SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT NO.: 470 of 1994

BETWEEN

HECTOR TOUSSAINT
VIRGINIA TOUSSAINT

Claimants

and

CUL-DE-SAC INDUSTRIAL ZONE LIMITED
B & D CONSTRUCTION LIMITED

Defendant

Appearances

Mr. D. Theodore for the Claimants
Mrs. V. Barnard for the First Defendant
Mr. P. Foster for the Second Defendant

2002: May 31
June 7
August 2

JUDGMENT

[1] Saunders J: Hector Touusaint (now deceased) and his wife Virginia Toussaint purchased 11 acres of land at Cul-de-Sac in 1984. They cultivated bananas on this land. Banana farming then was a very profitable and attractive enterprise and the Toussaints made good money. Since the mid 1990's or so, for a variety of reasons, farmers throughout the entire Windward Islands have been turning away from bananas. Mr. and Mrs. Toussaint may or may not have become part of that trend. We won't know. They experienced peculiar problems of their own. From about 1991, considerable deposits of water came onto and

remained on their land ruining much of their banana crop. Their income plummeted. They feel that someone's negligence is responsible. They have sued the defendants for the losses they have sustained.

[2] The First Defendant ("the developers") at all material times owned the land at Cul-de-Sac adjacent to and downstream, so to speak, the Toussaints' farm. The developers retained the services of the Second Defendant ("B & D") to perform certain earth works on the land. Both defendants resist the claims of Mr. and Mrs. Toussaint. Neither admits to any negligence. The developers say further that if anyone was negligent it was B & D as the latter was an independent contractor.

[3] B & D has defended this case in a half-hearted and spasmodic manner. It never entered an Appearance until some four months after being served with the claim. A default judgment was entered against it but it was subsequently set aside for irregularity. B & D eventually filed a Defence but a trial fixed for 14th March, 2002 did not come off. Instead, B & D was granted leave to file and serve a witness statement and the case was adjourned to 15th April, 2002. On that date no one appeared for B & D. Their counsel had apparently indicated that as a result of a family emergency he had to travel to London. Counsel's associate later appeared, profusely apologetic, and seeking further indulgences. The court made a costs order against B & D and the matter was finally adjourned to 31st May, 2002. The costs were to be paid by 28th May, 2002 failing which B & D's Defence was to be struck out. The costs were never paid. On the day for trial the court therefore declared a judgment against B & D and the trial proceeded against the developers. With the concurrence of the claimants, the court permitted the developers to adopt the witness statements filed by B & D and to call those witnesses as their own.

[4] No one really disputes the fact that the Toussaints' property has been adversely affected by water logging. Nor can it be denied that the couple has lost considerable income because of that problem. The question to be determined is whether the developers bear any responsibility in negligence.

[5] The Cul-de-Sac valley plain has always been prone to flooding. The area is located at or near sea level and the general drainage is poor. Mrs. Toussaint testified that a network of no fewer than 144 internal drains took surface water away from their land. These drains connected with a culvert, known as the Incommode crossing, that passed under the main road. The Incommode culvert carried the accumulated flow of water onto an open channel on the developers' land from where it was taken down to a river channel. This river channel itself had inadequate capacity.

[6] The Incommode crossing consisted of a 24-inch box culvert. In a report prepared as early as 1984 by Hunting Technical Services Limited, it was noted that the size of this culvert was woefully inadequate. The consultants recommended, among other things, its replacement by a larger and better located culvert.

[6] In or about July, 1991, the developers engaged B & D to design, execute and manage certain earth works on the lands of the developers. The land was being developed for commercial sale. In the course of their work, B & D engaged in land filling activity. They tipped large truckloads of soil onto the developers' land, across a ditch through which the flow of water was channeled, in order to create an earthen bridge. To accommodate the flow of water B & D inserted two consecutive (not parallel) 18-inch metal pipes. Quite apart from the risks of blockage thus entailed, effectively, an inadequate 24-inch channel was replaced by an even smaller one.

[7] After a particularly heavy downpour in November, 1991 the Toussaints' land became flooded. This was not strange. What was most unusual was that on this occasion the water would not go away. Large pools settled on their land for years. I accept in its entirety the cause of the water logging given by agricultural engineer, Mr. Martin Satney. He testified:

> "……..both culverts draining into the land filled area adjacent to the claimants' land were clogged with debris and deposits of silt. As a result of the land filling activity adjacent to the claimants' land, segments of the storm drains were also backfilled to facilitate the passage of vehicles and heavy equipment. Metal pipes were used as conduits to facilitate continuity in drainage flows. However due to the small size of those pipes (being 18 inches in diameter) relative to the cross sectional area of the storm drains, they were susceptible to blockage by silt and other debris.

> Those storm drains were eventually blocked by silt and debris and as a consequence there was a back-up of water into the adjacent banana field of the claimants. That water remained stagnant. In my opinion the water would remain on the farms until the culverts were unblocked. The situation in fact persisted for several years. This resulted in continuous deterioration of the banana field of the claimants and its drainage conditions which gave rise to reduced farm yields".

[8] In my judgment the land filling works carried out by B & D and their insertion of 18-inch pipes so exacerbated an already tenuous situation that the natural result was the flooding of the farm land of the Toussaints.

[9] Can the developers be held liable for the negligence of B & D? The developers claim that, in connection with this project, B & D were contractors with extant knowledge and expertise in this type of work. B & D were responsible for the detailed engineering plans, drainage plans, earth works for water installation, roadways and installation of utilities. B & D had entered into a performance bond for the performance of the contract with a reputable insurance company and it was also required to obtain public liability insurance coverage.

[10] Counsel for the claimants cited the case of *Rowe vs. Herman (1997) 1 W.L.R. 1390* for the twin propositions that an occupier is responsible for any dangers created or left on his land by an independent contractor and that where an employer owes a direct duty of care to the person injured he cannot delegate that duty to an independent contractor on his behalf. I disagree with Counsel's applicability of those propositions to the facts of this case. The case of *Rowe vs. Herman* itself reaffirms the principle stated in Widgery L.J.'s judgment in *Salsbury vs. Woodland (1970) 1 Q.B. 324, 336-337* that a person who employs an independent contractor is not vicariously responsible for the negligence of the contractor save where the employer owes a direct duty to the person injured. The classes of cases that fall within the exception are those where the work commissioned involves "extra-hazardous acts", cases where the danger is created by work on a highway and thirdly cases where liability is imposed by statute. In my judgment, there is nothing in the employment of B & D by the developers to bring this case within the cited exceptions. The

damage to the claimants' farm resulted from the negligent manner in which B & D carried out the works entrusted to them and the developers cannot be held responsible for this.

[11] Counsel also submitted that the developers, as owners of lower-lying land, were not entitled to pen back water and so cause damage to the owners of higher-lying land. The authority of *Home Brewery Co. Ltd. vs. William Davis & Co. (1987) 2 W.L.R. 117* was cited. In that case it was held that a lower occupier can pen back water coming from the higher occupier but that if he did so, he could be found liable for damages if it was reasonably foreseeable that by doing so injury would thereby be caused to the land of the higher occupier.

[12] I think that *Home Brewery* should be distinguished. No question of an independent contractor arose in that case. The acts of the lower occupier there were done by the defendant himself and were directly aimed at penning back the water and causing foreseeable damage. That was a wrongful act. Here there is no allegation of wrongdoing or negligence on the part of the developers. In all the circumstances I will hold that the claim against the developers should be dismissed with costs to the claimants.

[13] On the issue of costs in the exercise of my discretion I shall order that B & D should meet the costs of both the claimants and the developers. I further order that the quantum of both sets of costs and the damages to be awarded to the Toussaints should be assessed in Chambers.

Adrian D. Saunders
High Court Judge