SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. SLUHCV2003/0240

BETWEEN:

GERTRUDE ANN DANIEL

Claimant

and

(1) THE SAINT LUCIA NATIONAL HOUSING CORPORATION

(2) ZEBY HOWELL trading as Zeby Howell Construction and Equipment Rental

Defendants

Appearances:

Mr. Mark Maragh for the Claimant
Mrs. Michelle Anthony-Desir for the First Defendant
Mr. Sandy John for the Second Defendant

2004: July 07, August 10, November 05, 09, 19 December 03
2005: January 04, September 12

NEGLIGENCE… BREACH OF CONTRACT…WHETHER FIRST DEFENDANT WAS NEGLIGENT IN THE CONSTRUCTION OF THE CLAIMANT'S HOUSE…F NEGLIGENT, WHETHER IT CONTRIBUTED TO THE COLLAPSE OF THE HOUSE? …WHETHER SECOND DEFENDANT WAS NEGLIGENT IN CARRYING OUT WORKS….WHETHER CONSTRUCTION WAS ILLEGAL, PLANNING PERMISSION NOT BEING OBTAINED…WHETHER AGENCY AROSE…ARTICLES 985, 986, 917A AND 1137 OF CIVIL CODE REFER…WARRANTY UNDER LATENT DEFECTS… ARTICLE 1432 ET SEQ REFER TO

JUDGMENT

[1] HARIPRASHAD-CHARLES J: On 4th January 2005, I delivered an oral judgment in favour of the Claimant against the Defendants jointly and severally in the sum of $196,515.63 with 25% of the liability being apportioned to the First Defendant, the Saint Lucia National Housing Corporation ("the SLNHC") and 75% to the Second Defendant ("Zeby Howell")

with interest at the rate of 6% per annum from the date of judgment thereon to the date of payment in full and costs in the sum of $12,000.00. I indicated that the reasons therefor would be reduced into a written judgment subsequently. I do so now.

The facts in outline

[2] The background facts can be stated reasonably shortly. By written agreement for sale dated 6th September 1996, the Claimant, Gertrude Ann Daniel agreed to purchase from the SLNHC a "starter house" erected on pillars together with the land at Monier, Quarter of Gros Islet for the sum of $155,000.00. By Deed of Sale executed on 27th November 1996, the SLNHC conveyed the property to Ms. Daniel.

[3] At the time of the purchase of the "starter house", the servant or agent of the SLNHC informed Ms. Daniel that the house was guaranteed for 10 years and that, as a "starter house" on pillars, she could expand by building under it.

[4] Five years went by before Ms. Daniel decided to expand. She wanted to add a garage and a laundry room under the existing structure. After all, the house was designed and structured in such a manner which allowed for further building at the foundation and below the building.[1]

[5] On 30th July 2001, she entered into a written agreement with the Second Defendant, Mr. Howell for the construction of a garage and a laundry room under the house at a cost of $46,300.00. Mr. Howell was to be responsible for the supply of materials, labour, transportation and excavation costs ("Exhibit GAD 2"). The estimated time for the completion of the job was 2 months. Mr. Howell was also given 2 computer-generated drawings of what was required. The drawings were designed and provided by Mr. George Winter, now the husband of Ms. Daniel. They did not include any measurements or specifications. They were not plans ("Exhibit ZH 1"). On 21st August 2001, Mr. Winter left Saint Lucia for Barbados.

[1] See paragraph 15(c) of the witness statement of James Christopher Edward, Civil Engineer and witness for SLNHC

[6] On 24th August 2001, Ms. Daniel paid to Mr. Howell the first instalment of $15,000.00 for the first phase of construction work ("addendum to Exhibit GAD 2"). Mr. Howell commenced work shortly after the receipt of the first instalment.

[7] On 5th September 2001 at approximately 1.15 p.m. during the execution of the works by Mr. Howell's workers, the house collapsed and sustained physical damage. Mr. Winter was not around. He was still in Barbados. He returned to Saint Lucia some 2 hours after the house collapsed.

[8] Subsequent to the unfortunate incident, Ms. Daniel with the assistance of Mr. Winter and to some extent, Mr. Howell commenced remedial works to the house which was completed some 1 ½ years later. Ms. Daniel did not seek the professional advice of an engineer before or after the damage to the house. Neither did she obtain planning approval for the construction works which Mr. Howell undertook.

[9] During the remedial phase, Ms. Daniel expended a considerable sum of money. Her overall losses total $181,830.34. This sum was unchallenged at trial.

[10] Shortly after the collapse of the house, Ms. Daniel contacted Mr. Thomas R. Walcott, Civil and Structural Engineer to investigate the matter. After examining the house on 4th October 2001, Mr. Walcott reduced his findings into a written report ("Exhibit GAD 4"). Essentially, the report blamed Mr. Howell for the collapse of the house by the negligent excavation works. Ms. Daniel confronted Mr. Howell. She alleged that he never denied liability and that he was interested in finding a solution to the problem without resorting to the court.

[11] Around the same time, Mr. Howell presented Ms. Daniel with a report from Mr. Adrian M. Dolcy, another Civil and Structural Engineer. This report indicated that the house was of poor construction, drainage was inadequate at the site and the foundation and footings were not of a standard normally specified ("Exhibit GAD 5").

[12] Armed with these reports, Ms. Daniel instituted these proceedings against the SLNHC and Mr. Howell jointly and severally in tort for negligence and in the alternative, for breach of their individual contract with her.

The Proceedings

[13] Although the proceedings were protracted and lasted over a period of 6 months, the evidence adduced is relatively simple. Ms. Daniel gave evidence and called her husband, George Winter to testify on her behalf. The SLNHC called one witness, James Christopher Edward, a Civil Engineer employed by the Corporation as their Chief Technical Officer. Mr. Zeby Howell testified and called a friend and worker, Selsus St. Martin to support his account. Their accounts conflict substantially with that of Ms. Daniel and Mr. Winter.

The Evidence

Evidence against the SLNHC

[14] The factual evidence as adduced by Ms. Daniel against the SLNHC is really not in dispute. Stripped to its bare essentials, Ms. Daniel bought a "starter house" on pillars from SLNHC in 1996 and shortly thereafter, she took delivery of it. Except for some initial difficulty in obtaining the plans and warranties for the property, there were no complaints of a material nature until the collapse of the house in September 2001.

[15] Ms. Daniel's real grievance against the SLNHC is that the collapse of her house was caused or contributed to by the negligence of the SLNHC, its servants or agents as particularized at paragraph 13 of the Statement of Claim.

[16] Further or in the alternative, she claims that the SLNHC has breached the implied terms of the Agreement for Sale of the said property as particularized in paragraph 14 of the said Statement of Claim.

Evidence as against Zeby Howell

[17] I heard from Ms. Daniel and Mr. Winter. Their evidence is diametrically opposed to the evidence given by Mr. Howell and his witness, Selsus St. Martin. In her evidence, Ms. Daniel stated that she entered into a written agreement with Mr. Howell on 30th July 2001 for the construction of the garage and laundry room. Mr. Howell categorically denied that Ms. Daniel entered into a written agreement with him.[2] He claimed that except for an initial meeting with Ms. Daniel, he dealt exclusively with Mr. Winter who gave him instructions and paid him the sum of $15,000.00 before he left for Barbados. Ms. Daniel's evidence is that Mr. Howell requested payment for the job in 3 instalments. On 24th August 2001, she paid him the sum of $15,000.00 as a deposit so that he could start the job as is evidenced by receipt (addendum to "Exhibit GAD 2"). According to her, the job entailed the supply of materials, labour, transportation and excavation works. It is also correct to state that Mr. Winter was not in Saint Lucia on that date.

[18] In his defence, Mr. Howell averred that Mr. Winter and not Ms. Daniel was the person who ostensibly conducted business with him regarding the construction of the garage and the laundry room. He stated that Mr. Winter requested a "proposed" estimate for the said construction which was signed by Mr. Winter and himself. ("Exhibit ZH 2"). This estimate is the same as that produced by Ms. Daniel ("Exhibit GAD 2"). The striking difference is that the proposed estimate tendered by Mr. Howell bears the signature of one "George Winters." Mr. Winter produced his passport to verify that his name is "George Winter" and not "George Winters". Added to this, the signature of Mr. Winter on his passport and witness statement is vastly different from the signature on the proposed estimate which Mr. Howell tendered. The inescapable conclusion that can be drawn is that Mr. Howell either by himself, his servant or agent forged the signature of George Winter.

[19] Mr. Howell next averred that Mr. Winter presented himself as a qualified engineer and indicated to him that he did not require any planning approval since he was an engineer and would supervise the work himself. Mr. Winter vehemently denied that he ever spoke to Mr. Howell about planning approval.

[2] See paragraph 4 of defence of second defendant filed on 20th May 2003

[20] At paragraph 12 of his defence, Mr. Howell stated that on 24th August 2001, he was absent when Mr. Winter supervised the digging of the trenches underneath the house for the commencement of construction. Mr. Winter produced his passport to prove that he left Saint Lucia on 21st August and returned on 5th September 2001.

[21] Mr. Howell contended that Mr. Winter was the one who assumed the responsibility for the excavation which was carried out under the house and he had nothing to do with it. Mr. Winter said that before the work had started, Mr. Howell told him that the backhoe belonged to him and that he was going to drive it himself when doing the job. When one scrutinizes the proposed estimate, one observes that the cost of excavation is reflected as $3,241.00. At paragraph 8 of his witness statement, Mr. Howell attempts an explanation and stated that the word "excavation" meant costs for the use of the excavation equipment and the labour cost payable to the operator.

[22] Mr. Howell called Mr. St. Martin to testify on his behalf. Mr. St. Martin was employed by Mr. Howell as a mason on the project. At paragraph 3 of his witness statement, he stated that as far as he is aware, Mr. Howell's role in the project involved only the concrete work. He also stated that the concrete work started after the excavation was completed but the workers and himself were involved in preparing the steel while the excavation was going on. Under cross-examination by Mr. Maragh, Mr. St. Martin said that he was only employed after the excavation work was completed. He also stated that "the first day he worked there is when the concrete work started and that was the day the house collapsed". Under further cross-examination by Mrs. Desir, he added "I had no way of knowing who supervised the excavation."

[23] There is an obvious dispute as to the excavation works. Mr. Howell said that the excavation works were carried out under the supervision of Mr. Winter prior to his departure for Barbados. He maintained that Mr. Winter held himself out to be an engineer and to that extent, supplied 2 computer generated plans devoid of dimensions. Mr. Winter said that he had no involvement in the excavation which was done when he was in fact in Barbados. This is a significant finding of fact for the court to resolve.

[24] This is a civil claim for negligence and breach of contract wherein the standard of proof is based upon a balance of probabilities. Examining the evidence presented to the court and having had the opportunity of seeing and hearing the witnesses, I found the evidence adduced by Ms. Daniel and Mr. Winter to be more plausible. I found both Ms. Daniel and Mr. Winter to be honest and candid and I accepted their evidence as credible. I am afraid that I have to disagree with Mrs. Desir and Mr. John that Mr. Howell's evidence should be preferred to that of Mr. Winter. In my respectful view, I found Mr. Howell to be evasive, hesitant and unreliable in his testimony. There were many inconsistencies in his testimony. Mr. Howell brought Mr. St. Martin to corroborate his evidence but it was obvious from the inception that Mr. St. Martin was a self-serving witness. He contradicted his evidence on many occasions.

[25] Mr. Howell maintained that Mr. Winter held himself out to be an engineer and in that respect, provided 2 computer-generated 'plans' devoid of specifications and supervised the excavation prior to his departure to Barbados. I find as a fact that what Mr. Winter supplied were 2 computer-generated drawings, not 'plans.'

[26] Further, Mr. Howell's evidence is replete with inconsistencies. At paragraph 4 of his defence, he categorically denied that Ms. Daniel entered into a written agreement with him; secondly, Mr. Howell stated that Mr. Winter wanted him to build 2 additional floors below the existing structure - a guest room with toilet and bath and a computer room on the middle floor and a laundry and garage on basement. He told Mr. Winter that his proposal seemed impossible because of the extent of digging that would be required. Yet, the subject matter of his proposed estimate expressly states: "Proposed Estimate for the construction of a garage and laundry room under existing house". This is exactly what Ms. Daniel said that Mr. Howell was contracted to do; thirdly, Mr. Howell produced an agreement ("proposed estimate") signed by him and one "George Winters" not "George Winter". It is now clear that someone forged the signature of Mr. Winter; fourthly at paragraph 12 of his defence, Mr. Howell stated that on 24th August 2001, he was absent when Mr. Winter supervised the digging of the trenches underneath the house for the commencement of construction. It is a fact that Mr. Winter was in Barbados on that date;

fifthly, Mr. Howell said that the cost of excavation on the proposed estimate meant "the costs for the use of the excavation equipment and the labour cost payable to the operator." Yet, he chose to use words which did not indicate so; sixthly, Mr. Howell asserted that it was Mr. Winter who paid him the sum of $15,000.00 on 24th August 2001. It is a fact that Mr. Winter was in Barbados. Added to this, the receipt bore Ms. Daniel's name as the payer. These are some of the mind-boggling questions which makes Mr. Howell's evidence incredible.

[27] Be that as it may, Mr. Howell denies that he was negligent as alleged by Ms. Daniel. Instead, he alleges that Mr. Winter and the SLNHC are responsible for the damage caused by the "tilting" and not "collapse" of the house. He further asserts that Mr. Winter was acting as agent for Ms. Daniel and since, she did not obtain planning permission, the said construction was illegal.

Expert witnesses

[28] Any liability against the SLNHC will depend substantially on expert evidence. Ms. Daniel called Mr. Walcott as her expert witness while the SLNHC called Mr. Edward to testify on their behalf.

Mr. Thomas Walcott

[29] Mr. Walcott is a registered Civil Engineer in Saint Lucia. A graduate of the University of Toronto, Canada, he has been practising his profession since 1964. He is a member of the Professional Engineers of the Province of Ontario, Canada and a member of the Association of Valuation and Land Surveyors and a Fellow of the Saint Lucia Association of Professional Engineers.

[30] In his report prepared on 12th October 2001, Mr. Walcott interpreted and observed the following:

a) Columns 1A 2A and 3A have been dislocated completely from their original position and bases were all exposed and broken up.

b) Excavation works have been taken down to the subgrade at the level of the bottom of the foundation base.

c) Indiscriminate excavation carried out below the house resulted in the tilting of the entire building to the east.

d) That the existing columns were lengthened from 8 feet to 15 feet thereby altering the load carrying capacities of the columns.

e) That there was a failure in the clay medium as a result of the excavation works.

f) Excavation works were directly responsible for the collapse of the structure. It introduced slope instability and with the surcharge of the structure resulted in the failure.

g) That material showed some very strange qualities of plasticity, compressibility, sensitivity, expansion and shrinkage. Operations including excavation on that type of material always require sound engineering judgment and local experience.

[31] Mr. Walcott concluded that in his opinion, the excavation works resulted in slope instability culminating in column and base failures and recommended that the house be salvaged and demolished. Subsequent to his report, he saw the building plans for Ms. Daniel's house which appears to have been prepared for the SLNHC's Tapion Housing project. He observed that the plans specified a foot pad thickness of 12 inches whereas he observed that the foot pads were not built in accordance with the required specifications.

[32] He also noted that the Tapion foundation bearing strata is of volcanic tiff composition whereas the Monier foundation bearing strata is of a clay soil. The volcanic tiff is harder in composition than the clay soil. He pointed out that whereas they are both good bearing strata, the clay soil foundation loses its bearing strength, and can be undermined when exposed to water, for instance as a result of poor drainage. Mr. Walcott observed that there was no drainage built at the foundation of the house from inception.

[33] Mr. Walcott observed that the house was constructed according to accepted standards and performed satisfactorily until excavation works were carried out.

[34] Mr. Walcott opined that the main cause of the collapse of Ms. Daniel's house was the improper excavation procedures and to a lesser extent, the failure to provide adequate drainage at the foundation at the time of construction and the failure to build the foot pads in accordance with the specifications prescribed by the building plans.

Mr. James Christopher Edward

[35] Mr. Edward is currently employed by the SLNHC in the capacity of Chief Technical Officer. Like Mr. Walcott, he is also a registered Civil Engineer. He holds a Bachelor of Science Degree (Upper Second Division) from the University of the West Indies and he has been practising his profession for the last 8 years.

[36] On or about 5th September 2001, Mr. Edward viewed a television broadcast of a building that reportedly collapsed at the SLNHC's Monier Phase 2/3 Development. About a week later, he visited the site. He took photographs.

[37] In May 2003, he prepared a report. He observed, among other things, that the building was significantly tilted to the east and was partially supported by concrete blocks and metal props. Several foundation reinforced concrete footings were observed to have been partially demolished prior to the collapse. Steelwork for new columns were observed adjacent to several of the existing columns, erection of which necessitated the partial demolition of the reinforced concrete footings. He inferred that such columns were intended to carry an intermediate floor thereby converting the single storey building to one of three-storeys. Extensive excavations below the building were observed. Depth of excavation exceeded 7 feet at some locations and well below several footings.

[38] Based on his observations and his understanding of the principles of soil mechanics, he opined that the house was destabilized by the excavations and partial demolition of the foundations undertaken by Ms. Daniel and/ or Mr. Howell.

[39] Mr. Edward concluded the following:

a) That the said house type was designed to normal/ customary building specifications. The columns are stated to be 9" x 9" and the footings 3' x 3' x 12". To the best of his knowledge this conforms to standard building practices at the time.

b) The foundation of the building was designed and constructed to be adequate without the explicit provision of drainage to the foundation, and performed adequately for over 4 to 5 years until the intervention of Ms. Daniel and /or Mr. Howell. During the intervention, given the increased stresses that were being imposed on the soil, the extent of excavation, period which trenches would be left open and that the work was being undertaken in the rainy season, Ms. Daniel and/ or Mr. Howell was negligent in not providing temporary drainage in or about the foundation.

c) That the building was designed and structured in such a manner, which allowed for further building at the foundation and below the building.

[40] While the expert testimony of Mr. Walcott and Mr. Edward was unanimous on most points particularly (i) the extent of the excavation; (ii) the period for which the trenches were left open and their exposure to heavy rains and (iii) Mr. Howell not providing temporary drainage while undertaking the works, it was clear that the testimony of Mr. Edward was an attempt to exonerate the SLNHC from any liability. His findings were not based on any scientific analysis verified by empirical data.

[41] As such, I have this to say. Wherever the evidence of Mr. Edward contradicted that of Mr. Walcott's, the evidence of Mr. Walcott is to be preferred. Mr. Walcott was to my mind, a witness for the court. He gave his testimony without partiality as required by Part 32 of CPR 2000. It is difficult to say the same for Mr. Edward who is currently employed by the SLNHC. With respect, he was a self-serving witness. His evidence could not even qualify as reliable expert testimony because he failed to take any measurements or perform any

tests to verify, confirm or establish the conclusions which he arrived at during his "curious and casual " visit to the site.

The Issues

[42] All Counsel are agreed that the following issues are to be determined:

As against the SLNHC

a) Whether or not the SLNHC by itself, its servants or agents was negligent in the construction of Ms. Daniel's house?

b) If found to be negligent, did this in any way contribute to the collapse of Ms. Daniel's house in 2001 when Mr. Howell was carrying out works?

c) Further or in the alternative, whether the SLNHC breached its implied contractual obligations to Ms. Daniel to construct in a professional and workmanlike manner in accordance with the plans and to build of good and proper materials?

As against Mr. Zeby Howell

a) Whether or not Mr. Howell was negligent whether by himself, his servants or agents in carrying out the works?

b) Further or in the alternative, whether or not Mr. Howell was in breach of the implied terms of his contractual obligations to Ms. Daniel to execute the works in a professional and workmanlike manner and that he would use reasonable skill and care in the performance of the works?

c) Whether or not Mr. George Winter ever supervised the digging and excavation works during the construction as alleged by Mr. Howell?

d) Since no planning approval was obtained, whether the construction was illegal?

e) Was Mr. Winter an agent of Ms. Daniel?

The Legal considerations

[43] The following provisions of the Civil Code of Saint Lucia 1957 ("the Code") are relevant to the present case.

Warranty against latent defects –Articles 1432 et seq

[44] Article 1432 provides that:

> "The seller is bound to warrant the buyer against such latent defects in the thing sold and its accessories, as render it unfit for the use for which it was intended, or so diminish its usefulness that the buyer would not have bought it, or would not have given so large a price, if he had known them."

[45] Article 1433 relieves the seller from any liability for defects which are apparent and with which the buyer might have made himself acquainted while article 1434 holds the seller responsible for latent defects even when they were not known to him unless otherwise stipulated.

[46] Article 1437 reads:

> "If the seller knew the defect, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer. He is obliged in like manner in cases in which he is legally presumed to know the defects."

[47] Article 1439 reads as follows:

> "If the thing perish by reasons of any latent defect which it had at the time of the sale, the loss falls upon the seller, who is obliged to restore the price of it to the buyer, and otherwise to indemnify him, as provided in the last two preceding articles.
>
> If it perish by the fault of the buyer or by a fortuitous event, the value of the thing in the condition in which it was at the time of the loss must be deducted from his claim against the seller."

Liability under 1588 - Builders

[48] Article 1588 of the Code provides as follows:

> "If a building perish in whole or in part within ten years, from a defect in construction, or even from the unfavourable nature of the ground, the architect superintending the work, and the builder are jointly and severally liable for the loss."

[49] Thus, article 1588 imposes a liability upon a builder where a building perishes in whole or in part within 10 years. After 10 years, architects and contractors are discharged from the warranty of the work they have done or directed- article 2120.[3] It appears that this article creates an entirely separate liability regarding the specific negligence or breach of contract of builders and architects.

[50] Article 1588 also creates a delictual or tortious liability. In the case of *Hill-Clarke-Francis Limited v Northland Groceries (Quebec) Limited* [4], it was held that by the terms of articles 1683 and 1688 (identical to our article 1588), the builder or contractor is responsible for the consequences of a defect in construction or a defect of the soil; and a presumption of fault is created against him. The proprietor of the building is not obliged to prove the fault of the builder or contractor in the case of a contract by enterprise, and the latter can only be relieved from his liability by proving that the damage was attributable either to an act of God, to a fortuitous event, to a fault of the proprietor or to an act of a third person.

[51] Article 989D defines "fault" as "negligence, breach of statutory duty or other duty or other act or omission which gives rise to a liability in tort or would, apart from this article, give rise to the defence of contributory negligence."

[52] Mere proof of the fact that the building perished in whole or in part within 10 years of its construction and of the resultant loss or damage automatically shifts the burden to the builder or contractor to bring himself within the exculpatory defences stated in *Hill's* case. Unless he does so, he is absolutely liable to the proprietor.

[53] Mr. Maragh for the claimant argued that Ms. Daniel's case satisfies the triggering requirements of article 1588. Mrs. Desir for the SLNHC supported Mr. Maragh's arguments on this aspect of the law. The issue now is whether or not the SLNHC is able to bring itself within the exculpatory defences as enunciated in *Hill's* case.

[3] For an interpretation of these articles, see the case of Desgagne v Fabrique de Saint-. Philippe d'Arvida [1984] 1 RCS 19, an appeal from the Court of Appeal of Quebec
[4] [1941] R.C.S. 437

[54] Mrs. Desir submitted that the SLNHC may rebut the presumption of liability by showing that the act which resulted in the loss was caused by a fortuitous event, an act of the owner or of a third party. She argued that the evidence led clearly shows the intervention of actions by Mr. Winter (on behalf of Ms. Daniel) and by Mr. Howell whether by himself, his servants or agents and that the loss was due to the fault of some other person other then the SLNHC.

[55] With respect to fault of the owner (Ms. Daniel), Mr. Maragh argued that the SLNHC cannot maintain such an allegation as no negligence, contributory or otherwise has been alleged against Ms. Daniel in the pleadings. Mrs. Desir however argued that the SLNHC was unable to plead fault or contributory negligence because they were not possessed of the necessary information at the time of the filing of the defence. This submission is untenable because the Statement of Claim clearly indicated the circumstances under which the loss arose which would have provided the necessary catalyst for pleading negligence or contributory negligence against Ms. Daniel or Mr. Howell. In addition, the SLNHC could have applied for further information or interrogatories. In any event, there is no evidence of negligence on the part of Ms. Daniel or Mr. Winter. All that has been raised in relation to the owner is the alleged participation of Mr. Winter in this incident. I have already said that I believe Mr. Winter when he testified that he did not assume responsibility for the excavation works or actively participated in the performance or supervision of the said works and that he was in Barbados when the excavation commenced. In my considered opinion, no fault can be attributable to the owner.

[56] The only defence which is available to the SLNHC is the act of a third person namely Mr. Howell. Mr. Maragh submitted that while it will be shown that a third person namely Mr. Howell was responsible for the collapse of the house, the defects in construction by the SLNHC contributed to the loss.

Was the SLNHC negligent in the construction of the claimant's house?

[57] Mr. Maragh submitted that the SLNHC was negligent in the construction of the foundation of Ms. Daniel's house. He identified the following as defects in construction falling within the province of article 1588:

(i) The foundations were not built in accordance with the plans which presumably were prepared by a qualified architect and approved by an engineer and the relevant planning authority in that:

- The foot pads were not built to specifications and
- The columns were longer than they were specified in the plans.

(ii) Failure to install drainage from inception having regard to the nature of the soil upon which the house was built, they being in a better position than the claimant to know such fact and the consequence of failure to install such drainage.

Foot pads

[58] The SLNHC argued that there was no precise evidence as to exact thickness of the foot pads as Mr. Walcott could not confirm whether in fact he measured them. At paragraph 10 of his witness statement, Mr. Walcott stated:

> "I noted that the plans specified a foot pad thickness of 12 inches whereas I observed during my investigation that the foot pads were 6 - 8 inches thick. As such, the foot pads were not built in accordance with the required specifications."

[59] His testimony as to the precise thickness of the foot pads is supported by the evidence of Ms. Daniel and Mr. Winter as well as in the photographs submitted by the SLNHC themselves.

[60] It is obvious that the foot pads were not built to specifications. As a result, they were unable to handle the load and consequently, failed. There was evidence of "punching sheer" indicating that the columns had in some instances broken through the foot pads.

Columns too long

[61] Mr. Maragh asserted that the columns were built, at least to the front of the house, twice as long as they should have been built. Mr. Walcott testified as to the effect of such a deviation on the integrity of the foundation. Mr. Edward attempted to suggest that the additional steel bars were placed into those columns but could not proffer any evidence to verify that the columns were built to satisfactorily withstand the load of the house during expected construction works beneath. In addition, there was no evidence led by the SLNHC that the columns were built with these additional steel bars. These were facts, which it was incumbent on the SLNHC to prove in the circumstances.

Drainage

[62] Mr. Maragh asserted that the SLNHC failed to provide drainage to the foundations given the nature of soil. The SLNHC argued that there was really no need for drainage to be placed at the foundations permanently. Mr. Edward indicated that drainage was only necessary during the construction stage and not as a permanent feature.

[63] In cross examination by Mrs. Desir, Mr. Walcott stated:

> "I am always frightened when I see that type of soil. Once the soil gets saturated, you get failure very quickly…There was no drainage. The contractor has to be careful. In the excavation of clay soil, it is essential that there be adequate drainage…Mr. Howell should have attempted to minimize saturation during excavation."

[64] Mr. Walcott, whose evidence is to be preferred had this to say on what was responsible for the collapse of the house:

> "It is my opinion that the main cause for the collapse of the claimant's house was the improper excavation procedures and to a lesser extent, the failure to provide adequate drainage at the foundation at the time of construction and the failure to build foot pads in accordance with the specifications prescribed by the building plans."

[65] On the basis of the expert testimony, I find that the deviations from the plans in the construction of the foot pads and the columns constituted latent defects, of which Ms. Daniel could not have been aware at the time of purchase. She did not become aware of

them until sight of the receipt of the plans. The SLNHC knew or could reasonably suppose that persons buying these homes would eventually undertake construction beneath and that defects in these aspects of the foundations could manifest themselves in a failure of the kind suffered by Ms. Daniel in only a matter of time once the necessary stimulant is provided, albeit a negligent third party.

[66] On an analysis of the evidence and the law, it is clear that the SLNHC was negligent in the construction of the foundation of Ms. Daniel's house and as such, contributed to the loss of the said structure. I agree with Mr. Maragh that Ms. Daniel's claim against the SLNHC is sustainable under article 1588 and I so find.

Liability in Negligence (delicts and quasi-delicts)

[67] Mr. Maragh submitted that Ms. Daniel's claim against the SLNHC is also well founded under the Saint Lucian law of delict or tort, governed by Articles 985, 986, 917A and 1137 of the Civil Code. Article 985 of the Code provides that:

> "Every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or want of skill, and he is not relievable from obligations thus arising."

[68] Article 986 holds him responsible for damage caused not only by himself but by persons under his control and by things under his care. The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which had caused the damage.

[69] The case of *Northrock Ltd v Jardine and Another*[5] is indeed the *locus classicus* on the action of negligence in Saint Lucia. In that case, relying on two Privy Council decisions of *Quebec Railway, Light, Heat & Power Co. Ltd v Vandry*[6] and *City of Montreal v Watt & Scott Ltd*[7], the Court of Appeal (Sir Vincent Floissac CJ delivering the judgment of the Court) laid down the following principles:

[5] [1992] 44 WIR 160
[6] [1920] AC 662
[7] [1922] 2 AC 555

a) In actions falling under articles 985 or 986, the onus of proving as a pre-condition of the defendant's delictual liability that the damage suffered by the claimant was caused by the defendant or by persons under his control or things under his care, rests with the claimant.

b) In actions governed by article 985, the onus of proving as a pre-condition of the defendant's delictual liability that the damage was caused by the defendant's fault lies with the claimant.

c) In actions governed by article 986 where the claimant has proved that the damage, which he suffered, was caused by a thing under the defendant's care, there was no need for the claimant to prove fault on the part of the defendant as a prerequisite to the defendant's delictual liability: see *Vandry's case.*

d) The test for determining whether damage was caused by the defendant's fault and was therefore caught by article 985 or whether the damage was caused by a thing under the defendant's care and was therefore caught by article 986 lied in the distinction between damage caused by the defendant through the instrumentality of a thing and damage caused by an autonomous act of a thing without intervening human action. The former falls under article 985 which requires the proof of fault and the latter falls under article 986, which creates a presumption of liability and absolves the claimant from proof of fault.

e) To the extent to which article 986 is a rule of law, it conflicts with the Law of England and prevails over the latter by virtue of article 917A (3).[8] To the extent to which article 986 is a rule of evidence, it excludes contradictory English rules of evidence the importation of which would otherwise have been authorized by article 1137.[9]

f) Article 985 falls to be interpreted by reference to the English law of tort and to prove liability by reference to the English rules of evidence. Accordingly, where a cause of action is negligence, the claimant must prove under article 985:

    (1) that the defendant owed the claimant a duty of care;
    (2) that the defendant was negligent or in breach of that duty and
    (3) that the damage sustained/ suffered by the claimant was caused by that breach.

[8] Article 917 A (3) reads "where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail."
[9] Article 1137 reads "any question relating to evidence, which is not covered by any provision of this Code or of any other statute, must be decided by the rules of evidence as established by the law of England.

Duty of Care

[70] The classic test as to whether a duty is owed was laid down in the landmark case of *Donoghue v Stevenson*[10]. The law remained in a state of dormancy for some time and after a period of activity, it appeared to have been settled in the House of Lords case of *Murphy v Brentwood District Council* [11]. This decision restated the law of negligence in the following terms:

a) A builder owes a duty of care within the principles of *Donoghue v Stevenson* to persons likely to suffer injuries as a result of his negligence. This extended however, only to injuries caused by latent defects.

b) Where a defect came to light, whether through the existence of cracks or through a survey, expenditure on remedial work was to be regarded as pure economic loss, not recoverable in tort.

c) Cracks representing the manifestation of underlying defects were not regarded as material damage.

[71] The law of negligence is now to be regarded as being concerned with actual damage usually in the form of physical injury to persons or property necessarily caused by latent defects. It is in this context that the SLNHC accepted that it owed a duty of care to Ms. Daniel for any physical injury to her house which arose directly out of a latent defect to the building. Likewise, Mr. Howell owed to Ms. Daniel a duty of care to ensure that the works including the excavation works were executed with reasonable skill and care.

Breach of that duty

[72] The standard of care required is that of a reasonable man and depends on the particular circumstances. The duty of care of a builder is to carry out the work of construction with reasonable skill and competence using safe and appropriate materials.

[73] The injury complained of must have been caused by the defendants and must not be too remote. Mrs. Desir argued that it follows therefore that if the damage was a result of the claimant's own fault and partly that of any other person [s] then damages recoverable shall

[10] [1932] AC 562
[11] [1991] AC 398

be reduced. As stated previously, the SLNHC did not plead contributory negligence and cannot do so at such a late stage in the proceedings. It seems to me that there was a breach of the duty owed to Ms. Daniel by the SLNHC and Mr. Howell.

Breach of Contract

[74] Ms. Daniel also alleged that the collapse of her house was caused by the SLNHC's breach of the implied terms of the agreement for sale of the said property namely: (i) failure to provide a house that was safe for human habitation; (ii) failure to provide a dwelling house built of good and proper materials and (ii) failure to provide a dwelling house which was constructed in a professional and workmanlike manner and built in accordance with proper building standards and practice.

[75] Mrs. Desir argued that the house could not be unsafe and unfit for human habitation because it was the same house that Ms. Daniel lived in for about 6 years without any complaint or incident. She next argued that Ms. Daniel failed to report the matter to the SLNHC promptly after the incident and she only did so after her insurance was declined and after Mr. Howell abandoned the remedial works. I agree with Mrs. Desir.

[76] Ms. Daniel contended that the SLNHC failed to provide a dwelling house that was constructed in a workmanlike manner and built in accordance with proper building standards and practice and failed also to provide a dwelling house built of good and proper materials.

[77] Both Ms. Daniel and Mr. Winter indicated that the concrete could be crumbled by hand. This arose after the loss occurred. But, there was no evidence before this court that the concrete was of poor quality prior to the loss. The evidence of Mr. Walcott as set out in his Report and Witness Statement confirm that the building was constructed according to accepted standards and performed satisfactorily until excavation works were carried out. In cross-examination, he indicated that he examined the column finish and saw signs of clear face finish, clean soffit and beams. Generally, he saw a good standard of work. He opined that but for the excavation, the building would have stood for another 50 years.

[78] It seems to me that had the house been under-designed, it would have shown signs of this within a few months. Prior to the loss, the building stood firm for about 6 years without any signs of stress or instability. In cross-examination, Ms. Daniel stated that "prior to the excavation work, she had no reason to question the soundness of the existing structure." The loss occurred after the intervention of Mr. Howell.

[79] There are important terms which are implied in building contracts. Such terms require that the contractor must carry out the work with reasonable skill and care, that is, in a workmanlike manner. Goods and materials must be of good quality and reasonably fit for their purpose.

[80] In my considered opinion, the evidence adduced by Ms. Daniel and her witnesses including the expert testimony do not support the claim for breach of contract or of any terms implied in the parties' contract. As such, this aspect of her claim against the SLNHC must fail.

Liability of the Second-Defendant (Mr. Howell) in Negligence

[81] On the exposition of the law relating to delicts, Mr. Maragh submitted that, based on the evidence, the claimant has established a case of negligence against Mr. Howell on a balance of probabilities. He next submitted that if she has failed to prove fault or causation, that she may call in aid the maxim of *res ipsa locquitur,* if she is unable to say exactly how and why the house fell. Clearly, the tool and the manner of performance of work were solely within the control of Mr. Howell.

[82] The facts as I found them tending to prove negligence of Mr. Howell can be summarized as follows:

(i) Mr. Howell whether by himself, his servants or agents were responsible for the excavations.

(ii) It was Mr. Howell's backhoe and his backhoe operator that were involved in the excavation works. He admitted that he was paid for such works.

(iii) Mr. Winter was in Barbados during the time that the excavation works were being carried out.

(iv) Mr. Howell failed (i) to put props in place to secure the house before commencing work; (ii) to put in temporary drainage or sufficient drainage and (iii) to examine the soil on which he was to build.

[83] Mr. Howell attempted to allege that the use of wood beams instead of steel contributed to the cracking of the house after it fell but he is not an expert to provide this kind of evidence.

[84] Mr. Maragh submitted that Mr. Howell is also liable under article 1584 which provides as follows:

> "If the workman furnish the materials, and the work is to be perfected and delivered as a whole, at a fixed price, the loss of the property, in any manner whatsoever, before delivery, falls upon himself, unless the loss is caused by the fault of the owner or the owner has failed to receive the property in due time."

[85] The evidence disclosed that the elements required to trigger article 1584 were established. As I have already found, the contract provides for Mr. Howell to supply materials. It was also for a fixed price.

[86] Therefore, under article 1584, Mr. Howell is liable for the loss or damage to the property "in any manner whatsoever."

[87] In any event, Mr. Howell has not argued that the loss was not partly caused by his negligence. His pleadings have failed to allege any negligence against Ms. Daniel or the SLNHC. All that he has alleged is that the excavation works were not done by him but by Mr. Winter.

Illegality

[88] The main thrust of Mr. Howell's submissions centers on illegality of contract.

[89] Both Mr. Maragh and Mrs. Desir contended that in his defence, Mr. Howell never pleaded illegality and he is estopped from doing so at the eleventh hour. Mr. John argued that

notwithstanding that the word 'illegality' was not specifically used in Mr. Howell's defence, it is without a doubt that he pleaded illegality when he enquired into planning permission.

[90] I found as a fact that Mr. Howell was an untruthful witness. I did not believe most of his testimony including that he enquired into planning permission and Mr. Winter insisted that his drawings be followed. It is my firm view that at this stage, Mr. Howell, as a prudent contractor, knowing fully well that planning permission had not been obtained, could have extricated himself from entering into what he now termed an illegal contract; the very contract which in his defence, he alleged never existed.

[91] In my respectful view, illegality was an afterthought by Learned Counsel for Mr. Howell and as such, could not have been pleaded in the defence.

Pleading of illegality

[92] The next question is: should illegality have been pleaded? Both Mr. Maragh and Mrs. Desir submitted that illegality must be pleaded and Mr. Howell should not be permitted to argue it at this late stage as it amounts to trial by ambush which seriously prejudiced Ms. Daniel who did not have the opportunity to contest the allegation in testimony or even in pleadings.

[93] Under the old rules of the Supreme Court 1970 a defendant was required to plead illegality. The old rules were replaced by CPR 2000. CPR 2000 is silent on the issue of illegality but it is highly inconceivable that the new rules which were ushered in, in the spirit of openness between litigants and the need to have all issues clearly identified in the pleadings would be inapplicable under the new regime. Part 10.5(1) of CPR 2000 mandates a defendant to set out all the facts on which he intends to rely on to dispute his claim. Part 10.7 details out the consequences of not setting out defence. Part 10.7(3) expressly provides that "the court may not give the defendant permission after the case management conference unless the defendant can satisfy the court that there has been a significant change in circumstances which became known only after the date of the case management conference."

[94] It seems to me that Part 10.5 would necessitate a defendant to plead illegality as a matter of fact if he intends to rely on it. Otherwise, he will be estopped from doing so especially at the eleventh hour. To my mind, it was an issue which could have easily been pleaded.

[95] Moreover, even if I were to entertain the issue of illegality at this late stage, it is incumbent on Mr. Howell to prove that the contract was illegal. He has to produce positive evidence that what was being constructed – a garage and laundry room exceeded one-third of the floor area of the existing floor. This he has failed to do.

[96] It is also a well recognized principle of law that where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, where the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied upon are pleaded; thirdly, where unpleaded facts, which, taken by themselves, show an illegal object, have been put in evidence, the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but fourthly, where the court is satisfied that all of the relevant facts are before it and it can clearly see from them that the contract had an illegal object, it may not enforce the contract, whether the facts are pleaded or not.[12]

[97] It is clear that the contract is not *ex facie* illegal and therefore, any evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied upon are pleaded. The Court must be satisfied by precise evidence that the construction which was undertaken by Ms. Daniel fell within the schedule of the Land Development (Interim Control) Act of 1971("LDA") requiring permission. Mere speculation cannot suffice. Illegality must be strictly pleaded and proven.

[98] Even if I were wrong to come to this conclusion, there is another issue which falls for determination. Who should apply for planning approval? Mr. John argued that such responsibility rests with the owner of the property. Section 7 provides that "no person" shall

[12] Edler v Auerbach [1950] 1 K.B. 359, 371

commence such works which, to my mind, does include a contractor or a builder. It seems to me that both builder and claimant (Ms. Daniel) would be in breach of the required planning laws as far as approval for the works was concerned. It is abhorrent for Mr. Howell, knowing fully well that planning approval had not been obtained, chose to partake in such illegal activity and now wishes to avoid the contract on the basis that it is tainted with illegality.

[99] In any event, Mr. Howell having agreed to do the works cannot use the LDA to exempt himself from delictual liability even if the contract were illegal.

Agency

[100] Mr. John submitted that Mr. Winter was acting as agent for Ms. Daniel. In his submissions, he comprehensively explored the law of agency. With respect, I think he has ventured into unvirginal territory when it is unnecessary to do so for the purpose of this case. The factual findings speak for themselves.

Conclusion

[101] In conclusion, both the SLNHC and Mr. Howell are jointly and severally liable to Ms. Daniel for her loss. In apportioning damages, like Mr. Walcott, I am also of the view that the blameworthiness of Mr. Howell is far greater than that of the SLNHC. I therefore enter judgment in favour of the Claimant against the Defendants jointly and severally in the sum of $196,515.63 with 25% of the liability being apportioned to the SLNHC and 75% to Mr. Howell with interest at the rate of 6% per annum from the date of judgment thereon to the date of payment in full and costs in the sum of $12,000.00.

Indra Hariprashad-Charles

High Court Judge