SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 354 of 1994

BETWEEN:

(1) REGIS FRANK JU PIERRE
(2) JEAN HYACINTH JU PIERRE

Claimants

and

(1) ST LUCIA WATER & SEWERAGE AUTHORITY
(2) B & D CONSTRUCTION LIMITED

Defendants

Appearances:

Mr. Kenneth Monplaisir QC for the Claimants. With him is Ms. Marcellina John
Mrs. Kimberley Roheman for the Defendant.

2002: October 1, 4,11
2002: December 23
2003: May 20

JUDGMENT

1. HARIPRASHAD-CHARLES J: Mr. and Mrs. Ju Pierre brought this action alleging acts of public nuisance by B & D Construction Limited (B & D) as agent and licensee of St. Lucia Water and Sewerage Authority (WASA) in carrying out certain earthworks in the preparation for the laying down of some sewer works at Rodney Bay in the immediate vicinity of the Blue Lagoon Hotel. They alleged that B & D caused obstruction to the entrance of their hotel by blocking it with huge mounds of earth rendering it impossible for taxi drivers to bring guests to the hotel. The guests were thus taken to other hotels. As a result, they have been put out of business and had to temporarily close down their hotel during the months of June and July 1993.

Background Facts

2. Mr. and Mrs. Ju Pierre are hotel proprietors and operated a 19-room mini hotel called the Blue Lagoon Hotel at Massade, Gros Islet. They have been operating the hotel since 1974. The hotel is situated on low flat lands and due to inadequate drainage, it has been experiencing severe flooding damage during the rainy season for years. Mr. Ju Pierre sought governmental intervention to assist with the problem. He wrote numerous letters to various government departments and leading politicians. His letters fell on deaf ears. The problem of bad and inadequate drainage still persisted.

3. On 11th May 1992, WASA entered the picture. It signed an agreement with Radio Caribbean (1992) Limited (RCI) for the temporary use (18 months) of land opposite the Blue Lagoon Hotel to construct site offices and storage facilities for pipes and equipment. Then on 28th May 1992, WASA entered into a written agreement with B & D for the construction of an access road namely the Rodney Bay Sewerage Project. On 9th June, B & D began work on the Access Road. But as early as 11th June, the construction was faced with several designs, surveying and other technical problems resulting in significant delays. These delays were partly due to complaints by Mr. Ju Pierre which necessitated redesign. Although construction of the road began in June 1992, very little was done in the vicinity of the Blue Lagoon Hotel until April 1993.

4. B & D complained that works were delayed due to equipment breakdown and works programmed by WASA. B & D stopped attending progress meetings (Exhibit Z). In the meantime, Mr. Ju Pierre's complaints continued. First, he was not happy with the design of the culvert drain opposite his hotel. Next he complained about the poor performance and prolonged execution of road related works undertaken by B & D. Other complaints materialized during the execution of the project. Mr. Ju Pierre complained about damage to a 6" block wall. The damages were repaired immediately. Mr. Ju Pierre complained about the diversion of drainage through his property. WASA was not responsible for that. On a visit to the locus, it became evident that the Ministry of Communications and Works

was involved in such diversion and as such, should have been joined as a party to these proceedings.

5. By an amended writ of summons endorsed with statement of claim, the claimants claim damages in the sum of $300,000.00, general damages and costs.

6. On 4th April 1996, WASA filed its defence. In a nutshell, WASA denied any liability on the ground that it hired B & D to carry out certain earthworks in the immediate vicinity of the Blue Lagoon Hotel but B & D were employed as an independent contractor and not as its agent of licensee.

7. In its defence, B & D admitted that it was the agent and licensee of WASA and subject to the control, supervision and direction of that company. It denied being an independent contractor. B & D next denied that it performed the excavation works in such a manner as to create a public nuisance or as to cause obstruction to the entrance of the hotel or any of the forms of nuisance as particularized by the claimants and stated that even if it did, it was in the interest of the public so to do in that it was necessary to facilitate the works which had to be undertaken for the provision of water and sewerage to the public. Further, B & D denied any breaches on its part which have caused the hotel to temporarily shut down resulting in a loss of business.

8. On the totality of the evidence, I found as a fact that the Blue Lagoon Hotel always experienced severe flooding problems during the rainy season. At paragraph 23 of his witness statement filed on 8th March 2002, Mr. Ju Pierre alleged that the Blue Lagoon Hotel never experienced any flooding during the period of 1974 to 1993. But, as far back as May 1992, Mr. Ju Pierre sought the assistance of various government departments and Ministers to intervene and deal with the problem of flooding to his property. In a letter dated 14th May 1992 to the then Prime Minister, Rt. Hon. Sir John Compton, Mr. Ju Pierre wrote:

> "Over the years from 1974 up to the present day the Blue Lagoon have suffered severe flooding damage during the rainy season. Each and every year, all the

> water from the Massade Boys' School, Cas-en-Bas road and the Ambroise properties etc, rush down and pass through the Blue Lagoon properties causing damage to roads and my properties."

9. Then on 5th October 1992, Mr. Ju Pierre wrote to the Executive Secretary, Development Control Authority. He complained about the very large sum of money he had expended over the years to deal with the flooding problem. In that letter, he stated:

> "Over the year, I have spent a very large sum of money to take off water from other people's land, from flooding my premises. I will appreciate if you will look into this matter in rebuilding that road by keeping the road surface below the Blue Lagoon compound, so that no water will feed back to my property."

10. The problem of flooding became more pronounced when WASA employed B & D to carry out certain sewerage works in the vicinity of the hotel. The project started and shortly thereafter, it was faced with problems resulting in protracted delays. B & D blamed WASA for the delays. WASA blamed B &D.

11. Mr. Ju Pierre testified that from May 1992 to July 1993, his hotel was affected by the works undertaken by B & D. WASA alleged that it was from May to December 1993 or 8 months. WASA's allegation was confirmed by Mr. Thomas Walcott, expert witness for the claimants (see paragraph 2 of witness statement of witness filed on 5th June 2002. The agreement between WASA and B & D was entered into on 28th May 1992. Therefore, it is impossible for the hotel to suffer loss of revenue during the month of May 1992.

12. On this aspect of the case, I found Mr. Ju Pierre not to be a credible witness. I think that he exaggerated the length of the delay and the fact that the problem of flooding was always there. I prefer the evidence as adduced by the witnesses for WASA, in particular, Mr. John Joseph and Mr. Errol Frederick that the maximum time frame during which the hotel could have been affected was a period of 8 months from May to December 1993 and I so find.

13. WASA also alleged that the average rate for which the claimants hotel is rented is US$15.00 to US$25.00 per day and that the hotel has a total of 20 rooms. Mr. Ju Pierre

confirmed that the hotel has 19 rooms and is rented at US $30.00. The daily rate of $30.00 seems more acceptable in the light of prevailing rates for hotels of similar size and geographical location. If my mathematical calculation is accurate, the total loss of revenue suffered by Mr. Ju Pierre from May to December 1993 (a total of 245 days) at US$30.00 is US$73,500.00. Mr. Ju Pierre is claiming 25% occupancy which is US$18,375.00 or EC$49,602.50 for each room. There are 19 rooms. Therefore, the total loss of revenue is US$34,912.50 (approximately US$35,000.00 or EC$94,500.00).

14. I now turn to the defences as raised by WASA and B & D. I must state that B & D never showed up on the date set for trial but the matter proceeded. Two legal issues arise for determination.

Was B & D acting as an agent/ licensee or independent contractor?

15. Mr. Kenneth Monplaisir, QC for the Claimants submitted that B & D was acting as a sub-contractor for WASA and not as an independent contractor as alleged by WASA. To substantiate their contention, Counsel referred to the Progress Report June-August 1993 where B & D was referred to as the sub-contractor. Unfortunately, the court file was never found and the reconstructed file presented to the court by consent of the parties did not contain this report. But I accept Counsel's word that the progress report speaks of sub-contractor.

16. WASA contended that B & D was engaged as an independent contractor. The written agreement executed between WASA and B & D on 28th May 1992 describes B & D as "the contractor". In this agreement, B & D was responsible for the execution and completion of the works and the remedying of any defects. There is uncontradicted evidence that B & D was responsible for the hire, control, supervision and direction of all employees engaged on the contract. In my judgment, WASA engaged B & D as an independent contractor. If an employer has employed an independent contractor to do work on his behalf the general rule is that the employer is not responsible for any tort committed by the contractor in the course of the execution of the work and in this respect the employees of the contractor, whilst acting as such, stand in the same position as their employer, so that the employer of

the contractor is not liable for the torts committed by the contractor's employees: *Hollidayv National Telephone Co. (1899) 2 QB 392.* Of course, even though the damage complained of may have been caused by the wrongful act or omission of an independent contractor or his employee, it may be attributable to the negligence or other personal fault of the employer. If, for example, an employer negligently selected an incompetent contractor, or has employed an insufficient number of men or has himself so interfered with the manner of carrying out the work that damage results, he will himself have committed a tort, for which he can be held liable.

17. There are certain apparent exceptions to the general rule that an employer is not liable for the negligence of an independent contractor. Firstly, the monopoly granted by WASA to carry out its responsibilities under the Water and Sewerage Act, No. 18 of 1984 is a non-delegable duty. Secondly, the nature of the work is such that the control of the work is the responsibility of WASA and remains with WASA. Thirdly, the funds for this obtained from the French Government through the French Corporation which in turn imposed on WASA a non-delegable duty to see that the works were carried out properly.

18. Under the provisions of the Act, WASA is responsible for the management and control of water and sewerage works as well as the conservation and distribution of water resources in St. Lucia. The Claimant contended that the Act imposes a strict or absolute duty upon WASA and as such, WASA cannot discharge its duty by delegating performance of the work in question to an independent contractor. Lord Blackman in *Terry v Ashton (1876) 1 QBD 314 at 319* said:

> "I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of services or to an independent contractor under a contract for services."

19. I concur with Learned Counsel for the claimants that WASA cannot escape from its statutory responsibility under the Act and consequently, is liable for the negligence of B & D.

20. The claimant next submitted that WASA did not select a competent contractor to carry out the work. The attitude of B & D was one of total indifference and incompetence. The numerous complaints by the claimants as well as the inordinate delays by B & D in commencing the work gave WASA the right to dismiss B & D which it failed to do. Therefore, WASA cannot escape liability at common law.

21. In the end, I find that both WASA and B & D are equally liable as joint tortfeasors. As such, I will enter judgment against both WASA and B & D equally.

The Law of Public Nuisance

22. In order to establish that a public nuisance existed the claimants must establish that they suffered some particular, foreseeable and substantial damage over and above that sustained by the public at large.

23. As to whether a public nuisance was committed against the claimants, WASA says that the court must have regard to the extent to which the works were lawful and justified for the greater public good. Mr. Ju Pierre alleged that a large trench was dug right across leaving no access whatsoever except by foot. WASA contended that the said works were reasonable and in the public interest and a certain amount of interference with the hotel was unavoidable in order to complete the project. In the case of *Andreae v Selfridge & Company, Ltd (1937) 3 All ER 255 ,* the plaintiff, an occupier of a hotel complained that her business had been seriously interfered with by demolition and rebuilding by reason of noise and dust. It was held that: (a) in considering whether the development of property is abnormal, the methods of building must be taken as stabilized, but the development of the day must be regarded; but the operations of demolition, excavation or building must be carried out with reasonable care and skill, which may require (inter alia) restriction of hours of work, limitation of amount of a particular class of work done simultaneously in a particular area and the use of proper scientific means of avoiding inconvenience; (b) in estimating the damage done …damage caused by the lawful operations of the defendant must be excluded, and the plaintiff could only recover for loss caused by acts which were

abnormal or not carried out with proper care and skill. At page 265, Sir Wilfred Greene, MR said:

> "Guests at hotels are very easily upset. People coming to this hotel, who are accustomed to a quiet outlook at the back, coming back and finding demolition and building going on, may very well have taken the view that the particular merit of this hotel no longer existed. That would be a misfortune for the plaintiff but assuming that there was nothing wrong in the defendant company's works, assuming the defendant company was carrying on the demolition and its building … with all reasonable skill, and taking all reasonable precautions not to cause annoyance to its neighbours, then the plaintiff may lose all her clients in the hotel because they had lost the amenities of an open and quiet place behind, but she would have no cause of complaint."

24. In the instant case, Mr. Errol Frederick deposed that the project being undertaken affected other residents in the area, not only the claimants. In my opinion, both WASA and B & D should have taken all reasonable precautions not to cause annoyance to the guests at the hotel. After all, this was the livelihood of two aged claimants. Both WASA and B & D showed utter disrespect for the claimants. B & D stockpiled mud in the vicinity of the hotel and then turn around and state that the stockpiling of mud was done in the interest of the public.

25. In the case of *Gillingham Borough Council v Medway (Chatham) Dock Co Ltd (1992) 3 All ER 923,* it was held (per curiam) that:

> "Public nuisance need not be an unlawful act. If it is correct, in general, that a public nuisance cannot arise out of the lawful use of the highway, that is not because there is no unlawful act but because those who live close by highways must accept the inevitable disturbance for the greater good of the public. However, the principle that the private right must usually yield to the greater public interest does not mean that otherwise lawful use of a highway can never amount to a nuisance, since extreme circumstances may arise where it could be right so to hold."

26. Mrs. Roheman argued that no extreme circumstances arise here as having regard to the locus, access was totally not denied as a pedestrian footway existed. I do not agree with Counsel. I think that this case brings into play extreme circumstances. Paying guests arrive at a hotel and there is no motorable driveway. Mrs. Roheman suggested that access

was not totally denied. A footway existed. It seems to me that Counsel is saying that the guests are supposed to pull their luggage along the footway to get to the hotel. Had the defendants exercise reasonable care, skill and due diligence the project work could have been executed and completed earlier. No regard was paid to the hotel or the guests therein. B & D did not care. Neither did WASA. B & D procrastinated. WASA condoned the procrastination. WASA could have put an end to such uncaring behaviour. It did not. WASA, as a statutory corporation employed B & D to do a particular act. B & D failed to do the act. WASA cannot plead that it was not its fault for its own duty has not been performed.

Expert witnesses

27. I turn now to analyze the evidence of the expert witnesses. Mr. Thomas Walcott, a Civil & Structural Engineer of 37 years experience testified on behalf of the claimants. Mr. Gilbert Fontenard, also a Civil Engineer since 1990 gave oral evidence for WASA. He worked with the Ministry of Works from 1995 to 1999 as their Chief Engineer. During his tenure as chief engineer, he served as a member of WASA.

28. Both professionals understood the duty to the court as set out in Part 32.3 and 32.4 of CPR 2000. The evidence of these two engineers conflict with each other in respect to the size of the catchment and drains. Mr. Walcott carried out an investigation shortly after Tropical Storm Debbie in September 1995. He was aware of construction works carried out by WASA between April and December 1993 in the vicinity of the Blue Lagoon Hotel. (paragraph 3 of witness statement filed on 28th June 2002.

29. He had met with Mr. Frederick of WASA before Hurricane Debbie and pointed out the that there would be flooding and damage to the Ju Pierres' property as a result of the manner in which the works were being carried out but the works continued in the same manner. He was therefore not surprised when Hurricane Debbie came along resulting in extensive damage and flooding to the Blue Lagoon Hotel. As far as Mr. Walcott was concerned, the damage was predictable as the quality of both design and supervision did not meet

acceptable standards. In his report dated 17th September 1995 (TW1). He identified the problem. He stated that a concrete drain 2' 0" x 2' 0" constructed by WASA directs water from a large drainage area about 100 acres to Point (A) as indicated on survey plan by Trevor Isaac, Surveyor. At that point, a grille has been constructed to act as a debris screen. The concrete drain is routed at right angles, at that point continues for a distance of some 50 feet and again is right angled at Point (B) along the western boundary of the larger portion a distance of 170 feet. Using the Tablot formula, a required section of drainage channel should have been 4' 0" square minimum in size.

30. Mr. Walcott observed the following problems:
    (a) The existing concrete drain is under-designed.
    (b) The shape of the drain inhibits proper flow.
    (c) The drain should have continued along the western boundary of the smaller area.
    (d) The height of water in the lower section of the larger area was point five three meters or one foot nine inches above the ground level.

31. Mr. Fontenard assessed the situation using the same assumptions made by Mr. Walcott on the size of the catchment and drains. The parameters for estimating discharge are based on a study conducted after Tropical Storm Debbie. He based his study on a report prepared by Hunting Technical Services and Mott Mac Donald Limited and concluded that the discharge capacity of the drain was sufficient to carry the volume of water generated by the catchment for a return period of 20 years.

32. A visit to the *locus in quo* was of immeasurable assistance to the court. In the end, I found the evidence of Mr. Walcott to be more convincing. I shall return to it in my concluding paragraph.

Conclusion

33. In my judgment, both WASA and B& D are equally liable so far as the public nuisance is concerned.

34. There will be judgment against both WASA and B & D as follows:

(a) That WASA will bear all the expenses associated with the construction of a new catchment and drain near the entrance of the Blue Lagoon Hotel in conformity with the report of Mr. Walcott. This drainage channel should be 4' 0" square minimum in size; to be supervised by Mr. Walcott. The construction should commence within a month's time in preparation for the upcoming hurricane season. The water course to be redirected to the Rodney Bay Marina. WASA will bear the costs of Mr. Walcott's fees.

(b) That WASA do pay the sum of EC$47,250.00 (or 50% of the total loss of revenue to the claimants.

(c) That B & D do pay the sum of EC$47, 250.00 (or 50% of the total loss of revenue to the claimants.

(d) Using the scale of prescribed costs (Appendix B) - That Costs to the claimants are apportioned are follows:

(i) WASA- EC $10,500.00.

(ii) B & D- EC$ 10,500.00.

35. Lastly, I thank all counsel for their assistance and remarkable industry.

Indra Hariprashad- Charles

High Court Judge