

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV1996/0015

BETWEEN:

GERARD AND SONIA BENJAMIN

Claimants

and

ESAU MANSOOR

Defendant

Appearances:

Clare Roberts for the Claimants

Gerald Watt QC, Alex Fearon with him, for the Defendant

2002: June 24, July 2, 8

JUDGMENT

[1] **MITCHELL, J.** This was a claim in negligence brought by one landowner, the Claimants, against their neighbour, the Defendant, for loss and damage caused by the Defendant's retaining wall collapsing on the Claimants' property during Hurricane Luis. The defence is that the damage was due either to Act of God, or to the default of the independent contractor who built the wall.

[2] The case began by the issuing on 23 January 1996 out of the Registry of the Supreme Court of a generally endorsed writ of summons. The Statement of Claim was filed on 2 April. The claim was that on 4 September 1995 at approximately 6 p.m. the retaining wall at the southern boundary of the Defendant's property collapsed onto the property of the Claimants causing extensive damage. The claim was that this loss and damage was caused by the negligence of the Defendant in that he caused the concrete wall to be built with the foundation base

of insufficient width and depth and with the weep holes not located in the correct position. The Defence filed on 22 January 1997 denied that the Defendant was guilty of any negligence; that the builder of the wall was on Keith Hamilton who was an independent contractor engaged by the Defendant to construct his dwelling house and the retaining wall; and that the wall collapsed not as a result of a flaw in its construction but because of the drastic and horrendous effects of Hurricane Luis which lashed the island of Antigua for upwards of 48 hours continually and which brought with it torrential rains which caused water to undermine the centre of the wall and washed it onto the Claimant's land, this accident being an Act of God. On 5 February 1997, the order on the summons for directions was filed, and, on 9 December 1997, the request for hearing was filed. The matter has been ready for hearing ever since.

- [3] As a result of the coming into effect of the new rules CPR 2000, on 22 March 2002, directions were given by consent that the only issue at trial would be liability, the question of quantum if any to be dealt with at a later stage and for witness statements and expert reports to be exchanged. The witness statements and experts report were duly lodged and the matter came up for trial on 24 June 2002 at which time the witnesses were offered for cross-examination.
- [4] Giving evidence for the Claimants were Gerard Benjamin, Patrick Jeremiah the director of meteorology of Antigua and Barbuda, Trevor Gonsalves a civil engineer who put in an engineering report, and Glendora Vanbrooks, the live-in maid of the Claimants, who had been the only person present in the Claimants' home at the time of the passing of the Hurricane. The Claimants were out of Antigua during the passage of the Hurricane and could give no direct evidence of the circumstances surrounding the collapse of the Defendant's wall. The Defendant gave evidence on his own behalf.
- [5] The facts as I find them are as follows. The Claimants and the Defendant are neighbours. The parties live adjoining each other on sloping land at Tamarind

Heights at Crosbies in Antigua. The Claimants' home is built below the level of and to the north of the Defendant's home. The Claimants built first, in 1987. They erected a fence around their property. They had excavated into the hillside to level the land when they were constructing their house. The Defendant came to build above them at a later stage, in 1989. The Defendant had a retaining wall erected at the time that his house was being built. This retaining wall is on the north of his property a few feet away from the fence and building of the Claimants. The Defendant filled in behind the retaining wall for his convenience and to make his property more convenient and usable for him. The same contractor who built his house, an experienced well-known contractor named Keith Hamilton, built the retaining wall. No evidence was produced that any architect or engineer prepared any engineering or other plans for either the house or the wall. At the time that the wall was built no hurricane of any significance had hit Antigua in some 30 years. The Defendant relied on the contractor to use his experience as a builder to build the house and the wall that the Defendant required. It was a labour-only contract, with the Defendant providing the materials and the contractor being paid on the basis of periodic labour bills. The house and the wall were built in the year 1989, just months before Hurricane Hugo hit. The house has by now withstood some 5 hurricanes, including Hugo, which was a category 5 Hurricane, and Luis, which was a category 4 Hurricane.

- [6] Hurricane Luis was a powerful hurricane. The evidence of Patrick Benjamin on his measurements regarding the hurricane was not challenged. On the night in question he took his measurements at the VC Bird International Airport, which like Crosbies is to the north of the island. He testified that between 6:00 pm and midnight on 4th September 1995 rainfall was measured only at 8 pm, and some 0.6 mm of rain was recorded. Rainfall was moderate by midnight. Maximum gusts between 11:00 pm and midnight was 53 knots, one knot being 1.157 mph. The really heavy rain fell after midnight, but it was not measured because no one could go outside to take the measurement. It was heavy and continuous with winds

gusting to 98 knots between 5:00 and 6:00 am. A total of 3.4 inches fell between 2 pm on 4th and 12 noon on 5th September.

[7] The evidence of Glendora Vanbrooks was important for the time of the collapse of the wall. Was the collapse at 6 pm, before the real rain had started, which might suggest that it was due to an inherent defect and nothing to do with the purely coincidental passage of the hurricane, or was the collapse much later, after the heavy rain had begun, which might suggest that it was due to the Hurricane? Her testimony had originally been that the wall collapsed at about 6 pm on the 4th when she heard a terrible crash and felt the house shake. Her evidence was that there was not much rain until the following day. However, she retracted that in cross examination, and it became clear that she had no idea when the wall fell, and that it was probably some time within a few hours before or after midnight. Electricity, radio and TV services had been turned off for hours before the Hurricane hit, and I am satisfied that she was all alone in the house during the storm and that the time of various noises and events was the last thing on her mind on this night. I find that the wall probably fell about midnight when it had already been raining steadily for some hours.

[8] The evidence of Trevor Gonsalves was important as to the cause of the collapse of the wall. He was a qualified civil engineer of some 20 years' experience, and was accepted as an expert. His testimony was that the wall had not been built according to the minimum specifications for a retaining wall in that the foundations were totally inadequate. He explained, and he was not contradicted, that a retaining wall must have its foundation built differently to other types of walls. In particular, given the height of the wall in question, the foundation should have been at least twice the size it was. Also, the width of the foundation should have been much greater than it had been, at least 56 inches instead of 30 inches. Another defect that he reported on was the siting of the weep holes in the retaining wall. They had all been inserted 3 inches from the top of the wall instead of along the bottom of the wall. He explained, and it was not contested, that the weep

holes were required to drain off water that collected behind the retaining wall. These defects were, in his opinion, the cause of the wall overturning or as he put it rotating 90 degrees. The failure to build the wall according to these specifications, resulted in hydrostatic pressure building up behind the wall during rainfall until, because of the inadequate foundations, the wall was unable to maintain its stability, and collapsed. It is clear that with the weep holes at the top of the 8-foot high wall, water falling on the hillside above the wall would have percolated down through the soil and run down the hillside until it hit the wall. It would have built up behind the wall increasing pressure on the wall. I am satisfied that this wall was not constructed adequately to serve the purpose for which it was intended and that, while it had not collapsed in Hurricane Hugo, the first time that it was put under pressure, over a period of time it had become unstable, and it eventually collapsed as it did on this occasion. The rainfall in Hurricane Luis may not have reached its peak at the time of the collapse, but it had been sufficient to have caused the wall to collapse on this night. The only questions remaining are, do the defences of Act of God or "independent contractor" apply to protect the Defendant from liability for the consequences of the collapse of his wall.

[9] Both counsel produced law on Act of God. The Claimants referred to the following authorities:

Nicholas v Marsland (1876) 2 ExD 265

Greenock Corporation v Caledonian Railway [1917] AC 555

Ruck v Williams (1858) 3 H&N 308

Charlesworth & Percy on Negligence 9th Ed para 12-30 to 12-34

The Defendant referred to the following authorities:

Nicholas v Marsland [supra]

Ruck v Williams (1858) 3 H&N 308

Greenock Corporation [supra]

Fenwick v Schmalz (1868) LR 3 CP 313

Cushing v Peter Walker & Son [1941] 2 All ER 693

Legacy v Chaleur Country Club (1975) 53 DLR (3rd) 725

Charlesworth & Percy on Negligence 7th Ed para 13-21

The Defendant's position was that the combined forces of the hurricane-force winds, lightning and the torrential rains associated with a category 4 storm amounted to an Act of God which affords the Defendant a good defence. The Claimants' submission was that the defence of Act of God was not available to the Defendant because the occurrence must be the result of natural causes and not human agency. The settled law on act of god is that the occurrence must be (a) the consequence of natural causes exclusively; (b) of extraordinary nature; (c) and such that it could not be anticipated or provided against by the Defendant. To be an "act of god" the occurrence in question must be the result of natural causes, and not of human agency. In this case, there is no evidence that the wall collapsed because of an Act of God. The evidence is that the wall fell because it was not engineered and constructed to perform the function for which it had been built. It fell during an extraordinary storm, and one that could hardly have been anticipated in 1989 at the time that the wall had been built. But, the collapse was not the consequence of natural causes exclusively. It was the consequence of faulty human construction. The Defendant had had his retaining wall constructed in such a fashion that water would collect and build up behind it, and if the hydrostatic pressure got too much for the wall to bear, it would fall over. And, this is what happened. That was not a natural cause exclusively; that was a natural cause acting on a faulty construction.

- [10] Does the defence of "act of an independent contractor" avail the Defendant, given the circumstances set out above? The Defendant has referred to the following authorities in argument:

Dalton v Angus (1881) 6 App Cas 740

**Market Investigations Ltd v Minister of Social Security (1969) 2 QBD
173**

Montreal v Montreal Locomotive Works Ltd 1 DLR 161

Leeting Sang v Chung Chi-Keung (1990) 2 AC 374

Clerk & Lindsell on Torts para 3-40

The Claimant has referred to **Charlesworth & Percy 7th Ed para 2-140**.

- [11] Let us accept, as I do, that in this case the builder Keith Hamilton was an independent contractor. The fact that the Defendant paid the builder weekly for labour only is not significant. Who can doubt that an experienced builder such as Keith Hamilton undoubtedly from the evidence was an independent contractor? He provided his own equipment, hired his own workers and helpers, and was in business on his own account. There is no suggestion that in the process of the building he was under the control of the Defendant in the way that an employee is. But, how does that status of being an independent contractor assist the Defendant? The Claimants' case is that the Defendant owed the Claimants a duty of care to have the retaining wall erected with sufficient engineering that if there was extensive rainfall it would not cause the wall to collapse and fall on the building of the Claimants causing damage. This was a non-delegable duty. It was a duty not merely to take care but to ensure that care in the construction of the Defendant's premises was taken. It was the duty of the Defendant to have recognised the potential for danger that he was exposing the Claimants to (by constructing a retaining wall within reach of their home) and to take steps to ensure that the wall was designed and built to withstand the earthquakes that strike this island from time to time, and the most exceptional forces of wind and rain that can be expected of the hurricanes that strike these islands from time to time. According to the evidence, the specifications for a retaining wall are quite standard. The engineering required was not particularly complex, sophisticated or difficult, according to the evidence we have from the civil engineer. The wall

should have been built to standard retaining wall specifications, and this was not done.

[12] Even if the court were minded to find that the contractor could have borne some responsibility for the faulty construction of the wall, which the court is not minded to do, the builder not having been a party to this action and not having had an opportunity to defend himself, the court cannot make any finding of liability against him, even if only as a defence for the Defendant to use. It would have been quite strange for the Claimants to have done as the Defendant suggested and joined the contractor as a defendant to the action, unless the Claimants were prepared to prove that the contractor was liable to them in tort. In the normal course, where a defendant claims that a third party is liable, it is the defendant who takes steps to join the third party to the action. In this case, the Defendant did not do so for whatever reason, and the contractor plays no part in this action either as a party or as a defence available to the Defendant.

[13] There shall be judgement for the Claimants for damages to be assessed and their prescribed costs based on the quantum of damages that are assessed. I shall now hear Counsel on any directions that are required for the assessment.

I D MITCHELL, QC
High Court Judge