

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2007/0413

BETWEEN:

RONALD LESSEY

Claimant

and

GARTH GELLINEAU

Defendant

Appearances:

Mrs. C. Edwards, Q.C. with Ms. C. Johnson for the Claimant

Mr. T. St. Bernard with Ms. A. Ventour de Vega for the Defendant

2010: March 31, May 5
October 7

JUDGMENT

[1] **PRICE FINDLAY, J.:** This is a claim in nuisance where the Claimant claimed the following:

- (a) An injunction to restrain the Defendant whether by himself his servants and or agents from doing the following acts, that is to say, directing or permitting waste water onto the Claimant's property so as to cause a nuisance to the Claimant by structural damage to the Claimant's premises at Woodlands aforesaid;
- (b) An order that the Defendant take such steps as this Court thinks fit to alleviate the nuisance;
- (c) Damages for nuisance;

- (d) Interest pursuant to section 27 of the West Indies Associated States Supreme Court (Grenada) Act Cap 336 of the 1990 Revised Laws of Grenada;
 - (e) Further or other relief; and
 - (f) Costs.
- [2] The Defendant in his defence denies the allegations and puts the Claimant to proof on the allegations made in the claim.
- [3] The Claimant's evidence is that he bought his property situated at Woodlands in the parish of St. George.
- [4] The Claimant's property slopes away from the road and levels off at the back of the lot. He testified that his house is on the flat portion of the land.
- [5] The Defendant's property is on the Claimant's northern boundary and the Defendant's property is used for both residential and commercial purposes.
- [6] The Defendant's property is on a higher elevation than the Claimant's, and the Claimant testified that the Defendant has no proper drainage for the disposal of his waste water.
- [7] He further testified that because the Defendant has no proper drainage the Defendant's waste water flows onto the Claimant's property and has undermined the foundation of his building.
- [8] He testified that this undermining had led his house to crack towards the northwestern corner of the house. He also testified that due to the Defendant's waste water, the tiles of the floor of his building were damaged.
- [9] The cracks and the damage to the tiles occur only in the northwest corner of the house where there is direct flow of waste water from the defendant's land. Such water comes into contact with his land and building.

- [10] He testified that he had repaired the cracks in his building and had replaced the tiles.
- [11] For the first time in his witness statement he gave evidence as to the cost of these repairs. No documentation of these alleged costs was provided to the Court and there was no pleading for special damages in either the Claim Form or the Statement of Case. I will deal with this aspect of the matter later in the judgment.
- [12] In cross-examination the Claimant stated that he built his home between the years 1988-1989, some two years after he purchased the land.
- [13] He stated that when rain falls there is no accumulation of water on his property, only the flat portion had water. He testified that the distance between the ravine at the back of the house and the house itself is about 200 feet.
- [14] He dug out under the house sometime after the original building was erected. The digging took place some 35 feet away from the Defendant's boundary. The length he dug under his house was approximately 10 feet and the width about 4 feet. He also said that he barred up the area below his house about 10 years after he built the house. At the time he dug out under the house there were no cracks in his house. He denied the cracks appeared after he blocked off the area beneath his house.
- [15] He also said that the last time he saw the Defendant's waste water on his land was about two years aback.
- [16] He admitted that part of the roof of his house came off in Hurricane Ivan in 2004. He testified that water entered the house and that the floor swelled up. He also changed the tiles inside the house
- [17] He also testified that he changed the galvanize on the roof to red shingle tiles. This too happened after Hurricane Ivan. Two years later he testified that he cut the eaves of the roof shorter and covered it with galvanize. He did no further repairs to the house.

[18] He testified that he first noticed cracks in the building when the Defendant covered his roof and the water from the Defendant emptied into the boundary. He repeated that he saw waste water coming from the Defendant's house. He said he saw the water coming onto his land from the Defendant's land.

[19] Joseph John also testified on behalf of the Claimant. He is a qualified civil engineer, and his company Joseph John & Associates is in the business of inspecting and assessing properties to ascertain engineering problems.

[20] He carried out an inspection of the Claimant's property in March 2007. He visited the property to determine whether waste water from the Defendant's property was affecting the Claimant's property.

[21] He testified that among other things:-

"(a) The Claimant's property and building is on land which slopes away from the road and levels off at the rear of the lot;

(b) The Claimant's building is towards the flatter area and is set back from the road;

(c) The Claimant's building is on three levels and is constructed in contemporary style of reinforced concrete and concrete block work with a roof of timber covered with metal sheet;

(d) The Defendant's property is to the Claimant's north boundary and is used for both residential and commercial purposes and is on land with a slightly higher elevation than the Claimant's land;

(e) Whilst inspecting the Claimant's property I observed that there was waste water from the Defendant's land to the north was discharging at the southwest corner of the Defendant's land which is directly on the northern boundary of the Claimant's land;

- (f) The waste water from the Defendant's land that I observed being discharged onto the Claimant's land is near the northwestern corner of the Claimant's building;
- (g) I observed evidence of cracking to the walls at the northwestern corner of the Claimant's building and the Claimant explained there were also cracks to the floor;
- (h) Based on my observation the cracking to the Claimant's house and floor only developed at the corner of the building where there is discharge of waste water from the Defendant's property;
- (i) I measured the building setbacks to determine whether statutory requirements were met and observed the following:
 - (i) The Defendant's soakaway and septic tank were set back only 3 feet 9 inches and 6 feet respectively;
 - (ii) The minimal setback according to statute is 10 feet and the Defendant's on site sewage treatment facilities was not done in accordance with the statutory provisions."

[22] He further stated the Physical Planning requirements for waste water, and found that on inspection that the Defendant did not comply with these requirements along the northern boundary of his property. (The northern boundary is the shared boundary of the Claimant and Defendant.)

[23] He found that there was no proper chamber set up for waste water and as a result the water would percolate into the ground and may cause the foundation soils under the Claimant's building to soften and consolidate under the Claimant's building load.

[24] He concluded that the Defendant's soakaway was closer to the boundary than permitted by statute and the effluent may affect the Claimant's building foundation.

- [25] He formed the conclusion from his inspection of the Claimant's property and from his observation that there was a discharge of waste water from the Defendant's property to the north of the Claimant's property that may be the probable cause of the cracking to the northwest corner of the Claimant's building.
- [26] In cross-examination Mr. John stated that the Claimant's building had three levels and that he was of the opinion that all the levels had not been constructed at the same time (something confirmed by the Claimant himself).
- [27] He also opined that it was possible that cracks could appear along the joints, that is, the areas which were joined where the blocks joined the reinforced concrete pillars.
- [28] He stated that the cracks the Claimant referred to had been repaired and he did not see any cracks in the floor of the building. He was clear that he did not see any portion of the northwest corner of the building beneath the ground. He said the building was resting on the ground.
- [29] He made no assessment of the soil type in the area, but testified that the flow of water would be affected by the type of soil. Different soil types would affect the rate at which water percolated into the soil.
- [30] He also indicated that mold or mildew would indicate dampness in the walls rather than the foundation, but it depended on how porous the wall was. Mold on the wall of the building was not indicative of the undermining of the property by water. Mold, he said, cannot signify that there is settlement in any foundation.
- [31] There was no foul smell along the northern boundary of the Claimant's building and he did not observe any black water along that boundary.
- [32] He testified that when foundation soil becomes saturated it is likely to become weak and consolidated. He stated that the northwest corner of the Claimant's building is situated at the end of the slope.

- [33] He was of the view that inadequacies in construction could also cause cracks. He also stated that it was possible for cracks to occur in a building as a result of settling of the building.
- [34] In re-examination he reiterated that there was no evidence of cracks where the concrete pillars were resting on the new construction. Those cracks, if they existed, would be vertical. However, the cracks he observed were horizontal therefore he concluded that there was downward movement.
- [35] Finally, he stated that cracks would develop if one part of the building foundation is affected so that you would get a differential movement and cracks would develop.
- [36] The Defendant testified that he owned the property adjacent to the Claimant's land, having bought the land in 2002. The Claimant's building was already complete at the time he purchased his land. The property which he owns is both a residence and a commercial enterprise.
- [37] He said that his building was interrupted by the passage of Hurricane Ivan in 2004. His testimony differs from that of the Claimant where he states that the Claimant's property was largely unoccupied up to 2007. The Claimant said his property was always occupied save for a few months here and there.
- [38] He says he recalls the shingles being blown off the Claimant's roof during Ivan, leaving the ceiling boards exposed to rain.
- [39] His evidence was that the roof of the Claimant's building remained damaged through the passage of Hurricane Emily and was only repaired after he moved into his building in April 2006.
- [40] He said that early in his construction he became aware of problems associated with water run off from the road. His property, as well as that of the Claimant and others, slope steeply away from the road and further, he realized that after periods of heavy rainfall the area below his lot became flooded.

- [41] He was concerned. He noticed cracks in the Claimant's building while his construction was in progress in its early states, and was concerned as to the possible effects of soil movement in the area where he was building his property. He requested that his workmen take every possible precaution to reduce the possibility of cracks to his building.
- [42] He made provision to take rain and other waste water from his building by installing guttering and channeling the water through downpipes.
- [43] He tried to get his neighbours, including the Claimant, together to install a proper drainage system for all the properties and suggested that they share the cost. This initiative did not meet with success.
- [44] There were no visible drains on the Claimant's property, and the water from the Claimant's roof fell directly onto the ground in the corner of the Claimant's building. The Claimant only fixed this situation in January 2007.
- [45] He spoke of approaching the caretaker of the Claimant's building to alleviate the situation. He wished to have a concrete drain or conduit erected to extricate water from both properties.
- [46] He recognized that there was a problem in the area and that something had to be done about it.
- [47] He admitted that the concrete collection chamber was no longer in existence. Waste water from his building no longer enters the earth directly from the chamber. This situation was rectified in June or July 2006.
- [48] When his expert, Mr. Barry, did his inspection in 2008, things were different from when Mr. John did his inspection in 2007.
- [49] He denied that water from his property undermined the Claimant's building or escaped from his land onto the Claimant's land. He testified that the Claimant's building was damaged when a vehicle crashed into it. He suggested that more than one time vehicles had damaged the Claimant's home.

[50] Mr. Leslie Barry gave evidence for the Defendant. He is a civil engineer and he provides civil and structural engineering designs and drawings and also inspects properties to determine engineering problems.

[51] He inspected the Defendant's property to assess whether waste water from his property is causing or has caused structural damage to the neighbouring property owned by the Claimant.

[52] His inspection of the Defendant's property revealed:-

"(a) The property comprises a lot of land with an elevated building thereon constructed of reinforced concrete and situate at Woodland in the parish of Saint George

(b) The lot of land on which the building rests slopes steeply away from the main road

(c) The building has two levels and as aforesaid is constructed of reinforced concrete and concrete block work and has a typical gable roof

(d) Sharing the property's left side and rear boundaries is a residential building (Claimant's building) and a commercial outfit respectively

(e) I measured the building set backs to the rear and left sides of the Defendant's property and found them to be in compliance with minimum statutory requirements of six and ten feet respectively. The site measurements taken by me show approximately seven and twelve feet respectively.

(f) The septic tank I found to be positioned approximately five [feet] from the side boundary and as such does not comply with minimum statutory requirement of 10 feet.

(g) I also observed that the soak away pit for the septic tank is positioned approximately 12 feet from the left side boundary."

- [53] He concluded that effluent from the Defendant's property would percolate sufficiently deeply into the ground before crossing into the neighbouring properties.
- [54] He also concluded that grey water and roof water were channeled in a way which allowed for adequate percolation.
- [55] He concluded that the water from the Defendant's property could not cause nor contribute to the structural damage to the Claimant's property.
- [56] He admitted in cross-examination that he went to the property of the Defendant in 2008 in March, a year after Mr. Joseph John carried out his inspection and after the Defendant had carried out his remedial works.
- [57] The Defendant's last witness was Fred Boney, who testified that he worked on the Defendant's building while it was being constructed.
- [58] He said that he observed both horizontal and vertical cracks in the Claimant's building, but admitted that the last time he worked on the Defendant's building was in 2004.
- [59] He also said that during heavy rainfall water washed from the road to three locations: On the Spot Hardware store, the Claimant's property and the Defendant's property. He said water would settle on the Claimant's property at the back of the building and at the side of the building as well.
- [60] Clerk & Lindsell on Torts 18th Edition at para 20-29 states:-

"Liability in respect of water depends on whether the water is naturally on the land or whether it is artificially accumulated or interfered with in some way. The owner of land on a lower level cannot complain of water naturally flowing or percolating to his land from a higher level. Nevertheless, the higher proprietor is liable if he deliberately drains his land on to his lower neighbour's land ..."

- [61] I find that from the evidence led in the matter that the waste water from the Defendant's property did drain onto the Claimant's land. This was done by the pipes which the Defendant had leading from the catchment into the soil on the

northern boundary (the shared boundary of the parties). This was not a natural flow of water, but a flow of water directed by the Defendant onto the Claimant's property.

[62] **Rylands v Fletcher** sets out the principle in this way:-

“The person who for his own purposes brings on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”

[63] The Court is convinced on a balance of probabilities that the Defendant allowed water to run from his premises onto those of the Claimant. The Defendant admits that he had to carry out remedial work in order to contain the water coming from his property. He acknowledges that there was a problem, the Ministry of Health intervened. The problem was rectified. The Defendant took steps to alleviate the problem.

[64] The issue of whether the Claimant is entitled to the sum of \$7,118.00 next comes to be decided.

[65] A look at the pleadings of the Claimant discloses that there was no claim made for special damages. The first time the sum of \$7,118.00 is mentioned is in the witness statement of the Claimant filed on 15th May 2008.

[66] Even if the expenses of repairing the building were incurred after the filing of the claim, the Claimant has failed to produce any accompanying documentation to support the expenses he wishes to claim.

[67] The Defendant in this matter had no opportunity to challenge these expenses, and in view of the fact that there was no pleading to that effect and no documentation was produced, the claim for \$7,118.00 cannot be sustained.

[68] The Defendant's expert report was not of much assistance to the Court as it was carried out in 2008 after the Defendant had by his own testimony carried out remedial work prior to Mr. Barry's inspection.

[69] The report of Mr. Joseph John is persuasive and the Court accepts the conclusion arrived at by Mr. John in his report.

[70] Due to the fact that the Defendant has taken steps to remedy the situation and by the Claimant's own evidence, the last time he observed water coming from the Defendant's property was two years ago, granting the injunction sought by the Claimant would be of no consequence.

[71] Therefore, I would not grant that head of relief sought by the Claimant.

[72] Paragraph 2 of the Claim Form has also been satisfactorily dealt with by the Defendant, he having taken remedial action and the Claimant stating that the flow of water has ceased.

[73] With respect to general damages, bearing in mind the evidence which has been led, I would award the sum of \$5,000.00 to the Claimant.

[74] I would award costs of \$1,500.00 to the Claimant.

[75] Interest at the statutory rate of 6 percent on the sum of \$5,000.00 from the date of this judgment to the date of payment.

[76] The following cases were cited in this matter:

East Caribbean Flour Mills Limited v Boyea & Williams – Civil Appeal No.

12 of 2006 (St. Vincent & the Grenadines)

Phyllis Monah v Sylvia Paul – Civil Claim No. GDAHCV2004/0329

Sedleigh Denfield v O'Callaghan 1940 AC 880

Foster v Urban District Council of Warblington [1906] 1 ICB 648

[77] I would like to thank Counsel for their assistance in this matter.


Margaret Price Findlay
High Court Judge