

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV 2004/0981

BETWEEN:

THOMAS FONTINELLE

Claimant

and

CONSOLIDATED CONTRACTORS
INTERNATIONAL (U.K.) LIMITED

Defendant

Appearances :

Mr. Alvin St. Clair for Claimant

Mrs. Petra Jeffrey-Nelson for Defendant

2006: October 31,
November 27, 28,
2007: February 12,
March 7, 22
June 13.

JUDGMENT

Introduction

- [1] **EDWARDS; J.:** Mabouya Valley is one of the 3 major valleys in St. Lucia with substantial acreage of flat land that is cultivated with bananas as the primary economic crop. The Mabouya Valley like the other major valleys, is susceptible to flooding during periods of high rainfall. It is not unusual for the Mabouya Valley to be flooded to the extent where occasionally, the Main Castries/Vieux Fort Road is inundated with water. Although the major component of the soil type in the Mabouya Valley is clay and loam or alluvial clay, the residents there say that

normally, the flood water drains off rapidly as soon as the heavy rainfall subsides. The area has 2 major rivers which maintain a continuous flow throughout the year. They are the Grand Rivere River and the Deniere River. These meandering rivers merge close to La Perle/La Caye, and then flow into the sea at Fond D'Or Bay approximately one mile beyond where they merge. The wet season in St. Lucia is normally between May to December each year.

Background Facts

- [2] The Claimant Mr. Thomas Fontinelle is a banana farmer in Mabouya Valley, Rich Fond in the Quarter of Dennerly. He has been doing banana farming in Mabouya Valley since before 1980.
- [3] The Defendant Consolidated Contractors International (U.K.) Ltd (CCI), is a construction company registered in St. Lucia.
- [4] In early 2004, CCI was carrying out their contractual obligations to build a new bridge at La Ressource in the Mabouya Valley for the Government of St. Lucia.
- [5] The River course which was to be spanned by the new La Ressource bridge, does not butt and bound Mr. Fontinelle's banana field which is about 10 to 12 chains from the bridge in my estimation. However, I observed when I visited the site on the 12th February 2007, that the existing land drainage system on his farm, consists of a network of drainage ditches, which connect with the main land drainage ditch serving several other farms in the area. This main land drainage ditch crosses Mr. Fontinelle's farm, and continues through to and from other adjoining banana fields, ultimately leading into the La Ressource bridge River course, where this can be easily seen from the Road by the new bridge.
- [6] By his claim filed on the 16th December 2004, Mr. Fontinelle has claimed for trespass to goods, special damages of \$17,157.00, Loss of Earnings at \$4000

monthly from May 2004, Interest, Legal Costs for a letter and Costs. The damages claimed are alleged to be the direct result of the prolonged floodings of Mr. Fontinelle's banana plants from May to October 2004 at Mabouya Valley Rich Fond in Dennerly.

- [7] CCI have been blamed for this prolonged flooding because, as I understand the case, it is contended that CCI altered the drainage pattern of the flood waters on Mr. Fontinelle's banana farm, by constructing a temporary bridge substantially lower than the original bridge or new bridge, across the said River Course. This temporary bridge has been described by CCI as a diversion, to facilitate vehicular and pedestrian traffic, while the new bridge was being constructed from February to October 2004.

THE PLEADINGS

- [8] Mr. Fontinelle pleaded in his Statement of Claim that this temporary bridge caused significant flooding to occur from May 2004 such that his farm was inundated with water from that time, virtually destroying all banana plants thereon, and making further cultivation impossible as the flooding continued unabated.
- [9] Although the claim has been obviously mischaracterized as a Trespass to Goods cause of action, it has been argued by Counsel Mr. St. Clair as a nuisance claim. On the pleadings in the Statement of Claim Mr. Fontinelle has neither alleged that CCI owed him a duty of care and was negligent, nor that damage was caused by CCI's fault, neither has he pleaded any Particulars of Negligence or Fault, nor that damage was caused by CCI through the instrumentality of the temporary bridge. Had he done so, in my view Article 985 would have applied; and he would have been required to plead and prove as a precondition of CCI's delictual liability that the damage was caused by CCI's negligence, breach of Statutory duty, or other duty, or other act or omission, imprudence or want of skill: (See Articles 985 and

989 D (1) of the Civil Code of St. Lucia Cap. 242, and Northrock Ltd v Jardine (1992) 44 W.I.R. 160 concerning torts in St. Lucia).

- [10] Instead, he has pleaded in essence that the damage to his banana farm occurred by reason of the temporary bridge assumedly under the care of CCI. He is therefore not required to plead or prove fault on the part of CCI, and Article 986 of the Civil Code applies. Article 986 states that a person “is responsible for damage caused not only by himself, but by persons under his control and by things under his care. The responsibility attaches . . . only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage. Masters and Employers are responsible for damage caused by their servants and workmen in the performance of the work for which they are employed.”
- [11] In Northwest supra, Sir Vincent Floissac C.J. explained at page 167 para (d) that where Article 986 applies, it “creates a presumptive or defeasible liability on the part of the defendant and exempts the plaintiff from proving fault”. . . “The onus is then on the Defendant to rebut the presumption of liability or to defeat the defeasible liability by proving that he was unable to prevent the damage by reasonable means:” (at page 167 para (a)).
- [12] Sir Vincent observed also, that “To the extent to which our Article 986 is a rule of evidence, it conflicts with the Law of England and prevails over the latter by virtue of Article 917 A (4). To the extent to which our Article 986 is a rule of evidence, it excludes contradictory English rules of evidence the importation of which would otherwise have been authorized by our Article 1137”: (at page 167 para (b)).
- [13] CCI pleaded in their Defence that the topography of the property in question is flat and prone to flooding, and the period under consideration was marred by excessive extra-ordinary rainfall. They denied that the flooding alleged was

directly the result of the construction of the temporary bridge, and put the Claimant to strict proof of this averment and to the alleged loss resulting therefrom. They averred that they took all reasonable, practical steps by placing pipelines among other things to accommodate the flow of water.

[14] Further or in the alternative, they have pleaded that if the Claimant suffered some or all of the alleged loss as a result of CCI's actions, such loss was contributed to by the Claimant's negligence. The Particulars of Contribution to loss were pleaded as –

- “(a) Having regard to the Topography of the Land failing to construct proper or adequate drains on or around the said fields causing or contributing to the alleged flooding.
- (b) Failing to take all reasonable measures to prevent or alleviate the flooding.”

[15] Consequently Articles 989D and 985 of the Civil Code apply. The relevant provisions of Article 989 D provide –

- “(1) In this article, -
. . . “fault means 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.
- (2) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the Claimant's share in the responsibility for the damage . . .

(3) Where damages are recoverable by any person by virtue of the foregoing paragraph subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the Claimant had not been at fault.

(4) – (7) . . .”

[16] Article 985 states 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.”

[17] “The burden of proving contributory negligence in the Claimant rests on the Defendant, but this may be inferred from the Claimant’s own evidence or on a balance of probabilities from the facts . . . The Claimant’s knowledge of a danger is not of itself evidence of contributory negligence, though it may be relevant in other ways . . .”: (Clerk & Lindsell on Torts 19th ed. para 3-68).

Issues

[18] Consequently, the primary issues to be decided according to the law and pleadings are:

A. Whether or not the construction of the temporary bridge by CCI caused the flood waters to remain on Mr. Fontinelle’s banana farm for prolonged periods between May to October 2004? If yes –

B. Did the said flood waters cause damage to the banana plants of Mr. Fontinelle? If yes, has CCI proven that they were unable to prevent the damage by reasonable means? If no –

C. Did Mr. Fontinelle suffer damage as the result partly of his own fault?

D. What damages are recoverable by Mr. Fontinelle?

[19] What I consider to be a collateral issue, also arises where Mr. Fontinelle is pleaded as **“the owner of the banana farm of approximately 3.0 acres, planting approximately 800 mats per acre.”** This has been challenged in the Defence and submissions of Counsel for CCI. The clear evidence discloses that he is not the owner of the farm lot which was assigned to his common law wife of 30 years Ms. Lorna Edwin, although he occupies the holding, planting his bananas, and selling them to the Banana Companies in Ms. Edwin’s name.

[20] Learned Counsel Mrs. Nelson cited several authorities which deal with the issue of locus standi in constitutional or administrative matters. In these cases the Claimants were either claiming declarations of a right, or a prerogative order, or approaching the Court for construction of a statute. Mr. Fontinelle, is doing none of these things, he is claiming damages in tort.

[21] The cases cited therefore, in my view, do not assist her submission that the Claimant has no locus standi as he was not the assignee of the holding, and that the assignment predisposes the holder, to have the sufficient interest which is required for Mr. Fontinelle to have standing in this case.

[22] Learned Counsel Mr. St. Clair argued that Mr. Fontinelle has a right to sue simply because he has an interest in the property whether real, or by virtue of an easement or profit. Having pitched his cause of action inappropriately in my view, in trespass, Mr. St Clair argued that even a possession which is wrongful against the true owner can found an action for trespass or nuisance against someone else. He has cited as his authority for saying so the case **Asher v Whitlock** (1865) LR1QB1 without providing the Court with this authority.

[23] I therefore turn to Article 916A of the Civil Code and paragraph 20-44 of Clerk & Lindsell on Torts (19th ed) at page 1187. Article 916A (2) states that “Implied, constructive and resulting trusts shall arise under the law of . . . [St. Lucia] in the same circumstances as they arise under the law in England.” Paragraph 20-44 states that “The person in possession or occupation of the land affected can sue in private nuisance, . . . But, apart from rights arising from public nuisance, persons with no proprietary interest are accorded no cause of action in this tort.”

[24] In the absence of any evidence that Mr. Fontinelle is a usufructuary of Ms. Edwin's farm land, I hold that the evidence shows that he has a beneficial interest and thus an equitable interest in the land, and also that he is in occupation of the land.

[25] I therefore conclude on the authority of the law referred to at paragraph 23 above that Mr. Fontinelle has an interest in the land affected by the flood waters and can sue CCI in nuisance.

The Temporary Bridge

[26] Mr. Bassel Hilal is a qualified B.S.C. Civil Engineer employed to CCI, on the St. Lucia Roads Development Programme RDP003, from 2003 as an office Engineer/Project Quantity Surveyor. His duties included supervising the works and verifying the design provided by the Consultant for the Government of St. Lucia which was DIWI Consult International GmbH. He was responsible also for preparing method statements of the works, and quality assurance to make sure that the works were constructed to specification and international standards. He also deputized for the Project Manager in his absence, relating to all technical issues.

[27] Mr. Hilal testified that prior to commencing the construction of the temporary bridge which he called a Road diversion, a level survey of the River bed down

stream was concluded to an extent of 800 metres, for the bridge location and downstream out flow.

- [28] A document tendered by Mr. Hilal Ex "BH3" dated 19th February 2004, disclosed the measurements for the on the bank levels, and the river bed levels going towards the sea in the direction of the flow, among other data. Mr. Hilal explained that the levels showed 800 metres downstream that the river bed was fairly flat with gradient of 0%, these measurements were not used to calculate the diversion or rate of flow he said, and they did not represent a study to determine the rate of flow. The measurements on Ex "BH 3" served the purpose for a future study of maximum theoretical flow that can go into the existing river, he said.
- [29] Mr. Hilal testified that there were 2 basic formulae used in determining outflow – that is the Discharge Formula and the Manning Formula. The Discharge Formula is $Q = VA$. The velocity of water passing at certain places = V . The Cross section and area of that place = A .
- [30] The Manning Formula defines Velocity in the channel. Velocity is the speed of water passing through a certain section. The Manning Formula depends primarily on the Manning No. and the Hydraulic Radius. The second dependent of the Manning Formula is the Longitudinal Slope or Gradient. As the Slope is milder, the Velocity is slower. A smaller Quantity of water can pass through any surface. For a fixed cross section, when the discharge of the Quantity increases due to increased rainfall, or any form of water coming from the river, the Velocity is slow, and the river cross section is fixed. In other words, the Quantity discharge or the additional Quantity of water cannot fit in that cross section any more, causing floods in the channel.
- [31] Mr. Hilal prepared the Diversion Diagram, Ex "BH 2", and the Diversion was constructed in accordance with this diagram. The diagram includes drawings of the planned view of the new bridge location and the diversion around it, the

arrangements of pipe culverts used measuring 900 mm in diameter each, and the road shape on top of the culverts – “AA”; and a drawing “BB” showing how the Road is dipping even lower than in drawing “AA”. The culvert system for water flow consisted of 7 large culverts.

[32] Mr. Hilal explained that the dip in the road is used where it is not adequate to put a bridge or for any other feasible reason. In such situations you put a dip in the road and use a concrete Irish Crossing with Pipes to take the overflow, he said.

[33] Mr. Hilal testified that this diversion was studied and in May 2004, CCI started to construct the Road diversion to replace the existing situation and not to improve on it, as the finished bridge construction is the last stage that will improve the existing situation. During the construction stage there was very heavy rainfall, exceptional rainfall, not of previous 3 to 5 years he said.

[34] Mr. Hilal emphasized that **“The diversion was to satisfy normal requirements of average normal rainfall. This was why it was approved. During this exceptional rainfall there were floods. Under pressure from farmers we used excavators and broke the diversion down and then put it back after rain had stopped and the works would proceed again.”**

[35] Mr. Fontinelle deposed in his witness statement as follows:

“6. The area is an area where flooding occurs on a regular basis, but there has never been loss of bananas like this before caused by flooding.

7. When the rain came in May 2004 and the following months the temporary bridge was not adequate to allow for the quick flow of water and so the entire area flooded in such a way that my field became water logged . . . [and] the water

remained there stagnant for more days than normal, causing the destruction of my banana farm.

8. The situation of flooding is not unusual for the entire Mabouya Valley during heavy rainfall. However, flooded water does not stay in the field, as when the rain stops, within one hour the entire field would be free of excess water. Throughout the years this situation has never destroyed any banana field.
9. The loss of my banana crop is due to flooding and the sustained water logged condition of my farm. The situation was caused by the following after the temporary bridge was constructed. After the structure was completed whenever there was a flood the water was not flowing from our farm but remained stagnant for . . . (3) to . . . (4) days before it cleared. I went to Mr. Anise to complain about the situation. I made three . . . trips to CCI's office in Dennery – one . . . in May and two . . . in June before we received attention. Eventually in June Mr. Anise came to visit my farm and . . . stagnated water . . . was about 1 – 2 feet above ground level. I explained to him that the banana plants would die since they remained 3 – 4 days submerged whenever the rainfall is heavy. He said that he is praying and hoping that the plants do not die before he completes the bridge. I told him the only way to avoid the problem is to remove the barrier from the river. In early July I made another visit to the Dennery office of CCI. I was advised to put my complaints in writing. I wrote several letters and copied it to the Minister of Communications and Works, Minister of Agriculture and DIWI (letter dated the 28th October 2004). By mid July because of the worsening condition of my farm, I went to DIWI's office in Bexon to complain. The manager

immediately dispatched a driver who was identified as CR and a Supervisor – Mr. Roger to go along with me to assess the situation . . . Mr. Roger advised the CCI officials to break down the structure that was restricting the free flow of the river. They immediately did so with the use of an excavator. Within 1 –2 hours the farm . . . cleared of water and became accessible. Towards the end of July CCI reconstructed the barrier and the farms became [water] logged again. After complaining and pleading they broke it a second time. However, this situation of breaking and reconstructi[ng] the barrier kept recurring to the extent that between July and September it was broken down and rebuilt five . . . times .

From the foregoing it could be seen that flooding is not the problem. If the river flow is not restricted any excess water in the field due to flooding is usually cleared within the hour, and one . . . to two . . . feet of water does not remain stagnated in the field for 3 – 4 days. That has never occurred, not until CCI restricted the free flow of the river with the construction of the barrier . . .”

Despite rigorous cross-examination by Counsel Mrs. Nelson, Mr. Fontinelle did not waiver in his assertions.

[36] In commenting on this testimony of Mr. Fontinelle, Mr. Hilal testified – “Our studies show that the diversion was not the cause of the flooding. Even after the diversion was removed completely and the new bridge was operational, there were floods in the same magnitude and with the same effect, which proved that the diversion was not the problem. The flooding was not just behind the bridge. After the removal of the diversion the River was flowing to the top and to the sides, it was completely full and overflowing. What

really helped was rain stopping, removing the diversion did not really help.” Mr. Hilal also produced pictures taken of Mr. Fontinelle’s banana field in August 2005, showing the field was submerged in water. However when shown these pictures Mr. Fontinelle said: **“ I don’t know how long after the rain stopped that those pictures were taken . . . within 5 minutes it [water] starts to leave. It does not take 2 days to subside. It does not take a day for the water to leave after rain stops.”**

[37] Under cross-examination, Mr. Hilal said that the rate of the flow of the River was analysed in designing the diversion, and analysis of the rainfall for the area was also taken into account prior to the proposal for the diversion.

[38] The Claimant’s Expert Witness Mr. Stephen Best testified that the Ministry of Agriculture has rain gauges in various parts of St. Lucia including the Union Station. Rainfall information is submitted from these various stations island wide to the Ministry of Agriculture. It is collated and tabulated to give an island wide scenario. In Mabouya Valley there is a Rain Meteorological Station located about 400 yards from Mr. Fontinelle’s farm. Union is approximately 19 miles away from the relevant form, to the north east of the island in my estimation, and the rainfall pattern in Union may vary from the Mabouya Valley area. The law permits me to take judicial notice of this.

[39] The evidence disclosed that the Insurers of CCI had retained a loss adjuster to investigate the claim of Mr. Fontinelle and another farmer Mr. Joseph Polenaire. Mr. Hilal supplied this Loss adjuster with a copy of the monthly rainfall data for the years 1999 to August 2004 from the Union Agricultural Station.

[40] Mr. Hilal when questioned about the use of this data which related to rainfall in Union Hill area, at the analysis stage of the proposal for the diversion, prior to March 2004, explained, that CCI’s office maintains a rainfall record from start to the end of a project, which is used to compute any extension of time due to the

Contractor for abnormal rainfall. Though CCI had taken into account the rainfall from Cardi Station in Mabouya Valley, from Union Agricultural Station, and from Hewannorra Airport prior to the proposal, the Union Station Rainfall data that was given to the Loss Adjuster was the only approved document by the Consultant, so CCI gave it to the Insurance Adjuster even though it was not for Mabouya Valley, Mr. Hilal stated.

[41] Learned Counsel Mr. St. Clair pressed Mr. Hilal under cross examination as to the damming effect that the Road diversion had on the river course during this period of record breaking rainfall between May to December 2004.

[42] He said that the water diversion represented by drawing "AA" in Exhibit "BH 2", was built before the diversion represented by drawing "BB" was put in place. The diversion AA was placed higher up stream.

[43] When asked if the natural flow of the river was stopped by "BB" along the natural course, his response was: **"We redirected, yes. It stopped the natural flow of the river along the natural course."** He admitted that the River has 2 natural courses. He said that the River course to the left was diverted to "AA". He said that the diversion did not cause a standstill of water which caused water to be pushed back upstream. There was a flow continuing, he stated, after the created diversion. Given the technical nature of this evidence, my interpretation of it may not portray its significance. I consider it prudent therefore to state the evidence verbatim.

[44] Counsel Mr. St. Clair put the following questions to Mr. Hilal, to which he gave the following answers:

"QUESTION: Given the natural flow of water downstream pass the diversion created by CCI to a point where there is the blockage of the natural course, is not the effect of

that to push the water back up stream into the diversion?

ANSWER: The diversion is higher up stream then the location Mr. St Clair is asking about, so naturally the water would go into the 1st location from downstream. That water diversion AA was built before BB was put in place.

QUESTION: In situations where you have heavy rainfall, are you saying water would never get to Barrier "BB".

ANSWER: Yes, definitely, water will get there. It is possible during heavy rainfall water would pass above section "BB" in the Road.

QUESTION: In times of heavy rainfall it creates situation where water backs up?

ANSWER: No, the water does not back-up, it goes above the Road.

QUESTION: There is a volume of water remaining behind barrier?

ANSWER: Yes.

QUESTION: When it recedes below the level of road at "BB" the water comes to a standstill?

ANSWER: Water remains there below that level. "BB" is intended just for overflow "AA" is intended just for overflow.

QUESTION: In effect it creates a damming effect?

ANSWER: On that level Yes

QUESTION: Having created that damming effect, the effect is to slow the rate of flow of river through the diversion you created?

ANSWER: No

QUESTION: The diversion you created is much smaller than the natural run?

ANSWER: It is smaller, but not much smaller. My diagram is approximate of what is there.

QUESTION: To force larger flowing course of water into smaller, would slow the rate of water flow in the river.

ANSWER: No, in that situation.

QUESTION: Having created barrier "BB" you further created a bridge over the diversion with culverts?

ANSWER: Yes

QUESTION: . . . Would you agree for "AA" there was a further restriction of water along the "AA" diversion notwithstanding the culverts?

ANSWER: Yes.

QUESTION: During times of heavy rains the debris is carried into the river?

ANSWER: Yes

Yes - that debris can block the culverts and if not cleared can create even more restriction in flow of water.

QUESTION: On several occasions there was need to break down that diversion "AA" and "BB".

ANSWER: There was no need.
"AA" and "BB" separately did create restrictions.

QUESTION: The cost of breaking down structures was heavy costs?

ANSWER: Yes. Once we opened side of culverts only, and on the other occasions - maybe 3 times we did them together, maybe twice we broke them down together.

QUESTION: Upon breaking down structures flooding was alleviated in quick period of time?

ANSWER: No, it took a day to 1 ½ days and it usually happened after the rain stops . . .

QUESTION: Exhibit "BH 3" – According to this document there was a small flow close to zero. With river being slow flowing, the building of "BB" barrier would further slow rate down?

ANSWER: Not really, water goes to AA.

QUESTION: . . . During heavy rainfall, was there any time you did not break down "AA" and "BB"?

ANSWER: Yes many times there was no need to

QUESTION: The water at standstill in front of BB, where did it go?

ANSWER: It stayed there below the Road. There would always be water there. Can't tell you the lowest that water went with divergence "AA" and "BB".

QUESTION: At rainy season water was at level by "BB" always to point where it would overflow?

ANSWER: Yes

SUGGESTION: The effect of this was to create a damming effect for the water coming from areas all around.

ANSWER: [None]"

[45] Mr. Hilal also said under Re-Examination, that only "BB" was designed for water to flow over, and that the design of "BB" created a damming effect at a certain level because it was lower than the surrounding ground and all of the overflow of Section "AA" would be able to pass on top of Section "BB".

[46] Concerning Mr. Fontinelle's testimony that Mr. Anise from CCI's office in Dennery had come to visit his farm after he had complained about the stagnant water which was 1-2 feet above ground level in June, Mr. Hilal said that he personally did not investigate whether loss of banana crops in the area was normal. He said that there was a Superintendent on site who would take care and go see and find solution to the problem, depending on what can be done.

- [47] When questioned by Mr. St. Clair as to whether there were complaints from many persons concerning the diversion of the River, Mr. Hilal replied: **“Actually, there was complaints from same people in the case now, we did not have complaints from anywhere else. I know there were other claims, some related to water diversion and some related to other issues.”**
- [48] In considering Issue A, I must also take into account the evidence of the Expert Witness who both have personal knowledge of the Mabouya Valley area for a long period of time prior to the relevant flooding events in 2004.
- [49] Mr. Best is an Agriculturalist and Retired Extension Officer since 2000. As an Extension Officer he was responsible for preparing farm plans and showing farmers how to prepare and keep records. He lives in Mabouya Valley and has a banana farm about 1 mile away from Mr. Fontinelle’s field in Rich Fond.
- [50] Mr. Tedburt Theobalds is a Valuator, Surveyor and Agronomist who testified that Mr. Stephen Best had been a student of his at the Union Research Station Agricultural College. He said that Mr. Best served as Manager within the Ministry of Agriculture Union Proprogation Station, and he was also on a programme in which he Mr. Theobalds was a Consultant. Mr. Theobalds worked in the past as head of Communities Research at Windward Islands Banana Growers Association, and was responsible for certifying banana farmers islandwide, as project officer with St. Lucia Banana Growers Association. As a result of the Professional positions he has held, he testified that he was exposed to the acquisition of knowledge for Mabouya Valley area.
- [51] Both Mr. Best and Mr. Theobalds agree on the soil type of the Mabouya Valley, and that the area is very prone to flooding.
- [52] Mr. Theobalds said that Mabouya Valley was formerly a sugar plantation which about 40 years ago moved from cultivating cane to bananas. He agreed that as

time proceeds with cultivation, as you cultivate the soil particles break up, allowing water to percolate and go through, despite the water holding capacity of clay soil. He agreed that with flooding silt, sand and other matters have mixed with this clay soil in the Mabouya Valley, causing the soil to become more and more porous.

[53] He said that despite the fact that water is able to percolate through this soil, it is very important to have adequate drainage.

[54] Mr. Theobalds who is over 50 years old, explained about Mabouya Valley, that **“at one time it was a large estate owned by one Plantation Owner who had a system of drains and canals and waterways which he used to open or clean any time there was significant or a large amount of rainfall. The situation changed when the land was cut up and distributed into 5 acre lots to small farmers who are now independent and look after their individual farms. Many of them did not have resources to continue the drainage system of the [former] Plantation Owner; and as such any time abnormal rainfall occurs in this area, the area easily floods and water remains stagnant.”**

[55] Mr. Best said that the drainage on each farm may not have necessarily one drain flowing into the other, because of the roads that separate the holdings. However some farms may have structured drains flowing into each other depending on the layout of the farm. Mr. Best said that Infrastructure works on the holdings were undertaken by the Mabouya Valley Development Project.

[56] The evidence discloses that National Development Corporation acquired the Mabouya Valley Plantation from Dennery Farm Co. Ltd and placed it under the jurisdiction of Mabouya Valley Development Project, which assigned holdings to farmers.

[57] The Banana Emergency Recovery Unit (BERU) provides technical assistance to these farmers, who may obtain Tissue Culture banana plants from BERU under its

Tissue Culture Establishment Programme. Mr. Fontinelle testified that he was registered with BERU and had obtained Tissue Culture plants from them.

[58] Mr. Best had seen Tissue Culture banana plants in Mr. Fontinelle's field on October 16, 2004 when he inspected his field. Mr. Best said that with the BERU project, there would be no planting of Tissue Culture plants if the land is not ploughed, and drains lined up with appropriate gradient to facilitate control flow of water.

[59] He said: **"So farmers are required to maintain the drains. Farmers would not have aligned the drains themselves as they are not skilled in that. Where the drains are mechanically dug, the soil removed from the drains is placed in the beds, and this contributes to the elevation of the beds. If you have shallow drains, this would not contribute to elevation of the beds. In Mabouya Valley, the beds are elevated at maximum to allow for proper drainage of water."**

[60] Mr. Fontinelle testified that he has always maintained his drains. Both Mr. Best and Mr. Fontinelle corroborated each other in their testimony that over the years, the heavy rains do not cause damage to the bananas normally, because the flood waters usually subside quickly after flooding. According to Mr. Fontinelle: **"It does not take a day for the water to leave after rain stops."** Mr. Best also corroborated the observations of the Court at the site visit in February 2007, when he said that in October 2004, **"the entire holding had both lateral and main drains. In fact, the land in which one acre of tissue cultured bananas was planted was ploughed and adequately drained. The plants were planted on elevated beds."**

[61] Mr. Fontinelle testified further that his banana cultivation comprises elevated beds and lower beds and both beds had at the relevant time good drainage.

[62] However, it was the banana plants in the lower beds that were destroyed. He admitted that he has been farming bananas in another area in the Mabouya Valley since 1980. He said that the measures taken to combat flooding in Mabouya Valley is to have properly dug drains. He testified further that since the new bridge has been constructed, the Valley is still prone to flooding, but the water always runs off quickly after the rain has past.

[63] Of some significance to Issue A, is the evidence of Mr. Theobalds who is the Expert Witness for the CCI. At paragraph 2 of his Findings in his Report, he said that **“the heavy rains during the months of June to December 2004 did exacerbate the problem and coincided with the time the diversion works were taking place.”** He concluded in his Report: **“... let me state categorically that claim by Mr. Fontinelle is exorbitant and cannot be attributed only to the diversionary works that were taking place at the time.”** Concerning this conclusion Mr. St. Clair asked Mr. Theobalds the following question and received the following answer from him:

QUESTION: “See last paragraph of your Report – Your conclusion. What you are saying is that diversionary works contributed to losses of Mr. Fontinelle?”

ANSWER: “It is likely that the diversionary works contributed to the losses of Mr. Fontinelle.”

[64] Against this background of evidence, and other evidence not reproduced in this judgment, the following submissions were made by Counsel.

[65] Mr. St. Clair argued in substance that there was no evidence that similar losses caused by flooding, had occurred on the farms in the area after the new bridge was built, despite evidence that there was rainfall in 2005, as severe as in 2004, which caused flooding. This suggests, he argued, that the rate of flow was not slowed down by anything in 2005. There was nothing in the River Course in 2005,

and its rate of flow had reverted to being normal after CCI's Road diversion barriers were removed. In 2005 there was no such loss, because it is evident that the diversionary works slowed down the rate of flow of the river in 2004, causing a stagnation and water logging effect on the farms in the area resulting in significant losses, he contended.

- [66] Mr. St. Clair also criticized the design of the barricades and focused on the damning effect they had on the river flow. He argued that CCI had had no informed knowledge of the Mabouya Valley area prior to constructing the diversion, which is borne out by the type of diversion they constructed, the absence of any documentary exhibits from CCI concerning any rainfall analysis or study that they carried out the Mabouya Valley area for the relevant period 1999 to 2003, prior to constructing the diversion, or their probable reliance on inappropriate Union Rainfall Data.
- [67] Counsel for Mr. Fontinelle contended that the evidence that there were culverts which were susceptible to being blocked by debris, the presence of an excavator on stand by, and the multiple occasions when the barricades and Road diversion had to be broken down, demonstrates that the rate of the flow in the river was significantly slowed down by the Road diversion, causing the water logging situation in the area.
- [68] Learned Counsel Mr. St Clair emphasized the evidence of Mr. Theobalds, which in Counsel's words **"made it pellucidly clear that the loss suffered by the Claimant cannot be attributed only to the diversionary works taking place at the time."**
- [69] Learned Counsel Mrs. Nelson contended that the flooding was done by an Act of God, and the excessive rainfall over a period of time in a flood prone area, which saturated the soil. She questioned whether it was the river or the Road diversion

which was under CCI's care? She argued that the diversion was created by CCI, but the flooding cannot be attributed thereto.

- [70] She criticized the speculative hearsay evidence of Mr. Best, and his opinion proffered on such evidence, submitting that it was wholly unreliable as regards stating as a fact that any act or omission of CCI on its employees or anything under CCI's control caused the alleged damage. I agree with this submission of Counsel and having made no mention of such evidence in this judgment, I shall ignore it as in law it deserves no weight in my view.
- [71] Mrs. Nelson commended Mr. Hilal's evidence in its entirety as being credible and uncontraverted. She analysed his evidence and posited her view that the Courts' site visit provided observations which supported Mr. Hilal's testimony as to the nature of the river course and the location of the Road diversion. She submitted that the fact that the diagrams for the actual diversions were approved by the Ministry of Communications, Works and Transport and the Consultants DIWI shows that CCI had maintained internationally approved standards.
- [72] Counsel referred to the distance Mr. Fontinelle's farm was from the River and the fact that the farmers were at the level of the Main Road, but that the diversions were much lower than the road level and the farm level. This, Counsel argued demonstrates that the diversions could therefore not have slowed the rate of the river flow, nor cause a damming effect.
- [73] Mrs. Nelson referred to the observations the Court made at the site visit. She referred to the main drain that Mr. Fontinelle pointed out and she remarked that he never showed where the river intercepted with his farm. She remarked that the main drain was very narrow and filled with grass at the time of the visit during the dry season. She said it certainly did not look well maintained, and the size of it seemed grossly inadequate especially for a flood prone area. She described the

main drain as being small and inadequate for the proper carriage of water during normal rainfall, far less excessive rainfall as fell in the period May to October 2004.

[74] Learned Counsel Mrs. Nelson referred to the burden of proof. She said that Mr. Fontinelle must prove on a balance of probabilities that the damage had occurred by reason of anything under CCI's care.

[75] She submitted that Mr. Fontinelle has not discharged his obligations to the Court so as to cause the burden to shift to CCI to disprove Mr. Fontinelle's posture. Hence, CCI did not have to prove that it was unable to prevent the damage.

[76] Mrs. Nelson also made submissions concerning Mr. Fontinelle's burden of proof in negligence. I have already expressed very early in this judgment my understanding of the pleadings and Articles 985 and 986, as explained in Northrock supra. I therefore will not consider those submissions any further.

[77] Mrs. Nelson concluded that since CCI did all in its power to preserve the lands in the area of Mr. Fontinelle's property, CCI is not liable for the prolonged flooding of Mr. Fontinelle's farm; it was the excessive rainfall and the intervening act of nature which caused the damage.

Discussions and Findings

[78] As I understand it, the essence of the Claimant's case disclosed in the Statement of Claim and evidence, is that –

- (1) CCI substantially interfered with the River Course by the La Ressource bridge by constructing a temporary bridge; and
- (2) the design of this temporary bridge was inadequate for a flood prone area since it obstructed the natural flow of the river and

reduced the capacity of the river course to convey flood water from the land to the sea; and

- (3) this gives rise to a nuisance in law since the temporary bridge of CCI caused the drainage pattern of flood water from prolonged and intense rainfall in the area, from May to October 2004 to be negatively altered, causing stagnation of flood water, and
- (4) the stagnation of flood water caused by the temporary bridge did damage to Mr. Fontinelle's banana plants in the lower beds in his field.

[79] Apart from Article 986 of the Civil Code, I am also guided by Article 917A which states that the Law of England for the time being relating to torts shall extend to St. Lucia, and the provision of Article 985 must as far as practicable be construed accordingly.

[80] Lord Finlay in Greenock Corporation v Caledonian Railway Co. Ltd [1917] A.C. 556, 572 stated authoritatively that: "It is the duty of anyone who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable."

[81] Also, in Bybrook Barn Centre Ltd and Others v Kent County Council [2001] B.L.R. 55; The Times 5/1/01; Daily Telegraph 19/12/00 C.A. (Civ. Div.). According to Waller L.J. at para 19:

". . . Generally, an action for private nuisance lies in respect of interference with the plaintiff's enjoyment of his land, arising from something emanating from the defendant's land, . . . But the liability for nuisance from flooding from a natural stream where the flow has been interfered with would not at first sight appear to me to require emanation from the defendant's land, as

opposed to the creation of the obstruction or control over the obstruction, that may be a distinguishing feature of this form of liability.”

[82] Learned Counsel Mr. St. Clair relied on these judicial statements in those 2 cases in his submissions.

[83] Although the site visit in February 2007 revealed that the drainage ditches on Mr. Fontinelle’s banana farm were narrow with vegetation growing in some of them, and that the main drain which ultimately led to the river course was not a large drain, I must take into account the fact that the site visit was during the very dry season in St. Lucia when there was scarcely any rainfall. This by itself is therefore no indication that during the wet season in 2004 the ditches were in a similar condition and were not being adequately maintained. I accept the evidence of Mr. Fontinelle and Mr. Best concerning the drainage system put in place for banana farmers in Mabouya Valley. I accept Mr. Fontinelle’s evidence as to his maintenance of the drainage system on his farm at the relevant time.

[84] I therefore find that from May to October 2004 the drainage ditches on Mr. Fontinelle’s farm were being adequately maintained and that the soil type in the area permitted flood water to percolate with the excess water running off into the drainage ditches.

[85] For the year 2004, the monthly Rainfall in the Mabouya Valley according to the Data in Mr. Best’s report was for the months of May-212.2 mm; June-214.00mm; July-186.00 mm; August-138.00 mm; September-149.00 mm.

[86] For the year 2005, the monthly rainfall in Mabouya Valley was stated by Mr. Hilal and Mr. Theobalds to be just as intense and prolonged as in 2004 for the relevant period.

- [87] Though Mr. Hilal stated that the same flooding effect existed in 2005 as in 2004, I accept the evidence of Mr. Fontinelle that despite the flood waters in 2005, the water drained off quickly, causing no damage to his field. It is also significant that, there was no such catastrophe on Mr. Fontinelle's banana plants in previous years according to his evidence, and in 2005 despite the area being flood prone, and despite the excessive rainfall in 2005.
- [88] I accept Mr. Fontinelle's evidence concerning his trips to CCI's office in Dennerly, his discussion with CCI's Mr. Anise, and the result of those discussions.
- [89] It is also preponderant evidence, that the diversion had to be broken down on several occasions and that as soon as it was broken down the flood waters rapidly receded.
- [90] I do not accept Mrs. Nelson's submissions that as Mr. Hilal stated, the breaking down of the diversions (which was an expensive exercise) was done merely to appease 2 farmers in the Mabouya Valley only.
- [91] The fact that with each breaking down of the diversion between May to October 2004, the flood waters on Mr. Fontinelle's banana field subsided rapidly, provides the causal link which points to CCI's liability for the stagnating flood waters.
- [92] Having taken into account the nature of the diversion constructed in the river course by CCI, and all of the other relevant circumstances, I find on a balance of probability that the stagnation of the flood waters on Mr. Fontinelle's farm from May to October 2004 would not have occurred if the River Course had been in its natural state, and not restricted by the temporary bridge constructed by CCI.
- [93] Moving on now to consider the remaining issues together, I shall deal first with the alleged damage to the banana field.

Damage to Plants

- [94] Banana plants are sensitive to water logged situations, so naturally, well-drained soils, or soils in which the drainage is enhanced are a prerequisite to a successful banana cultivation. The evidence of both Expert Witnesses bears testimony to this.
- [95] Banana plants are also sympodial in that after a mature banana plant produces fruit, new shoots spring out after the mature fruiting tree is cut back. If a banana plant root is submerged in water for a long period, this will kill the plant. Where the banana plant roots are submerged in water for a short period of time, the plant may survive, or it may rot. The longer the period of submersion, the less chance of survival. Learned Counsel Mr. St. Clair elicited this evidence by cross-examination of Mr. Theobalds.
- [96] Mr. Fontinelle's entire 3 acres farm was at the relevant time planted with Valerie bananas. Mr. Fontinelle told Mr. Best that the Tissue culture plants that Mr. Best saw submerged in stagnant water had been planted in September 2004. Mr. Best testified that given the 2 feet high size of the plants, they were consistent with having been planted in September 2004, at the time Mr. Best saw them on October 16, 2004. Mr. Best said that the banana plants in elevated beds were not in much better condition than those in unelevated beds. These Tissue culture plants apparently were in an area of about 1 acre.
- [97] The other 2 acres had banana plants that came from first bearing plant crop that was planted in February/March 2003. These subsequent bearing plants called ratoons were at a stage where Mr. Fontinelle was about to harvest from the second ratoon. These bananas were described by Mr. Fontinelle as the big banana plants which became sick as a result of the prolonged stagnating water between May to October 2004.

- [98] Mr. Best said in his report that “Crop husbandry such as pruning, detrashing, bunch sleeving and other recommended practices were carried out. However the efforts made to upkeep the bananas through proper agronomic practices were not yielding the desired result because of the poor condition of the crop attributed to prolonged water logging. Mr. Best noticed that the banana foliage was yellowish green in colour and wilting. The plant growth of the bananas was stunted or retarded, and the bunch size was small, and the follower suckers were poorly developed, which directly affects the potential of the follower crop. These symptoms Mr. Best said, were caused from root rot, rotting of corms and lower pseudo stems.
- [99] Under cross examination Mr. Best agreed that he could not say if the only reason for poor performance was stagnated water in the field. He said he could only speak about what he saw at the time. He based his conclusions on the manifested symptoms of the plants.
- [100] It has been canvassed by CCI's Expert Witness Mr. Theobalds that the persistent showers during the period of the claim caused an islandwide problem with resultant upsurge of banana leaf spot disease to the extent that the rate of infection of the inoculum was so high, that farmers in that locality were advised by WIBDECO and the Banana Companies to cut back on the plants in the field.
- [101] Learned Counsel Mrs. Nelson therefore cross examined Mr. Best at length on this contention. Mr. Best responded, admitting that “During rainy season there is a high incidence of leaf spot. Different factors cause leaf spot, such as poor drainage. Plant density may exacerbate it, it may be a contributing factor. Weed control and field sanitation may cause it also where old banana leaves have leaf spot and are not cleaned often.”

- [102] Mr. Best said that the Tissue Culture banana plants are not more resistant to leaf spot. Leaf spot does not cause rotting of roots. Mr. Best noticed no high incidence of leaf spots on Mr. Fontinelle's farm in October 2004.
- [103] Mr. Best agreed that 6 months of constant rain, oversaturation of soil and dampness can cause high incidence of leaf spot.
- [104] He did not agree that during period of excessive rainfall banana companies asked farmers to cut back due to high incidence of leaf spot.
- [105] Mr. Best ruled out that leaf spot could have caused the conditions in the plants that he had observed by saying that he saw no signs of leaf spot on Mr. Fontinelle's farm. He said that if it is a pathogenic as bacteria or leaf spot, it carries a specific symptom, apparently not manifesting the conditions he saw in the plants. He said that stagnated water will result in physiological breakdown of plant tissue. It gives rise to the condition called physiological drought. Despite all the water in the soil the root system is unable to absorb it, and the plant wilts and dies, particularly in the case of soft tissue basal feeder plants like bananas with a pseudo-stem.
- [106] Mr. Best concluded that the harvest that Mr. Fontinelle was anticipating from the second ratoon would not be forthcoming economically because of the problem. From the 2 acres of second ratoon, crop will be extremely low. He said that although the entire field may not have to be planted, there will be substantial plant cut back and input application to stimulate follower sucker development. This, he said, will result in loss of revenue during the recovery period which will be approximately 6 months. He recommended that all drains be cleared, replanting of dead and severely affected plants and the cutting down of most parent plants, applying inputs to stimulate development of follower sucker.

[107] Having regard to this evidence from Mr. Best who has a diploma in General Agriculture from a 2 year programme in Farm Management, Chemistry, Biology, Botany and Zoology, and possesses several other agriculturally related Certificates, I find him a credible Expert Witness despite the submissions of Counsel Mrs. Nelson.

[108] I therefore conclude for ISSUE B that on a balance of probability Mr. Fontinelle has proven that the stagnation of the floodwaters caused by CCI's temporary bridge did do damage to his banana plants.

Rebutting Presumption

[109] I do not accept that CCI's breaking down of the road diversions periodically to alleviate the problem, and constructing "AA" with 7 culverts of the previously mentioned size were the only reasonable measures available to CCI in the circumstances. The evidence shows that there were other available means at their disposal, to avoid the intermittent stagnation of flood water during the relevant period. Consequently, CCI have failed to rebut the presumption of their delictual liability.

Loss Suffered

[110] I shall now deal with the loss suffered by Mr. Fontinelle, and whether or not he contributed to such loss. This is Issue C.

[111] Mr. Theobalds visited Mr. Fontinelle's farm on the 26th April 2005 a few days removed from the 6 months recovery period forecasted by Mr. Best.

[112] Mr. Theobalds found that the farm was back in production, and there was never a total loss of crops on the said holding as claimed in letter of October 18, 2004. This letter was written by Mr. Alvin St. Clair of the law firm Jolie & St Clair to the

Manager of CCI. At paragraph 4 of this letter, it stated: **“That the construction of the said temporary bridge has caused considerable loss and damage to both of our clients as flooding has become an everyday occurrence as a result of the said construction. Moreover as a further result their plantation and crops on the said farms are a total loss and the farms have been rendered impossible to cultivate.”**

[113] Pictures were produced to support Mr. Theobald’s assertion that the farm of Mr. Fontinelle was back in production. As to what was the nature of the production, can be gleaned from Mr. Fontinelle’s documentary exhibits. It shows that from weeks 1, 3, 5, 7, 9, 11, 13 and 15 in 2005 there were a total of 490 boxes of bananas sold which earned Mr. Fontinelle \$7,985.31 net.

[114] Mr. Theobalds stated at paragraph 4 of his report that **“The claim for total loss of earnings and means of survival has been grossly over stated. The records presented in Mr. Stephen Best’s report from the Banana Company do not relate entirely to the Rich fond holding as Mr. Fontinelle admitted to me in the MVDP office that he has been assigned and operates a farm at Bousquet D’OR – an adjacent estate on the opposite side of the highway and which was never affected by flooding.”**

[115] While Mr. Fontinelle has admitted that he sold bananas from his Bousquet D’OR farm under the same number for the Rich Fond farm in question. When asked how he distinguished the Rich Fond farm sales, from this farm sales, he said that he gave his wife the slips for Rich Fond to hold and show her how much money and she holds slips. Both Mr. Fontinelle and Ms. Edwin are illiterate. The documents show that in May 2004 for the weeks 18 to 20 he made more money than for the same period in 2003. Mr. Fontinelle explained that the plants did not die the same week as the rain.

[116] The Commercial Farmers Organisation Inc. documents disclose that for a 13 week period from 6/7/04 to 12/10/04, Mr. Fontinelle's net earnings were \$7,551.27. Also, for a total of 44 weeks from February to December 2004, his net earnings were \$39, 818.66.

[117] For the 5 weeks period in 2004 from April to July, when compared with the same period in 2003 showed the following results –

	<u>2003</u>	<u>2004</u>
Week 18 -	\$572.06	\$732.85
Week 20 -	\$495.50	\$304.60
Week 22 -	\$648.01	\$926.73
Week 24 -	\$457.32	\$681.66
Week 26 -	\$314.63	\$913.69
Week 28 -	<u>\$160.17</u>	<u>\$686.22</u>
	<u>\$2,647.69</u>	<u>\$4,245.15</u>

[118] Mr. Best said that he saw 2 categories of plants, those totally destroyed and beyond redemption, and those that something could be done with. He said also that Mr. Fontinelle would not have realized more than 4 tons to the acre from the Ratoon plants he saw there, at 40¢ to 60¢ per pound, and that during winter periods, the prices are on a downward trend. He agreed that the Ratoon plants could yield some bananas at a low production. He valued a Ratoon plant bearing for \$15 and those not bearing for \$10-\$15.

[119] He produced a Valuation showing that for partial rehabilitation, he recommended that 1400 mats in production @ \$10.00 each be planted to replace the completely destroyed plants. For the Tissue Culture Plants, he recommended that 1000 plants be replanted @ \$1.50 each. He also recommended labour costs for 5 man days @ \$45.00 per day, Transportation for taking plants to site being \$200.00, Chemical dressing at planting for \$110.00, and Fertilizer for \$70.00. He

recommended further the cutting of affected parent plants to stimulate growth sucker costing 2 man days @ \$45.00 per day, and the clearing and reshaping of drains using 15 man days @ \$45.00 per day. He added miscellaneous costs as 10% of replanting/rehabilitation costs being \$287.00. The Grand Total of these costs was \$17,157.00.

- [120] It is important to note Mr. Fontinelle's reactions to the recommendations of Mr. Best that the parent plants be cut back to stimulate growth. He went against Mr. Best's recommendations, scoffing at the suggestion as **"nonsense for farmer to do, that is wasting time,"** and it would not be in his favour. In his opinion, the best thing to do was to replant them since they were sick since **"even if I give it fertilizer it would not give me good result."**
- [121] Learned Counsel Mrs. Nelson has therefore submitted that Mr. Fontinelle's tendered documents show that despite what he regarded was a total destruction of his field, Mr. Fontinelle continued to sell bananas on a regular basis during the period in question, earning a more substantial income, better than in 2003. She submitted further that the documents showing that for the year 2004, he earned a total of \$39,818.00 for 44 weeks in February to December, serve to disprove his claim to loss rather than assist him in proving his earning capacity.
- [122] I agree with Mrs. Nelson's interpretation of the Valuation recommended by Mr. Best. Mr. Best certainly has indicated that all of the plants should be replaced. If the plant density for 3 acres is 800 mats to the acre, and he has recommended that 1000 tissue culture plants be planted to replace those 2 feet high ones that were under water, and 1400 to replace the rotting or completely destroyed banana plants, this connotes that of the 2400 plants the farm of 3 acres is capable of growing 2400 must be replanted.
- [123] In my view, the rehabilitation component for the cutting of the affected plants to stimulate the growth of suckers counters the recommendation for 2400 plants to

be replanted. Consequently, if I accept Mr. Best's Valuation, it would render incredible and unreliable the Statements for 2004 showing that between October and December 2004, after Mr. Best's recommendation, Mr. Fontinelle from week 43 to week 52 was able to harvest 670 boxes of bananas weighing 11.754875 tons or 26330.92 lbs with net earnings of \$10, 214.35. This would mean that most of the wilted plants suffering from physiological drought obviously recovered and also some of the tissue culture plants.

[124] CCI has put Mr. Fontinelle to prove his damages. On the state of the prophetic and hypothetical valuation evidence proffered by Mr. Best as proof of damages, and the documentary evidence of Mr. Fontinelle's earnings for the relevant period, I find that the damages proven on a balance of probability have been grossly exaggerated, and that the Statements tendered probably reflect a mingling of the Rich Fond bananas produced with the Bousquet D'OR bananas produced. The amount claimed is clearly an overly ambitious and unsubstantiated sum.

[125] I accept that Mr. Fontinelle did suffer damages however, and the measure of damages in the circumstances is the difference between the monetary value to Mr. Fontinelle of his interest before and after the event: (**Moss v Christchurch Rural District Council** [1925] 2 K.B. 750. I accept that he would have had to rehabilitate his banana field by cleaning the field and drains, cutting affected plants, chemically dressing and fertilizing plants and probably replacing some of his plants. In the circumstances in my view it is just, reasonable and fair that he recover a sum of \$6,000 for damages inclusive of the letter cost.

[126] The evidence does not disclose that there was any contributory negligence on the part of Mr. Fontinelle which should serve to reduce the award of \$6,000.00. Though I have found this case to be stimulating and interesting, in my opinion the parties should not have allowed it to go to Trial, this is a case that should have been settled.

CONCLUSION

- [127] I therefore enter Judgment for the Claimant in the sum of \$6,000.00 with Prescribed Costs pursuant to PART 65.5 (2) (a) and Appendix B being \$1,800.00.
- [128] There will be interest on the Judgment Debt at the rate of 6% from the 13th June 2007 until full and final payment.

Dated this 1st day of June 2007

OLA MAE EDWARDS
HIGH COURT JUDGE