IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Sir James Wicks CJ, Wambuzi & Law JJ A)

Between

CIVIL APPEAL 5 OF 1978

LALJI BHIMJI SANGHANI .....APPELLANT

SHAMJI JINABHAI PATE.....APPELLANT

AND

CHEMILABS.....RESPONDENT

JUDGMENT

Law JA The appellants are the owners of a building in Kerinyaga Street, Nairobi, which in July 1971 had just been built or was nearing completion. The respondents are a firm consisting of three partners who carry on business as chemists, druggists and dealers in pharmaceutical goods. They required space for the storage of their goods and on 30th July 1971, through one of the partners Mr NP Patel, they addressed a letter to the appellants in the following terms:

> We refer to the discussions which took place between Mr LB Sanghani and the under-signed whereby it was agreed that our company lease from [the appellants] the ground-floor premises comprising one large showroom of approximately 3000 square feet together with the open paved yard, service passage and amenities, also the basement storage area situated beneath the showroom comprising approximately 5000 square feet to be leased at a total overall inclusive net rental of Shs 7500 with effect from 1st September 1971, for a period of four years with an option in favour of lessee for a further period of five to ten years thereafter. It was also agreed that you will draw up the necessary lease with your advocates and the expenses will be borne by you.
>
> It is understood that the water and power charges will be at the lessee's expense, and similarly you will make arrangements to provide a parking area for us at the rear of the premises. It was also agreed that we can make temporary partitioning according to our requirements. Further it was agreed that we can sub-let the premises at any time either in part of in whole.

On the 3rd August 1971, Mr L B Sanghani under the word "lessors" affixed his signature, and following the signature are the words "as agreed above".

The respondents did not go into possession on 1st September 1971, as certain work still had to be done to the premises. This consisted of plastering and painting walls, putting in partitions and fitting burglarproof

grills in front of sliding doors. The respondents went into occupation of the ground floor on 18th September and of the basement on 28th September. Rent for the first half of September was later waived by the appellants; from then on it seems to have been regularly paid by the respondents and accepted by the appellants.

In accordance with the agreement evidenced by the letter of 31st July 1971, the appellants' advocates prepared a draft lease and forwarded "the engrossed lease in triplicate for execution by your clients" under cover of their letter dated 7th April 1972 addressed to the respondents' advocates; but two of the partners in the respondents' firm objected to most of the lessees' covenants and refused to execute the lease. It has never been executed and therefore has not been registered.

The respondents' occupation of the showroom and basement was uneventful for some nine or ten months. The upper floor was occupied by a different tenant who used if for purposes of a lodging house. There were seven lavatories in the building, one in the basement, one in the showroom, and five in the lodging house, which was also equipped with four showers and four kitchen sinks; and there were six wash basins in the building, two in the lodging house, three in the showroom and one in the basement. It seems that the wash basins and lavatories in the showroom and basement were not used as that part of the building was used exclusively as a store. There was an inspection chamber or manhole outside the building which did not form part of the premises demised to either the respondents or the tenants of the lodging house. It remained in the occupation and control of the appellants.

All effluents in the form of water and sewage from the building were discharged into this chamber by two 4-inch pipes, one leading from the lodging house and the other from the showroom and basement. The plans for the building, including the system for the discharge of water and sewage, were approved by the city council engineer in September 1970.

The actual designing and installation of the system, including the chamber, had been done by a Mr VV Patel, an experienced but unqualified plumber carrying on business as an independent contractor, who had designed and installed similar systems in a number of other buildings. The drainage system was inspected and approved by a city council inspector, Mr Karanja, when it was being built. Mr Karanja noted that the chamber was 2 feet long by 1 foot 6 inches wide, which was 6 inches less in each case than the relevant by-laws required. Mr Karanja was of the opinion that this did not matter. As regards the chamber itself, it was in his view properly constructed and working efficiently. He saw no broken or jagged cement or plaster.

Things began to go wrong in July 1972. On 20th July, water and sewage had been forced back from the chamber, through the lavatory in the basement, causing some flooding in the basement. This was reported to Mr Shanghani, who at once took action. He instruct Mr VV Patel to deal with the matter. Mr Patel did so on the same day. He found that the chamber was full of sewage. It should not have been. A chamber should not collect sewage, but should receive it from the inlet pipes and discharge it through the outlet pipe to the main sewer as it is received. The trouble was due to a blockage in the outlet pipe caused by some hard object. Mr Patel was unable to retrieve this object; but by the use of rods he was able to push it down the outlet pipe into the main sewer. The water and sewage then dispersed normally. The chamber was cleaned out. Neither Mr Patel, nor Mr Sanghani, who was present, saw any damage to the walls of the chamber or the surrounds to the outlet pipe, such as broken cement or plaster, requiring repair. So far as they were concerned, the trouble was due to a blockage in the outlet pipe, as can happen and does happen to any sewage system. As Mr Patel deposed, "blockages occur everywhere. City Council sewers get blocked. No-one says their designs and construction are bad."

A month later, on 23rd August, there was a second and much more serious flooding in the basement to the depth of several inches. Damage was caused to pharmaceutical and medical goods stored in the basement to the extent of over a quarter of a million shillings. This time the respondents called in a highly qualified civil engineer, Mr Fitzgerald. He inspected the flooded basement. Sewage was flowing into the basement from the chamber outside. The manhole cover to the chamber was hidden by an accumulation of rubbish. Next day this rubbish was removed by a gang of labourers, and the manhole cover lifted. Sewage overflowed and ran into the street. A rod was used down the outlet pipe, and the sewage slowly emptied,

leaving paper and solids all round the exit pipe. The surrounds to the pipe were then cleaned. According to Mr Fitzgerald, the cement surrounding the exit pipe was broken and jagged. The pipe was probed with a rod, and again a round, solid obstruction was detected about 3 feet down the outlet pipe. It was not recovered but was again pushed down. Mr Fitzgerald formed the opinion that the chamber was not properly constructed, for three reasons: (1) its dimensions were too small and did not comply with the by-laws; (2) the plaster round the exit pipe was in a bad condition; and (3) the inlet pipe from the upper floor was defective in that it ended abruptly instead of leading incoming sewage in a gentle curve towards the outlet pipe and on a level with it. As a result sewage was discharged from some 20 inches higher than it should have been and splashed on the walls of the chamber, lodging there and on the jagged edges of the exit pipe instead of passing through smoothly.

Mr Fitzgerald's conclusions were that the flooding was caused by the combined effects of a large solid object blocking the exit pipe and of paper and sewage solids which had collected round the outlet, causing water to flow back into the basement through the lavatory pan there and spill onto the floor. He formed the opinion that even if the obstructions were cleared, the improper construction of the chamber would lead to periodic blockages in the future and repetition of the flooding in the basement. There has been in fact no repetition because the pipe joining the basement and showroom installations to the chamber was then sealed off, making further flooding impossible.

However, the chamber was again inspected, for the purpose of this suit, on 21st January 1976 by another highly qualified civil and water engineer, Mr Girling. Again, an obstruction was found some way down the exit pipe. Mr Girling also formed the opinion that the chamber was badly designed, for two of the reasons given by Mr Fitzgerald. It was too small and contravened the by-laws in this respect. The inlet from the upper floor was too short and steep so that instead of water and sewage following the channel it was thrown against the walls of the chamber, where some of the matter would stick and accumulate before dropping to the floor at the point where the outlet pipe begins.

So much for the facts. The respondents claimed damages for the loss sustained by them, the appellants denied liability. The respondents filed suit. By their original plaint, dated 17th May 1973, three causes of action were pleaded: (1) That the damage was caused by the escape of a dangerous thing, to wit sewage, from the appellants' chamber to the premises demised to the respondents. This head of claim was based on the principles of absolute liability enunciated in the case of *Rylands v Fletcher* (1868) LR 3 HL 330. (2) That the damage was caused by the negligence of the appellants, arising out of the construction of an allegedly defective chamber, and their alleged failure properly to repair and maintain the same. And (3) that in the premises the appellants maintained a nuisance by reason of which damage and loss were caused to the respondents.

To this plaint the appellants, on 3rd July, filed a defence denying liability, and counterclaimed for specific performance of the contract between the parties by the respondent executing the engrossed lease. By paragraph 1 (vii) of that defence, the appellants pleaded that:

> the letting was further subject to covenants, conditions, agreements, restrictions, stipulations and provisions embodied in a draft lease duly agreed between the respective advocates for the parties, and confirmed by correspondence between them, which said lease was duly engrossed and tendered in triplicate, and which the [respondents'] advocates agreed in writing that their clients would duly execute but to date have failed to do so.

The appellants thus contended that the agreement between the parties, evidenced by the letter of 30th July 1971, set out at the beginning of this judgment, incorporated the covenants, terms and conditions of the draft lease.

Faced with this contention, the respondents then, on 19th July, amended their plaint to add a cause of action in contract. They alleged a breach by the appellants of the express covenant in the draft lease to keep the demised premises and the drains, conservancy tanks and pipes therein in good and tenantable condition.

The appellants then amended their defence on 27th July, to make it clear that their contention that the draft lease was incorporated into the agreement was conditional 'upon perfection of a written lease" and stating, contrary to their original contention, that the agreement could not be added to by any unsigned draft lease. The pleadings closed with the respondents' reply to the defence and their defence to the counterclaim, dated 21st August 1973, in which they put forward yet another head of claim based on contract, this time alleging that the agreement was for the letting of premises "under construction and as yet incomplete", for the purpose (of which the appellants were well aware) of storing mainly pharmaceutical goods, and that the agreement was accordingly subject to a warranty that the premises were, or would be, made fit for such storage, and that as the premises were liable to flooding by sewage water the appellants were in breach of the implied warranty.

It was in this state that the trial of the suit began before Kneller J. Evidence and argument occupied seven days between 15th and 23rd March 1976, and the judgment occupying sixteen pages was delivered on 30th August 1976. In his judgment, the judge defined the issues as follows. (1) Are the appellants liable to the respondents in damages under the rule in *Rylands v Fletcher?* (2) Are they liable for the tort of negligence? (3) Are they liable for the tort of nuisance? And (4) are they liable in contract: (a) express, or (b) implied?

In the event the judge decided all five issues in favour of the respondents, and gave them judgment for the amount claimed, with interest thereon from the date of the amended plaint, and costs. The counterclaim for specific performance was not proceeded with, as the term of four years specified in the agreement had expired before the suit was heard. The judge dismissed the counterclaim with costs.

The appeal was argued before us over a period of five days. We had the advantage of hearing distinguished leading counsel on both sides, Mr Gerald Godfrey QC for the appellants and Mr JM Nazareth QC for the respondents. Mr Godfrey challenged the judge's findings on all five issues, and the award of costs on the dismissed counterclaim.

Mr Nazareth argued in support of the judgment on all five issues, and supported the award of costs on the counterclaim. He also submitted that interest on the damages should have been ordered to run from the date of the original plaint and not of the amended plaint. As there was no crossappeal on this point, we did not allow it to be argued. In the absence of argument I am unable to say that the judge was wrong in awarding interest only from the date of the amended plaint. My personal view is that this was an unusual order and that it should not be taken as a precedent until the point is decided, after full argument, should it arise again. *Prima facie*, where the amount claimed as damages represents actual loss incurred at or before the date of filing suit, interest should run from that date; see *Prem Lata v Peter Musa Mbiyu* [1965] EA 592.

Before considering the grounds of appeal, I must deal with Kneller J's findings of facts and the inferences drawn from those facts. This was his basic finding:

> The inspection chamber was not working properly. It was too small for the purpose. It had not been plastered properly. Its design was wrong both so far as the discharge from the inlet pipe and the design of the floor is concerned. It was not secure from the attentions of anyone shoving something through its cover which could not pass through the outlet.

This Court on a first appeal is not necessarily bound by the findings of fact in the court below, but it will not usually depart from them unless it appears that the trial judge failed to take account of particular circumstances or probabilities, or if his impression of the demeanour of a witness is inconsistent with the evidence generally; see *Selle v Associated Motor Boat Co* [1968] EA 123. Mr Godfrey submitted that the defects, if any, in the size and design of the inspection chamber were insignificant and irrelevant and were not the primary cause of the flooding, which was due to the unexplained presence, in the outlet pipe, some distance away from the inspection chamber of a hard solid object such as rock or stone. In my view this Court would not be justified in differing from the judge's finding and inference that the flooding was primarily due to the defective design and construction of the inspection chamber. He had heard much contradictory evidence on this point, which he considered in detail in the course of his judgment. Having

heard and seen the witnesses, he preferred the evidence of Mr Fitzgerald. I can see no reason to think that he was wrong in this respect.

I propose to approach this appeal on the basic assumption that the flooding of the basement was primarily due to the defective design and construction of the inspection chamber.

I now turn to the grounds of appeal, and propose to consider them in the order in which they were argued before us. We were referred in argument to a large number of authorities. I have read them all and endeavoured to understand them; I hope I will be excused if I do not refer to them all.

The first ground of appeal is against the finding that the appellants were liable under the express covenant to repair contained in clause 2(e) of the engrossed lease, which reads:

> The lessors ... covenant ... as follows: (e) To keep the roofs main walls and all timbers of all buildings forming part of the said premises, electrical wiring and electrical circuits of the same and the exterior of all such buildings and additions thereto and drains conservancy tanks and the pipes carrying the same situate on the said premises in good and tenantable repair and condition.

The premises were defined in the preamble as being the ground-floor "shop ... together with the open paved yard, service passage, and amenities and the basement storage area ...". Mr Godfrey's main submission on this point is that an express covenant must be contained in an agreement, and that there was no concluded agreement here on any terms as the lease was never executed by the parties. Mr Nazareth's reply to this is that the agreement set out in the letter dated 30th July 1971 was varied by the incorporation of the terms contained in the draft lease, which was agreed by the advocates on both sides acting with the authority of their respective clients. This submission finds support in paragraph 1(vii) of the original defence which contended that the letting was subject to covenants duly agreed between the respective advocates for the parties in the draft lease, and the judge was satisfied that the contract between the parties was that "set out in the draft lease and correspondence". I am not prepared to dissent from this finding, although not convinced by it. Assuming that the terms of the lease were agreed by the respective advocates, having authority to do so, the position is the same as if the parties themselves had executed it. Although unregistered, it nevertheless operated as a contract *inter partes* and was capable of being specifically enforced (*Souza Figueiredo & Co Ltd v Moorings Hotel Co Ltd* [1960] EA 926).

The question therefore arises, are the appellants liable under the covenant to repair set out in clause 2(e) of the draft lease? It is limited, so far as this case is concerned, to the buildings forming part of the demised premises, and to the drains and pipes "situate on the said premises."

The inspection chamber did not form part of the demised premises, nor was it situated "on the said premises" and unless it can be brought within the meaning of the word "amenities" it would not appear to be covered by the covenant. Even if it can, a covenant by a lessor to repair must be construed as a covenant to repair on notice, and there can be no breach of such a covenant until the lessor has notice of want of repair; see *Torrens v Walker* [1096] 2 Ch 166. Did the appellants have notice in this case? The point is not dealt with in the judgment. I think that they had no notice of any need to repair the chamber. It had worked satisfactorily for nine months. In July 1972, there was a stoppage of the outlet pipe, involving some flooding of the basement. The matter was attended to by a competent plumber, who cleared the obstruction. He did not think the chamber needed repair. He did not tell Mr Sanghani that repairs were needed, nor did the respondents do so. It is not until after the August flood, when Mr Fitzgerald inspected the chamber, that any suggestion was made that the chamber was inherently defective and in need of repair. It was the August flood which caused the damage but the appellants had no notice of any want of repair before that flood happened. For this reason I consider that this ground of appeal succeeds.

Kneller J also found for the respondents on the basis of an implied warranty for the following reasons:

> The [respondents were] to use [the premises] for storing their excess stock. The [appellants] knew that. The parties struck a bargain about the hiring of these premises for that purpose. There must

> be an implied covenant that the godown would be one in which goods could be stored safely otherwise the [respondents] would have no benefit from the bargain.

and the judge referred to *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113.

Mr Godfrey attacked this part of the judgment on several grounds. He submitted that an implied warranty as to fitness only arises on the sale or letting of an incomplete house, and then only to a dwelling-house, so that no implied warranty arose in this case. Mr Nazareth contended that the building, the subject of this appeal, was incomplete or under construction at the time of the agreement to let, and submitted that there was accordingly an implied warranty that it was fit for the purpose for which it was intended. He submitted that there was no difference in principle whether that purpose was human habitation or storage or goods, so long as the purpose was known to the vendor or lessor, as was the case here. As to whether the building was complete or not on 30th July 1971, the only assistance to be derived from the judgment is the statement on the first page that the appellants "were just completing" the premises at that time. From my own evaluation of the evidence, the building was structurally complete on 30th July. All that remained to be done was work of a minor character not affecting the structure. The agreement of 30th July 1971 only refers to "temporary partitioning" as remaining to be done.

My view is that the building was not under construction or incomplete on 30th July 1971. It was a complete building, and no implied warranty attaches to the sale of a complete house *(Hoskins v Woodham)* [1938] 1 All ER 692). If I am wrong on this, and the building was still under construction, then the question arises whether any implied warranty arose in this case.

So far as I am aware, it is only in the case of the letting of a furnished house (*Smith v Marrable* (1843) 1 M&W 5) or in the case of a contract to sell land and to build or complete a house on it, that an implied warranty of reasonable fitness arises, and that warranty is limited to reasonable fitness for habitation as a dwelling. All the cases cited by Mr Nazareth on this point relate to dwelling-houses and to their fitness for human habitation (see *Perry v Sharon Development Co Ltd* [1937] 4 All ER 390, *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 1, *Jennings v Tavener* [1955] 2 All ER 769, and *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113). I can find no support in the cases or in textbooks for extending the principle to a house or building, whether complete or not, sold or leased for the commercial purpose of storing goods. Mr Nazareth submitted that there was no difference in principle between a dwelling-house and a warehouse, once the purpose for which the building was required was known. Mr Godfrey suggested that the reason for the protection afforded to persons acquiring homes was a social one; ordinary persons proposing to live in houses needed protection, hard-headed businessmen negotiating for storage space did not. Be that as it may, I can find no authority for holding that, in the case of the purchase or leasing of a building for the purpose of storing goods, an implied warranty exists that the premises are fit for that purpose. On the contrary, Lord Coleridge CJ in *Manchester Bonded Warehouse Co Ltd v Carr* (1880) 5 CPD 507, 511, after referring to the warranty of fitness for residential purposes, went on to say "but we are not prepared to extend these decisions to ordinary leases of lands, houses, or warehouses".

I see no justification or necessity for extending the well-established principle, as it applies to uncompleted dwelling-houses, so as to include uncompleted commercial premises. In my view, this ground of appeal also succeeds.

This brings me to the rounds grounds of appeal directed against the causes of action based on tort, all of which were decided by Kneller J in favour of the respondents. Firstly, there is the finding that the appellants were liable under the principles laid down in *Rylands v Fletcher* (1868) LR 3HL 330. This is how the judge set out these principles, and applied them to the facts of this case:

The only question to be asked is whether or not [the appellants'] acts occasioned the damage. The only defences to it would be act of God or *vis major*. It is a matter of strict liability and based on the maxim *sic utere tuo ut aliennam non laedas*. Here the [respondents] did not need and did not use this inspection chamber. It was not part of their premises or that of East End Lodging. It belonged to the [appellants] alone. The [respondents were] not bound to receive sewage from the [appellants]. The [appellants] were

bound to prevent its escape to the injury of others. He [*sic*] brought it onto his own land and accumulated it and it was the sort of thing that if it would escape might cause damage to his neighbour, so he brought it on to his land at his peril. If it does escape and cause damage he is liable however careful he may have been and whatever precautions he may have taken to prevent the damage ... This sewage escaped and damaged the [respondents'] goods so the [appellants] are liable.

Mr Godfrey submitted that the judge had misunderstood and misapplied the rule in *Rylands v Fletcher*; and, in particular, that he had ignored the many exceptions to that rule. For instance, for absolute liability to attach under that rule, there must have been an unnatural user of land. Water and sewage systems are an ordinary and natural user of land, and if there is an escape onto the land of an adjoining occupier, the person from whose land the matter escapes is only liable if he has been negligent (*Ross v Fedden* (1872) LR 7 QB 661). Again, if the system is for the common benefit of adjoining occupiers, and represents an ordinary and natural user of land, there is no liability in the absence of negligence (*Rickards v Lothian* [1913] AC 263). In that case, the occupier of a lower floor suffered damage from a continuous flow of water from a lavatory basin on the top floor caused by water tap having been turned on full and the waste pipe plugged, this being due to the malicious act of some unascertained person. It was held that in these circumstances the case was not governed by *Rylands v Fletcher*. As was said by Wright J in *Blake v Woolf* [1898] 2 QB 428:

> The general rule as laid down in *Rylands v Fletcher* is that *prima facie* a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water which his neighbour keeps on his land. The general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him.

It seems to me that the appellants in this case can only be absolutely liable under the rule in *Rylands v Fletcher* if they brought and accumulated, or stored, on their land water and sewage, in circumstances involving knowledge and volition on their part, and which constituted a unnatural or extraordinary user of their land. In that case, they would be absolutely liable for the damage caused by the escape of this matter on to the respondents' adjoining land. Mr Nazareth submitted that all these conditions were present in this case. The appellants installed a defective inspection chamber which, instead of being a conduit for dispersing sewage, caused it to accumulate. The chamber was thus in the nature of a reservoir of sewage and represented an unnatural user of land. They had, or should have had, knowledge of this. The sewage escaped, and the appellants are liable for the consequences. Mr Nazareth relied on *Jones v Llanrwst Urban District Council* [1911] 1 Ch 393, in which case the defendants were held liable for the escape of sewage from their land into a river, thus causing damage to an adjoining landowner.

The basis for the decision in that case was that the sewage had been collected by the defendants, whose duty it was not to let it escape. Can it be said that the appellants in this case collected, or accumulated or stored sewage in their inspection pit, and did so consciously and with knowledge, so as to be absolutely liable for the consequences of the escape of that sewage? I think not. The inspection pit was part of a drainage system, constructed for the appellants by a competent independent contractor. It was designed as and intended to be a conduit for water and sewage, which is a normal and usual user of land. It was installed for the common benefit of all concerned. In August 1972, it began to accumulate sewage. It became, in a sense, a reservoir of sewage. Whether this was due to defective construction or design, or to a blockage, seems to me immaterial. What is material is that the appellants did not know, and had not the means of knowing, that the accumulation was taking place. By the time they knew, the sewage had escaped and the damage had been done. The appellants did not, by any conscious act of volition, bring about that accumulation. They were not liable in the absence of negligence for the consequences of the escape of the sewage. In my view, this ground of appeal also succeeds.

As regards their appeal against the finding that they were liable in negligence, they had no notice until after the August flood, which gave rise to these proceedings, of any inherent defect in the inspection chamber. They were accordingly not negligent in failing to remedy that defect. Even if the plumber, Mr V V Patel, was negligent in the way he dealt with the earlier flood in July or in the manner in which he

originally constructed the inspection chamber, he was a competent independent contractor, and a person is not liable for the negligence of an independent contractor *(Blake v Woolf* [1898] 2 QB 426). In my view the appeal against the finding of negligence also succeeds.

As regards nuisance, Kneller J held as follows: "The [appellants] knew what this faulty chamber would probably lead to, and they could have prevented this trouble but they omitted to do so" and he cited *Sedleigh- Denfield v O'Callaghan* [1940] 3 All ER 349. In that case, Lord Atkin said (at page 360):

> Nuisance [can be] sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied – or in some cases, owned – by oneself. The owner or occupier is not an insurer. There must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient, but some degree of personal responsibility is required, which is connoted in my definition by the word "use". This conception is implicit in all the decisions which impose liability only where the defendant has "caused or continued" the nuisance.

The inspection chamber in the instant case undoubtedly constituted a nuisance immediately before the August flood. Did the appellants "cause" this nuisance? The judge thought so, because in his view they "knew what this faulty chamber would probably lead to". With respect, I cannot agree. They did not know, before the August flood, that the chamber was faulty. Its defects were not discovered until after the August flood, by Mr Fitzgerald. The appellants had no prior knowledge of these defects. The chamber had been inspected and approved by the local authority. I do not see how the appellants can be said to have "caused" the nuisance. Nor do I see how they could be said to have "continued" it. A person can only be said to "continue" a nuisance, in Lord Atkins' word, "if he knows that it is operating offensively, is able to prevent it, and omits to prevent it."

The appellants did not know, before the August flood, that their inspection pit was operating offensively, and it follows that they were not able to prevent the nuisance, and did not omit to prevent it. They had no knowledge of the existence of the nuisance until after the event and, in my view, were not liable for its consequences. I am accordingly of the view that this appeal succeeds in all respects as regards the findings that the appellants were liable for the damage suffered by the respondents resulting from the August flood.

There remains only the ground of appeal against the award of costs on the dismissal of the counterclaim. Section 27 of the Civil Procedure Code lays down that a judge has a full discretion as to costs, provided that the costs of any action, cause or other matter or issue shall follow the event unless the judge shall for good reason otherwise order. On behalf of the appellants it has been urged that, on the authority of *Nesbitt v Meyer* (1818) 1 Swan 223, no costs should have been awarded on the dismissal of the counterclaim. In *Nesbitt's* case the plaintiff had sued for specific performance of an agreement to grant a lease for a term which had expired before the hearing of the cause. The suit was dismissed but the Master of the Rolls refused to order costs in favour of the defendants, because:

> The principal subject on which expense has been incurred by the examination of witnesses, is the act of the defendant in cutting down trees ... without a lease, or permission from his landlord.

I can derive no assistance from that decision in relation to this appeal. It does not appear to me to lay down any principle of general application. In the present case, no indication was given by the appellants of their intention not to pursue the counterclaim until the very last stages of the hearing in the Court below. Furthermore, in *Nesbitt's* case it appeared to be common ground that specific performance decreeing execution of a lease, after expiration of the term, can be ordered by a Court of equity if the circumstances so require, so that the respondents had no reason to suppose that the counterclaim would not be pressed. The respondents had to be prepared to defend the counterclaim, and I do not see any reason for holding that the judge wrongly exercised his discretion in awarding them costs on the dismissed counterclaim. I would dismiss this ground of appeal.

I would accordingly allow this appeal on all grounds relating to liability. I would set aside the judgment

and decree appealed from, and substitute a judgment and decree dismissing the suit, with costs, and dismissing the counterclaim, with costs, with a certificate for two counsel in each case. The appellants should have the costs of this appeal, with a certificate for two counsel.

It was urged on behalf of the appellants that in the event of this appeal succeeding, this Court should give directions in respect of the expense incurred by the appellants in preparing photostat copies of several of the authorities cited by them. This seems to me to be a matter primarily for the taxing officer, and I do not think that any directions from this Court are necessary or desirable.

Wambuzi JA. I have had the advantage of reading in draft, if I may say so with respect, the pellucid judgment delivered by Law JA. I agree with it and accordingly it is my view also that the appeal must succeed against both causes of action, that is to say in contract and in tort. I wish, however, to make a few observations.

As regards contract there was first the allegation of a breach by the appellants of an express covenant to repair contained in clause 2(e) of the engrossed lease. Mr Godfrey for the appellants submitted, and I think, that it is common ground, that an express covenant must be contained in a valid agreement. According to Mr Nazareth for the respondent, there was one agreement which was later replaced by another one; or there was an agreement which was later varied. Counsel appeared to shift his position from one to the other. Mr Godfrey referred to the initial agreement, the terms of which are contained in the letter dated 30th July 1971. Counsel submitted that there was no binding agreement for a lease as the lease was to be drawn up by the advocates. The parties were in negotiation until the lease was finally exchanged. He relied on *Hollington Bros Ltd v Rhodes* [1951] WN 437. In the case before us, the draft lease was objected to in a letter dated 14th December 1971 as not being in accordance with the letter of 30th July 1971. Suggestions were made as to what should be included or excluded. Two of the partners in the respondents' firm refused to sign the draft lease. All these are factors which clearly indicate that there were differences between the parties and consequently that no final agreement was reached.

In my view the circumstances of this case indicate that there was some agreement for a lease since the respondents were granted occupation of the premises at some stage, but, except for the letter of 30th July, there are no clear terms of that agreement. It is to be noted that the letter does not contain any covenants. It has not been shown that any tenancy which operated as a result of this agreement implied any covenant to repair. I would therefore not go so far as to say, as Kneller J did, that the agreement is set out in the draft lease and in the correspondence. Mr Nazareth identified two letters as the relevant correspondence. The first letter was dated 30th March 1972 which refers to a meeting on 10th March. This letter does no more than indicate the names of the lessees to be inserted in the lease. It does not refer to any other terms agreed at the meeting. In a way it adds very little to the first letter of 30th July, which contains the original agreement. The second letter referred to by Mr Nazareth is the reply to the letter of 30th March, and it encloses the engrossed lease. It was put by Mr Nazareth that the advocates agreed on the terms after some initial disagreement. That may be so, but there is no evidence that the advocates in drawing up the lease were acting as the agents of the parties with full powers to bind them; see *Lockett v Norman-Wright* [1925] Ch 56 and *Raingold v Bromley* [1931] 2 Ch 307. As the draft lease is not signed by all the parties and in the circumstances of this case, I am unable to say that all the parties agreed to the terms contained therein. The evidence indicates differences between them as to the terms and, accordingly in my view, the respondents cannot rely on clause 2(e) of the draft lease. With respect to the trial judge I cannot say that there is evidence to justify the finding that there was an express covenant, the terms of which were breached. Mr Nazareth took us through the original pleadings and drew support from the original written statement of defence which clearly admitted a contract between the parties. These pleadings, however, were later amended and in their new form do not admit that there is a binding contract. Although normally a party is bound by his own pleadings, I do not think any fact may be shown to be proved by original pleadings which have been subsequently amended. If this were not so there would be no point in amending pleadings.

Secondly, as regards contract, there was the allegation of breach of an implied covenant or warranty. I would observe that all the cases we have been referred to, including *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113, relied on by the trial judge, concern dwelling-houses. I would only refer to the headnote

in *Miller's* case which reads as follows:

> In a contract with builders or with the owners of a building estate for the purchase of a house to be erected or in the course of erection, there is an implied warranty by the vendors that the house shall be built in an efficient and workmanlike manner and of proper materials, and that it shall be fit for habitation.

Does the principle extend to commercial buildings? In *Kevin Brown v James Norton* [1954] 1 R 34, the principles in *Miller's* case were discussed. The case itself related to a dwelling-house. Davitt P said, at page 50:

> ... the main basis for the decision ... in the *Cannon Hill Estates* case was that the circumstances of the case justified the inference that it was the common intention of the parties, and the object of their contract, that the defendants should supply the plaintiff with a house to live in and therefore reasonably fit for that purpose.

Later in his judgment he said, at page 52:

> In my opinion no term should be implied in the contract in a case of this kind unless the Court which is asked to do so is prepared to say ... 'This is what both parties wanted at the time they were making their contract'. If that cannot truthfully be said then the Court, if it were to hold that the term was implied, would not be determining what the contract was; it would be itself making the agreement between the parties.

Still later in his judgment he remarked, at page 54:

> I confess that I am unable to appreciate any difference in principle between cases on the one hand of a sale of a dwelling-house in the course of erection and the letting of a furnished dwelling-house, and on the other hand cases of the sale of a newly completed dwelling-house or the letting of a dwelling-house unfurnished, if in all cases it is clearly the common though unexpressed will of the parties that what the purchaser or lessee is contracting to acquire and the vendor or lessor is contracting to supply is a dwelling-house for the purchaser or lessee to live in at the earliest opportunity. The same considerations seem to me to apply to all cases and the arguments to be adduced in favour of implying a warranty in cases in the first category appear to me to apply to cases in the second; and all the stock arguments against implying it in cases in the second category seem also to apply to cases in the first. I doubt if a general rule against implying the warranty in cases within the second category can be supported in principle and suspect that if it exists it must rest solely upon authority.

Mr Nazareth submitted that here it was the common intention of the parties that the premises should be fit for the purpose they were let (which was known to both parties), namely storage of stock-in-trade. He argued that there is no difference between the sale of a house in the course of erection or letting a furnished house and the letting of any other building. In both cases there is a transfer of property. Whichever view may be taken of the analysis of the cases by Davitt P it would appear that *Miller's* case was new law or broke new ground. In his own words, Davitt P said ,at page 50:

> I hold that the judgments in the *Cannon Hill Estates* case if they did not make new law did break new ground in the sense that it is the first reported case, so far as I am aware, in which in a contract for the acquisition of an unfurnished house a term was implied as to its fitness for a particular purpose.

The extent of the principle has been limited, as far as the authorities before us show, to dwelling-houses. In these circumstances I would hesitate to extend the principle any further by applying it to commercial buildings. I should think that business people should carry out their business in a business-like manner so that if they contract they should spell out the terms of their contract, unless of course a particular law implies any other terms. I find no such law here.

As regards tort, I have nothing useful to add to the judgment of Law JA. I wish, however, to make one last observation on this appeal as regards liability. The evidence indicates that on at least three different occasions, in July 1971, August 1971 and January 1976, there was a hard object, a stone, or rock, a few feet or inches from the manhole in the exit pipe which was described as the city council pipe. The matter was not raised during the proceedings, but I wonder where liability would lie for damage resulting from a blockage in the city council pipe? In this case would it be in the appellants, the respondents, or the city council? Be that as it may, I have my own doubts as to the finding of fact by the trial judge that the cause of the flooding of the basement in August 1971 was the defective construction of the manhole. The end-result of the appeal will be the same, so I say no more about the matter.

Having made my observations I concur in the orders proposed by Law JA.

Sir James Wicks CJ. I have read in draft the judgment prepared by Law JA, and agree with it in every respect.

The only doubt I have had in this case is the assumption, from the finding of fact made by Kneller J, that the defects in the design and construction of the inspection chamber were the proximate cause of the flood.

It has been accepted throughout that the immediate cause of the flood was the presence of a hard object about 3 feet down the outlet pipe from the inspection chamber to the sewer, which outlet pipe is the property of the city council, that this object completely blocked the outlet pipe, and that the stoppage was cleared when it was pushed down into the sewer. It is possible, and it seems to be the only logical conclusion, that this obstruction in the city council's sewage system was the proximate cause of the flood and that the deficiencies of the inspection chamber were irrelevant, and that the flood would have occurred had the chamber been of perfect design and construction.

In the pleadings, and in the conduct of the case, the parties have seen fit to concentrate on the issues of express covenant, implied warranty, *Rylands v Fletcher* (1868) LR 3 HL 330, negligence and nuisance, paying little regard to the relevance of the proximate cause.

In the result we have been faced with the task of coming to decisions on complicated issues which may not have been relevant in this Court had thee been a clear finding of fact in the court below of the proximate cause of the flood.

I agree that the appeal succeeds so far as liability is concerned and there will be an order in the terms proposed by Law JA.

Appeal as to liability allowed.

Dated and delivered at Nairobi this 10th day of November 1978

SIR JAMES WICKS

.....

CHIEF JUSTICE

S.W.W WAMBUZI

.....

JUDGE OF APPEAL

E.J.E LAW

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR