May 2009. In September 2009 there was damage to the Subject Land and in January 2010 the Claimants and their family abandoned the house on the Subject Lands and they have been renting since that date. This evidence is inconsistent with the pleading in the Claimants' Reply that they abandoned the house on the 19th July 2011.

75. Assuming I accept all of the Claimants' evidence, it supports their original pleading in the Statement of Case that they abandoned the house in January 2010. Therefore, their cause of action arose in January 2010. Therefore, when they filed the instant action in January 2015 the four year limitation period had expired.

76. In **Vishnu Gyan** the Claimant brought an action against the Defendant for damages to his premises which he alleged was caused by escaping water belonging to the Defendant. The action was grounded in negligence and alternatively in nuisance. One of the issues the Court had to determine at the trail was whether the Claimant's action was statute barred. The Court stated that the onus was on the Claimant to make out a case for negligence against the Defendant by proving on balance of probabilities that he sustained the damage as a result of the negligent acts of the Defendant within four (4) years of the date of the claim. Charles J adopted the learning of Rajkumar J (as he then was) in **Rameshwar Maharaj &Anor v Andrew Johnson & Ors**[18] where he stated:

> "50. The Court analysed the law relating to limitation in cases of tort as follows:
> a cause of action in tort can accrue for the purposes of limitation without the claimant being aware of it;
>
> (i) the existence of actual damage for these purposes does not therefore depend on the claimant's state of knowledge in relation to the breach of duty or its consequence but on whether the breach has in fact caused actual loss;
>
> (ii) in determining whether actual damage has occurred, one must assume, that the claimant was aware of the breach at the time of its commission and

[18] CV 2012-00789

assess the impact of that breach on the claimant's property or other assets at that date.

51. The Court accepted in full the reasoning of the **Bell** case on the question of whether or not the Defendants owed a continuing duty to the Claimant. It concluded that no special facts were pleaded to support the claim in this regard…

52. It held that even if the duty owed by the solicitors was a continuing one of the kind alleged, that duty could make no difference to the time when the limitation period began to run in a cause of action founded in tort because the cause of action accrued when loss was first suffered as a consequence of the breach of the alleged continuing duty."

77. In **Vishnu Gyan** Charles J found that the claim was statute barred since the Claimant suffered damage to his property before the year 2000 which was outside the limitation period to ground the claim for the tort of negligence or nuisance and that he had pleaded no facts nor adduced any evidence to support the contention that the damage in respect of which the claim was based occurred during the limitation period.

78. While I am mindful that at this stage of the proceedings the Court must be cautious in not conducting a mini trial, I cannot ignore that the best evidence before me from the Claimants is that by January 2010 their cause of action against the First Defendant would have accrued yet they only instituted the instant action in January 2015.

79. Therefore, they have failed to demonstrate a realistic prospect of success of the claim with respect to the action being statute barred against the First Defendant.

**Suitability of the Subject Lands for construction of the house**

80. The First Defendant pleaded that the Claimants acted to their detriment by constructing the house on the Subject Lands since it was constructed contrary to prudent building standards and without the express planning permissions and approval required from the **Town and**

**Country Planning Act**[19]. The First Defendant also pleaded that the Subject Lands upon which the house was constructed were not suitable or fit for constructing a house since the soil conditions were unstable which led to continued movement and slippage of the Subject Lands. Therefore, the Claimants were put on notice that they had to prove that they had obtained Town and Country planning approvals for the construction of the house on the Subject Lands and more importantly that the soil of the Subject Lands was suitable for construction of the house.

81. However, the Claimants' Reply is silent on if they had obtained permission for the construction of the house on the Subject Lands. Their pleaded position was that the Subject Lands did not suffer from landslides and slippage prior to the leaks from the pipeline and they called upon the First Defendant to prove that they contributed to their loss.

82. Both parties referred the Court to the equitable principles in **Snell's Equity**[20] which states:

> "Equity does not demand that its suitors have led blameless lives". What bars the claim is not a general depravity but one which has "an immediate and necessary relation to the equity sued for, and is not balanced any mitigating factors."

83. Further **Halsbury's Laws of England**[21] states:

> "The maxim does not mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal, as well as in a moral sense."

84. It was also noted that there must be a sufficiently immediate relationship between the misconduct and the relief.[22]

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[19] Chapter 35:01
[20] 31st Edition, pgs.98-99:

[21] 5th Edition 2014, Vol.47, p.112
[22] Fiona Trust and Holding Corporation v. Privalov [2008] EWHC 1748 (Comm); Murphy v. Rayner [2011] EWHC 1 (Ch) and Royal Bank of Scotland plc v. Highland Financial Partners LP [2013] EWCA Civ 328

85. The Claimants' evidence is in their respective witness statements is that from the time they have lived on the Subject Lands with respect to the First Claimant for thirty four (34) years and the Second Claimant fifty nine (59) years they never experienced or observed any landslides or slippage of the Subject Lands prior to the leak from the pipeline. None of the other witnesses for the Claimants has stated in their respective witness statements anything about the planning permission from the Division or on the suitability of the soil of the Subject Lands for construction of the house. There was no expert evidence filed on behalf of the Claimants to attest to the suitability off the soil.

86. According to the witness statement of Mr. Clyde Watche the Subject Lands upon which the house stood is part of a parcel consisting of 1.9 hectares which under the present planning policy is allocated for agricultural use. The Division's records did not indicate that planning permission was ever given for the erection or retention of any building or structure on the Subject Lands which is required under sections 8 and 11 of the Town and Country Planning Act. Outline planning permission was issued to Ms. Dolly Boodoo for the 1.9 hectares on the 28th February 2013 which is valid for one (1) year. There was no request to the Division for an extension of time to submit a final application for the development of the 1.9 hectares therefore the outline planning approval had lapsed.

87. **Section 8 of the Town and Country Planning Act** provides:

> "8. (1) Subject to the provisions of this section and to the following provisions of this Act permission shall be required under this Part for any development of land that is carried out after the commencement of this Act.
>
> (2) In this Act, except where the context otherwise requires, the expression "development" means the carrying out of building, engineering, mining or other operations in, on, over or under any land, the making of any material change in the use of any buildings or other land, or the subdivision of any land, except that the following operations or uses of land shall not be deemed for the purposes of this Act to involve development of the land, that is to say."

88. The effect of section 8 is that after 1969 any party who is constructing a house must obtain approval for the construction of the building from the authority responsible under the **Town**

**and Country Planning Act**. There was no evidence from the witnesses for the Claimants based on the witness statements filed that a request for such approval was made and/or received.

89. Therefore, based on the only evidence on planning approval which is from Mr Watche, the Claimants did not have the approvals from the appropriate authority for constructing the house. While this may appear to be an illegal act, the appropriate procedures for enforcing such failure lie with the authority under section 16 of the **Town and Country Planning Act** and there was nothing placed before the Court in the witness statements for the Defendants to indicate that any such action has been taken.

90. However, the lack of enforcement by the appropriate authorities does not make the Claimants violation of the provisions of the **Town and Country Planning Act** legal. In my opinion the failure by the Claimants to provide any evidence of approval from the appropriate authorities to demonstrate that they had planning approval means that they have no realistic prospect of success in proving that the house was built with the said approvals.

91. Even if the Claimants had gotten over the planning approval hurdle, they also have to prove that the soil of the Subject Lands was suitable for the construction of the house. This is critical in them having a realistic prospect of success with their claim since one limb of the First Defendant's Defence is that the area where the Claimants constructed the house was prone to land slippage and unfit for construction of the house.

92. The Claimants evidence was that the landslides and slippages of the Subject Lands only started after the pipeline was installed in or about 2007. However, there was no witness statement filed on behalf of the Claimants of any person who was an expert of suitability of soil for construction of a house in the said area to demonstrate that the soil was suitable. At best, the only evidence is from the witness statement of Me. Clyde Watche which is the area where the Subject Lands is situated is zoned for agricultural use. Even if I accept the Claimants' evidence, in my view, it still does not demonstrate any realistic prospect that the soil was suitable for construction.

**Causation- Was the Claimants loss as a result of the negligence of the First Defendant?**

93. The onus is on the Claimants to prove that the negligence of the First Defendant caused the damage to the house on the Subject Lands. The particulars of negligence which the Claimants pleaded were all related to the First Defendants failure to install, maintain and repair the pipeline properly. The Claimants also have to prove that the water from the pipeline caused the damage to the house on the Subject Lands. The Claimants' case against the Defendants is that water from three (3) sources entered the Subject Lands causing damage to the Subject Lands and the house. The three (3) sources are wastewater, rainwater and water from the pipeline.

94. At paragraph 9 of the Claimants submissions filed in opposition to the application, the Claimants state: *"the exact cause of the damage is not known by the Claimants."* This was an astonishing admission made by the Claimants since two possible defences raised by the First Defendant supported by documents are that the damage was caused by land slippage and rainfall in the area.

95. 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**:

> "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."

96. In **Darwin Sahadath and anor v The Water and Sewage Authority of Trinidad and Tobago**[23] Kokaram J examined the relevant law on causation where a claimant has brought

[23] CV 2016-01737

an action for damages to property grounded in negligence and nuisance against the First Defendant. At paragraphs 42 to 46 he stated:

> "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 12th 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 13th Edition** where it was stated:
>
> > "A "scope of risk" analysis underlies an example given by Lord Hoffman in **Environment Agency v Empress Car Co (Abertillary) 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."

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 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."

96. Based on the pleaded case between the Claimants and the First Defendant the issue of causation to be determined is whether the First Defendant's negligence in the installation, maintenance and repairing of the pipeline caused the damage to the Subject Lands.

97. The Claimants' evidence is that after the drain to the East of the Subject Lands was condemned by the Second Defendant, excess wastewater and rainfall runoff flowed unto the Subject Land. Further, in January 2008 the Claimants observed two (2) small streams of water emerging from the Mundo Nuevo Road flowing unto the Subject Lands. The first stream was next to fire hydrant and the other was on the North Western boundary of the Subject Lands. They reported the leak to the First Defendant. Over the next six (6) years until January 2015 the leaks grew in size. They made several reports to the First Defendant. On fifteen (15) occasions between 2008 and January 2015 the First Defendant excavated

the pipeline for repairs. Each time leaks returned and gradually increased in intensity and causing damage to the Subject Property. When it rains waste water from the road flows freely unto the Subject Lands because of the gradient of the road and there is no drain to collect waste water. At the time of the signing of the witness statements in May 2017 the Claimants stated that the leaks had stopped completely but the rain wastewater continued to flow unto the Subject Lands. The landslides and slippages of the Subject Lands only started after the pipeline was installed in or about 2007.

98. The Claimants have not filed any witness statements for any experts.

99. The First Defendant has filed four (4) witness statements to dispute the Claimants contention. The evidence of Leslie Ann Bristow who is an senior engineering technician with a diploma in mechanical engineering. According to Ms. Bristow's evidence, she was commissioned by the First Defendant in July 2012 to investigate an issue with respect to the Subject Lands. The area is served by an 8 inch PVC water main. She visited the Subject Lands where she observed visible signs of land slippage and the roadway was in a dilapidated condition. She observed several depressions along the roadway which was indication to her that the land was slipping and eroding. She noticed that the house on the Subject Lands was damaged and it was vacated by the Claimants. She said that the land appeared to have a 40-45 degree downward slope/grade in an easterly direction and that there was no evidence of a drainage system close to the Subject Lands and the road inclines slightly after it. She observed visible channels of water which resulted from the street flooding due to water flowing into the Subject Lands. She noted that this was a contributing factor to the water logging on the Subject Lands. She concluded that the damage to the Subject Lands was due to unstable soil which was compounded by lack of drainage.

100. However, Ms. Bristow is not an expert in soil quality to assist the Court and her evidence is based on her observations two (2) years after the damage in January 2010.

101. Mr. Imtiaz Mohammed is the Administrator of Data Management. His evidence in his witness statement was that the First Defendant used a computerized database which logged all the customer reports and works performed on its behalf in response to reports. He

printed the job card reports for the period 4th June 2009 to 29th January 2013 which detailed the summary of repairs which were reported and worked on at the Subject Lands. His evidence provides the First Defendant account of the reports made on leaks of the pipeline

102. Mr. Terrance Francois is a senior information technology officer employed by the First Defendant. His evidence is describing the system of reporting and repairing of leaks used by the First Defendant. Mr. Anthony Lewis is an adjuster in property claims and he conducted an investigation. Ms. Fazia Hosein is an area manager of the Central/North division employed with the First Defendant and she had custody of the files and records related to the Subject Lands. None of these three witnesses evidence assist the Claimants in determining the source of the water which damaged the Subject Lands and the house.

103. The Second Defendant's witnesses are Mr. Vincent Jaggernauth, acting engineering assistant III in the Ministry of Works and Transport, Highways Division for the area where the Subject Lands are situated. He was responsible for all read upkeep and maintenance works during the period 2002 to 2008 and from the end of 2010 to 2014. Some of his duties included conducting site investigations, preparing reports recommending and preparing estimates for construction projects, supervision of projects and administrative duties. He detailed the work with respect to the construction of a new retaining wall and his evidence was concerning his observation of the Subject Lands, his interaction with the Second Claimant. His evidence is primarily with respect to the works done to the Mundo Nuevo Road and does not assist in determining if it was the excessive wastewater, surface water from rain or water from the pipeline which caused the damage to the Subject Lands and the house.

104. The other witness the Second Defendant has is Mr. Clyde Watche Acting Director, Town and Country Planning Division, Ministry of Planning and Development. His evidence was that the land use for the Subject Lands was for agriculture and there were no records that approval was given for the construction of a house on the Subject Lands and only outline approval was given to Ms. Dolly Boodoo in 2013 but it lapsed.

105. In **Vishnu Gyan** the Court considered the issue of the causal link between the damage sustained by the Claimant's premises and the leak on the Defendant's water line. The Court found that the failure by the Claimant to adduce evidence from an expert in the field of engineering was fatal to proving his case since there was no admissible evidence adduced by the Claimant to prove his contention that water from the Defendant's line percolated his land and caused damage to the structures thereon. At paragraphs 61 and 62 of the judgment Charles J stated:

> "[61] As noted above apart from his plea that from the year 2000 or earlier the Defendant's water main burst and began leaking on the eastern perimeter of the Claimant's property and percolated onto his land, there was no other pleading to support the allegation that it was water from the Defendant's water main which caused the damage complained of by the Claimant. No admissible evidence was adduced by the Claimant to support this contention. In proof of his claim that water from the Defendant's line percolated his land and caused damage to the structures thereon, it was necessary, in my view, that the Claimant adduce admissible expert evidence in support of his case. This was not done. He attempted to put in a report from a company Consulting Engineering Associates Limited but this report was struck out on the basis that it did not comply with Civil Proceedings Rule 33. Additionally, the report was unsigned, undated and there was no indication as to the qualification of the person or persons who prepared this report. The court had to determine the source of the water which caused the alleged damage to the Claimant's property. Further, as noted above, there were two possible sources of water on the Claimant's land – rainfall runoff as well as water from the Defendant's pipeline. In the circumstances, expert evidence was required in order to assist the court in determining on a balance of probabilities whether water from the Defendant's pipeline caused damage to the Claimant's property.
>
> [62] This case is similar to the Harvey Nichols case cited above in that there was no direct evidence as to the origin of the water that had caused the alleged damage to the Claimant's walls and perimeter fence. In the absence of this evidence and assuming that the claim had been brought within the limitation period, I am unable

to determine on a balance of probabilities that it was water from the Defendant's main which percolated onto the Claimant's land and caused the damage which is the Harvey Nichols & Co. Ltd v Thames Water Utilities Ltd 1999 All ER (D) 1272 17 basis of this claim. In the circumstances I hold that the Defendant has failed to prove that his premises was damaged by water that originated either entirely or substantially from the Defendant's main. (emphasis mine)

106. In **Darwin Sahadath and anor. v the water and Sewage Authority of Trinidad and Tobago**[24] the Claimants brought an action for damages in negligence and nuisance against the Defendant in 2016. The Claimants claimed that water had escaped from a leak from an underground water pipeline maintained by the Defendant which they claimed triggered a landslide causing the road to collapse and eventually their house to sink. The leak continued from 2012 to 2014.The Defendant's defence was that the source of the leak was not from its pipeline and in any event, it was not responsible for the Claimants loss as they had built their home on land which was prone to slippage. The Defendant failed to provide any explanation of its inspection regime for the pipeline and any steps taken to repair and detect the leaks of which Mr. Sahadath complained. There was also no expert evidence by the Defendant to support its theory that the slippage of land was due to another cause unrelated to a leaking pipe.

107. At paragraph 2 of the judgment Kokaram J indicated that the main issue in determining liability was causation. At the trial two experts a geophysicist and a civil structural engineer gave evidence on behalf of the Claimants. At the trial Kokaram J found that the two experts both visited the site in 2014 and in 2015. They both could not conclusively determine that the leaking pipe caused the damage but they expressed an opinion that having regard to the topography, the nature of the soil and terrain, the cause of the slippage of land was not due to rainfall or natural movement but by a human element and that there was no other human activity in the area except for the leak of which the Claimants complained off.

[24] CV 2016-01737

108. Kokaram J concluded that based on the evidence it was more likely that the land slippage that occurred at the home of the Claimants was triggered by a leaking pipeline maintained by the Defendant and that there was no evidence to supplest that another cause such as a landslide unconnected with a leak or heavy rainfall or other sources of water caused either the leaks in the roadway or the resulting damage to the Claimants house.

109. In **Afzal Aziz v The Water and Sewerage Authority of Trinidad and Tobago**[25] the Claimant claimed damages in negligence and nuisance against the Defendant for damages to his property situated at Princes Town. He claimed that water under the control of the Defendant was permitted to escape over a sufficient period of time onto his property as a result of which the land began slipping causing serious cracks to the structure and placing his home in jeopardy. The Defendant denied that any water from its pipes or under its control for which it was responsible escaped onto the Claimant's property and it denied that the water that the Claimant was sampling was from its supply. It therefore denied that it was responsible for the slippage of the land.

110. There were two issues of fact which the Court had to determine namely: (a) whether water the cause of the damage observed on the Claimant's premises and (b) if so, whether water, then emanating from a supply or source under the Defendant's control was the cause of damage observed on the Claimant's premises.

111. With respect to the first issue there were three possible sources of water; a natural sources (ie a spring, run off from the road onto the Claimant's property and rainwater); water escaping from a pipe under the control of the Defendant; and water escaping from pipes or drains under the control of the Claimant. The Court found that the Claimant had failed to prove on a balance of probabilities that the source of water was from the pipes under the control of the Defendant which caused the damage to the Claimant's property.

112. In **Afzal Aziz** the Court had the benefit of the evidence of a civil engineer, a hydrologist, a geologist and three chemists who conducted onsite testing for chlorine.

[25] CV2013-00632

113. The Claimants' case and their evidence are that the damage to the Subject Lands and the house was from water from three sources, wastewater, surface water from rainfall and water from the pipeline. The Claimants' evidence also is that the damage to the Subject Lands started when the Second Defendant removed the drain which caused excess wastewater and surface water to go unto the Subject Lands. Part of the First Defendant's Defence is that the Claimants' loss was not due to any water from the pipeline but due to rainfall and land slippage. Assuming I accept all of the evidence on behalf of the Claimants, there is no evidence to demonstrate if it was the wastewater, excess surface water from rainfall or the water from the First Defendants pipeline which caused the damage to the Subject Lands and the house. In my opinion, this is critical since the First Defendant cannot be liable for any damage due to wastewater or excess surface water from rainfall. In my opinion, the evidence filed on behalf of the Claimants do not demonstrate that they have a realistic prospect of success in proving causation against the First Defendant.

**Conclusion**

114. I have concluded that the Claimants action against the First Defendant has no realistic prospect of success for the following reasons. The Claimants' action against the First Defendant is statute barred because their action was filed in January 2015 and they claim they abandoned the house in January 2010. Though they filed a Reply to the Second Defendant's defence to state that they abandoned the house in July 2011, they did not file a reply to the First Defendant's defence. Therefore, their claim against the First Defendant is that they abandoned the house in January 2010 which is thus statute barred.

115. **The Water and Sewerage Act** does not state that where there is a dispute of liability and the amount of compensation, that arbitration is to be the method of dispute resolution. The Claimant are entitled to approach the Court to determine liability and quantum since the pipeline was not laid on private lands but along the roadway. However, the Claimants' action against the First Defendant cannot succeed because the Claimants pleaded loss is from the flow of water and they have not pleaded any claim for damages in nuisance.

116. The Claimants have failed to demonstrate a realistic prospect of success with respect to having an interest in the Subject Lands as statutory tenants or adverse possessors. Further,

the Claimants did not have approval from the appropriate authority for constructing the house. The failure by the Claimants in providing evidence of approval from the appropriate authority to demonstrate that they had planning approval means that they have no realistic prospect of success in proving that the house was built with the said approvals. The Claimants have also not demonstrated any realistic prospect that the soil was suitable for construction.

117. The Claimants' case and their evidence are that the damage to the Subject Lands and the house was from water from three sources, wastewater, surface water from rainfall and water from the pipeline. There is no evidence to demonstrate if it was the wastewater, excess surface water from rainfall or the water from the First Defendants pipeline which caused the damage to the Subject Lands and the house. Therefore, the Claimants have not demonstrated that they have a realistic prospect of success in proving causation against the First Defendant.

**Order**

118. The Claimants claim against the First Defendant is struck out. Summary judgment to the First Defendant against the Claimants.

119. The Claimants to pay the First Defendant the costs of the Notice of application filed on the 12th March 2018 to be assessed by the Registrar in default of agreement.

**Margaret Y Mohammed**
**Judge**