REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2014-01088

BETWEEN

DARON ANDREW WILLIAMS

CLAIMANT

AND

R.B.P LIFTS LIMITED

FIRST DEFENDANT

NICHOLAS HOLDINGS LIMITED

SECOND DEFENDANT

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. L. Sanguinette instructed by Mr. F. Masaisai for the Claimant

Mr. A. Singh instructed by Mr. R. Mungroo for the First Defendant

Mr. F. Hosein for the Second Defendant

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Judgment

Background

1. By amended claim form filed on the 12th November, 2014, the thirty-three year old Claimant, an elevator service technician employed with the First Defendant claims damages for personal injuries as a result of negligence of the First and Second Defendants.

   It is his case that the Second Defendant contracted the First Defendant to maintain and service the elevators at the Second Defendant's building called Nicholas Court, formerly Customs House ("Nicholas Court") located on the corner of Independence Square and Abercromby Street, Port of Spain.

2. The Claimant along with one David Beharry being the two Service Technicians employed with First Defendant and assigned to maintain and service the said elevators attended Nicholas Court to carry out monthly maintenance works as well as to perform unscheduled servicing of the elevators in cases of emergences and/or breakdowns of the same. While ascending a ladder to the elevator machine room, the Claimant slipped and fell thereby injuring himself.

Disposition

3. The order of the court shall be as follows;

   a. Judgment for the Claimant against the First and Second Defendants for negligence reduced by a contribution of 20% on the part of the Claimant with liability on the claim being apportioned at 40% on the part of the First Defendant and 40% on the part of the Second Defendant.
   b. Judgment for the Second Defendant against the First Defendant on part only of the Ancillary Claim as follows;

i. The First Defendant shall indemnify the Second Defendant in respect of half of its liability to the Claimant under this order and shall therefore pay to the Second Defendant 50% of the damages assessed to be paid by the Second Defendant to the Claimant.

c. The First Defendant is to pay to the Claimant 40% of the prescribed costs of the Claim.

d. The Second Defendant is to pay to the Claimant 40% of the prescribed costs of the Claim.

e. The First Defendant is to pay to the Second Defendant 50% of the prescribed costs of the Ancillary Claim.

f. Damages are to be assessed and costs quantified by a Master on a date to be fixed by the Court Office.

TRIAL ON LIABILITY

4. The Claimant's medical witnesses were unavailable on the day of trial. In order therefore to avoid the wastage of the days allotted for trial, the Court conducted a trial on liability only.

5. The general legal issues for determining liability in this case are as follows:

i. Whether the First or Second Defendant owed a duty of care to the Claimant and if so what was the extent of that duty of care.

ii. Did either the First or Second Defendants breach a duty of care and whether damage resulted.

iii. If so, whether there was contributory negligence on the part of the Claimant.

iv. If there is a finding of negligence is the Second Defendant entitled to be indemnified by the First Defendant.

6. The First Defendant has pleaded that the Claimant was negligent and so it is not liable. The particulars of negligence alleged against the Claimant by the First Defendant is that

he failed to exercise any or any sufficient care in using the ladder that he has used many times before.

7. The First Defendant also pleaded negligence on the part of the Second Defendant, the particulars of which are as follows:

    i. If there was rust, which is not admitted, the Second Defendant failed or omitted to remove the rust from the ladder;
    ii. Failing and/or omitting to inspect the premises that were regularly used by the First Defendant, its servants and/or agents;
    iii. Failing and/or omitting to remove from the pathway of the workspace, the mop bucket and chair as alleged to be present by the Claimant.

8. There are several issues to be decided in relation to the respective Defences and the Ancillary Claim. The issues of fact to be decided prior to treating with the issues of law are also several. They are hereinafter set out and dealt with individually. The evidence in this case is somewhat voluminous but it was necessary to set out most of it as most of the evidence is highly relevant to all of the issues presented. It is to be noted that the court has considered all of the evidence although not all has been hereinafter set out.

Case for the Claimant

9. The Claimant gave evidence for himself on the issue of liability. It is the case of the Claimant that on the 26th July, 2012, between the hours of 11 a.m. to 12 noon, Mr. Beharry and he attended Nicholas court for an unscheduled, emergency service on one of the elevators. In order to carry out the maintenance works on the elevator, the Claimant and Mr. Beharry had to get access to machine room. To enter the machine room, they used a ladder which was located in what is called the access room. It is the evidence of the Claimant that the ladder was the only form of access available to enter the machine room as no alternative was provided by any of the Defendants. According to the Claimant, the ladder was not fitted with a handrail and did not afford any proper balance

when he was ascending it. He also testified that it was rusty as well as slippery. During cross-examination, he testified that the ladder was attached to the wall in the access room at an angle of approximately sixty degrees (steep), contained about thirteen rudders and was more than ten feet in length. The Claimant further testified that he was wearing his safety boots whilst ascending the ladder but he was not wearing gloves.

10. It is the evidence of the Claimant that he received safety equipment from the First Defendant. He received safety boots, safety gloves and a safety helmet. He did not receive a safety harness. According to his evidence, Mr. Beharry was given a safety harness but he was not given one. He could not recall being given slip resistant gloves.

11. The Claimant testified that the area where the ladder was located had no windows and very little lighting since the light in the area was not working. During cross-examination the Claimant testified that there was not an absence of light. That there was sufficient light for him to see the items which was stored in the access room, that is, the chair and the mop bucket. However, the Claimant testified that the light was not sufficient to see the surface of all the rudders/treaders of the ladder while ascending.

12. It is the evidence of the Claimant that Mr. Beharry ascended the ladder and went directly to the machine room. He stayed at the bottom of the stairs and sorted the tools to be carried up the ladder into the machine room. After sorting the tools, the Claimant placed the bag on his right shoulder and began ascending the ladder. The Claimant during cross-examination was shown a tool bag similar to the one he would have had on his right shoulder when he was ascending the ladder. The bag was described as one foot and a half by one foot and a half by twelve inches in size. The bag weighed between fifteen to twenty pounds. The Claimant testified that when he stated that he was *"sorting out the tools"* he meant that he shook the bag of tools and positioned same to hold snugly on his shoulder in order to get ready to ascend the ladder. In this tool bag there was a torch light.

13. Whilst ascending the ladder his hand slipped off a rusted cluttered rudder of the ladder and he fell backwards unto the ground. The Claimant testified that he fell from about four

to six feet off the ladder. His back collided with an industrial mop bucket and his head slammed into a steel office chair before he hit the concrete floor. He claimed that as a result he suffered severe personal injuries to his lower spine and cranium. It was the testimony of the Claimant that he cried out in pain and was unable to see anything. Mr. Beharry came down the ladder and assisted him. Mr. Beharry contacted Mr. Rene Blanc, the safety officer of the First Defendant. Mr. Beharry further contacted the ambulance but after an hour of waiting, he decided that Mr. Blanc's vehicle should be used to carry the Claimant to the hospital. The Claimant was taken to St. Clair Medical Hospital where he was treated and warded for three days.

14. During cross-examination, the Claimant testified that he has never received any official training from the First Defendant. That Mr. Blanc, the safety officer of the First Defendant would usually give the workers safety instructions via tool box meetings. When asked if prior to joining the First Defendant he undertook any health and safety training, the Claimant testified that he never did any safety training. He further testified that he could not recall participating in a certified course in health and safety called "Fall Prevention". When asked if he recalled stating in his resume that he did in fact receive training, the Claimant admitted that he undertook safety, environment and industrial training while working with his former employer, Illuminat in March, 2006. That the training he underwent at Illuminat may have been in fall prevention.

15. During cross-examination, he testified that he was following proper procedure whilst ascending the ladder. According to the Claimant, one uses their right foot with their left hand and their left foot with their right hand interchangeably when ascending a ladder. He further testified that when one's right hand grips the rudder, one's body would instinctively tell itself that one has a solid grip therefore causing one's left hand to slowly release its grip on the rudder. Thus, according to the Claimant when his right hand slipped on the rudder, his left hand would have been on the rudder but would have already been releasing its grip, therefore, with the weight of the tool bag and the slipping of his right hand he fell backwards.

16. He further testified during cross-examination that this was the same ladder that he has been ascending and descending, using the same technique mentioned above for three years and four months prior to the fall. He also had possession of the tool bag on those prior occasions. He visited Nicholas court approximately four times a month. That would mean that he would have used the ladder approximately one hundred and fifty nine times prior to his accident.

17. During cross-examination, he testified that the ladder itself was not rusting but that there was rust on the ladder. He further testified that the rust that was on the ladder came from the machine room. According to the evidence of the Claimant, the machine room was not closed off from the access room. In the machine room there were metal cables which against each other over a period of time, causing the cables to shred rust which fell onto to ground of the machine room. There was an air condition vent in the machine room which distributed these rust particles all through the access room. The court notes that the inference which the Claimant appears to be making is that of the metal shredding falling onto the ladder from the machine room above it. This evidence became a very contentious issue of fact during this case. This material evidence has not been pleaded and therefore the court attaches very little weight to it.

18. The particulars of negligence against the First Defendant are as follows:

    i. Failure to inspect the job site in advance so as to ensure that it was safe for the Claimant to work in.
    ii. Failure to take appropriate steps to reduce the risk of injury to the Claimant arising out of him climbing the said ladder.
    iii. Failure to take any or adequate precautions for the safety of the Claimant while he was engaged in his said work.
    iv. Failure to take any proper measure to protect the safety of the Claimant when it knew or ought to have known that the ladder was rusty and that the Claimant would be required to climb the said ladder.

v. Exposing the Claimant to a risk of damage or injury of which they knew or ought to have known was present at the material time.

vi. Failure to provide the Claimant with suitable safety protection including a helmet, safety harness and respirator on the day of the accident.

vii. Failure to provide suitable and sufficient lighting in respect of the Claimant's work space and/or environment.

viii. Failure to keep the floor from obstructions and/or obstacles which could cause injury to the Claimant.

ix. Failure to take any or adequate steps to prevent the Claimant from being injured on the job.

x. Failure to provide competent staff and/or adequate supervision of operations whilst the Claimant was engaged in his said work.

xi. Failure to warn the Claimant of the risk of danger to his safety.

xii. Failure to devise, institute and maintain a safe system of work and has subjected the Claimant to unnecessary risk and danger.

xiii. Giving and/or directing the Claimant to undertake work and/or task function which was inherently dangerous without providing the Claimant with proper safety equipment or tools.

xiv. Failure in all circumstances to discharge the common duty of care owed towards an employee.

19. The particulars of negligence against the Second Defendant are as follows:

i. Failing to take any or any reasonable care to ensure that the Claimant would be reasonably safe in using the said premises as a visitor and as a servant and/agent of the First Defendant.

ii. Failing to replace and/or remove the rusty ladder in circumstances when it knew or ought to have known that the said ladder was the only form of access to the control room.

iii. Failure to provide alternative access to the control room.

iv. Failing to provide hand and/safety rails on the said ladder.

v. Causing or permitting the said ladder to be or to become or remain a danger to persons lawfully authorized to use same.

vi. Exposing the Claimant to a danger or a foreseeable risk of injury.

vii. Failing to give the Claimant any or any adequate or effective warning of the pending danger associated with using the said ladder.

viii. Permitting the Claimant to ascend the said ladder when it knew or ought to have known that it was unsafe and dangerous for him to do so.

ix. Failing to take such care as was reasonable in all of the circumstance to see that the Claimant did not suffer injury in the premises from falling off the said ladder after he ascended same which constituted a danger to which the Second Defendant was aware or ought to know.

x. Failure in all the circumstances. To discharge the common duty of care owed towards an employee.

Case for the First Defendant

20. The First Defendant called three witnesses, Rene Blanc, David Lezama and David Beharry and admitted that the accident of the Claimant on the 26th July, 2012 was reported to it. The First Defendant denied that its servants and/or agents were either negligent or in breach of their duty of care and averred that the accident was wholly caused or contributed to by the negligence of the Claimant or the Second Defendant.

21. **Rene Blanc** has been employed by the First Defendant since 2009. As the safety technician, Blanc was aware that the First Defendant provided safety training for all their technicians and that there were regular toolbox meetings on safety at which the importance of being cautious on job sites and wearing safety equipment for the particular job zone were discussed. A power-point presentation on safety in the workplace and safety equipment was prepared and presented by the Health, Safety and Environment Coordinator, Ms. Lorna Dyal and the Claimant was in attendance. The presentation dealt with job safety, assessment, personal protective equipment and training amongst other things.

22. According to the evidence of Blanc, he is responsible for disbursing safety equipment to all technicians. He would therefore supply the technicians with the relevant safety equipment to perform their job and he recalled having provided the Claimant with equipment and the Claimant signing specifically for low heel boots amongst other items but was unable to locate the signed document. During cross-examination, he testified that not all jobs required technicians to wear gloves and more particularly gloves were not required to climb a ladder.

23. Between the periods 2009 to 2012, he conducted two site visits on Nicholas Court. During cross-examination, he testified that he did not know who did the site visits on Nicholas Court prior to 2012. On or around the 11th May, 2012 was his first site visit to Nicholas Court. During this visit he conducted a visual inspection with respect to the general operation, the machine room, the lift car and the elevator shaft. The second site visit on Nicholas Court was done on the 3rd July, 2012. Based on this visit, he did not regard the site as dangerous. During cross-examination he testified that this site visit to Nicholas Court was done because Beharry contacted him and informed him that he had some issues at Nicholas Court that had to be rectified. The three main issues were firstly the use of the access room as a storage area by the maintenance department, which made it difficult for the technicians to access the ladder, secondly poor shaft lighting and thirdly, difficultly in accessing the machine room having ascended the ladder. The latter difficulty arose because of the absence of handrails on the ladder.

24. In relation to this evidence it is to be noted that he appeared to retract his original statement of fact about handrails and testified that the technicians did not complain about the absence of handrails however through discussions with Beharry, they found that it would have been feasible to install a handrail on the ladder. According to his evidence, the first time the issue of handrails came up was in 2012. He testified that prior to 2012 no complaints were ever made about handrails. However, lighting in the access room was a general complaint made on many occasions. The court however understood his original evidence to be that of a complaint of the absence of some type of railing at the top of the

entrance to assist in entry to the machine room at the top of the ladder and not the absence of a handrail alongside the ladder.

25. After being informed about the issues he spoke to the properties manager, Mr. Sealy who then conducted a walkthrough with him and pointed out the areas of complaint. This was done prior to the incident. He thereafter formed the opinion that it was important to have a handrail installed on the ladder. It was the evidence of Blanc that the issue of handrails was addressed after the accident of the Claimant. It was at his request that the handrail was erected. The items stored by maintenance in the access room were also subsequently removed.

26. Blanc received a telephone call from Beharry on the 26th July, 2012, who informed him that the Claimant fell down the machine access ladder. He arrived on site within five minutes. According to him, the area was well lit at that time and the Claimant was lying on the ground. The Claimant was conscious and informed him that his head was hurting. He drove the Claimant to St. Clair Accident and Emergency Department.

27. He also testified that having climbed the ladder, both before and after the incident, he was able to say that the ladder was not rusty since it is coated with red oxide to prevent rust. During cross-examination Blanc testified that the rust he was referring to was rust which originated from the corrosion of the ladder itself. Finally, he testified that even though Nicholas Court had problems, it was not dangerous since the job site did not pose a threat to the employees at the point in time.

28. **David Beharry** has been employed with the First Defendant as an Elevator technician for twelve years. He testified that he received internal training from the First Defendant in the form of on the job training with senior technicians and supervisors, as well as safety training from contractors hired by the First Defendant to train its employees. During cross- examination, he testified that he now holds the position of Service Technician II, however he could not say when he was promoted to this position. The Claimant and he has been servicing the elevators installed at Nicholas Court for approximately five years.

He believed that the Claimant was servicing the said elevators since he began working for the First Defendant. During cross-examination, he testified that the Claimant was junior to him and that the Claimant and he visited Nicholas Court approximately four to five times a month for about three years and four months. He is aware that all technicians working for the First Defendant are provided with safety equipment. He testified that they were informed that safety equipment must be worn on the job at all times. At the time of the incident he had all his personal protective equipment (PPE) and so did the Claimant.

29. On the 26th July, 2012 at approximately 12:01 p.m. the Claimant and he was attending to the elevator when having entered the machine room which at the time was dimly lit, the Claimant fell from the ladder. He recalled that office chairs and a mop bucket were on the floor of the access room together with the air condition condenser. These items were located on the ground close to the ladder. It is his evidence that he ascended first since only one person could ascend at a time. On this day there was no rust on the ladder and that he was able to reach the top with no difficulty.

30. He admitted that the elevation of the ladder was very steep, that as a consequence, he found that it convenient to hold onto the rungs of the ladder whilst ascending and descending. He observed the Claimant begin his ascent carrying a tool bag over his shoulder. The Claimant was wearing his safety boots but no other safety equipment since the job had not yet begun. Whilst in the machine room, he heard a crashing sound, looked down and saw the Claimant on the floor. He immediately descended the ladder and rendered assistance. During cross-examination, Beharry admitted that on that day there were no handrails installed, that prior to the incident, Blanc and he had discussions about installing handrails on the ladder and that there was also a discussion with Sealy.

31. He testified that there was no positive feedback from the Second Defendant despite the First Defendant having meetings and furnishing the Second Defendant with monthly service reports which indicated that the lighting and access to the service room should be cleared.

32. During cross-examination, he testified that subsequent to the Claimant's fall, by the time he returned the following month to service the elevators, handrails had been installed on the ladder. Further, that the ladder was attached flush to the wall, therefore one could not put their hands around the sides of the ladder. He admitted that on the day of the incident, he had in fact held on to the underneath of the rungs of the ladder whilst ascending and descending because the top of the rungs had dust and grease. It is his evidence that this dust and grease came from the cables in the machine room.

33. He testified during cross-examination that there are cables running on pulleys in the machine room. These cables are made of metal, therefore whilst running against each other, the cables will begin to wear and thus metal fillings will fall from the cables. Also, the cables are supposed to be self-lubricating in that the core of the cables have grease which is supposed to keep the cables from wearing too quickly. Therefore, after a while the grease and the metal filings would come out and fall around the machine. Further, that whilst lubricating the pulleys with oil and grease, this oil and grease may spill on the ground. This oil and grease may get on the technicians' boots. The technicians ascended and descended the ladder with their boots. He also testified that after he left the hospital, he returned to the offices of the First Defendant to make a report to Blanc.

34. The witness was cross-examined on the contents of his incident accident form attached to his witness statement and marked *"D.B. 2".* In this form he described the incident as having occurred as follows

> *"while climbing up access ladder to enter machine room Daron hand slipped off the ladder and fell backwards approximately four feet on the floor hitting his back on the mop bucket and the back of his head on an office chair."*

Further, in the report he selected a box for contractor negligence and housekeeping slip, trip and fall. When asked why he ticked off contractor negligence, he testified that the machine room was being used as a storage area. According to him, if the chairs and mop bucket were not present in the machine room, the Claimant would not have been injured.

However, he testified that if there were no objects on the floor in the vicinity of the base of the ladder, the fall may have still occurred as the root cause of the incident was the fall off the ladder. He agreed that he did not make mention of any reason for the Claimant's fall in his report.

35. During cross-examination, he testified that he did do a witness statement in support of the Claimant's case, one for the Claimant and one for the First Defendant. The Claimant elected not to call him as a witness and so he appeared on the case for the First Defendant.

36. It is to be noted that he admitted that he did complain that the use of the ladder was not an appropriate method of access to the machine room but that it was not sufficiently dangerous for him to refuse to do his job.

37. **David Lezama** has also been in the employ of the First Defendant as a Service Administrator for twelve years. He is responsible for the daily operations of the service department at First Defendant and for negotiating maintenance service contracts with their customers. He often executes these service contracts on behalf of the First Defendant. The contract that was entered into for the maintenance of the elevators at Nicholas Court between the First and Second Defendants on the 28th August, 2008 was negotiated and executed by him. He testified that the Claimant did in fact receive training on risk assessment.

38. According to his evidence, the contract between the First and Second Defendants is a labour only contract. Clause 5 of the contract reads as follows:

> *"The contractor shall not be liable under any circumstance whatsoever for any loss, damage or injury which may be sustained either to persons or property or goods owing to any accident or failure in the working of the plant nor shall he be liable for indirect or consequential loss or damage or injury except in the case of an accident arising from his own negligent act or that of his sub-contractors"*

39. Lezama testified that from the records at the First Defendant, the elevators were installed by the First Defendant. Further, that since the written contract in 2008, an ongoing oral contract now exists between the First and Second Defendants with the understanding that the same clauses in the written agreement signed in 2008 would apply.

40. He testified that the Claimant and Beharry were familiar with the surroundings at Nicholas Court since they visited these premises on numerous occasions prior to the incident. He is aware that supervisors are regularly in contact with the technicians and if the supervisors are needed on the job at a particular time to help the technicians, they would be in attendance. He is aware that the First Defendant conducted inspections of the job site in advance and ensured that it was safe for technicians to visit. According to him, Nicholas Court was inspected in or around May, 2012 and then again on the 3rd July, 2012. The ladder as well as other materials and equipment placed in the vicinity where the accident occurred are the property of the Second Defendant who has full control over its access and use. He was aware that the corridor to the machine room was being used as a storage area.

41. During cross-examination Mr. Lezama testified that he has never visited Nicholas Court. Therefore, all information in relation to Nicholas Court contained in his witness statement was information which was not within his personal knowledge or made by his own observation but came from reports prepared by the technicians. He received reports from the Claimant with respect to the state and condition of Nicholas Court and those reports would have been given to the Second Defendant. However, he never received any complaints from the Claimant or Beharry relating to the ladder.

42. Finally, it was his evidence that in accordance with standard operating procedure, the technicians were supplied with the relevant safety equipment.

<u>Case for the Second Defendant</u>

43. The Second Defendant puts the Claimant to strict proof of the alleged fall and the circumstances surrounding it. The Second Defendant denied that at the material time the ladder or any rudder or any part thereof was rusted. Further, the Second Defendant denied the allegation that it and/or its servants/agents were negligent and/or in breach of any duty as occupier. It averred that if the Claimant did slip and fall from the ladder, the fall was caused by and/or contributed by the Claimant's negligence and in alternative the First Defendant's negligence.

44. The Second Defendant called one witness, **Ashram Ramnarine.** Ramnarine is the Group Chief Financial Officer of the Issa Nicholas Group of Companies. He has held this position for the past ten years. The Second Defendant is a member of Issa Nicholas Group of Companies.

45. Ramnarine testified that his duties and responsibilities include review and overview of the Company's operations. In his capacity as Group Chief Financial Officer, he has custody and control of the records and contracts of the Second Defendant, including the records relevant to this case. In or about 2011, the Second Defendant contracted with the First Defendant to provide maintenance services on the elevators installed at Nicholas Court. On the 29th July, 2012, it was reported that the Claimant sustained injuries whilst performing works on the elevator. At the time the Claimant allegedly sustained injuries, the ladder from which he was said to have fallen off was in a good state of repair. The ladder was also equipped with handrails/arm bars. During cross-examination he testified that he visited Nicholas Court six months prior to the date of the incident and the ladder had handrails at that time. During cross-examination, this witness was shown a purchase order dated the 26th August 2012 *(page 33 of the forth trial bundle).* This purchase order which was signed by Mr. Ramnarine himself was for the supply and installation of handrails to the machine room access ladder. This purchase order clearly contradicted this witness's evidence on that issue of fact. It is clear to the court that all of the evidence in this case demonstrates that the handrails were installed after the incident and the court so finds.

46. The particulars of negligence/contributory negligence of the Claimant as claimed by the Second Defendant are as follows:

    i. The Claimant failed to ensure that in ascending the ladder he had a firm grip on the armguards/handrail and /or to take any proper care or necessary precautions for his own safety;
    ii. The Claimant failed to heed, observe or pay any or proper attention when ascending the ladder at the material time;
    iii. The Claimant failed to use proper ascending technique whilst ascending the ladder;
    iv. The Claimant failed to grip the armguards/handrail of the ladder adequately or at all whilst ascending;
    v. The Claimant attempted to ascend the ladder to quickly without any or any adequate care or regard for his own safety;
    vi. The Claimant failed to perform any hazard analysis exercise prior to ascending the ladder although he is and was aware and/or ought to have been aware that he had to look out for his own safety by performing such an assessment before commencing any exercise.

47. The particulars of negligence/contributory negligence of the First Defendant as claimed by the Second Defendant are as follows:

    i. Failure to inspect the job site in advance so as to ensure that it was safe for the Claimant to work in.
    ii. Failure to take appropriate steps to reduce to risk of injury to the Claimant arising out of him climbing the said ladder.
    iii. Failure to take any or any adequate precautions for the safety of the Claimant whilst he was engaged in his said work.
    iv. Failure to take any proper measures to protect the safety of the Claimant when it knew or ought to have known that the Claimant would be required to climb the said ladder.

v. Exposing the Claimant to a risk of damage or injury of which he knew or ought to have known was present at the material time.

vi. Failure to provide the Claimant with suitable safety protection including a helmet, safety harness and respirator on the day of the accident.

vii. Failure to provide suitable and sufficient lighting in respect of the Claimant's workspace and/or environment.

viii. Failure to keep the floor free from obstruction and/or obstacles, which could cause injury to the Claimant.

ix. Failure to take any or any adequate steps to prevent the Claimant from being injured on the job.

x. Failure to provide competent staff and/or adequate supervision of operations whilst the Claimant was engaged in his said work.

xi. Failure to warn the Claimant of the risk of danger to his safety.

xii. Failure to devise, institute and maintain a safe system of work and subjecting the Claimant to unnecessary risk and danger.

xiii. Giving and/or directing the Claimant to undertake work and/or task and/or function which was inherently dangerous without providing the Claimant proper safety equipment or tools.

xiv. Failure in all circumstances to discharge the common duty of care owed towards an employee.

Ancilliary Claim of the Second Defendant

48. The Second Defendant instituted an ancillary claim against the First Defendant. If found liable to the Claimant, the Second Defendant claimed against the First Defendant, inter alia, the following:

i. Indemnity against the Claimant's claim and costs of this action;

ii. Costs incurred by the Second Defendant in defending this claim;

iii. Costs incurred by the Second Defendant in this ancillary claim.

Findings of fact

The Pleaded Case- a Rusted ladder

49. The court finds that there was indeed some foreign material present on at least one rung on the ladder on the day that the Claimant slipped and fell. The court accepts the evidence of the Claimant in that regard. His evidence is supported by the evidence of the witness for the First Defendant, Beharry, who under cross-examination, admits that there was dust and grease present on the rung of the ladder. In his evidence in chief, he testified that there was no rust on the rung and further, that he did not observe the cause of the fall, however his admission is quite telling in the court's view. It highlights to the court that there was foreign matter in the nature of grease or rust and dust that was present on the rung on that day and the court so finds.

50. The First Defendant submitted that the Claimant departed from his pleaded case. Counsel for the First Defendant submitted that the Claimant's pleaded case clearly expressed a rusty ladder and not rust filings (dust) originating from the periodic degradation of the elevator cables, which settled or accumulated on the rudder. The First Defendant further submitted that whilst the Claimant did mention *"a build-up of metal filings"* in his Rely to the Second Defendant filed on the 26th January, 2015, this was mentioned in relation to the ladder being rusted. Moreover, it was submitted that the Claimant only responded to the Defence of the Second Defendant and not the First Defendant's Defence.

51. Accordingly, the First Defendant submitted that a Reply is for the Claimant to allege facts in answer to the Defence which were not included in his Claim: ***See paragraph 16.7.1 Civil Procedure Volume 1.*** That a Reply must not bring a new Claim and if the Claimant wishes to depart from his case, he should sought to amend his case rather than serve a reply: ***See paragraph 16.7.3 Civil Procedure Volume 1, Blackstone's Civil Practice 2011, paragraph 27.2***. As such, it is the contention of the First Defendant that the Claimant did not sought to amend his claim to reflect that he meant rust upon the rudder when the First Defendant denied that the ladder was rusted.

52. Counsel for the First Defendant relied on the case of ***Waghorn v George Wimpey & Co. Ltd. [1969] 1 W.L.R 1764***. In this case it was unanimously agreed that it is wrong to dismiss a claim because pleadings do not measure up to technical facts which emerge during a case, particularly if they are technicalities possibly not foreseeable by pleaders. However, the evidence in Waghorn was a drastic departure from the pleaded case and as such it was held that *"the version of facts found was not just a variation, modification or development, but was something new, separate and distinct and not merely a technicality, there had been so radical a departure from the pleaded case as to disentitle the plaintiff to succeed, for if his case had been pleaded in accordance with the facts found the defendants' preparation and presentation would have been different."*

53. Counsel for the First Defendant further relied on the Court of Appeal case of ***Alice Mohammed v Jeffrey Bacchus C.A. CIV. 106/2001***, wherein Sharma JA (as he then was) at page 4 stated as follows:

"…the fact finding exercise is generally approached by the judge, by looking at the inherent probabilities of the various versions in order to assist him, together with all the viva voce evidence, in the case. But there is one compelling factor which is of tremendous help in the fact-finding exercise, and it is most acutely demonstrated in cases which are commonly called 'running down actions' - that is, facts pleaded are quite different from the evidence adduced."

54. His Lordship went on to say at page 5 the following:

"The trial judge in my view, was entitled in these circumstances not to rely on the appellant as a witness of truth. He was also entitled to conclude, if the evidence was truthful, why did they not find their way in the pleadings. In my view this was a perfectly valid approach by the trial judge to assist him together with other matters to determine the matter on a balance of probabilities. In point of fact, I find it a valuable approach, which other judges may adopt when assessing questions of fact, particularly in running down actions."

55. Moreover, Justice Des Vignes in the case of ***Mary Crawford v Ministry of National Security and the Attorney General of Trinidad and Tobago CV2008-00042,*** held against the Claimant who made belated references of facts in her case during cross-examination. In Mary Crawford, the Claimant alleged that she had fallen on the stair case at the Police Administration Office at the corner of Edward and Sackville Streets. In her witness statement she testified that her fall was due to the stair case being wet but she did not provide any explanation as to the circumstances in which it became wet. Under cross-examination, however, the Claimant sought to explain that rain had fallen that morning about half hour before and the staircase was wet because rain had blown in onto the corridor and stairs. Justice Des Vignes interpreted her belated reference to a rain shower blowing in on the staircase as a fabricated attempt to provide a rational explanation for her evidence that there was water on the staircase at the time of her fall.

56. Counsel for the First Defendant submitted that there was no evidence to contradict the Claimant's allegation that his right hand slipped on the rung. However, that on a balance of probabilities, it is difficult to find that if there was rust on the rudder, the rust caused the Claimant's fall.

57. The Second Defendant also submitted that the Claimant failed to prove his case as pleaded and that the evidence that he sought to be admitted during cross-examination pertaining to the rust on the ladder did not expand or explain the plea of the material facts, namely the existence of the rusty ladder. It was argued on behalf of the Second Defendant that the Claimant's evidence adduced during cross-examination was inconsistent with his pleaded case.

58. Counsel for the Second Defendant relied on the case of ***Candice Villafana v Trading And Distribution Ltd CV2005-00825***, wherein Justice Gobin did not make a finding of negligence against the Defendant in a slip and fall case because the Claimant failed to establish the cause of the fall. As such, Counsel for the Second Defendant submitted that as in Villafana supra, the Claimant in this case failed to prove his case as pleaded.

The Submissions of the Claimant

59. The Claimant submitted that his evidence of his hand slipping from a rust cluttered rudder has been consistent and unshaken from the commencement of this action through the end of the trial. That he never said that the rust came from the ladder but gave evidence that there was rust on the ladder. The Claimant further gave evidence as to where the rust came from and that the rust which was on the ladder caused his hand to slip, therefore causing him to fall.

60. Counsel for the Claimant submitted that the legal definition of rusty provides two meanings. The first is that an object can be covered with rust and the second is that an object can be affected by rust. It is the contention of the Claimant that his pleadings, evidence as well as the evidence of the witnesses for the First Defendant support the second definition of rusty.

61. As such, it is the submission of the Claimant that he pleaded that there was a clutter of rust on the rudder of the ladder by stating that there was a "rusted cluttered rudder" and/or a "rusty ladder". Moreover, that he pleaded by way of his reply to the Second Defendant that there was a build-up of metal filings (dust) and that this rust affected the said ladder.

62. It was argued on behalf of the Claimant that the First Defendant clearly understood the Claimant's position in regards of rust on the ladder since at paragraph 4(h) of the First Defendant's Defence they distinguished both forms of rust by stating *"rusting of or on the ladder".* Therefore, the Claimant submitted that the First Defendant was cognizant of the rust being referred to by him.

63. The Claimant submitted that he had no intention to substitute his reply to the Second Defendant for an amended statement of case but used the reply to clarify his pleaded case against the Defendants. He further submitted that if the First Defendant had adopted a

similar position in its defence, he would have similarly responded to the First Defendant's Defence.

64. Moreover, the Claimant contended that neither of the Defendants has put forward any sound evidence of there being no rust on the ladder at the time of the accident as they were not present at the time of the accident.

Finding

65. A court must adopt a common sense approach to evidence and to the issue as to whether a litigant has deviated substantively from his pleaded case. It would defeat the ends of justice if parties were to be restricted to the narrow confines of facts which are themselves obscure. Such an approach will result in manifest injustice to the litigant having regard to the overriding objective of the CPR. In this case, the pleading of the Claimant is clear. Its import is that that was a clutter of what he considered to be rust present on the rung of that ladder. There is no evidence that the Claimant is an expert when it comes to rust, neither is such evidence to be expected. A common sense approach would consider that the Claimant with knowledge of the condition and relative position of the machine room in relation to the access ladder may well conclude that that which was present of the rung was rust. It is not the pleaded case of the Claimant that the ladder was a steel one which was corroded.

66. Further, the evidence of the witness Beharry in cross-examination demonstrates that there was in fact grease and dust on the rung, again a matter of his opinion as to the nature of the material on the rung. His evidence also purports to give an explanation as to how the material would have found its way there. According to him, the constant traversing by the technicians with boots would have more likely than not deposited grease picked up in the machine room.

67. The evidence of the Claimant does not in the court's view depart from his pleaded case. The Claimant maintains that there was rust on the ladder. He does not vary or modify

what he had pleaded, neither has he sought to set up something new, separate and distinct. In any event, whether the substance on the rung was rust or grease, and whether it came from the ladder itself or not is not an integral part of the Claimant's case. The factual fulcrum of the case lies with the allegation that the rung of the ladder contained a substance (which the Claimant is of the opinion was rust) and that the presence of that substance caused his hand to slip off the rung ultimately resulting in a fall. To put it another way, it would be a grave injustice, were a court to find that the Claimant has deviated from his case or is not telling the truth simply because he says that the ladder contained rust and not grease and dismiss his claim as a consequence.

68. In that regard, it is not that the court does not appreciate the arguments of the Defendants that they are entitled to know the case they are to meet. But with the greatest of respect to attorneys for the Defendants it cannot be said that they were unaware that the claim was that of the existence of foreign substance on the rung of the ladder which caused slippage of the hand of the Claimant. To sit by and submit that the only case they would have been put on notice for and therefore be prepared to meet was that of a rusted ladder does not accord with common sense. The court therefore finds no merit in the arguments of the Defendants on this issue and finds that there was a foreign substance present on the rung of the ladder, namely rust.

69. Further, the evidence of the Claimant that his hand slipped on the rung and he fell is accepted. In that regard the evidence of the witness Beharry supports the evidence of the Claimant in so far as he testified that he fell off the ladder. When the necessary inferences are drawn from the relevant evidence of Beharry, whose evidence is that there was grease and dust on the rung and that the Claimant fell off the ladder, the court finds that the Claimant has proven that it is more likely than not that he fell off the ladder.

Duty and Causation

70. A finding of negligence requires proof of (1) a duty of care to the Claimant (2) breach of that duty (3) damage to the Claimant attributable to the breach of the duty by the

defendant(s): ***Charlesworth & Percy on Negligence Thirteenth Edition, Chapter 1, paragraph 1-19.*** There must be a causal connection between the Defendant's conduct and the damage. Further, the kind of damage to the Claimant is not so unforeseeable as to be too remote: ***Clerk & Lindsell on Torts Nineteenth Edition. Chapter 8, paragraph 8-04.***

71. In these proceedings both the First and Second Defendants owed a duty to the Claimant in different capacities.

72. The First Defendant owed a duty of care to all its employees to take reasonable care for their safety: ***Charlesworth & Percy on Negligence Thirteenth Edition, Chapter 11, paragraph 11-02 and 11-17.***

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.***

74. The Second Defendant owed a duty of care to its lawful visitors: ***Charlesworth & Percy on Negligence Thirteenth Edition, Chapter 8, paragraph 8-15.***

75. The duty owed by an occupier of premises to his visitors is the common duty of care. This duty, except in so far as it is extended, restricted, modified or excluded by agreement or otherwise, is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the

purposes for which he is invited or permitted by the occupier to be. The relevant circumstances include the degree of care, and of want of care, which would ordinarily be looked for in the visitor: ***Halsbury's Laws of England, Volume 78 (2010), paragraph 32.***

Gloves and Rust

76. The evidence discloses that the Claimant's hand slipped off of the rung because of the rust and he lost his balance and fell back. The court finds that the evidence is equally clear that the Claimant was provided with all the necessary PPE by the First Defendant and that the First Defendant provided the relevant safety training as set out in the evidence of its witnesses, to which there has been no real challenge. The court also finds that the Claimant was provided with gloves, but that he not wearing those gloves at the time that his hand slipped from the rung. That being said, it is equally clear that the case is bereft of any evidence that failure to wear the gloves would have contributed to the slippage of the hand from the rung of the ladder. As a consequence the court finds no link between the failure of the Claimant to wear his gloves and the cause of his fall.

77. It is the submission of the Claimant that the First Defendant owed a duty to take reasonable care of its employees as well as to ensure their safety at the workplace. That in ensuring that it provided a safe working environment, the First Defendant had to ensure that the ladder was within the required safety regulations and that it was maintained (cleaned) at all times, so as to provide no unusual danger to its users.

78. The Claimant submitted that Mr. Blanc, the occupation safety technician for the First Defendant, gave evidence that he only visited Nicholas Court twice. As such, it is the contention of the Claimant that by not regularly inspecting the work site, the First Defendant contributed to his fall. It was further submitted that the evidence of Mr. Blanc demonstrated that the First Defendant was well aware of the poor conditions that existed at the work site and did nothing to remedy the hazards until after the Claimant fell and

injured himself. Therefore the First Defendant failed to provide a safe system of work or a safe work environment.

79. Counsel for the First Defendant submitted that the Claimant and Beharry were aware that metal dust fell onto the ladder. Therefore, the Claimant cannot say that the First Defendant exposed him to something unknown to him. It was further submitted that if an employee is aware of a risk, an employer is not entitled to expose the employee to such a risk and do nothing. However, that the compulsion to take action is based on foreseeability. As such, it is the contention of the First Defendant that for the Claimant to suggest that the First Defendant was obligated to do something to prevent his hand slipping from the rudder must be taken in the context that there was no previous incidents as well as there was no complaints to them pertaining to the presence of rust being a hinder to the safety of climbing the ladder. The matters of complaint were the lights, the storage of items in the access room and the access to the machine room from the top of the ladder.

80. The First Defendant relied on the case of ***Latimer v A.E.C. [1953] 3 WLR 259***, wherein their lordships refused to impose an obligation on the Defendant that it ought to have shut down its operations due to the flooding and risk of slippage as suggested by the Claimant. Lord Tucker at paragraph at 268 stated *"The absence of any evidence that anyone in the factory during the afternoon or night shift, other than the plaintiff, slipped or experienced any difficulty or that any complaint was made by or on behalf of the workers all points to the conclusion that the danger was in fact not such as to impose upon a reasonable employer the obligation placed upon the respondents by the trial judge."*

81. Counsel for the First Defendant submitted that for the Defendants to be negligent there must be some breach of duty of care. Further, that the materialized risk must be something that was foreseeable. The First Defendant contended that since there were no prior incidents, it cannot be said that the risk of the Claimant's hand slipping from the rudder due to rust being present on it was reasonably foreseeable.

82. The Second Defendant further submitted that in deciding whether or not a defendant "unreasonably failed" to take appropriate steps or measures so as to affix liability on him, the court will have to consider the facts as known to the Defendant at the relevant time and also facts which ought to have been known to him insofar as the relevant operation being undertaken is concerned. Such facts would include, inter alia, the complexity or simplicity of the operation, the length of time the particular employee has been engaged in the operation, whether the operation is one which he is familiar with and experienced in and whether or not there as in this case the Claimant has been engaged in the particular operation before without incident.

83. The court finds that the First Defendant owed a duty of care to provide a safe work environment to its employees. This duty must extend to ensuring that dangers that are reasonably foreseeable are treated with so as to extinguish the danger thereby providing a safe work environment. Whether something is reasonably foreseeable must depend on the individual circumstance of each case when taken in the context of the evidence as a whole. The evidence shows quite clearly that complaints were made to the First Defendant in relation to the position of the access entrance to the machine room, to lighting and also to the presence of cleaning apparatus in the access room. There is no evidence that a complaint was made in relation to the presence of rust on the rung of the ladder. Be that as it may, the evidence also discloses that visits were made to the access room by the First Defendant prior to incident. In the court's view, it must be that although at least one visit was made in order to identify the specific issues complained of, the duty of the First Defendant can only be fulfilled by a proper and comprehensive examination of the access room to determine whether there are any other dangers apparent. It cannot be that the duty only extends to matters in respect of which there has been complaints. Surely the duty to provide a safe environment is much wider.

84. It follows that a proper examination of the room would have disclosed the patent presence of the rust on the ladder. It also follows that it is foreseeable that the presence of such matter would likely lead to injury to those who are to use the ladder to gain access to the machine room. But even further, it would be highly foreseeable that a technician who

would be in possession of a relatively heavy tool bag would be at the risk of sustaining a fall in those circumstances. This is exacerbated by the fact that there was no handrail to hold onto to break the fall. Even more troubling is the presence of cleaning items within the access area which would have been more than obvious to the visitor. The evidence shows that none of these matters were attended to.

85. Similarly, the duty of the Second Defendant is that of taking reasonable care to ensure that the Claimant's employees would be reasonably safe in using the said premises as a visitor and agent of the First Defendant. Reasonable diligence in inspecting and clearing clutter from both the ladder and the room was required by the Second Defendant in the performance of its duty. It is the evidence that the First Defendant complained to the Second Defendant about the lighting and clutter in the room but not on the ladder. This however does not relieve the Second Defendant from its duty to ensure that the ladder was clear and safe. There was therefore a breach of the Second Defendant's duty to the Claimant.

Handrail

86. Counsel for the First Defendant submitted it cannot be said that if a hand railing was installed, the Claimant would have avoided his injury. That the reason for the installation of the hand railing was not in relation to issues of slippages off the rudder of the ladder due to rust. Therefore, Counsel for the First Defendant submitted that a hand railing not being present at the time of the Claimant's fall cannot be an omission for which this claim in negligence can be based upon against the Defendants, since the Claimant's chain of events was too remote from what could have been reasonably contemplated by the First Defendant. In other words, the duty in relation to the installation of the handrail and its omission at the time of the fall was not connected.

87. Counsel for the First Defendant relied on the case on ***Jaguar Cars Ltd. v Alan Gordon Coates [2004] EWCA Civ. 337***, paragraph 11 which stated as follows:

"It is accepted that the fact that the Defendants have provided a handrail since this accident is not of itself evidence of negligence… It does seem to me that the judge has equated his finding of foreseeability of risk with a finding that there was a duty to provide a handrail, but one does not follow from the other."

88. Moreover, Counsel for the First Defendant submitted that the items stored in the access way did not cause the Claimant's fall and as such cannot be considered when determining liability for negligence.

89. The Second Defendant submitted that it was not negligent in failing to provide hand railings. Counsel for the Second Defendant relied on the case of ***Vozza v Tooth & Co. Ltd. (1964) 112 CLR 316,*** wherein it was held that *"For a plaintiff to succeed it must appear, by direct evidence or by reasonable inference from the evidence, that the defendant unreasonably failed to take measures or adopt means, reasonably open to him in all the circumstances, which would have protected the plaintiff from the dangers of his task without unduly impeding its accomplishment."*

90. The Claimant submitted that the specifications of the ladder are within the Defendants' possession, therefore the burden lay on them to disprove that the ladder did not require a handrail and they failed to do so. Therefore, Counsel for the Claimant argued that the absence of a handrail on this design of and location of the ladder rendered the ladder extremely unsafe and as a result the First Defendant breached its duty of care towards the Claimant.

91. The Claimant submitted that he was an invitee to Nicholas Court, therefore, the Second Defendant also owed him a duty of care to prevent damage to him from usual danger which the Second Defendant knew or ought to have known: ***See Indermaur v Dames (1866) L.R.1 C.P. 274***. The Claimant further submitted the Second Defendant was aware that the lights in the access room needed changing, the access room was being used as an area to store maintenance products, there was no handrail on the ladder, and there was a leaking motor *(see the Maintenance Safety Checklist annexed to the Witness statement of*

Mr. Blanc and marked "R.B. 2"). As such, it is the contention of the Claimant, that the Second Defendant had knowledge of these unusual dangers but failed to prevent damage to its invitee, the Claimant.

92. The Claimant submitted that the rust on the ladder was not something that occurred over night. That the rust was not present on the ladder forty months ago. The Claimant further submitted that he had no choice but to continue to carefully use the ladder which did not have a handrail, had rust upon the rudders and was poorly lit since it was the sole access to the machine room. Therefore, it is the contention of the Claimant that in those circumstances he could not have been deemed to have accepted the danger.

93. Counsel for the Claimant relied on the case of ***Smith v Charles Baker & Sons [1891-94] All ER Rep 69 at 85***, wherein Lord Watson stated as follows:

"...I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations, which must vary according to the circumstances of each case."

94. Counsel for the Claimant also relied on the case of ***Bowater v Rowley Regis Corporation [1944] K.B. 476 at page 479***, wherein Scott LJ stated as follows:

"...a man cannot be said to be truly "willing" unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will."

95. The First Defendant submitted in reply that the Claimant did not raise in its particulars of negligence any omission on their part in relation to the handrails. The Claimant only did so in relation to the Second Defendant. Accordingly, the First Defendant only dealt with allegations that related to the ladder generally.

96. The court accepts that it has not been specifically pleaded that the First Defendant was negligent in failing to provide handrails. This however is to be reasonably expected on the facts of the case as the evidence shows that control of the room and the ladder resided with the owners thereof namely the Second Defendant. It naturally follows that the duty of the First Defendant could not have been that of providing handrails. This does not mean that the First Defendant owed no duty in relation to the provisions of handrails. Complaint having been made to it, it was its duty to bring the matter to the attention of the Second Defendant and the evidence is that this was in fact done.

97. The court does not accept the argument of the Second Defendant that the issue of rust present on the ladder is not linked to the provision of the hand rail in the context of the facts of this case. The court must remind itself that context is of paramount importance when examining the evidence. The evidence demonstrates that the ladder was steep. That Beharry was compelled to hold on to the bottom of the rung for stability in climbing the steep ladder. That the Claimant was compelled to hold on to the rung in an effort to steady himself to ascend the ladder. That the ladder was attached to the wall. This means that the back of the ladder would have met the wall directly, thereby providing no space for one's grip to extend behind the rung for grip according to Beharry. It is a reasonable conclusion that the provision of a handrail in those circumstances would have ensured that there was a structure which would have provided enough grip for the purpose of ascending thereby obviating the need to hold on to the top and front of the rungs, a somewhat precarious and dangerous act having regard to the length and gradient of the ladder. In such a manner, the failure to provide a handrail is directly linked to the slippage of the Claimant's hand form a rung.

98. Further, as a matter of common sense, it is reasonable to conclude that the presence of a handrail may have assisted in breaking the fall of the Claimant thereby giving him the opportunity to hold instead of falling to the ground and hitting the maintenance equipment.

Cleaning Equipment

99. The court accepts that the presence of the cleaning equipment would not on its own have been the cause of the fall. Whether its presence may have exacerbated the injury to the Claimant is a matter of evidence which is patently lacking. In that regard there are two equal inferences to be drawn, both of equal weight. The failure to remove the equipment is therefore not relevant to the issues to be decided at this stage in the court's view.

Breach

100. The court finds that both Defendants breached their respective duties to the Claimant as set out above and are therefore liable in relation to the following particulars. It is to be noted in so doing that several of the particulars of negligence pleaded by the Claimant are repetitive in substance. In relation to the First Defendant the finding is that it;

a. Failed to take any proper measure to protect the safety of the Claimant when it knew or ought to have known that the ladder was rusty and that the Claimant would be required to climb the said ladder.
b. Exposed the Claimant to a risk of damage or injury of which they knew or ought to have known was present at the material time.

101. In relation to the Second Defendant the finding is that it;

a. Failed to take any or any reasonable care to ensure that the Claimant would be reasonably safe in using the said premises as a visitor and as a servant and/agent of the First Defendant.
b. Failed to provide hand and/safety rails on the said ladder.
c. Caused or permitted the said ladder to be or to become or remain a danger to persons lawfully authorized to use same.
d. Exposed the Claimant to a danger or a foreseeable risk of injury.

Contribution

102. **Munkman: Employer's Liability at Common Law, Fifteenth Edition, Chapter 6, paragraph 6.10,** defines contributory negligence as follows: *"Contributory negligence means some act or omission by the injured person which constituted a fault, in that it was blameworthy failure to take reasonable care for his or her own safety and which has materially contributed to the damage caused".*

103. In order to establish contributory negligence the defendant has to prove that the claimant's negligence was a cause of the harm which he has suffered in consequence of the defendant's negligence. The question is not who had the last opportunity of avoiding the mischief but whose act caused the harm. The question must be dealt with broadly and upon commonsense principles. Where a clear line can be drawn, the subsequent negligence is the only one to be considered; however, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the person secondly negligent might invoke the prior negligence as being part of the cause of the damage so as to make it a case of apportionment. The test is whether in the ordinary plain common sense the claimant contributed to the damage: **Halsbury's Laws of England, Volume 78 (2010), paragraph 76.**

104. In this case, the evidence demonstrates that the substance contained on the ladder would have been discoverable by the application of reasonable prudence on the part of

the Claimant. Beharry testified that not only did he observe grease and dust but that the grease and dust accumulated due to the traverse of the boots of both the Claimant and he. It is reasonable to infer that they therefore would have both been aware of the existence of the potential of slippage due to the presence of the rust but the Claimant nonetheless proceeded to take the risk of climbing the ladder with a full tool bag. In this regard the court is of the view that he must bear some responsibility for his negligent act of climbing the ladder in complete disregard for the danger it presented. In so doing the Claimant failed to perform any hazard analysis exercise prior to ascending the ladder although he was aware and/or ought to have been aware that he had to look out for his own safety by performing such an assessment before commencing any exercise. The court also agrees with the submission of the Second Defendant that a contribution on the part of the Claimant in the amount of 20% is therefore appropriate and liability will therefore be reduced accordingly.

105. In relation to the pleading of the Second Defendant of contribution by the First Defendant, having regard to the findings of the court in relation to the shared liability by both Defendants there is no need to make a separate determination thereon as the court's award on liability will be adequately reflected in its order.

The Ancillary Claim

106. The Second Defendant by Ancillary claim claims an indemnity against the First Defendant should the Second Defendant be held liable. The court notes firstly, that its decision is that both Defendants are liable in negligence but in respect of different particulars. Specifically, the Second Defendant has been found liable in respect of the provision of handrails which was totally within their control.

107. The indemnity clause (clause 5) set out in the memorandum of agreement made between the First and Second Defendants on the 28th August 2008, (which according to the evidence is still in effect the parties having orally continued their contractual relationship under the same terms of the written agreement), reads as follows;

"The contractor shall not be liable under any circumstance whatsoever for any loss, damage or injury which may be sustained either to persons or property or goods owing to any accident or failure in the working of the plant nor shall he be liable for indirect or consequential loss or damage or injury <u>except in the case of an accident arising from his own negligent act or that of his sub-contractors</u>" (emphasis mine)

108. The indemnity clause is clear and unambiguous. The Second Defendant is therefore independently liable in respect of the failure to provide handrails and the indemnity cannot attach to this liability under clause 5. With respect to the other findings of negligence, it is clear that these acts fall squarely within the four walls of the indemnity and therefore the clause must apply to those acts. The Second Defendant is therefore entitled to be indemnified by the First Defendant in respect of half of its liability to the Claimant. In relation to costs, the usual order will apply in respect of the claim and having regard to the partial success of the Second Defendant on its Ancillary Claim, the First Defendant shall be liable for half of the costs of the Ancillary Claim.

Dated the 27th day of October 2016

Ricky Rahim
Judge