THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando

IN THE CONSOLIDATED CLAIMS OF:

CLAIM NO: CV2019-03225

BETWEEN

WESTERN INDUSTRIAL SOULUTIONS LIMITED

Claimant

AND

J.T. ALLUM AND COMPANY LIMITED

First Defendant

O.T.I. TRINIDAD LIMITED

Second Defendant

CLAIM NO. CV2019-03889

BETWEEN

DEBERA RAMPERSAD
(Trading as Debera Fashion Step Up and Save)

Claimant

AND

J.T. ALLUM AND COMPANY LIMITED

First Defendant

O.T.I. TRINIDAD LIMITED

Second Defendant

Before the Honourable Madame Justice Quinlan-Williams

Appearances: Mr. Chanka R.L. Persadsingh instructed by Mr. Dipnarine Rampersad for the Claimants

Mr. Shankar Bidaisee instructed by Rachael L. Jaggernauth for the First Defendant

Date of Delivery: 24 March 2022

ORAL JUDGMENT REDUCED INTO WRITING

Introduction

1. By order dated the 6 August 2020, the court consolidated the claims herein bearing case numbers CV2019-03225 ("WISL's claim") and CV2019-03889 ("Debera Rampersad's claim").

2. The first defendant J.T. Allum and Company Limited is involved in the business of real estate and one of its properties, is Allum's Shopping Centre, Marabella. The claimants Western Industrial Solutions Limited ("WISL") and Debera Rampersad and the second defendant O.T.I. Trinidad Limited ("OTI") were tenants of the first defendant.

3. The instant proceedings arise out of an incident that occurred on the 9 December 2018 where a large body of water escaped and entered into the respective premises rented by the claimants causing them to incur tremendous loss, damage and expense. The claimants and the first defendant agree that the water emanated from a PVC pipe and/or tap and/or angle valve, originating from the business store tenanted and operated by the second defendant.

4. The first defendant avers that its investigation revealed that the angle PVC fitting in the second defendant's kitchen had become loose and/or dislodged, thereby causing water to escape. The said angle PVC fitting was within the confines of the demised premises, which was at all times under

the sole care and/or control of the second defendant who had exclusive possession of the store.

5. Accordingly, in reliance of the terms of the various lease agreements issued to the parties, the first defendant contends that the second defendant was responsible for its own plumbing and the first defendant therefore was in no way negligent and/or caused a nuisance to any of the claimants.

Procedural History

6. By Claim Form and Statement of Case filed on the 8 August 2019 and 25 September 2019, Western Industrial Solutions Limited and Debera Rampersad respectively claimed against the first and second defendants:
    a. Damages for negligence and/or nuisance;
    b. Special damages;
    c. Interest pursuant to Section 25 of the Supreme Court of Judicature (Amendment) Act 2000 at a rate of 3% per annum on Special Damages and 6% per annum on General Damages and thereafter, the statutory rate of 5% per annum from the date of judgment until payment;
    d. Costs;
    e. Any further and/or other relief as the Court deems just.

7. On the 14 October 2019, the first defendant filed its defence to Western Industrial Solution Limited's claim.

8. On even date, the first defendant filed an Ancillary Claim Form and Ancillary Statement of Case against the second defendant for:
    a. An Order that the Ancillary Defendant/Second Defendant is liable to satisfy any judgment for damages, interests and/or costs that

may be awarded to the Claimant in the Principal Claimant against the Ancillary Claimant/First Defendant.

b. Damages in the sum of $70,413.61 for repairs, clean up and/or consequential loss as a result of the Ancillary Defendant/Second Defendant's breach of contract and/or negligence arising out of a burst and/or dislodged and/or malfunctioned water pipe at Allum's Shopping Centre, Marabella;

c. Interest pursuant to Section 25 of the Supreme Court Judicature Act, Chapter 4:01 at the rate of 1.25% per annum from 9th December 2018 (date of the incident) until the date of payment (which accrues at a daily rate of $2.41 and which has accrued the sum of $747.10 as at the date of filing this Ancillary Claim) or at such rate and such period as the Honourable Court deems just;

d. Costs in accordance with the Prescribed Scale of the Civil Proceedings Rules 1998 as amended; and

e. Any further and/or other relief that this Honourable Court deems just in the circumstances.

9. Pursuant to the court's order dated the 6 August 2020, judgment was entered for Ancillary Claimant/First Defendant against the Ancillary Defendant/Second Defendant in terms of the reliefs claimed in the Ancillary Claim filed on the 14 October 2019.

10. On the 14 November 2019, the first defendant filed a defence and counterclaim in Debera Rampersad's claim. Therein, the first defendant contended that the rent for Shop No S2 (also known as Shop 102) and Shop No S3 (also known as Shop 103) at Allum's Shopping Centre, Marabella leased by Debera Rampersad had been in arrears and she failed to settle same. Therefore, the first defendant counterclaimed against Debera Rampersad for:

a. Damages for breach of tenancy agreement for rent for Shop S2 Allum's Shopping Centre, Marabella also known as #102 Allum's Shopping Centre, Marabella for the period 1st September, 2016 to 1st August, 2017 accrued in the sum of $65,790.90.

b. Damages for breach tenancy agreement for rent for Shop S3 Allum's Shopping Centre, Marabella also known as #103 Allum's Shopping Centre, Marabella for the period 31st October, 2016 to 1st December, 2018 accrued in the sum of $114,704.28.

c. In relation to the arrears for Shop S 2 Allum's Shopping Centre, Marabella also known as #102 Allum's Shopping Centre, Marabella, interest pursuant to Section 25 of the Supreme Court of Judicature Act, Chapter 4:01 at the rate of 1.25% per annum from 1st August, 2017 (the last day of accrual of arrears) until the date of payment. Interest accrues at the daily rate of $2.25 and which at the date of filing this Counterclaim, has accrued in the sum of $1,883.25 (1st August, 2017 to 15th November, 2019 = 837 days) or at such rate and for such period as the Honourable Court deems just.

d. In relation to the arrears for Shop S 3 Allum's Shopping Centre, Marabella also known as #103 Allum's Shopping Centre, Marabella, interest pursuant to Section 25 of the Supreme Court of Judicature Act, Chapter 4:01 at the rate of 1.25% per annum from 1st December, 2018 (the last day of accrual of arrears) until the date of payment. Interest accrues at the daily rate of $3.93 and which at the date of filing this Counterclaim, has accrued in the sum of $1,253.67 (31st December, 2018 to 15th November, 2019 = 319 days) or at such rate and for such period as the Honourable Court deems just.

e. Costs in accordance with the Prescribed Scale of the Civil Proceedings Rules 1998 as amended; and

f. Such further and/or other relief as to the Honourable Court deems just.

11. On the 14 February 2020, Debera Rampersad filed a defence to the counterclaim denying that the first defendant was entitled to the reliefs claimed on the basis that there was an informal arrangement between them whereby the claimant was excused from paying her rent until such time when her business was up and running.

12. The second defendant's appearance filed on the 30 August 2019 and 7 October 2019 in respect of Western Industrial Solution Limited's claim and Debera Rampersad's claim respectively. However, the second defendant has not filed any pleadings or witness statements in these proceedings.

13. On the 7 January 2021, the General Manager of J.T. Allum and Company Limited, Suraj Sankar filed a witness statement on behalf of the first defendant.

14. On the 29 January 2021, Narendra Moonan, Debera Rampersad, Kerwin Simmons and Vedesh Gopaul filed witness statements of behalf of the claimants' claims. However, pursuant to the court's decision dated the 2 March 2022 in relation to the evidential objections raised by the parties, the witness statement of Vedesh Gopaul was struck out in its entirety.

15. Subsequently, the trial of these proceedings was held on the 16 March 2022.

The Evidence

- The Claimants' Evidence

16. WISL is involved in the business of providing safety training to employees of other companies under the OSH Act. The company also manufactures safety uniforms and imports and sells other safety items such as boots, fire extinguishers, gloves, alarms, etc.

17. WISL rented five suites on the first floor of Allum's Shopping Centre, Marabella from the first defendant:
    - Suite No. 7 comprised the Director's office and the Retail Administrative office for its staff;
    - Suite No. 8 comprised the classroom for training and a storage area for safety boots;
    - Suite No. 9 comprised a conference room, storage area and kitchen;
    - Suite No. 10 comprised the manufacturing room which contained sewing machines, threads, cloth, finished and unfinished products and cabinets;
    - Suite No. 10 stored the inventory of raw materials, fabric, cables, coveralls, thread and shelving.

18. The claimant Debera Rampersad is the owner of Debera Fashion Step Up and Save involved in the retail sale of clothing, shoes, accessories and similar apparel. Debera Rampersad rented from the first defendant Shops No. 102 and 103 located on the ground floor.

19. On the 9 December 2018, a large body of water entered the business premises tenanted by WISL and Debera Rampersad. The accumulation of the water escaped from a water pipe/angle valve located in the kitchen of the business tenanted by the second defendant on the first floor of the J.T. Allum's Shopping Centre. Water escaped from the said water pipe/angle valve overnight causing water to run along the flooring of the first floor

and the ceiling of the ground floor, which seeped into premises tenanted by a number of tenants of the shopping centre including the claimants.

20. WISL's evidence was that the water level, rose to about four to five inches, damaged and rendered useless stored materials, office equipment, stock in trade, furniture and various items used for demonstrations. Other charitable items such as toys and party bags, meant for distribution over the Christmas season, were also destroyed. The damage along with the dampness, stench and need for clean-up operations resulted in the cancellation of confirmed scheduled training sessions with clients.

21. Debera Rampersad's evidence was that stock in trade/items for sale[1] located on racks on the floor, displayed by hangers or placed on the top of glass cases, were exposed to dripping water. What is more is that the water rose to a height of about four to five inches exacerbating the damage and rendering most of the product useless.

22. The claimants aver that due to the time spent on clean-up operations, they were unable to facilitate sales for a period of two weeks. Moreover, the claimants paid an additional one days' pay to their staff who assisted with the clean-up operations on the day of the incident i.e. Sunday 9 December 2018.

23. In order to quantify the loss and damage sustained to their respective businesses, the claimants retained the services of Messrs. Simmons Claims Consultant Services who prepared two separate Adjuster's Reports assessing the losses suffered due to the escaped water. WISL and Debera Rampersad paid Mr. Kerwin Simmons of Messrs. Simmons Claims

[1] Including various pants, tops, dresses, shirts, jeans, socks, undergarments, handbags, footwear, towels, bedsheets, tablecloths, schoolbags, table mats, gift bags, gift paper, lipsticks, perfumes and glass bowl sets

Consultant Services the sum of $30,000.00 and $20,000.00 for their respective reports. The said reports were generated based on receipts and/or online purchases and/or invoices for purchased goods as an indicator of the likely cost price, which was then deducted from the sale price of the items.

24. In addition to those losses as itemized, WISL sustained further expenses for the preparation of the said adjuster's report ($30,000.00) and legal letters ($5,625.00) which in total amounted to $2,708,450.00 in loss, damage and expense due to the escaped water.

25. In addition to the loss of stock, the claimant Debera Rampersad incurred the following losses – loss of sales/profits for the period 10 – 24 December 2018 ($2,000.00/day x 14 days) valued at $28,000.00; costs of janitorial services at $12,500.00; and the cost of the adjuster's report at $20,000.00. Therefore, Debera Rampersad averred that her total loss, damage and expenses amounted to $796,300.00.

26. Debera Rampersad asserted that due to the severe loss and expense incurred, she was constrained to shut down her business operations. In attempts to mitigate her loss, this claimant held a sale and sold whatever products were salvageable.

27. The claimants aver that within a period of three years (prior to the flooding incident on the 9 December 2018), there has been at least two occasions where various parts of the said shopping centre had become flooded. On these occasions, the first defendant as landlord, took the responsibility of conducting repairs and the necessary clean up.

28. However, on the 9 December 2018 neither of the claimants were afforded the same courtesies that the first defendant as landlord extended to other tenants including a hairdressing salon, Sissons, Earner Insurance and B-mobile. The escaped water also affected these tenants and the first defendant ensured, at its own expense, that the water was removed, the flooring (inclusive of carpets) was professionally cleaned and sanitized and the roofing (including gypsum roofing) was repaired and/or replaced and painted where necessary.

29. What is more is that the first defendant even waived the rent for that particular month in circumstances where these claimants had to cover their own clean-up expenses and rent. WISL expended the sum of $3,500.00 whereas Debera Rampersad spent $12,500.00 to clean up their respective premises after the water escaped.

30. Debera Rampersad denies that she in in arrears of rent and avers that she paid off any arrears prior to September 2016. Debera Rampersad has been a tenant of the first defendant for over 20 years and based on the good relationship, the strict terms of the agreement were waived and/or relaxed. As a result, there was an informal arrangement between her and the first defendant where she was allowed to pay the rent when she was able to, having regard to her and her husband's failing health. Debera Rampersad's evidence is that she was excused from paying rent until her business was back up and properly running.

- The First Defendant's Evidence

31. At about 6:00am on the day of the flooding incident, the General Manager of the first defendant Suraj Sankar, was contacted about a problem at the shopping centre. In response, he issued instructions to turn off the valves

and pump of Allum's Shopping Centre's water system. After arriving at the shopping centre and ensuring that the water system was shut off, Mr. Sankar contacted the claimants and the second defendant advising them of the incident and requesting their attendance at the premises.

32. Mr. Sankar's evidence was that the escaped water emanated from the first floor. Therefore, when the representative of the second defendant arrived and opened its business premises, inspections were conducted. There was about three inches of water in the kitchen of the second defendant's premises. When the kitchen cupboard was opened, Mr. Sankar observed that a 90-degree angle PVC fitting had become loose and/or dislodged and/or unstuck from the intake pipe, supplied from inside of the wall.

33. The first defendant supplied water through the wall, which was capped off until the second defendant occupied the suite and connected the kitchen sink and faucets.

34. Upon inspection, there was no breakage of the pipe and the intake supply was positioned as it was prior to the suite being tenanted. The point at which the pipe became dislodged was a 90-degree angle pipe, placed by the second defendant when it installed the kitchen sink. It appeared that the 90-degree angle fitting popped out of place due to water flowing from the first defendant's tanks via gravity causing water to escape from the dislodged pipe inside the kitchen cupboard.

35. On the same day, the second defendant conducted the necessary repairs on the loose/unstuck pipe.

36. While on the ground floor, Mr. Sankar noticed that water seeped from the first floor of the shopping centre through the ceiling of stores located on

the ground floor. On the said day, Mr. Sankar contacted several janitorial staff who assisted in cleaning up the escaped water.

37. The first defendant asserts that claimants and the second defendant were all bound by respective lease agreements containing terms and/or conditions issued to them by first defendant. Mr. Sankar asserted that pursuant to the various lease agreements, all tenants are contractually responsible for taking the necessary steps to install, keep and/or maintain in a good and tenantable state, their respective internal plumbing. The point at which the water escaped was the internal plumbing installed by the second defendant within the confines of the tenanted suite.

38. According to Clause 2(d) of the second defendant's lease agreement dated the 21 January 2000, the second defendant agreed to:

> "… to keep and maintain the interior of the premises with the allocated toilets including the paintwork, the internal plumbing and electrical wiring thereof and all door windows show window glass locks fastenings bolts and other fittings fixtures and furniture in good and tenantable repair and condition as regards loss or damage by fire earthquake tempest hurricane flood lightening and/or other acts of God or by civil commotion or the State enemies excepted."

39. The second defendant also agreed pursuant to clause 2(o) of the said lease agreement:

> "… that he will not suffer any part of the premises of other parts of the premises of which the premises are a part to be used in a manner so as to cause nuisance annoyance or inconvenience to the occupies of the neighbouring portions of the Allum's Shopping Centre."

40. The second defendant according to Clause 2(s)(ii) of its lease agreement agreed:

> "… to indemnify and hold the landlord harmless against all claims actions and proceedings in respect of any loss injury damage or

inconveniences to the tenant(s) their servants or agents and persons having business with them arising out of any wrongful act or default other than that of the landlord its servants and/or agents in connection with any construction fixtures or fittings on the premises which were constructed or installed at the expense of the tenant(s)."

41. Further, the second defendant pursuant to Clause 2(s)(iii) also agreed:

> "… to indemnify and hold the landlord harmless against all claims actions and proceedings in respect of any loss injury damage or inconveniences suffered by the tenant(s) their servants agents or persons having business with him however caused except injury or damage caused by the wrongful act or default of the landlord its servants or agents acting within the scope of their authority and except also injury or damage contributed to by such act of default to the extent of contribution."

42. Accordingly, the first defendant contends that at no point in time was it responsible for, nor did it install the plumbing, water fittings and/or fixtures in the suite rented by the second defendant. At all material times, the second defendant was responsible for and did install its own plumbing. Therefore, the plumbing including the angle PVC pipe which became dislodged and/or unstuck were installed by the second defendant and remained under its control and/or maintenance as the first defendant had absolutely no access to the inside of the second defendant's kitchen. Moreover, the first defendant was never notified about or called upon to address any issue with the second defendant's plumbing.

43. Furthermore, the first defendant in reliance on Clause 3(c) of the claimants' respective lease agreements denies liability for any compensation claimed by the claimants for damage to goods due to the second defendant's dislodged pipe.

44. Therefore, based on Mr. Sankar's understanding of the lease agreements, he wrote to the second defendant by letter dated 12 December 2018 to

advise amongst other things, that any and all claims for compensation due to the dislodged angle fitting resulting in damage to tenanted spaces at Allum's Shopping Centre, Marabella would be directed to them.

45. As it relates to the counterclaim against Debera Rampersad, the first defendant states that in accordance with Clause 1 of the lease agreement dated 1 December 1995, she agreed to pay a monthly rent of $2,000.00 to the first defendant for Shop No S2 (also known as Shop 102) at Allum's Shopping Centre, Marabella. She also agreed by Clause 1 of lease agreement dated 17 January 2000 to pay a monthly rent of $1,500.00 for Shop No S3 (also known as Shop 103) at Allum's Shopping Centre, Marabella.

46. Nevertheless, Debera Rampersad failed to pay the monthly rent in accordance with Clause 1 of the respective lease agreements although she remained in occupation of the premises operating her business. As such, representatives of the first defendant sent numerous letters to Debera Rampersad from the 11 September 2003 to the 10 January 2019 setting out the arrears of rent, which had accrued over the various years.

47. On the 25 July 2017 and the 23 November 2018, Mr. Sankar while he was the first defendant's Senior Property Manager, issued Notices to Quit to Debera Rampersad for Shop No S2 and Shop No S3 respectively due to the continued accrual of arrears of rent. However, the said Notices to Quit were never enforced due to Debera Rampersad's continued acknowledgment of the debt and promises to pay the first defendant.

48. On the 31 August 2017, Debera Rampersad eventually vacated Shop No S2 and in or about January 2019 she vacated Shop No S3.

49. Nevertheless, Debera Rampersad's tenant files reflect that the arrears of rent payable to the first defendant in relation to Shop No S2 for the period 1 September 2016 to 1 August 2017 is in the sum of $65,790.90.

50. With respect to Shop No S3, the first defendant's records show that Debera Rampersad had made two payments on account of the arrears of rent in the sums of $9,450.00 on the 31 October 2018 and $2,000.00 on the 31 December 2018. However, there remains the outstanding arrears of rent in the sum of $114,704.28 payable by her to the first defendant for the period 31 October 2016 to 1 December 2018.

51. Consequently, the first defendant asserts that due to Debera Rampersad's non-payment of rent to the first defendant, there is a total outstanding arrears of rent for Shop No S2 and Shop No S3 in the sum of $180,495.18.

The Law

52. The claimants claim damages for negligence and/or nuisance caused by the second defendant as tenant and by the first defendant as landlord or in the alternative pursuant to the rule in Rylands v Fletcher.

Negligence

53. The claimants allege that the incident was caused by the negligence of the first defendant. The allegations of negligence are that the first defendant owed a duty of care to the claimants to ensure that the premises and surrounding premises were safe, regularly inspected, well maintained and up kept. They say further that this duty of care was breached by keeping a faulty PVC pipe on the compound, by failing to regularly inspect and/or maintain it and ensuring that the pipe was sufficient for water capacity and water flow. The claimants allege that the first defendant allowed the large

quantity of water to escape and failed to warn the claimants of that risk. The claimants say that the loss suffered by them was foreseeable.

54. The first defendant asserts that they fulfilled their obligation and that the incident was not caused by their neglect. Therefore, the first defendant submits that there was no breach of the duty of care. The resultant damages suffered by the claimants are not the first defendant's responsibility.

55. To establish the tort of negligence requires proof of four distinct requirements:
    a. The existence of a duty of care;
    b. Breach of the duty of care;
    c. A causal connection between the breach of the duty of care and the damages suffered; and
    d. That the damages are not so unforeseeable as to be too remote.[2]

56. The dispute here requires the court to resolve, firstly whether the first defendant owed a duty of care to the claimants. Secondly, was the owed duty of care breached by the first defendant. If these two are proved to the extent that the court feels sure, then the court will consider causation and remoteness of damages.

57. The relationship of landlord and tenant, by its very nature allows the tenant to claim that the landlord has certain obligations to fulfill, both express and implied towards the tenant. Those obligations are prescribed by the law, both common law and statue, concerning landlord and tenant.

[2] Clerk & Lindsell on Torts, Twenty-Second Edition. Paragraph 8-04

To be clear the claimants are not claiming damages as a consequence of breach of contractual covenants.

58. Outside of obligations owed by virtue of the relationship of landlord and tenant, a tenant could possibly argue that all landlords should owe a duty to all tenants to protect them from actions taken by landlords. The breach of this general duty would likely be more difficult to prove liability.[3]

59. In this case, the claimants are relying on the first defendant's lease with the second defendant. The lease they say, created a duty of care between themselves and the first defendant. However, breach of the covenants between the first and second defendants does not create a situation where it is reasonably foreseeable that the type of damage suffered would have resulted to the claimants.

60. If however there is evidence that the event complained of occurred because of the negligence of the first defendant they would be responsible for the consequences of the negligence – once the alleged damage was reasonably foreseeable.

61. In this case, it seems more reasonable that a court would find that the second defendant owed a duty of care to neighbouring tenants to avoid foreseeable damage to their tenanted premises by acts or omissions likely to result in such foreseeable damage. However, regarding the first defendant, the court could find no duty of care owed to the claimants as pleaded by them.

Nuisance

[3] Clerk & Lindsell on Torts, Twenty-Second Edition. Paragraph 8-07

62. The claimants pleaded and submitted that their enjoyment and use of their tenanted property was interfered with by keeping a faulty PVC pipe and/or failing to regularly inspect and/or maintain same.

63. The first defendant submits the plea of nuisance is unsustainable as there was no continuous interference but rather a one off occurrence.

64. Nuisance is defined as "a condition or activity which unduly interferes with the use or enjoyment of land".[4] It is said to require a state of affairs from which damage is likely to occur.[5] It is not necessary for the actual damage to be continuing and a single isolated event leading to damage or the first incident causing damage may be sufficient to sustain a claim for nuisance.[6]

65. The question for this court is whether the first defendant not exercising their right of reentry to inspect the property over the 18 years created a state of affairs such that it was likely that the PVC pipe would have unstuck and caused the water damage. The court has to determine whether the event that occurred and resulted in damage was foreseeable by the first defendant.[7]

66. In this case, it is not alleged that the first defendant did an act that caused the damage. Rather the claimants allege that the first defendant's neglect to enter and inspect led to the PVC pipe coming detached and leading to the water damage. In this circumstance, the court is of the view that there must be evidence to find that the event was foreseeable.

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[4] Clerk & Lindsell on Torts, Twenty-Second Edition. Paragraph 20-1. see also CV2016-01369 Leynan Rodulfo v Arima Borough Corporation
[5] Clerk & Lindsell on Torts, Twenty-Second Edition. Paragraph 20-16
[6] Clerk & Lindsell on Torts, Twenty-Second Edition. Paragraph 20-16
[7] Clerk & Lindsell on Torts, Twenty-Second Edition. Paragraph 20-37

67. The first defendant retained unto themselves under the lease agreement an option to enter the leased premises:

> "To permit the landlord and/or its agents with or without workmen and others upon no less than 24 hours written notice except in an emergency to enter upon the premises at any time during the said term, convenient hours in the day for the purpose of viewing the condition thereof and of executing of all repairs thereto which the tenant is/are obliged to do in accordance his covenants in that behalf hereinafter contained and on being served with a notice in writing from the Landlord of any defect or want of reparation for which the Tenant (s) is are liable therefrom by the Landlord forthwith at the cost of the Tenant (s) to repair and make good all such defect and want of reparation to the extent that the same shall be the obligation of the Tenant (s) under the covenants herein contained and if the Tenant (s) shall not within ten days after service of such notice have commenced to proceed diligently with the execution of such repairs, then to permit the Landlord to enter upon the premises and execute such repairs and the costs thereof shall be a debt due from the Tenant (s) to the Landlord and be forthwith recoverable by action."

68. The claimants rely on - where the landlord has covenanted to repair or has the right to enter and repair, he will be liable where the nuisance arises after the tenancy has commenced. The claimants also relied on *Wilchick v Marks and Silverstone* [1934] KBD 56 – the court held that the landlord was under a duty to prevent a nuisance on the premises of which they had knowledge and therefore responsible for the damage to the plaintiff.

69. In *Wilchick v Marks and Silverstone* (supra) the plaintiff was injured when walking on a street. A window fell off a house that abutted the street causing injury to the plaintiff. The defendants were the landlord and tenant of the house. When the house was let, it was in a good state of repair. At the time of the incident, a hinge on the wooden shutter was broken. This defect was known to both the landlord and the tenant for some time before the wooden shutter fell. The issue in the case was

whether the landlord, tenant, both or neither were liable for the injury caused by the nuisance.

70. The court found that there was no covenant requiring the tenant to do repairs. There was also no contract for the landlord to do repairs. The court also found that the landlord had done repairs when they were necessary. There was however, an entry in the rent book that "the landlord, his agent and workmen shall have permission to enter the premises at any reasonable our to inspect same or execute any necessary repairs".

71. Both the landlord and the tenant knew of the state of disrepair of the wooden shutter. The tenant had informed the landlord. The court decided that the landlord was liable because he retained a right to enter the premises and do any reasonable and necessary repairs. The landlord had notice of the required repairs. The tenant was also liable because he was aware of the nuisance created by the defect and as the fact that the window overhung a street where people walked.

72. The question is whether a landlord who has retained the right to enter, inspect and maintain premises would always be liable for a nuisance? According to the authors of Clerk & Lindsell,[8] if the landlord undertakes to repair, he will be liable for the consequences of the disrepair whether he knew or ought to have known of the disrepair. However, there would be no liability ascribed to the landlord if the disrepair is due to the act of a trespasser or a secret and unobservable operation of nature.[9] See *Wringe v Cohen* [1940] 1 K.B. 29, *Spicer v Smee* [1946] 1 All ER 489

[8] Clerk & Lindsell on Torts, Twenty-Second Edition. Paragraph 20-79
[9] Clerk & Lindsell on Torts, Twenty-Second Edition. Paragraph 20-17

73. The court finds that the first defendant, by virtue of the lease, retained unto himself or herself, the right to repair. If therefore the premises had fallen into a state of disrepair, the first defendant would be liable for the nuisance caused whether or not they were aware of it or ought to be aware of it.

74. There is no evidence that the suite let to the second defendant had fallen into a state of disrepair therefore the first defendant is not liable in that regard. Since there is no absolute liability, the court must consider the specifics and determine whether there was a nuisance, whether the first defendant knew of it and whether it is such that the first defendant should be held liable.

75. Neither claimants saw the specific place in the suite rented to the second defendant, where the water escaped. There is also no expert evidence adduced to assist the court. The only evidence on this issue comes from the witness called by the first defendant.

76. The evidence about the cause of the leak comes from Suraj Sankar. At the time, Mr Sankar was the General Manager of the first defendant with 22 years of experience in property management. Mr Sankar is not able to give evidence from his own knowledge about the circumstances leading up to the occupation of OTI. Mr Sankar relies on records kept by the defendant company. He can however speak about the last eight years leading up to the incident.

77. The company had two plastic 600 gallon water tanks installed on the roof of the building. The roof was reinforced and waterproof concrete. Water flows by gravity from the tanks through ¾ inch PVC pipes to the tenanted suites. On Sunday the 9 December 2018, Mr Sankar received certain

information. On arrival at the mall, he saw that the common areas were wet.

78. Mr Sankar went with a staff member of OTI into the suited tenanted by OTI. He searched and opened the cupboard and saw that a 90-degree angle PVC fitting inside the cupboard had become loose and/or dislodged and/or unstuck from the intake pipe which is supplied from inside the wall. From the records, it seemed that OTI had connected the kitchen sink and faucet to the intake pipe. There was no breakage in any of the pipes. Mr Sankar also observed that the intake supply pipe was positioned in the wall as it was prior to OTI occupying the suite. Mr Sankar formed the opinion that the cause of the 90-degree angle fitting had popped out due to the poor application of glue. The same day OTI had someone repair the loose/unstuck pipe. Mr Sankar's evidence is that there was no evidence of a burst. He admitted that the word "burst" was used in the response to the pre-action protocol letter, but that usage was an error.

79. Mr Sankar described what an inspection would entail; a walk in and a visual inspection of the space. Mr Sankar also said in cross-examination that had the first defendant done routine inspections it might have been possible to pick up the issue with the angle valve. There were two unrelated episodes during the 3 years before the incident. One concerned a leak in a toilet located in the common area and the other was a leak from an air condition unit. Both issues were corrected and repaired by the first defendant.

80. Mr. Sankar speculated that it might have been possible to pick up the issue with the angle valve. However, the evidence established that the building rented to the claimants and the surroundings were not in a state of disrepair. There is no evidence from which the court could find that the

first defendant knew or ought to have known of the problem with the angle valve. There was no evidence of any leaks from inside the kitchen cupboard of OTI or from any other plumbing from OTI's suite. Further, the position of the tanks or their installation did not cause or contribute to the escape of water which occurred on the 9 December.

81. There is no evidence of a state of affairs that would constitute a nuisance. The liability to a landlord, such as the first defendant who had retained the right to enter, inspect and repair cannot be absolute. It must be reasonable in the circumstances of each case. In this case, the evidence established that there was an unsticking of the 90-degree angle valve pipe. There is no evidence for the claimants that they saw where the water escaped to provide an alternative to the evidence that the pipes were unstuck. There is also no evidence from the claimants or any other tenant that there were any leaks from OTI or any other suite. The court does not believe that the right to enter and inspect would include the right to inspect all water connections and installations unless there was some indication of a problem.

The Rule in Rylands v Fletcher

82. The claimants pleaded and relied on the rule in Rylands v Fletcher, asserting nuisance, as an alternative. The claimants submit that the first defendant is liable by allowing a dangerous element namely water to escape. The water caused damage and the first defendant is strictly liable for the damages.

83. In *Rylands v Fletcher*[10] the lessee of the certain lands was desirous of building a reservoir. During that building process, they came upon old shafts. No proper care and skill were taken to ensure that the old shafts could take the pressure of water. The old shafts communicated vertically and horizontally with old shafts on other lands. When the new reservoir was filled, one of the old shafts gave way, flooding certain other lands by communicating with old shafts on those lands. Those other lands had been leased for the purpose of coal mining and damage was done.

84. The House of Lords, in *Rylands v Fletcher* decided that imposing upon the land a reservoir, was not a natural condition of the land. If that unnatural condition whether above or below ground, introduced water in quantities and in a manner which resulted in water escaping and causing damage to other land users, the defendant would be liable for the resultant damage.

85. The rule in Rylands v Fletcher imposes strict liability for damage done by dangerous things escaping from land even where the landowner exercised all due diligence.[11] Unlike the tort of nuisance, the rule in Ryland v Fletcher will impose liability with a single or isolated escape of the dangerous thing.[12]

86. In this case, there is no evidence for the court to find that water by itself is a dangerous element as pleaded by the claimants. Whether the manner in which the storage of the water was an unnatural use of the land is another question. From the agreed evidence, the water was stored in water tanks. Storing water in tanks is not an unnatural use of land. It is rather a common and everyday use of land. Storing the water tanks on an elevated platform

[10] (1868) L.R. 3 H.L. 330
[11] Clerk & Lyndsell on Torts, Twenty-Second Edition. Paragraphs 1-30 and 1-71
[12] Clerk & Lindsell on Torts, Twenty-Second Edition. Paragraph 1-42

is also not an unnatural use of the land. Even here, where the water tanks were stored on the roof of the building is not an unnatural use of the land. There is no evidence that the manner of storage or use of the water tanks caused or contributed to the seepage or outflow of water.

87. Water was piped to each unit and caped off. From the evidence, the court could surmise that the second defendant installed a kitchen sink and connected their water line to the inflow line. There is also no evidence from which the court could find that the second defendant's installation is an unnatural use of land.

88. The court is not satisfied that the rule in Rylands v Fletcher can be applied to the facts, as the court found them, in this case.

Res Ipsa Loquita

89. The claimants have not pleaded the maxim res ipsa loquita – as such the court did not address its mind to it.

Counter Claim

90. The court is satisfied that the claimant DEBERA RAMPERSAD while Trading as Debera Fashion Step Up and Save did not fulfil her contractual obligation to pay the rent for the suites she occupied. The court is also satisfied that the claimant fell into arrears of rent as claimed by the first defendant.

Disposition

91. The claimants' claims against the first defendant are dismissed.

92. On the first defendant's counterclaimed against DEBERA RAMPERSAD Trading as Debera Fashion Step Up and Save, there shall be judgment for

the first defendant against DEBERA RAMPERSAD while Trading as Debera Fashion Step Up and Save:

a. Damages for breach of tenancy agreement for rent for Shop S2 Allum's Shopping Centre, Marabella also known as #102 Allum's Shopping Centre, Marabella for the period 1 September, 2016 to 1 August, 2017 accrued in the sum of $65,790.90.
b. Damages for breach tenancy agreement for rent for Shop S3 Allum's Shopping Centre, Marabella also known as #103 Allum's Shopping Centre, Marabella for the period 31 October, 2016 to 1 December, 2018 accrued in the sum of $114,704.28.
c. In relation to the arrears for Shop S2 Allum's Shopping Centre, Marabella also known as #102 Allum's Shopping Centre, Marabella, interest pursuant to Section 25 of the Supreme Court of Judicature Act, Chapter 4:01 at the rate of 1% per annum from 1 August, 2017 until 24 March 2022.
d. In relation to the arrears for Shop S3 Allum's Shopping Centre, Marabella also known as #103 Allum's Shopping Centre, Marabella, interest pursuant to Section 25 of the Supreme Court of Judicature Act, Chapter 4:01 at the rate of 1% per annum from 1st December, until 24 March 2022.

93. The court orders Costs as follows:

a. The claimant, WESTERN INDUSTRIAL SOULUTIONS LIMITED, to pay 75% of the first defendant's costs on the claim, as prescribed, in the sum $132,533.44;
b. The claimant, DEBERA RAMPERSAD Trading as Debera Fashion Step Up and Save, to pay 75% of the first defendant's costs on the claim in the sum of $70,291.88; and

c. On the counterclaim, the claimant, DEBERA RAMPERSAD Trading as Debera Fashion Step Up and Save, to pay the first defendant's costs on in the sum of $36,074.28.

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Justice Avason Quinlan-Williams

JRC: Romela Ramberran