THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2016-01918

BETWEEN

DIANE SOOKER-AKALOO

Claimant

AND

REPUBLIC BANK LIMITED

Defendant

By Ancillary Claim

REPUBLIC BANK LIMITED

Ancillary Claimant

AND

SECOND PLAZA LIMITED

Ancillary Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Date of Delivery: Tuesday 19 January 2021

Appearances:

Larry N. Lalla for the Claimant

Keston McQuilkin instructed by Nalini Jagnarine for the Defendant

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JUDGMENT

I. Introduction

[1] The case at bar involves a claim for damages in negligence by the Claimant against her employer, the Bank, for failing to provide a safe place of work.

II. Background

[2] The Claimant filed her Claim Form and Statement of Case on 7 June 2016. The Defendant filed its Defence on 8 September 2016. The Defendant filed an Ancillary Claim Notice to its landlord, Second Plaza Limited, on 11 January 2017seeking an indemnity from the Ancillary Defendant against the Claimant's Claim and costs. The Ancillary Defendant has neither entered an Appearance nor filed a Defence to the Ancillary Claim.

Claimant's Case

[3] The Claimant claims against the Bank the following relief:

(i) Damages including aggravated damages for injury and consequential loss due to negligence arising out of the Defendant's failure to provide the Claimant with a safe system and place of work in or around September 2015.

(ii) Payment of the Claimant's pension and other benefits.

(iii) Costs.

(iv) Further or other reliefs as the Court may deem appropriate.

[4] The Claimant has been permanently employed with the Bank for the last 20 years, having commenced her employment with the Bank on April 29, 1996 at age 20.

[5] Over the last 20 years, the Claimant has devoted her life to the Bank and has performed as an exemplary employee, moving from a Part Time Grade I employee to a Grade 4 employee. She has acted as Grade 5 in the positions of Sales Supervisor and Relationship Manager.

[6] Her position as Personal Banking Officer at the Bank included functions such as marketing, processing of loan applications, mortgages, credit cards, dealing with investments, opening and closing of accounts, wire transfers, preparing foreign bank drafts and manager's cheques, negotiating local and foreign cheques, attending to queries on customers' accounts and providing day to day banking service to customers.

[7] She was paid her net salary of $9,886.74 up to 10 March 2016 when her pay was unceremoniously terminated by the Bank, though the Bank is the cause of her present injury as explained below.

The Cause of Injury - Contaminated air at the Bank's Valpark Branch

[8] On the morning of September 15, 2016 when the Claimant dutifully attended to the Valpark Branch of the Bank to begin her day's work, she was met in the branch by a strong, foul, chemical smell, which was the source of discomfort to her during the course of that day.

[9] The following day, September 16, 2015 when the Claimant attended to her duties at the branch there was no air-conditioning at the branch and she was again met at the branch by a stronger chemical smell, which made her unwell (feeling nauseous). She was unable to perform her functions because of the said strong chemical smell and had to leave work early that day.

[10] On that day, several other employees of the Bank also complained about the strong chemical smell at the branch and feeling unwell. Some even had to seek medical attention at the nearby Valsayn Medical Clinic. As a result, the branch was closed early that day.

[11] On September 17, 2016, the Claimant woke with a high fever, severe headaches, heavy wheezing and severe stomach pains and had to seek medical attention from her doctor, Dr. Neevan Sampson, following which she was placed on sick leave.

[12] The Claimant returned to work on September 21 and 22, 2016 and noticed that air purifiers had been installed at the branch but that there was still a foul chemical smell in the branch. The smell again made her ill and she and other members of staff complained to management.

[13] On September 23, 2016, she returned to work at the branch but the foul chemical scent still pervaded the branch. On that day, other employees were seriously agitated about the obviously contaminated air at the branch and they refused to work in the branch. The said employees left the branch and assembled at the Valpark Plaza's food court. Again, staff sought medical attention at the nearby Valsayn Medical Clinic. The branch was again forced to close during the course of the day.

[14] On the said September 23, 2016 the Claimant, again feeling very ill, visited a doctor at the Valsayn Medical Clinic.

[15] On September 25, 2015, the Claimant, still feeling very ill, visited Dr. Neevan Sampson (her private doctor) who referred her to Professor Terrance Seemungal, a specialist in respiratory and general internal medicine.

[16] On October 19, 2015 the Branch Manager of the Valpark Branch (Ms. Karen Ann Sturge-Crichlow) referred the Claimant to Dr. Victor Coombs (the Bank's doctor) for assessment stating and admitting in letter (copy attached as "A") of the same date to Dr. Coombs:

> *"We advise that the captioned employee has been suffering from a medical condition precipitated by exposure to a cleaning agent and diesel fumes which contaminated the air at the Valpark Branch on September 15, 2015 and September 23, 2015 respectively."*

[17] On being exposed to chemically contaminated air at the branch in September 2015, the Claimant has suffered severe neurobehavioral injury, which has resulted in her being in a state of constant depression and anxiety to the extent that she is unable to carry out her normal personal, family and work-related duties.

[18] In an attempt to diagnose the cause of her illness and to receive appropriate treatment the Claimant has been examined and diagnosed by:

l) Professor Terence Seemungal, specialist in respiratory and general internal medicine and Professor of Medicine at the University of the West Indies; and

2) Professor Gerard Hutchinson, Professor and Unit Lead in Psychiatry, Department of Clinical Medical Sciences, University of West Indies and Consultant Psychiatrist, North Central Regional Health Authority.

[19] Both Professor Seemungal and Professor Hutchinson are of the expert medical opinion that the Claimant sustained serious injury as a result of chemical exposure at the Bank's Valpark Branch.

[20] Professor Seemungal has prepared a detailed report on his findings dated March 28, 2016 (copy attached as "B" to the Statement of Case), a summary of which is contained at paragraph 9 of his report and is as follows:

9.1 There is a strong past history of asthma.

9.2 Mrs. Sooker-Akaloo had acute events at her office in September 2015 (My own view and Dr. Sampson's).

9.3 The acute event consisted of a syndrome of respirator)' and dermatologic symptoms.

9.4 The acute events followed exposure at work place on or around the 15 September and 23 September 2015. The exposure consisted of fumes from a cleaning agent and diesel.

9.5 Following this event and NOT before, she had a constellation of neurobehavioral symptoms with features of anxiety and depression.

9.6 These neurobehavioral symptoms and her respiratory symptoms resulted in a severe impairment of her capacity to perform daily functions both at home and at work.

9.7 Following this she was deemed to be unfit to perform the detailed financial transactions required of her in her job and she was given sick leave.

9.8 Mrs. Sooker-Akaloo recalls three prior episodes of severe allergic reactions all occurring at the workplace.

[21] Further, Professor Seemungal points out at paragraph 13 of his report that inhalational exposure to diesel fumes could lead to neurobehavioral symptoms as displayed by the Claimant.

[22] Professor Gerard Hutchinson has prepared a report dated March 7, 2016 (copy attached as "C" to the Statement of Case) in which he stated:

> *"Ms. Sooker-Akaloo was referred by Professor T. Seemungal after he had seen her for an anaphylactic reaction to chemicals following exposure at work (Republic Bank, Valpark Branch). This has been an ongoing problem for her and Prof Seemungal has been treating her for this. I have now seen her on six occasions since that initial visit in November. She has been unable to return to work since the incident in Sep 2015.*
>
> *She has continued to have marked depressive and anxiety symptoms which have begun to resolve only in the last month. Her husband has noted a subtle change in her personality and there are times she seems to have regressed to a less mature state of being. However she has developed symptoms suggestive of mild cognitive impairment, with deficits in short term or working memory and with visual memory. One of the consequences of this, is that driving has become very challenging.*
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> *These symptoms may be a central nervous system consequence of the toxic exposure or the attendant cognitive response to the elements of her*

depressive and anxiety condition. She has also indicated that she finds it very difficult to attend public activities including those related to her children. She also feels that she is always being watched and cannot relax in these situations. She has not been able to return to full functioning within the household either.

The above clinical picture would certainly compromise her capacity to work in a banking environment and with the added fears of additional exposures to chemicals, it would be extremely difficult to envision Ms. Sooker-Akaloo returning to work in that environment. I estimate that she is now functioning at the 80-85% level and cannot predict a time frame that would guarantee a return to normal functioning. On the Sheehan Disability Scale, I would estimate that her functioning is at the 50% level which represents moderate impairment. I would contend that the high pressure environment of commercial banking would be entirely unsuitable for her.

She would also need to continue follow-up psychotherapeutic treatment at least for the next three months."

The Negligence of the Bank

[23] The Claimant contends that the Bank caused and is entirely and solely responsible for the injury to her in that it inter alia:

a) Failed to ensure that the Claimant was provided with a safe system of work.

b) Failed to ensure that the Claimant was provided with a safe work environment.

c) Failed to ensure that at all times the Bank was properly ventilated.

d) Failed to take reasonable steps to ensure that the air in the Valpark Branch was at all times of a fit and proper quality for the employees working there.

e) Failed to monitor the air quality at the Valpark Branch to ensure that air at the branch was at all times of a fit and proper quality for the employees working there.

f) Failed to respond adequately or at all to complaints by the Claimant and employees in September 2015 that the air at the Valpark Branch was contaminated and unfit for them to breathe.

g) Failed to take adequate steps to test, monitor and or purify the air at the Valpark Branch once it was reported by the Claimant and other employees that the air at the branch was making them ill.

h) Allowed the air in the Valpark Branch of the bank to become contaminated with cleaning agents and/or diesel and/or noxious fumes and therefore harmful to humans.

i) Failed to have systems in place at the Valpark Branch of the bank to prevent the air therein from becoming harmful to humans and contaminated by noxious fumes and/or fumes of cleaning agents and/or diesel.

[24] But for the Bank's negligence/breach of duty qua employer the Claimant would not have been injured in her place of employment and that it was reasonably foreseeable to the Bank qua employer, that exposing its employees to contaminated air was potentially harmful and could have caused some form of injury to such employees, including the Claimant.

The Changes to the Claimant's life as a result of injury by the Bank

[25] Prior to the injury at the hands of the Bank the Claimant was a beautiful, happily married, confident, fun-loving, energetic, motivated, organized woman in the prime of her life who enjoyed her job, spending quality time with her husband and children and socializing with relatives and friends.

[26] As a result of the injury sustained by the Claimant at the hands of the Bank, her employer, she now:

a) Is permanently overcome by depression, sadness, anxiety and mental confusion;

b) Is very sensitive to smell;

c) Feels a loss of confidence and trust in people;
d) Suffers from a serious loss of short term memory;
e) Moves about at a much slower pace than she should at her age or that she is use to;
f) Is easily agitated and feels misunderstood and vulnerable;
g) Feels uncomfortable and insecure around others and is therefore unable to socialize with her husband, children, other relatives and friends;
h) Has since experienced serious marital issues;
i) Is extremely fearful about her future and the future of her family and relationship with her husband.

The Response of the Bank

[27] Despite the obvious and serious negligence of the Bank, its admission that the Claimant's injury was caused by exposure to fumes of cleaning agents and diesel in September 2015 and the known effects on the Claimant's life, the Bank has, as of March 10, 2016 refused to pay the Claimant's salary and has effectively terminated the Claimant's employment.

[28] The Bank's action in so terminating the Claimant's salary has acted towards the Claimant in an arbitrary, oppressive and high-handed manner, has caused her severe emotional distress, and has aggravated her condition and difficulty.

[29] To date the Claimant remains without an income and with no prospect of any source of income to replace her income unfairly terminated by the Defendant.

[30] Further, the Bank has failed/refused to meet the Claimant's outstanding medical expenses which to date amount to over $30,000.00 and continue to increase.

[31] The Claimant will at trial present evidence of her up to date medical expenses to which she is entitled by way of special damages.

[32] The Claimant will at trial maintain that having terminated her services that the Bank owes her damages, including special damages for its negligence as well as all pension and other benefits in accordance with the terms of her employment.

[33] By pre-action protocol letter dated April 21, 2016 (Copy attached marked "D") and delivered to the Defendant the Claimant called upon the Defendant to:

a) Make a formal admission of liability for the Claimant's injury, condition and disability;
b) Make an offer of compensation to the Claimant that would cover the salary, benefits and profit sharing that she would have earned at the Bank until retirement;
c) Meet all the Claimant's present medical bills and those forthcoming;
d) Make an offer of substantial compensation to the Claimant for her pain, suffering and loss of amenities brought on by the injury that she has suffered at the hands of the Bank.

[34] To date the Bank has failed/refused to respond to the Claimant's above requests in a positive manner though the Bank has requested more time to respond to the Claimant's pre-action protocol letter.

[35] The Claimant, being gravely prejudiced and suffering grave distress as a result of her injury and subsequent treatment at the hands of the Bank is unable, and it is unfair to expect her to give the Bank any more time to respond to her claim.

The Defence

[36] The Bank has admitted that there was a foul chemical odour at the Valpark Branch on the 15, 16 and 23 September 2016.

[37] The Bank contends that the complaint from employees was made on 23 September 2016. The employees led by their respective Union Branch

Representatives insisted that they wanted certain assurances before resuming duties that the air quality at the said Branch was safe for them to continue work.

[38] The Bank does not admit that the air quality was contaminated and says that the employees at their Valsayn Branch requested an air quality test be conducted to determine whether the air was contaminated and safe for them to resume their duties. That the Defendant instructed Kaizen Environmental Services to conduct an air quality test and that they did so on 23 September 2015 and again on 25 September 2015. That the results of the test on 25 September 2015 which was intended to test for acceptable levels of Oxygen, Carbon Monoxide, Lower Explosive Limit, Hydrogen Sulphide, Volatile Organic Compounds, Sulphur Dioxide in the air quality at the Valsayn Branch, all demonstrated that the levels of the aforesaid elements were acceptable and that the air quality was not permanently contaminated.

[39] The Bank denies that the letter of 19 October 2015, from the Valpark Branch Manager, can be construed as an acceptance of liability or an acceptance of culpability for any alleged negligence.

[40] The Bank relies on the medical report of Dr. Coombs dated 15 December 2015, which indicates that the Claimant is suffering from depression that is not work-related but personal.

[41] The Bank contends that Professor Seemungal could not in his report provide a correlation between the Claimant's neurobehavioral symptoms and the alleged inhalation.

[42] The Bank denies the particulars of the Negligence of the Bank as stated by the Claimant and avers that pursuant to their investigations on 23 September 2015, a container (not left by them) containing diesel was found in the vicinity of the air condition vents at the exterior of the building and that it appeared some of the said

diesel spilled in the said area and was responsible for the chemical odour, which permeated the Branch office. The Bank avers that they were not responsible for the container and/or its placement and that they at all times did all that was reasonably practicable to provide a safe place of work for the Claimant and her fellow employees.

[43] The Bank states the following Particulars:

PARTICULARS

a. that the Defendant has staffed and equipped a Premises Department which is responsible for inter alia inspecting the Defendant's premises to identify and remedy any dangers to the Claimant and the Defendant's employees which included the staircase;
b. that the employees of the Premises Department regularly inspected the Defendant's premises and remained at all relevant times fully equipped to address and remedy any dangers;
c. that the Defendant on 20th May 2015, executed a lease arrangement with Second Plaza Limited (hereinafter referred to as "the Landlord") for the Defendant's rental and use of the area utilised as its Valsayn Branch. That pursuant to the agreement the Landlord was responsible for the maintenance of the Common Areas and Facilities which included the air condition ducts and that any container which may have caused the chemical odour to permeate the building was the responsibility of the Landlord. Further, the Defendant avers that the Landlord is culpable for any negligence, which the Claimant may prove.
d. that the Defendant commissioned air quality tests which over the period of the alleged incidents demonstrated that the air quality at the Valsayn Branch was not contaminated and that any cause of the odour permeating the Branch that the Claimant may prove was caused by an isolated incident over which the Defendant could not reasonably be expected to foresee and or prevent and/or guard against.

[44] The Bank contends that it never admitted to the Claimant that they were culpable for her alleged inhalation, that the Claimant refused to sign the necessary documents to allow the Defendant to obtain copies of her medical reports, that pursuant to the report of Dr. Coombs which was commissioned by the Defendant to attain the Claimant's fitness to work, the report as averred above indicates that the Claimant's inability to work is not as a result of the alleged incident but is personal and unrelated and therefore the Claimant remains an employee of the Defendant on sick leave until she is able to return to active duty.

[45] The Bank denies that it terminated the employment of the Claimant and avers that her salary was not paid because pursuant to the **Workmen's Compensation Act, Chap. 88:05**, the payment of the Claimant's salary would continue if the reason for her absence was as a result of a work related injury which as averred is not part of the present circumstances.

[46] The Bank says that the Claimant was informed that since her medical condition was personal and not work related that the Defendant would no longer be responsible for her medical expenses and that she could access the Group Health Plan for continued care.

[47] The Bank admits the Pre-Action Protocol letter of the Claimant but denies that it has not responded in a positive manner and admits that they requested more time to respond and says further that the Claimant, in breach of the practice direction on Pre-action Protocols has unreasonably refused to allow the Defendant an opportunity to respond and/or explore the possibilities of an amicable resolution but instead chose to refuse to grant an extension of time and offered conditions for the Claimant's reinstatement if an extension of time was to be granted.

[48] The Bank denies that the Claimant is entitled to the alleged and/or any reliefs claimed.

The Bank's Ancillary Claim

[49] In the event the Claimant is successful, the Bank claims against the Ancillary Defendant the following relief:

a) An indemnity against the Claimant's claim and costs of this action;

b) Costs incurred by the Defendant/Ancillary Claimant in defending this claim;

c) Costs incurred by the Defendant/Ancillary Claimant in this Ancillary Claim;

d) Alternatively, an order that the Ancillary Defendant shall contribute as determined by the Honourable Court to any judgment obtained by the Claimant inclusive of interest and costs of the substantive claim against the Ancillary Claimant/Defendant;

e) Such further and/or other relief as the Honourable Court may deem just.

[50] The Bank bases it claim against the Ancillary Defendant on the Lease Agreement between the parties dated 20 May 2015, particularly Clause 4(2) and Clause 1.

> ***"Clause 4(2) - Landlord Covenants***
>
> *"with all due diligence to keep cleansed and in good and substantial repair and condition the foundation, the roof the main wall, main structural members and the supporting columns of the Demised Premises and the Office/Shopping Complex and also the Common Facilities roofs internal and external structure and the pipes wires water gas drainage and electricity services in the Common Facilities... "***"**

> ***"Clause 1- Common Facilities***
>
> *"all the vehicular ways entrances, exits thereto and all buildings and facilities in or near the Office/Shopping Complex including but not limited to... Office/ Shopping Complex management offices parking areas toilets, sewers, drains pipes, wires, ducts and conduits, air conditioning systems and installations and the other facilities and improvements…"***"**

[51] The Bank contends that any contamination of the air quality which the Claimant may successfully prove is as a result of the breach of the expressed and/or implied terms of the Lease Agreement by the Ancillary Defendant.

PARTICULARS OF NEGLIGENCE OF THE ANCILLARY DEFENDANT

a. The Ancillary Defendant pursuant to Clause 4(2) of the Lease Agreement failed to keep cleansed and in good and substantial repair the Common Facilities, namely the air conditioning ducts, situate at the subject premises in that the Ancillary Defendant and/or their servants and/or agents left a container containing diesel within close proximity to the said air conditioning ducts servicing the Premises and that the container fell over and spilled the diesel within close proximity to the said air conditioning ducts. The smell which permeated the premises on 15th 16th and 21st to 23rd September 2015 was therefore caused by the spilled diesel which the Ancillary Defendant their servants and/or agents negligently caused and failed to notice and/or clean up the said diesel before same could permeate and contaminate the air quality on the premises.

[52] Therefore, if the Ancillary Claimant should be held liable for the negligence/breach of duty of care of the Ancillary Defendant, which the negligence/breach of duty of skill and care was not that of the Ancillary Claimant, and the negligence/breach of duty of skill and care it specifically denies, the Ancillary Claimant is entitled to recover from, or be indemnified by, the Ancillary Defendant for all sums adjudged against it in favour of Claimant and resulting from the negligence of the Ancillary Defendant pursuant to its breach of clause 4(2) of the said Lease Agreement.

[53] The Bank pleads the following:

PARTICULARS OF LOSS AND DAMAGE

a. The costs incurred by the Ancillary Claimant in retaining and instructing Attorneys-at-law to defend the Claimant's claim;

b. Any damages payable to the Claimant by the Ancillary Claimant by virtue of the Ancillary Defendant's breach of contract; and

c. Any costs and interest adjudged payable to the Claimant by the Ancillary Claimant.

[54] The Ancillary Claimant avers that the Ancillary Defendant is responsible for any negligence which the Claimant may prove and must indemnify the Ancillary Claimant against the Claimant's claim for damages, interest and costs.

[55] Alternatively, the Ancillary Claimant avers that any negligence the Claimant may prove was caused by them was contributed to by the Ancillary Defendant and that the Ancillary Defendant must share with them any damages, interest and costs which the Claimant would be entitled to receive.

[56] The Ancillary Defendant has been in default having not entered an Appearance nor filed and served a Defence to the Ancillary Claim. The Ancillary Defendant has not sought to defend the Ancillary Claim in any way although duly served with the proceedings against it.

III. Issues

[56] The following issues arise for determination by the Court:

Issue 1- Did the Bank breach its duty of care to provide a safe place of work for the Claimant?

Issue 2- If the Bank is liable, what is the quantum of damages owed to the Claimant by the Bank?

IV. Witnesses

[57] The Claimant's witnesses included herself, Sharaze Akaloo (her husband), Professor Terence Seemungal and Professor Gerald Hutchinson. The Bank's witnesses included Suzanne Allen, Karen Ann Sturge-Crichlow and Kevin Grant.

V. Law and Analysis

[58] The law of negligence is by now well-established. To prove negligence, a claimant must satisfy the Court that (i) the defendant owed a duty of care to the claimant; (ii) the defendant has breached that duty of care; and (iii) the defendant's breach of his/her duty of care has caused or resulted in damage or loss to the claimant.

[59] Regarding the duty of care, it is also well-established that an employer owes each of his employees a duty to take reasonable care for his safety. As explained in **Daron Andrew Williams v. R.B.P Lifts Limited and anor[1] at para. 73**:

> ***"At common law an employer owes to each of his employees a duty to take reasonable care for his safety in all the circumstances of the case. The duty is often expressed as a duty to provide safe plant and premises, a safe system of work, safe and suitable equipment, and safe fellow-employees; but the duty is nonetheless one overall duty. The duty is a personal duty and is non-delegable.*** *All the circumstances relevant to the particular employee must be taken into consideration, including any particular susceptibilities he may have. Subject to the requirement of reasonableness, the duty extends to employees working away from the employer's premises, which may include employees working abroad:* ***Halsbury's Laws of England, Volume 52 (2014), paragraph 376."*** [Emphasis added]

[1] CV2014-01088

[60] In respect of any damage claimed by a claimant, it has also been emphasised in case law that to sustain an action for negligence it must be shown that the negligence is the proximate cause of the damage: **Rickards v John Inglis Lothian (1913) A.C. 263.**

[61] The authors of **Munkman on Employer's Liability**[2] described the duty of the employee where there is an allegation that the employer has breached this duty as:

> *"The principles of causation may be summarized that, where a claimant can establish that the injury or damage was foreseeable, it is still necessary for the claimant, on whom the burden of proof lies, to establish that the wrongful act of the defendant was the cause of it, or at least materially contributed to it. The correct test is a matter of law and varies depending on the circumstances of the case."*

[62] At paragraph 3:04 the author continued:

> *"Even where the claimant can establish that the injury or damage he sustained was within the bounds of foreseeability, it is still necessary for him to establish that the wrongful act of the defendant was the sole or substantial cause of it, or at least that the wrong materially contributed to it. Indeed in many actions for personal injuries... the starting point in any causation is the "but for" test; that is, it must be shown that had the defendant not committed the breach of duty concerned, the injury would not have happened."*

[63] **Munkman on Employer's Liability**[3] sets out that the employer does not undertake that there will be no risk, merely that such risks as there are will be reduced so far as reasonable. To the extent that this leaves an employee at risk, he will accept the inherent risks that cannot be avoided by the exercise of such reasonable care and skill on the part of his employers.

[2] 15th edition, para 3.03
[3] 16th Edition at paragraph 4.62

[64] The employer's statutory duty is set out at **section 6(1) and (2) of the Occupational Safety and Health Act**[4] , which states, inter alia that -

i. It shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees; and

ii. That that duty extends to the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health.

Issue 1- Did the Bank breach its duty of care to provide a safe place of work for the Claimant?

[65] The evidence of the Bank's witness, Karen Ann Sturge-Crichlow, Manager of the Valpark Branch at the time, is that on the 14 September 2015, she was on duty at the Branch and around 10a.m smelled an offensive odour emanating throughout the Branch.[5]

[66] She stated that despite the steps she took, namely (i) in contacting the necessary personnel, in particular Mr. Kevin Grant of the Premises Department; (ii) advising staff to move to the top floor while the ground floor was sprayed with Lysol; (iii) telling all staff members to go outside the Branch; (iv) instructing that the doors to the branch remained open for 20 minutes to facilitate removal of some of the odour; and (v) calling the Ancillary Defendant's office to enquire whether work regarding spraying of the mall area was ongoing, the smell continued.[6]

[4] Chapter 88:08
[5] Paragraph 5 of her Witness Statement
[6] Paragraphs 6 and 7 of her Witness Statement

[67] According to her, despite Mr. Kevin Grant arriving before mid-day and placing Bad Air Sponges in the vents, more staff members complained about the odour and the Claimant[7] was sent home complaining of severe nausea.[8]

[68] She called the mall office again and advised that they should send someone to check the roof ventilation system, but this never materialised.[9]

[69] On the 15 September 2015, she states that the odour was not as bad, however, staff on the top floor complained and the air condition units on the top floor stopped functioning properly, at which time she instructed all staff of the top floor to be relocated to the ground floor. Five staff members, not including the Claimant, were sent to the Valpark Medical Centre and received four days sick leave.[10]

[70] She proceeded on vacation on the 17 September 2015.

[71] On 18 September 2015, Suzanne Allen, assumed acting duties at the Branch in place of Ms Sturge-Crichlow, but was not informed of the issue by Ms. Sturge-Crichlow.

[72] On 23 September 2015, she was advised of the issue at the Branch and visited same. She did not smell a strong odour, however, the employees were in the Food Court of the mall with their Union Representative.

[73] She went to the Food Court to speak to the employees. The Union Representative delivered a letter to her indicating that due to the issues one-week prior they would not go to work and wanted assurances of the air quality. The Claimant had already left the compound.[11]

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[7] The Claimant's evidence, the Bank's Defence and the referral to Dr. Coombs all state the odour was on the 15 September 2015
[8] Paragraph 8 of her Witness Statement
[9] Paragraph 9 of her Witness Statement
[10] Paragraph 11 of her Witness Statement
[11] Paragraph 6 and 7 of her Witness Statement

[74] Frank Griffith arrived and did an inspection of the building. Based on his inspection, she formed the opinion that a container with some liquid was found on top of the Branch's building and that some had spilled near the air condition vents.[12]

[75] Kaizen Environmental Services (Trinidad) Limited conducted air quality tests on 23 and 25 September 2015. Staff returned to work on 25 September 2015.[13]

[76] The evidence of Mr. Kevin Grant is that he was contacted by Karen Ann Sturge-Crichlow on 14 September 2015, at approximately 10:30a.m notifying him of the offensive odour. He went to the Branch before mid-day to investigate.[14]

[77] Upon his arrival, he smelled a chemical scent and other times he smelled a burnt scent. He placed Bad Air Sponges in the vent. He inspected the building and determined that the scent was not based on anything within the building.[15]

[78] He also called Peake's to check out the air-conditioning units. They arrived after mid-day and he left shortly thereafter.[16]

[79] There is no dispute that the Claimant fell ill on 15 September 2015, following the offensive odour at the Branch. The Bank argued that there was no complaint by staff of a foul odour on 21 and 22 September 2015, but does not deny that there were complaints by staff members of a foul odour on the 15 and 23 September 2015. Even the Bank's witnesses admitted to the offensive odour.

[80] From the evidence of Ms. Sturge-Crichlow and Mr. Grant, it is clear that the inspection done by Mr. Grant on 14 September 2015, did not find that the source of the offensive odour was a container with some liquid, which was found on top of

[12] Paragraph 8 of her Witness Statement
[13] Paragraphs 10 and 11 of her Witness Statement
[14] Paragraph 7 of his Witness Statement
[15] Paragraph 8 of his Witness Statement
[16] Paragraph 9 of his Witness Statement

the Branch's building and that some had spilled near the air condition vents. It was only upon another investigation being conducted by Mr. Frank Griffith on 23 September 2015 that the source was discovered.

[81] Mr. Kevin Grant admits in his Witness Statement that his inspection comprised of the electrical room, communications room, kitchen and AC units, from which he could not find anything causing the scent.[17]

[82] Further, Ms. Sturge-Crichlow admits in her witness statement that the mall office did not check the roof ventilation system when she notified them of the issue on 14 September 2015. She stated that the odour still lingered.

[83] Ms. Sturge-Crichlow stated at paragraph 4 of her Witness Statement that her duties included the health and safety of the employees and the management of the premises.

[84] In cross-examination, Ms. Sturge-Crichlow testified that the Bank had a duty to ensure that its employees had a safe environment in which to work; that at all times the Bank had a duty to ensure to the best of its ability that the air in the bank was safe for employees to breathe; and that at all times, the Bank appreciated that it was dangerous for its employees to inhale polluted air.

[85] Ms. Sturge-Crichlow also admitted in cross-examination that despite her being in charge of health and safety at the Branch, she did not undergo any training in health and safety.

[86] Based on the evidence of the Bank's witnesses, I find that the Bank breached its duty to provide a safe place of work for the Claimant.

[17] Paragraph 8

[87] Firstly, Ms. Sturge-Crichlow as the person in charge of the health and safety of the employees at the Branch, admitted that she received no training in health and safety. It is wholly reasonable that if a member of staff were tasked with ensuring the health and safety of employees, that member of staff should be properly trained in what constitutes a healthy environment and what does not. It is further incumbent on the Bank to train its health and safety personnel in what is required in the event of a breach of health and safety. It is evident from Ms. Sturge-Crichlow's evidence that she was not equipped with such training.

[88] Further, it would appear from Mr. Grant's Witness Statement that he too was not in a position to ascertain whether there was a breach of health and safety. Mr. Grant stated in his Witness Statement that he is a Senior Engineering Technician and his duties include project managing, renovation and maintenance works for the Bank's properties.[18]

[89] In cross-examination, Mr. Grant testified that he did not give any evidence of any expertise in air quality and testing.

[90] From Mr. Grant's evidence, he did not conduct an inspection on the top of the Branch's building but conducted an investigation only inside the building. He led no evidence that he was prevented by mall management from going on top the Branch's building to conduct a thorough investigation. It is therefore highly plausible that he failed to conduct a thorough investigation to determine the source of the odour.

[91] Had a more thorough investigation by Mr. Grant been conducted on the 14 September 2015, particularly the top of the Branch's building, it is more reasonable that the source of the offensive odour would have been discovered earlier than the 23 September 2015. This of course is dependent on Mr. Grant's training and expertise.

[18] Paragraphs 3 and 4 of his Witness Statement

[92] In any event, Mr. Grant was the representative of the Bank tasked with maintenance on that day. Therefore, whether he would have been in a position to identify the source on the 14 September 2015 or not, the responsibility still fell on the Bank to ensure proper procedures and training were received by all persons with responsibility for health and safety.

[93] Ms. Sturge-Crichlow as the person in charge of the health and safety of staff at the Branch, did not provide any evidence to show that she followed up with the mall's management or made any further attempts to have the mall conduct its own investigation, as the Landlord of the Bank.

[94] Taken together, Ms. Sturge-Crichlow's failure to follow up with mall management, Mr. Grant's failure to conduct a more thorough investigation, and the Bank's failure to train staff in handling possible breaches of health and safety, the Bank failed in its duty to ensure the health and safety of the Claimant and by extension, to provide a safe place of work. There is a direct causal link between the failures of the Bank and its representatives and the injuries sustained by the Claimant.

Issue 2- If the Defendant is liable, what is the quantum of damages owed to the Claimant by the Bank?

Special damages

[95] As established in **Grant v Motilal Moonan Ltd**[19], it is trite law that special damages must be specifically pleaded and proved.[20]

[96] It is clear from the learning that whilst special damages ought to be specifically pleaded and proved, there should be no rigidity in the application of this formula, and the 'strictness' to be applied in any given case should be tempered by or

[19] **(1988) 43 WIR 372 per Bernard CJ**
[20] Re-affirmed in **Rampersad v Willies Ice Cream Ltd Civ App 20 of 2002**

'tailored to the peculiar facts and circumstances' before the court. In this regard, the words of Archie J (as he then was) on this issue is relevant:

> *"It is well accepted that special damages must be specifically pleaded and proven. However with regard to the degree of strictness required, the law appears less certain. The authorities show that the degree of strictness depends on what is reasonable in the circumstances. Terms such as "having regard to the circumstances", "nature of the acts themselves", "tailored to the facts", "nature of the item" and "reasonable to require" have been used to express the fact that a rigid formula does not and ought not to exist in this aspect of the law."*[21]

[97] The Claimant attached to her Witness Statement medical bills amounting to **$29,190.00**. There has been no serious challenge to these expenses and the Court is satisfied they have been proved.

[98] The Claimant is therefore entitled to the said amount in special damages.

General Damages

[99] The relevant principles for assessing general damages in a personal injuries claim were laid down by Wooding CJ in **Cornilliac v. St. Louis**.[22] They are as follows:

i. the nature and extent of the injuries sustained;
ii. the nature and gravity of the resulting physical disability;
iii. the pain and suffering which had to be endured;
iv. the loss of amenities suffered; and
v. the extent to which, consequentially, pecuniary prospects have been materially affected.

The nature and extent of injuries

[21] Anand Rampersad v Willies Ice Cream Ltd CA 20 of 2002
[22] (1966) 7 WIR 491

[100] The Claimant was born on 26 August 1976. At the time of the incident she was 39 years of age. The Claimant saw numerous doctors following the incident at the Bank, and has been under the continuous care of Professor Seemungal and Professor Hutchinson for her injury and called both as medical witnesses on her behalf.

[101] In his very detailed Report dated 28 March 2016, Professor Seemungal concluded that the Claimant had sudden onset respiratory, skin and neurobehavioral symptoms during September 2015 while at her workplace. He stated that on a balance, these symptoms were due to inhalational exposure of cleaning fluid and diesel fumes at her workplace, and there were neurobehavioral complications due to this acute event. He assessed her respiratory disability at 15% temporary and stated that her neurobehavioural disability is severe and recovery is slow but believes it to be temporary.

[102] On his assessment of the Claimant, he reported that she had respiratory symptoms suggestive of anaphylaxis; headaches on the right temporal region; right neck pain; feeling of heaviness/puffiness/paraesthesiae in the right side of the face extending to the upper right limb. She has had mild confusion in conducting tasks; episodes of sadness; paraesthesiae in the feet; and her sleep had been affected.

[103] In cross-examination, Professor Seemungal explained that although he spoke of diesel combustion in his Report, this was because he was uncertain whether there was diesel or combustion or both. However, when asked if no actual combustion would exclude the opinions he expressed, he testified that in diesel, there are many other chemicals and some of which are aliphatic hydrocarbons, and therefore, once inhaled, they may also have effects on the body, so that they could create similar anaphylactic reactions.

[104] He admitted that at the time he saw the Claimant, her anaphylactic reaction had resolved but she was still having headaches.

[105] Professor Hutchinson prepared two Reports dated 7 March 2016 and 8 June 2017.

[106] In his Report dated 7 March 2016, he reported that the Claimant continued to have marked depressive and anxiety symptoms, which began to resolve within the last month. He noted that she developed symptoms suggestive of mild cognitive impairment, with deficits in short term or working memory and with visual memory. One of the consequences was that driving became difficult.

[107] He stated in said Report that these symptoms might be a central nervous system consequence of the toxic exposure or the attendant cognitive response to elements of her depressive and anxiety condition. He estimated that the Claimant was functioning at the 80-85% level and could not predict a time frame that would guarantee a return to normal functioning. On the Sheehan Disability Scale, he estimated that her functioning was at the 50% level, which represents moderate impairment. He recommended that she continue follow-up psychotherapeutic treatment for three months.

The nature and gravity of the resulting disability

[108] In his Report dated 8 June 2017, Professor Hutchinson stated that over the past six months the Claimant improved somewhat but continued to have difficulties with day to day functioning but is generally able to complete household tasks.

[109] He noted that there were periods of depression. He stated that the symptoms of Post Traumatic Stress Disorder were receding and he expected with ongoing therapeutic work the Claimant would be able to resume a generally normal lifestyle though she may never cope well with work related stress if placed in that environment.

[110] He testified that by the date of his second Report in 2017, he did not mention anxiety symptoms as he was satisfied that they had more or less dissipated, so that the only issue then were periods of depression.

[111] Professor Hutchinson testified that over the time he has been treating the Claimant, Post Traumatic Stress Disorder became a better descriptor than either anxiety or depression, and he expects that with time and ongoing therapeutic work she will be able to resume a generally normal lifestyle.

The loss of amenities suffered

[112] The Claimant stated in her witness statement that since the incident her family and social life has been affected. She is now overcome by depression, sadness, anxiety and mental confusion. She is sensitive to smells. She also suffers from short-term memory; moves about at a slower pace; experienced marital issues; and is unable to enjoy quality time with her children.

The extent to which, consequentially, pecuniary prospects have been materially affected

[113] In cross-examination, Professor Hutchinson testified that when he stated in his Report dated 7 March 2016, that "*"The above clinical picture would certainly compromise her capacity to work in a banking environment and with the added fears of additional exposures to chemicals…"*what he meant was that the banking environment was not suitable for her to continue working in as she associates the banking environment with exposure. He testified that that did not mean that she was unemployable.

[114] When asked if the Claimant's complaints about her experiences at her workplace and her saying that she cannot work in a financial environment in the future was due to the way she was treated after this particular incident and not necessarily in relation to the incident itself, Professor Hutchinson testified that he would have to say yes.

[115] He also testified that since his second Report, he would say that the Claimant is now functioning at 90-95%.

[116] He testified that the Claimant's issue in relation to the banking environment revolves around exposure and the perception of treatment.

[117] He testified that he is optimistic with therapeutic support, the Claimant can regain 100% functioning, however it is impossible to predict what other occurrences might take place in her life, while this in ongoing that could cause her to regress.

[118] Professor Hutchinson confirmed in cross-examination that the Claimant is employable.

[119] In re-examination, Professor Hutchinson stated that because of her experiences and her perception of those experiences, her capacity to respond to work-related stress would be compromised or more easily compromised say, than someone who has not had her previous experience. He stated that he was referring to the banking environment specifically, but that in any work environment, she would be more sensitive to stress than the average person.

[120] The Claimant submitted that as a result of her condition, it is likely that her employment at the Bank would have to be terminated.

[121] There was no evidence or indication from the Bank that the Claimant would have to be terminated. And there was certainly no evidence that she was terminated.

[122] Regarding this head of injury, I find that the Claimant has not shown sufficient evidential basis of her inability to work. The evidence of the Claimant's medical expert, Professor Hutchinson, is that she is employable. In fact, during cross examination, Professor Hutchinson testified that although he did not attempt to ascertain from the Bank whether or not there was some alternative sort of employment that she could have been engaged in at the Bank, the Claimant

indicated, given her experience and training at the Bank, what alternatives were possible. This was not challenged in re-examination of Professor Hutchinson.

[123] It was and remains incumbent upon the parties to discuss what alternative employment she may perform at the Bank.

Claim for Profit Sharing

[124] The Claimant submitted that her evidence, unchallenged by cross-examination is that until the age of retirement at 65, she would have been entitled to profit sharing benefits and that her average profit sharing is **$30,000.00** per year.

[125] The Defendant in response submitted that the issue of profit sharing did not form part of the Claimant's pleaded case. However, in addressing the issue, the Defendant submitted that based on a lack of evidence the Court should conclude that the Claimant has failed to prove her case.

[126] In cross-examination the Claimant was questioned on the issue of profit sharing. She testified that when she received profit sharing benefits, she would be notified by the Bank as to what those benefits were, consistent with the profit sharing agreement. She admitted that she has not attached to her witness statement any evidence of her previous correspondence in relation to profit sharing, so that there is no way of assessing what her entitlement may be.

[127] I agree with the submission of the Defendant on this issue. The Claimant has not provided any evidence to the Court from which a determination of her entitlement to profit sharing can be assessed. In fact, no evidence of how she arrived at the average figure of **$30,000.00** has been provided, or that this was the sum she was paid previously during her employ at the Bank. In cross-examination she even admitted that profits vary. Some form of documentary evidence to prove her entitlement is necessary but this was not forthcoming. The Claimant has therefore failed to prove any entitlement to any specific sum for profit sharing.

[128] In light of the above, I find that the Claimant is not entitled to any loss of pecuniary earnings nor any prospective earnings.

Claimant's submissions

[129] The Claimant in submissions referred the Court to the following cases on general damages:

[130] In **De Gannes v. Seecharan**[23] the plaintiff experienced severe pain when he was struck on the head, and he suffered personality change. He was unable to continue his job because of his inability to concentrate. He lost his ability to engage in sexual intercourse, experienced headaches and lost his ability to play cricket. His permanent partial disability was assessed at 25%. He was awarded **$15,000.00 in 1971**. In Volume 7 No. 6 of The Lawyer, the figure awarded is updated to 2007 as being **$356,076.00**.

[131] In **Sieunarine v. Doc's Engineering**[24] the plaintiff sustained head injuries while in the course of his employment with a construction company when he was struck in the head by falling rubble from a wall that was being demolished. He suffered a compound fracture of the left temporal bone and hematoma, had an emergency craniectomy, and in the aftermath of his treatment, suffered right sided weakness, seizures, headaches, personality change, noise intolerance, blurred vision, slurred speech and poor memory. He was awarded the sum of **$200,000.00 in 2005** for pain, suffering and loss of amenities. In Volume 7 No. 6 of The Lawyer, the figure is updated to 2007 as being **$231,513.00**.

[132] The Claimant submitted that unlike the above cases, the Claimant suffered no physical injuries but nevertheless sustained serious injury and a fair compensation would be **$200,000.00**.

[23] HCA No. SF 185 of 1970
[24] H.C.A. No. 2387 of 2000

Defendant's submissions

[133] The Defendant referred the Court to the following cases:

[134] **Matthew Tambie v Joseph Coraspe & Motor One Insurance Company Limited**[25] a decision of the Honourable Madam Justice Donaldson-Honeywell delivered on 23 May 2018. In that case, the Claimant was diagnosed with Post Traumatic Stress Disorder and cerebral irritability secondary to the head injury and was recommended to a neuro-psychologist after he was involved in a collision that threw him from his bicycle and into a drain face down and was dragged as the Defendant's vehicle continued. He claimed constant pains in his neck and headaches and a no longer positive interaction with his family and other persons. He lost interest in socializing and cycling as a result of the incident. After assessing the authorities, the Honourable Judge awarded the Claimant general damages in the sum of **$52,964.00**.

[135] **Reynold Kalloo & Tyrone Stevenson v Tidewater Marine West Indies Limited**[26] a decision of Madam Master Martha Alexander delivered on 17 September 2013. The First Claimant was diagnosed with chronic PTSD but also suffered hearing loss, issues with his eyes and an inability to walk upright as a result of an explosion that occurred in 1996. After assessing the authorities that were largely based on injuries sustained to the ear the learned Master awarded the First Claimant General Damages in the sum of **$130,000.00**.

[136] **Roger Gaffor v The Port Authority**[27] a decision of Master Paray-Durity in October 2010. In that case, the Claimant who was employed as a stevedore by the Defendant received an injury to his left leg in the course of his employment. He was diagnosed as suffering from chronic post-traumatic stress disorder as he was fearful of construction work, construction sites and was uneasy around loud noises. The injury to the Claimant's left leg was described as a deep eight

[25] CV 2015-02989
[26] CV2009-00488
[27] HCA S 339 of 2003

centimetre laceration of the medial aspect of the lower left leg involving the gastrocnemius and soleus muscles on their medial aspects. The Claimant spent three days in the Hospital; he experienced pain and numbness and walked with the aid of crutches for four (4) months and a stick for two (2) months. After assessing authorities with similar injuries, Master Paray-Durity awarded the Claimant general damages of **$95,000.00** inclusive of the physical and psychological injuries suffered by him.

[137] **Dianne Quamina v Anthony Cherry and Jackie Cherry**[28], a decision of the Honourable Justice Vasheist Kokaram delivered on 21 July 2006. In that case the Claimant was attacked by a number of dogs owned by the Defendants. She received several wounds "punctured lesions" about the body requiring several stitches. As a result, of the attack the Claimant was bed ridden for three weeks. She was diagnosed with posttraumatic stress disorder since she trembles at the sight of large dogs. She was also fearful of the sight of roaming dogs and was depressed and anxious. Justice Kokaram in his judgment stated that the medical reports were deficient since they did not indicate the length of time that the Claimant was observed by the doctors. Even further Justice Kokaram formed the opinion based on the evidence that the PTSD diagnosis of the Claimant was not permanent and was treatable. After assessing the nature of the attack, the resulting injuries, the impact the attack had on her personality, her anxieties at the sight of large roaming dogs and the level of embarrassment felt by the Claimant, Justice Kokaram awarded the Claimant general damages in the sum of **$48,000.00**.

[138] **Mark Rattan v Carlisle Tire and Rubber (Free Zone) Limited**[29], a decision of Master Sobion delivered on 3 June 2003. In that case, the Claimant was injured during the course of his employment, which led to him losing the distal two digits of all the fingers on his left hand. He was treated for and diagnosed by Dr. Ramthahal with post traumatic stress disorder after treating him from November

[28] HCS 556 of 1995
[29] HCA No 1029 of 2000

11 1999 to January 2001 with pharmaco-therapy and psycho-therapy. The Claimant's permanent partial psychological disability was assessed at 40%. After assessing all of the relevant factors Master Sobion awarded the Claimant general damages in the sum of **$90,000.00**.

[139] **Sunil Maharaj v Property Protectors and Anderson Persad**[30], a judgment of Mr. Justice Mendonça (as he then was) delivered on 6 March 2001. In that case the Plaintiff was attacked on three occasions by the Second Defendant a security guard employed with the First Defendant at the Valpark Shopping Plaza. The brunt of the Plaintiff's complaints related more to his mental injuries as opposed to physical injuries. The Plaintiff was treated for a manic depressive illness and was diagnosed with post traumatic stress disorder. Mr. Justice Mendonça (as he then was) accepted the medical evidence of the practitioners called on behalf of the Plaintiff that two of the attacks caused him to suffer a manic depressive illness and post-traumatic stress disorder and after assessing the relevant factors for an award of general damages awarded the Plaintiff the sum of **$65,000.00.**

[140] The Bank submits that fair compensation would be in the range of **$40,000.00 to $65,000.00.**

[141] The authorities referred to by the Claimant are both too old and exorbitantly excessive.

[142] The assessment of damages is not an exact science. No two sets of facts are exactly alike nor are the effects of the actions complained of the same for each victim.[31]

[143] Taking into account that the Claimant herself admitted that she suffered no physical injuries; the Reports of her medical experts; the length of time she has been under psychological care; her slowly improving psychological state; the

[30] HCA No 1919 of 1994
[31] Civil Appeal 172 of 2012 Darrell Wade v The Attorney General of Trinidad and Tobago

effects of the injury on her quality of life; and the authorities in this jurisdiction, I am of the opinion that a fair award for general damages for pain and suffering and loss of amenities would be **$90,000.00**.

Claim for interest

[144] The Claimant, in her Claim, Statement of Case and closing submissions has claimed interest on any sum awarded but has given no details of (i) the basis of entitlement; (ii) the rate; and (iii) the period for which it is claimed, as provided for by **Part 8.5(3) of the CPR 1998**. Nonetheless, having expressly claimed interest in the Claim, I am minded to allow interest on the sum to be awarded at the rate of **2.5% per annum** as recommended in the Court of Appeal decision in the case of **The Attorney General of Trinidad and Tobago v Fitzroy Brown et al, No. CA 251 of 2012.**[32] [See also the cases of **Larry Baila v AG, CV2015-00249; and Zalina Karim v Christopher Boodram v Motor One Ins. Co. Ltd CV2016- 00400].** It is usual for the Court to order the payment of interest on an award of special damages from the date of the accident to the date of judgment and on general damages from the date of service of the writ to the date of judgment.[33]

[145] The award of interest on special damages is therefore to be calculated from 15 September 2015 to the date of judgment, which is **$29,190.00 x 2.5% x 5.34794 = $3,902.66.** Interest on general damages is to be calculated from 7 June 2016 to the date of judgment being **$90,000.00 x 2.5% x 4.621915 = $10,399.31.**

Award of Costs

[146] The Claimant has been successful in her Claim against the Defendant. I can therefore find no justification for departing from the general rule relating to the entitlement to costs provided for by **Part 66.6(1) CPR 1998** which states that the Court must order the unsuccessful party to pay costs of the successful party.

[32] Decision of Archie C.J. delivered on 12 October 2015 (see page 18 lines 25 – 32 of the official transcript)
[33] Civ App No. 61 of 2009 **Amin Mohammed v Alvin Panalal & Ors** per Mendonça

[147] In order to quantify costs on the prescribed scale, the **"value"** of the claim must first be determined in accordance with **Part 67.5(2) CPR 1998**. In relation to the Claimant, the value of the claim will be the amount ordered to be paid by the Defendant as damages: **CPR 67.5(2)(a).** However, on the authority of the Privy Council Appeal in **Benoit Leriche v Francis Maurice [2008] UKPC 866** the **"amount ordered to be paid"** by the Court for the purposes of determining the **"value"** of the Claim, must **include** the amount ordered as **pre-judgment interest.** Effectively, therefore, the value of the claim would be **($29,190.00 + $3,902.66 = $33,092.66) + ($90,000.00 + $10,399.31 = $100,399.31) = $133,491.98.** Prescribed costs in accordance with the Scale of Prescribed Costs at **Appendix B of Part 67 CPR 1998** are quantified in the sum of **$29,023.80.**

VI. The Defendant/Ancillary Claimant's Notice of Application for Default Judgment against the Ancillary Defendant filed on 19 November 2018

[148] The Bank's Application was filed pursuant to **Part 18.12 CPR**, for failure by the Ancillary Defendant file and serve a Defence within 28 days after the date of service of the Ancillary Claim: **Part 18.9(2) CPR**.

[149] The grounds of the Application are that the Ancillary Claim was served personally on the Ancillary Defendant on 11 January 2017 as deposed to in the affidavit of Kristen Sooklal sworn and filed on 1st May 2017. However, no Appearance or Defence was filed and the time for filing and serving same has since expired.

[150] Pursuant to **Part 18.12(2)(a) CPR**, the Ancillary Defendant is "***deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim."***

[151] The Ancillary Claim is directly relevant to the matters, which arise in the main proceedings.

[152] By virtue of **Part 18.12(2)(a) CPR**, this Court is empowered to grant the Application of the Defendant/Ancillary Claimant.

[153] Accordingly, since judgment has been awarded against the Defendant/Ancillary Claimant on the substantive claim, the Ancillary Defendant is liable to satisfy the judgment by way of indemnity to the Defendant/Ancillary Claimant and costs.

VII. Disposition

[158] Given the reasoning, analyses and findings above, the Order of the Court is as follows:

ORDER ON THE SUBSTANTIVE CLAIM

1. **Judgment be and is hereby awarded to the Claimant against the Defendant on her Claim filed on 7 June 2016 in the terms stated hereunder.**

2. **The Claimant is awarded special damages in the sum of $29,190.00 with interest at the rate of 2.5% per annum from the date of the incident, i.e. 15 September 2015 to the date of judgment calculated in the sum of $3,902.66.**

3. **The Claimant is awarded general damages for pain and suffering and loss of amenities in the sum of $90,000.00 with interest at the rate of 2.5% per annum from the date of filing of the Claim, i.e. 7 June 2016 to the date of judgment calculated in the sum of $10,399.31.**

4. **The Defendant shall pay to the Claimant prescribed costs in the sum of $29,023.80 pursuant to Part 67.5 Civil Proceedings Rules 1998.**

ORDER ON THE ANCILLARY CLAIM

5. **There be judgment for the Defendant/Ancillary Claimant on its Ancillary Claim filed on 11 January 2017 against the Ancillary Defendant for failing**

to file and serve a Defence, the Ancillary Defendant having been deemed to admit the Ancillary Claim pursuant to Part 18.12(2)(a) CPR.

6. **The Ancillary Defendant do satisfy the judgment obtained by the Claimant against the Defendant/Ancillary Claimant in the main proceedings.**

7. **The Ancillary Defendant do pay to the Defendant/Ancillary Claimant the costs of the substantive claim, the ancillary claim and the cost of the Notice of Application filed on 19 November 2018.**

8. **The Ancillary Claimant's attorneys to file submissions on the basis upon which the costs mentioned in clause 8 of this order above are to be quantified on or before 15 February 2021.**

9. **Thereafter, the Court shall give its decision on the quantification of the Ancillary Defendant's recoverable costs without a hearing.**

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Robin N. Mohammed
Judge