THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2016/0808

BETWEEN:

SYSTEMS COMPUTER AND OFFICE SUPPLIES LIMITED

Claimant

and

JOHN PARKS

Defendant

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Ms. Paulette Francis of Counsel for the Claimant
Mrs. Kimberley Roheman of Counsel for the Defendant

Present:
Mr. Goddard Darcheville, Managing Director of the Claimant
Mr. John Parks

2018: October 17, 18;
November 28.

JUDGMENT

[1] CENAC-PHULGENCE J: This is a case of nuisance by water and an all too often seen case of adjoining owners who find themselves embroiled in a dispute.

[2] The claimant, Systems Computer and Office Supplies Limited ("Systems Computer") has filed a claim against the defendant, John Parks ("Mr. Parks") seeking an order that Mr. Parks be compelled to stop the nuisance affecting the property of Systems Computer and divert his waste water away from Systems Computer's property and for loss of income for a period of six (6) months in the sum of $18,000.00, interest and costs.

[3] Evidence for Systems Computer was given by its Managing Director, Mr. Goddard Darcheville, Licensed Land Surveyor, Mr. Dunstan Joseph, Civil and Structural Engineer, Mr. Thomas Walcott and Mr. Harold Anthony Beausoleil, a building designer. Evidence for the defendant was given by Mr. John Parks, and Mr. Swithin Montoute, the contractor at the time of the construction of the wall. The witness Ms. Basilia Kade Jackson was unavailable for trial and her witness summary was struck from the record.

[4] Systems Computer is the owner of a parcel of land registered in the Land Registry as Block 1454B Parcel 57 situate at Bonne Terre which was acquired in 2010 ("the SC Property") and is represented in these proceedings by its Managing Director, Mr. Goddard Darcheville. Mr. Parks is the half share owner of a parcel of land registered as Block 1454B 63 ("the Parks Property") together with Ms. Denise Rhonda Wilson ("Ms. Wilson") who is not a party to this claim and which is situate adjacent to the SC Property and was acquired in 2014.

[5] Systems Computer alleged that sometime in June 2014, Mr. Parks requested permission to access the common boundary to replace a failing retaining wall which separates his property from another property registered as Block 1454B Parcel 64 ("Parcel 64") in the name of Goddard Erysthee who it would appear is the same person as Goddard Darcheville. Permission was granted. Mr. Parks in his evidence confirmed that this was indeed the case and stated that he had sought permission to allow the engineer to access the existing wall.

[6] Mr. Parks gave evidence that Mr. Darcheville in anticipation of the construction works took down his wire fence on the other side of the wall sometime in the second half of 2014. That fence was on Parcel 64. Counsel for Mr. Darcheville in cross-examination of Mr. Parks sought to indicate that Mr. Darcheville had not taken down the fence in anticipation of the construction and Mr. Parks was resolute in responding that Mr. Darcheville had. Mr. Darcheville in his reply to the defence filed by Mr. Parks averred that the fence was only removed as a good gesture by a good

neighbour to facilitate the building of the wall, upon Mr. Parks request for permission in June 2014. However, I do not think there is any material difference in the evidence of the two gentlemen and I find that the evidence of one corroborates that of the other.

[7] Systems Computer alleged that Mr. Parks built a drain on Mr. Darcheville's personal property (Parcel 64) which was about 1 foot 7 inches wide and was advised by Mr. Darcheville that he should construct the drain in a southerly direction to avoid his (Mr. Parks') waste water from coming onto the SC Property. Systems Computer claimed that it indicated to Mr. Parks that it would give permission to run a six inch PVC pipe along the southern fence of Parcel 64 in order that his waste water could be deposited into the drain on Old Military Road. Mr. Darcheville's testimony was that the suggestion was rejected by Mr. Parks.

[8] Mr. Parks' evidence is different in some material particulars. He testified that the drain was not built on the SC Property or on Mr. Darcheville's property (Parcel 64) as far as he was aware. In cross-examination, Mr. Parks said he knew of the licensed land surveyor's report and what it had indicated as to the location of the wall and drain. Mr. Parks said that he did discuss the building of the retaining wall with Mr. Darcheville and did advise him that the wall would have weep holes and that a drain was also going to be constructed. Mr. Darcheville denied that he was told about the drain. His evidence was that he was told of the wall only.

[9] Mr. Parks testified that in March 2015, Mr. Swithin Montoute was employed to construct the new retaining wall. Mr. Parks said that Mr. Darcheville gave permission for the builders to access Parcel 64. Mr. Parks said that Mr. Darcheville was aware of the exact location where the drain was being built. He said the new wall was built where the old wall was inside the boundary line of the Parks Property. Mr. Parks' testimony was that in fact Mr. Darcheville had been the one who pointed out the boundary on Parcel 64 and he relied on Mr. Darcheville as he seemed to

know a lot more about the area and also because he had recently conducted a survey of Parcel 64.

[10] According to Mr. Parks, the drain collects rain which falls directly into the drain. The only other water that flows into the drain would be from the weep holes in the wall which has a lawn on the other side of the wall and water from one part of the roof on the Parks' Property but the pipe leading into the new drain from the roof has been blocked and is inaccessible except through Mr. Darcheville's Parcel 64 as access is prevented by a wire fence running along the southern boundary of Parcel 64 and the Parks Property.

[11] Mr. Parks testified that at some point before the construction, Mr. Darcheville had spoken about reconstructing the driveway on the SC Property as it was too steep and cars were having difficulty getting up the property. Mr. Darcheville admitted that prior to the retaining wall construction; he had plans to reposition his driveway.

[12] Mr. Parks gave evidence of a broken drainpipe on Parcel 64 which appeared to empty close to the SC Property and also a broken drainpipe at the SC Property. Both of these are denied by Mr. Darcheville.

[13] Mr. Parks admitted that Mr. Darcheville had asked that the drain be constructed in a southerly direction but he said that was after the majority of the wall had already been built with the drain flowing in a northerly direction into the existing pipe. Mr. Parks' testimony was that when Mr. Darcheville made the suggestion he consulted with his contractor who advised that such a move would significantly compromise the integrity of the retaining wall. Mr. Parks explained that the wall and drain was one structure. He said he conveyed this to Mr. Darcheville. Mr. Parks said when he was approached by Mr. Darcheville about redirecting the drain, he asked him whether the drain was on his (Mr. Darcheville's) property and he said it was not.

[14] Mr. Darcheville in his testimony said the change would not affect the integrity of the retaining wall. This statement was however not supported by any independent evidence.

[15] Throughout the evidence, it became clear that what was being referred to by the parties as drains were really references to pipes. Mr. Darcheville said Mr. Parks connected his pipes into his pipes which run on Parcel 64 and the water is being deposited onto the SC Property. He said that this wastewater is causing erosion, a buildup of moss on the driveway which hinders vehicles from driving freely up the driveway and the driveway is constantly wet. Mr. Darcheville said that there were several pieces of correspondence sent to Mr. Parks requesting that he divert his wastewater from the SC Property but Mr. Parks has failed to do so. He said that the pipes on the SC Property were not laid down by the developers of the Bonne Terre Estates and that when he acquired Parcel 64 in 1983 and when he commenced construction of his home in 1984, there were no pipes or portable water laid down on the land.

[16] The evidence of Mr. Parks is that the drain collects rainwater, water from a part of the Parks' roof and the weep holes and then is fed through a pipe into the pipe at the boundary of parcel 64 and the Parks property. In cross-examination, Mr. Parks said he did not know where the water went and he assumed that it went down to the big drain on Old Military Road. Mr. Darcheville's evidence was that indeed, the pipe from the drain fed into a pipe on Parcel 64 but then Mr. Parks connected that pipe to a pipe on the SC Property which then caused the issues with the driveway. The parties are at odds on this matter.

[17] Systems Computer claimed that several efforts were made and letters written with a view to trying to resolve the matter but to no avail and the nuisance continues. Mr. Darcheville's evidence is that because of the nuisance caused on the SC Property, the tenant who was renting the house was having difficulty driving up the driveway and eventually vacated the house. That tenancy agreement was for one year and

was dated 25th November 2015. He said he lost $18,000.00 on the contract and exhibited a copy of the rental agreement. He also said that he was unable to rent the house because of the problem with moss on the driveway. It is to be noted that the tenancy agreement is with CES Ltd and not Systems Computer.

[18] It is Mr. Darcheville's evidence that the SC Property was purchased in 2010 and he had never had an issue with water on the property until Mr. Parks constructed the drain in 2014.

[19] Mr. Parks in his evidence denied that there was any loss suffered by Systems Computer and said that from the time he moved into the property in January 2014 to about two years after there had been no tenant.

[20] Mr. Parks admitted that he has not complied with any of the lawyer's requests written on behalf of Systems Computer but says that is because he had asked for specific information as to what was causing the problem and on the actual flow of the waste water but none was forthcoming. The specific correspondence would be:

(a) Email dated 24th April 2016 requesting information on how the waste water was causing an issue to which there was no response;

(b) Email dated 11th December 2016 requesting that the drainpipe that leads from one part of the Parks' roof into the new drain be unblocked. It had been noticed that the drainpipe was not draining and Mr. Parks discovered that it was blocked and someone had placed a cap on the end of the drainpipe.

[21] Mr. Parks denies that Systems Computer has suffered the loss which they allege they have since there was no tenant on the SC Property from January 2014 when he moved onto the Parks Property for almost two years. Mr. Parks relies on all applicable covenants contained in the Original Deed for Bonne Terre Estate.

Facts not in dispute

[22] It is not in dispute that

(a) Mr. Darcheville gave permission to Mr. Parks to access the common boundary between Parcel 64 and Parcel 63

(b) That the said parcels are gently sloping southwards with Parcel 63 being to the top of Parcel 64 whilst parcel 57 runs adjacent to the two parcels

(c) Mr. Parks replaced a failing retaining wall and constructed a drain to the front of that wall, the drain being only visible from Parcel 64

(d) That Mr. Darcheville sometime after construction began suggested that the drain should be diverted to allow the waste water to flow in a southerly direction along parcel 64's southern boundary

(e) Mr. Darcheville had indicated prior to the construction of the wall that SC Property driveway would be reconstructed since it was too steep making it difficult for cars to drive up to the property

(f) There was correspondence between the parties attempting to resolve the matter

Issues identified by the Court:

[23] The issues for determination are summarized as follows:

(a) Whether the defendant built a drain on the claimant's property;

(b) Whether the construction of the wall and drain has resulted in waste water and run off from the Parks Property to flow onto the SC Property thereby creating a nuisance and that this was caused as a result of the 'fault' of Mr. Parks;

(c) Whether the defendant is liable for any loss, damage or injury suffered by the claimant;

(d) Whether the loss, damage or injury suffered by the claimant was reasonably unforeseeable by the defendant and whether the defendant is as a result not liable to the claimant in nuisance or under the rule in Rylands v Fletcher;

(e) What (if any), is the measure of damages the claimant is entitled to.

Whether the defendant built a drain on the claimant's property

[24] That issue is not one which the Court can deal with on this claim. There is no pleading as regards this and no relief is claimed in that regard. The evidence of licensed land surveyor, Mr. Dunstan Joseph which spoke to the location of the wall and drain as being 80% on Parcel 64 and 20% on the Parks Property is of no moment in the context of this claim. In any event, Parcel 64 is not owned by Systems Computer.

Whether the construction of the wall and drain has resulted in waste water and run off from the Parks Property flowing onto the SC Property thereby creating a nuisance **and that this was caused as a result of the 'fault' of Mr.** Parks

[25] Private nuisance is designed to protect the individual owner or occupier of land from substantial interference with his enjoyment thereof. The main issue in private nuisance is trying to strike the balance between the right of a defendant to use his land as he wishes and the right of the claimant to be protected from interference with his enjoyment of the land.

[26] This is the claimant's case and the burden of proof lies on them. Systems Computer must prove:

(a) That it suffered damage and that the loss suffered was of a type reasonably foreseeable

(b) That the damage suffered was caused by the defendant and was his fault.

[27] Articles 985 and 986 are the applicable provisions[1] as relates to torts under the Civil Code of Saint Lucia.[2] Article 985 states:

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

[1] See Northrock Limited v Desmond Jardine et al, Saint Lucia Civil Appeal No. 12 of 1991, delivered 26th October 1992, unreported.

[2] Chap. 4.01, Revised Laws of Saint Lucia, 2013.

[28] Article 986 states:

> "He or she is responsible for damage caused not only by himself or herself, but by persons under his control and by things under his or her care.
>
> …
>
> The responsibility attaches in the above cases only when the person subject to it fails to establish that he or she was unable to prevent the act which has caused the damage."

[29] The application of these articles is well laid out in Northrock Limited v Desmond Jardine et al[3] where Floissac CJ said this:

> "There has never been any doubt that our articles 985 and 986 place on the plaintiff the onus of proving as a precondition of the defendant's delictual liability that the damage suffered by the plaintiff was caused by the defendant or by persons under his control or things under his care. Nor has there ever been any doubt that that where the plaintiff alleges that the damage was caused by the defendant (as distinct from a thing under the defendant's care) or where the plaintiff relies on our article 985 (as distinct from our article 986), the onus is on the plaintiff to prove as a precondition of the defendant's delictual liability that the damage was caused by the defendant's fault. I use the word "fault" in its technical sense to signify the concept which is expressed in the words "act, imprudence, neglect, or want of skill" appearing in our article 985 and which is defined in our article 989D(1) 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 a defence of contributory negligence."

[30] It would appear that Systems Computer is relying on article 986 to ground their claim in nuisance. In Northrock the Court looked at the question whether in the case of damage caught by article 986 (i.e. damage proved to have been caused by a thing under the defendant's care), it is necessary to prove fault on the part of the defendant. Floissac CJ opined that there is no need for the plaintiff to prove fault on the part of the defendant as a prerequisite to the defendant's delitual liability for such damage. Proof by the plaintiff that the damage which he suffered was caused by a thing under the defendant's control engenders a presumptive or defeasible liability on the part of the defendant for that damage. The onus is then on the

[3] See page 4 of Northrock.

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.[4]

[31] My reading of the judgment in Northrock suggests that Rylands v Fletcher[5] should not be applied in construing articles 985 and 986 of the Code. The Court of Appeal in Northrock quoted from the judgment of Quebec Railway, Light, Heat and Power Company v Vandry,[6] where the Privy Council said that there was no reason why the Quebec Code should be made to conform to the cases of Rylands and Nichols v Marsland.[7]

[32] I quote extensively from the judgment of Floissac CJ in Northrock because I believe it assists in understanding the burden which the claimant has to meet. Floissac CJ spoke of 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 learned Chief Justice said the former was caught by article 985 (which requires the plaintiff to prove fault on the part of the defendant), whereas the latter scenario is caught by article 986 which creates a presumptive or defeasible liability on the part of the defendant and exempts the plaintiff from proving fault. Therefore, in Northrock, the court found that the damage to the defendant's dwelling house was not caused by a thing (i.e. a quarry) and that the alleged detonations at the quarry and the resultant vibrations were not autonomous acts of a quarry. They were human acts of the operators of the quarry and were caught by article 985. Therefore the onus lay at the feet of the claimant to prove that the damage suffered was caused by the fault of the defendant.

[33] What is clear from the discourse in Northrock is that the claimant must prove that the damage alleged was caused by the defendant and was foreseeable. Then it is for the claimant to prove that the damage was the defendant's fault. If it is that the

[4] Pages 6-7 of Northrock v Jardine.
[5] (1868) LR 3 HL 330.
[6] (1920) AC 662.
[7] (1876) 2 ExD 1.

damage is caused by the defendant through the instrumentality of a thing, article 985 is the applicable provision but if the damage is caused by an autonomous act of a thing without intervening human action, then it is article 986. In this case, the construction of a drain can hardly be said to be an autonomous act of a thing without human intervention and it for the claimant to prove fault. I cannot see how article 986 can be applicable in the circumstances of this case.

[34] The evidence of Mr. Parks was that the rainwater from the drain, the weep holes and also the corner of the roof at the front of the house facing the SC Property drained into the drain in front of the wall. He also testified in cross-examination that his waste water is also channeled to the drain through pipes and then both sets of water are channeled to an existing pipe on Parcel 64. Mr. Darcheville's evidence is that that pipe on Parcel 64 is then connected to a pipe on the SC Property. Mr. Darcheville relies on the expert report of Mr. Thomas Walcott. Mr. Walcott is a civil and structural engineer and presented a report dated 26th February 2018.

[35] The report indicated that his instructions were to give evidence as to whether the water emanating from the wall and the drain erected along Block 1454B Parcels 63 and 64 was causing moss on the driveway on the SC Property making it unmotorable. Mr. Walcott said that after receiving instructions from Mr. Darcheville, he conducted two site visits of the SC Property and the adjacent Parcels 64 and the Parks Property. He said his investigations revealed that the wall was inadequate for a number of reasons one of these being that there is constant cover of moss on the driveway of the SC Property caused by constant runoff water from the Parks Property.

[36] The report contains no basis for this finding. It does not detail how Mr. Walcott went about ascertaining that this was indeed the case. He does not indicate what he saw which led him to that conclusion stated in his report. In the case of Yates

Construction Company Limited v BIue Sand Investments Limited,[8] the Court of Appeal said:

> "…The judge must determine what weight to attach to the expert evidence. It is necessary for an expert to present the analytical process by which he or she reached the conclusion in the report. It is insufficient that an expert merely supplies his or her conclusion on a matter in issue between the parties. …"

[37] On that basis, I attach no weight to Mr. Walcott's evidence and his report as they have provided no assistance to the Court in the determination of whether in fact the constant moss on the SC Property was indeed caused by run off from the Parks Property or whether there was any soil erosion caused by the run off.

[38] Mr. Parks in evidence indicated that he had not changed any pipes after he purchased the property and that pipes used were all existing pipes. Mr. Darcheville denied that there were any existing pipes.

[39] Having done a site visit, I was able to observe the following:

i. The pipe on Parcel 64 into which the pipe from drain is connected and which was confirmed by both Mr. Darcheville and Mr. Parks. The pipe was exposed at the time of the visit but is not a surface pipe ordinarily;

ii. I could see no evidence of the connection of the pipe on Parcel 64 to a pipe on the SC Property as was stated by Mr. Darcheville. Mr. Darcheville offered to dig up the pipes to ascertain this but that is evidence which the claimant should have adduced and which should have been part of the exercise undertaken by the expert witness to be able to answer the question as to whether the water from the Parks Property was indeed flowing onto the SC Property and was caused by the construction of the drain;

iii. I observed a down pipe to the front of the property which did not seem to run into any particular drain;

[8] BVIHCVAP2012/0028 delivered 20th April 2016, unreported.

iv. The area where the moss had gathered appeared caked and the driveway did not exhibit the constant wet which Mr. Darcheville testified of. Given the weather the night before the site visit, it was anticipated that some water or wet especially in the area of the moss would have been more visible.

v. It was evident that there was some surface water at a particular point of the land just off the driveway but it was not visibly clear where the water came from;

vi. The slope of the SC Property means that water from the top of the property is likely to flow downwards onto the property;

vii. The driveway was very steep coming off the Old Military Road;

viii. There was no visible sign of soil erosion.

[40] The evidence provided by Systems Computer falls woefully short of proving even on a balance of probabilities that Mr. Parks by his construction of the drain caused water to flow onto the SC Property causing damage. The damage spoken of as being constant wet on the driveway, build-up of moss and erosion were not visibly present on the site visit and there was no evidence from the claimant's own expert witness to assist the Court to make a determination as to damage caused and the cause of the damage.

[41] It is accepted that where there are sloping lands that there will be some flow of water from the top lands onto the bottom lands and the Civil Code does envisage this when it provides in Article 451 as follows:

> "Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man."

[42] It is to be noted that Systems Computer's case as pleaded is that the construction of the wall and the drain is what caused the nuisance. As the case proceeded, this metamorphosed into the nuisance having been caused because Mr. Parks connected his pipes onto pipes on Parcel 64 and then onto the SC Property. Justice of Appeal Barrow in the case of East Caribbean Flour Mills v Omiston Ken Boyea

et al[9] quoted from the dicta of Lord Woolf in McPhilemy v Times Newspapers Ltd[10] where he said:

> "Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."

[43] On the question of foreseeability of loss and damage, Mrs. Kimberley Roheman ("Mrs. Roheman") submitted that this cannot arise in the circumstances of this case. She argued that the building of a drain for the capture of rainwater and I add other water emanating from the Parks Property as this was the evidence of Mr. Parks, could not conceivably give rise to the alleged moss and soil erosion complained of. This Mrs. Roheman said was because Mr. Parks' evidence was that he had connected the waterflow from the drain into an existing pipe on Parcel 64 which he understood existed prior to him purchasing the property in January 2014.

[44] Ms. Francis on the other hand, argued that Mr. Parks ought to have foreseen that allowing his water to flow down onto the driveway on the SC Property would have caused damage. She further argued the fact that Mr. Parks said that he had connected the pipes from the drain into an existing pipe on Parcel 64 is not a defence.

[45] The difficulty with this case is that whereas it started as the nuisance being caused by the action of the defendant building the drain, it has now become about connection of the pipe from the drain into a pipe on Parcel 64 and then on the SC Property. Ms. Francis although relying on article 986 of the Code, made submissions in relation to recklessness and fault on the part of the defendant but a finding of fault is not necessary for a finding of liability under article 986. Even if the rule in Rylands v Fletcher were to be applicable, the claimant would have to prove that the defendant brought something onto his land which is a dangerous thing and

[9] SVGHCVAP2006/0012, delivered 16th July 2007, unreported.
[10] [1993] 3 All ER 775, 792J-793A.

there must be a non-natural use of the property. Ms. Francis, counsel for the claimant did agree with the Court that the building of a drain could not be said to be a non-natural use of the land. This therefore would take this case outside the realms of Rylands v Fletcher.

[46] Mrs. Roheman argued that Mr. Parks would have had the right to join his pipes to existing pipes on adjoining property in any event by virtue of the covenants in his Deed of Sale dated 17th January 2014. The Deed transfers to the purchasers, Mr. Parks and Ms. Wilson 'the immovable property described in the Schedule together with the rights specified therein'. The Schedule speaks to the rights, one of them being:

> "A right to the passage and running of water sewerage and electricity through any sewers drains pipes or cables now laid or hereafter to be laid under or over the Bonne Terre Estate lands with power to enter upon the said lands to construct make connections to and repair the same the person or persons so entering making good all damage occasioned thereby excepting and reserving unto Bonne Terre (Property) Limited and its successor-in-title and the owner or owners for the time being of any part of its said Bonne Terre Estate or any adjoining or neighbouring land as may be affected thereby a right to the passage and running of water sewerage and electricity through any sewers drains pipes or cables now laid or hereafter to be laid under or over the land hereby sold with power to enter upon the said land to construct make connections to and repair the same the person or persons exercising such right making good all damage done."

[47] Ms. Francis argued that this covenant was only applicable to the vendor and that Mr. Parks could not rely on it. I must disagree. The wording of the right granted in the Deed is very clear. Such a right would be necessary in developments such as this where the SC Property, Parcel 64 and the Park's Property are located. The right envisages that which is provided for in the Code that owners of such properties would have to co-operate with each other to deal with water which emanates from lands above flowing onto lands below. It only makes sense that the property owner at the top should be able to connect his pipe or drain to that of the property owner below to be able to drain off the water properly. The right however is not an absolute one as if a property owner were to act in accordance with the right granted and

cause damage to another's property, he is not absolved from making good the damage and he surely can still be liable in nuisance.

[48] Systems Computer relied on the evidence of Mr. Harold Beausoliel to support their contention that there were no existing pipes on Parcel 64 into which Mr. Parks could have connected the pipe from the drain. Mr. Beausoleil said he was the supervisor when both the house on the Parks Property and the SC Property were built and he says no pipes were connected underground as there were no existing pipes. However, his evidence does not assist me as I still do not know whether there were existing pipes on Parcel 64 which is Mr. Park's evidence. Interestingly, by letter dated 13th April 2016, solicitors on behalf of Mr. Darcheville stated:

> "My client further instructs me that he intends to construct a new drive way to the house on Block 1454B 57 because of the steepness of the current one and in so doing, he would have to remove all the underground pipes, including your connection." (my emphasis)

[49] This clearly shows that there was a recognition that there were underground pipes although it does not say where the pipes are located. As indicated earlier, the presence or absence of underground pipes and where located could have easily been verified by the expert but that was never done.

[50] In assessing the evidence, I have considered the topography of the various properties. The lands are all sloping downwards and so it would be expected that the land owner at the top property, Mr. Parks would have to channel his water be it rainwater or waste water down through the lands below. Sadly, the expert's report did not assist with this at all which I think would have been instructive in determining whether in fact it was the building of the drain which led to the run off on the SC Property. It must be remembered that the claim is brought by Systems Computer and not the owner of Parcel 64.

Whether the defendant is liable for any loss, damage or injury suffered by the claimant

[51] Systems Computer must prove that it has suffered loss as a result of the nuisance. Even if I were to find that Mr. Parks was liable in nuisance what is the evidence of loss before the Court. The evidence of loss provided is a rental agreement dated 25th November 2015 between CES Limited and Livity (St. Lucia) Ltd. which agreement was terminated due to the problems with the driveway access caused by nuisance created by Mr. Parks. There is no evidence as to what would allow the Court to accept that this was evidence of loss of income in relation to the SC Property to Systems Computer when the agreement is clearly with another entity. Had there been a finding of nuisance, the loss claimed has not been proven.

[52] Counsel for the Systems Computer, Ms. Paulette Francis ("Ms. Francis") in her closing submissions suggested that even if the court were to find that Systems Computer suffered no damage or does not accept the loss of rental income claim, he is still entitled to damages. That is indeed a perplexing proposition. Ms. Francis relied on the case of Fay v Prentice[11] where she says the plaintiff was entitled to recover damages without showing the existence of damage.

[53] Counsel for Mr. Parks, Mrs. Roheman submitted that Ms. Francis' argument must be flawed as proof that loss and damage had occurred was an essential ingredient to prove nuisance. I must agree.

[54] In Fay v Prentice, it was not that the plaintiff did not prove damage and loss but that the Court was willing to presume that damage would have occurred. In that case, the defendant had built a cornice which projected over the garden of the plaintiff and caused rainwater to flow from the cornice into the garden causing damage and the plaintiff had been inconvenienced in his possession and enjoyment of his property. The Court held not that the plaintiff did not have to prove damage but that he could maintain an action without proof that rain had fallen between the

[11] (1845) 135 ER 769.

period of the erection of the cornice and the commencement of the action. It could be inferred that rain would have fallen during the period and there would have been a flow of water from the cornice into the garden. This is in no way similar to the circumstances of the instant case.

[55] Systems Computer has failed to show that they suffered any loss and damage and therefore would not be entitled to any award of damages.

Conclusion:

[56] Based on the foregoing, I find that the claimant, Systems Computer has not made out a case in private nuisance against Mr. Parks. I find that there is no evidence that Mr. Parks deliberately or recklessly used his land by constructing a wall and drain in a way which he knew would cause his waste water to flow onto the SC Property and cause damage. On the contrary, Mr. Parks seemed to be trying to ensure that he dealt with his water in a proper manner. I also find that Mr. Darcheville, who is the Managing Director of Systems Computer and the owner of Parcel 64 would have known that a drain was being constructed as the drain falls on the side facing his Parcel 64. But he took no steps to stop the construction of the drain but simply asked that the water from the drain be made to flow in a southerly direction.

[57] Based on the evidence provided, I am unable to conclude even on a balance of probabilities that the alleged damage to the SC Property was caused by the construction of the drain. Systems Computer was in the best place to provide the Court with all the evidence to support its case. Both the SC Property and Parcel 64 have the involvement of Mr. Darcheville and so would have needed no one's permission to access these properties to ascertain where the water from the drain flowed to, which pipe the pipe from the drain fed into and where that pipe ultimately led to. Mr. Parks could not provide that evidence and indeed it is not for him to, but suffice it to say, he would not have had the same access to the adjoining properties that Systems Computer and Mr. Darcheville would have had.

[58] In conclusion, I would dismiss Systems Computer's claim with prescribed costs on the sum of $18,000.00 to the defendant in the sum of $2,700.00.

[59] In situations like these, it is imperative that the parties engage in discussions so that the matter can be resolved. Perhaps that is the reason that mediation is normally recommended where the issues involve neighbours. When Mr. Parks had asked for confirmation that his water was actually flowing onto the SC Property, a simple exercise of digging up the area, unearthing the pipes and observing water flow when waste water was being channeled from the Parks Property could have provided a basis for further discussion instead of a response speaking to how experts are engaged. At that point, the matter was still in the domain of the parties and not before the Court. I therefore strongly encourage some level of discussion between the parties as soon as possible to chart the way forward.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar