

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011-04675

VISHNU GYAN

Claimant

AND

WATER AND SEWERAGE AUTHORITY

Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. Khristendath Neebar
Instructed by Mr. Haresh Ramnath

For the Defendant: Mr. Alvin Ramroop

Date of Delivery: 16th June 2017

JUDGEMENT

THE CLAIM

- [1] The Claimant Dr. Vishnu Gyan brought a claim against the Defendant for damage to his premises which he alleged was caused by water escaping a water main belonging to the Defendant.
- [2] The Claimant pleaded¹ that from or about the year 2000 or prior, the water main/ water line for which the Defendant was responsible burst and/or began to leak on the Eastern boundary of his land situate at Lot 84 Central Park, Charles Street, Ortiz Crescent, Balmain, Couva. The water escaped from that burst pipe and percolated onto the Claimant's premises causing damage thereto.
- [3] The Claimant averred that the leak and damage to his property was occasioned by the negligence of the Defendant.
- [4] In the alternative, the Claimant pleaded that the water main or line constituted a non-natural use of land and water escaped therefrom onto the Claimant's premises and caused damage thereto.
- [5] The Claimant pleaded² the following Particulars of Negligence against the Defendant – that it:
- 1) Failed to suitably maintain and/or repair the said water main and/or line or at all.
 - 2) Caused and/or permitted water to flow from the water main and/or line onto the Claimant's premises.
 - 3) Failed to take any or any adequate steps to prevent the flow of water unto the Claimant's premises.
 - 4) Caused and/or permitted water to flow onto and into the Claimant's premises when it knew the percolation of same would or could affect the Claimant's premises as it did.

¹ Amended Statement of Case para. 5

² Amended Statement of Case para. 6

- [6] The Claimant outlined the damage he sustained which included cracks in the perimeter wall, cracks in several areas in the walls of the building, cracks in the 'out fall drain' at the north eastern corner of the building, a crate at the north eastern corner of the property and a hole in the ground in the vicinity of the cracked fall out drain.
- [7] The Claimant therefore claimed damages for negligence or alternatively for nuisance.

THE DEFENCE

- [8] The Defendant filed a Re Amended Defence by which it denied all liability for any damage occasioned the Defendant.
- [9] The Defendant denied that the water main, along the Claimant's eastern boundary belonged to it, or that the Defendant was responsible for its maintenance and repair. The Defendant averred³ to the contrary that the water line was laid by a third party developer of the land occupied by the Claimant. The Defendant averred further, that the water line was already in existence when the Claimant bought the property.
- [10] The Defendant also pleaded that its own investigation and report by its Engineering Technician revealed that the water main was ruptured by the Claimant his servants or agents while the Claimant was digging a hole for the construction of a wall. The ruptured water main was reported by the Claimant to the Defendant on the 19th July 2003 and the Defendant's workmen effected repairs to the main on the 20th July 2003.

³ Amended Defence para. 4

- [11] The Defendant averred that any damage caused the Claimant by the burst water main was occasioned by his own negligence the particulars of which were set out⁴.
- [12] The Defendant pleaded further that between 1999 to 2002 the Claimant made no complaints to the Defendant about any burst water mains and consequential damage to the Claimant's property. It was also pleaded by the Defendant that the Claimant, by letter dated the 21st July 2003, complained to the Defendant that surface water on his land could not flow into a tunnel drain because of the indiscriminate erection of structures by the Claimant's neighbours, in an area reserved for drainage, causing the Claimant's land to become waterlogged.
- [13] The Defendant therefore denied the Claimant's allegation of negligence pleaded against it.
- [14] It was contended by the Defendant that the water main supplying the Claimant with water is not a non-natural user of the land having regard to the Defendant's statutory duty to supply water to the populace; the Claimant was reasonably expected to 'put up with it'⁵.
- [15] The Defendant put the Claimant to strict proof that its premises were inspected by 'Consulting Engineers Associates Limited' who found that the damage to the Claimant's premises was caused by the percolation of water onto the land. The conclusion arrived at by Consulting Engineers Associates Limited was denied by the Defendant.
- [16] The Defendant asserted that the only report made by the Claimant about water seeping onto his premises was on the 19th July 2003 which was followed by a letter dated the 21st July 2003 referred to above.

⁴ Re Amended Defence para. 5 (a-h)

⁵ Re Amended Defence para. 9

AMENDED REPLY

[17] By his amended reply the Claimant denied that the action was statute barred and averred that on the 16th July 2003 the Claimant discovered water percolating onto his property and that this percolation started three years before and stopped after the Defendant isolated the water main in August 2003.

[18] Further, the Claimant denied that its letter dated 10th June 1999 was posted in 2003 and asserted that it was indeed posted at or around the 10th July 1999.

[19] It was also pleaded by the Claimant that in 1999 when a hole formed on his property and increased in size and vegetation in the area died, he was not aware as to what was causing these events. He pleaded further that “it was subsequently discovered that same was caused by leaking water main and/or line”.

[] An outline of the evidence adduced in this case is necessary in order for me to determine the facts.

EVIDENCE FOR THE CLAIMANT

Witness Statement of Vishnu Gyan

[20] The Claimant testified that in 1980 he became owner of the subject property by Deed of Lease registered No 7241 of 2001.

[21] The Claimant testified further, that in 1999 he observed a hole 10 feet by 10 feet by 5 feet deep in the north eastern corner of his property between Lot 84 and Lot 83, and another smaller hole 5 feet by 5 feet by 3 feet between Lot 93 and Lot 94, which caused the vegetation around them to die. At the time he did not know what caused these holes to develop and

he repaired them at his own cost. However, he wrote letters to the Defendant, Town and Country Planning Division and the Ministry of Works by letter dated 10th June 1999 (the said letter) advising these authorities about the appearance of the holes on his property and the adjoining lot. He asserted that all the authorities acknowledged receipt of his letter except the Defendant.

- [22] In the said letter, the Claimant complained that the owner/occupier of Lot 83 had built a structure on a reserve space, under which was a tunnel drain. He stated that as a result, surface water from his property could no longer run off into the drain. He also described the holes that had opened on his land and attributed their development to water erosion from the blocked drain.
- [23] Dr. Gyan stated further, that while carrying out construction work on his property on the 16th July 2003 to repair the eastern perimeter fence wall which was cracked in several places, a heavily leaking main was disclosed within the boundary line of his property. He denied that the main was ruptured by his workers while effecting foundation work for the new perimeter fence that he was erecting.
- [24] This witness stated that there were cracks in several areas in the walls of the building and the outfall drain at the north eastern corner of the building had a crack in it. On the 18th June 2003 Consulting Engineering Associates Limited inspected the property and submitted a report.
- [25] This witness related that he reported the leaking main to the Defendant, whose workers cut off the water supply for the portion of the line running alongside his property. He sent a letter dated the 21st July 2003 to the Defendant relative to the ruptured line.

[26] He denied knowledge of any third party developer of the land who laid the waterline within the eastern boundary of his property.

[27] Dr. Gyan stated that the Defendant's employees carried out repairs on the 4 inch PVC main passing on the eastern boundary of his land which stopped the leaks. Dr. Gyan stated further that he incurred expenses to rectify the damage caused by the leaking main for which he demanded that the Defendant compensate him.

Witness Statement of Vashty Maharaj

[28] The Claimant's wife, Vashty Maharaj, gave a witness statement in support of his case. Her evidence was on all points identical to his; no new testimony on the issues was given by her so that there is no need to reproduce her evidence.

Cross examination of Vashty Maharaj

[29] This witness was cross examined on the similarity between her witness statement and the Claimant's. She denied that her witness statement was a copy of his.

Witness Statement of Joseph Ragbir

[30] This witness, a building contractor, testified as to the works carried out by him on the Claimant's premises in 2003 and the cost of those works.

Cross examination of Joseph Ragbir

[31] Joseph Ragbir was briefly cross examined and did not add to the evidence contained in his witness statement.

EVIDENCE FOR THE DEFENDANT

Witness Statement of Wendy Agimudie

[32] The Defendant called Wendy Agimudie, Acting Payment Officer of the Defendant's south regional office.

[33] She testified that in 2003 she was the Supervisor Records Management, South Regional Branch of the Defendant. This department receives all correspondence sent to the Defendant and distributes such correspondence to the appropriate departments. Ms. Agimudie stated that she prepared the witness statement after having reviewed the correspondence records of the Defendant especially as they referred to the Claimant.

[34] This witness asserted that on the 22nd July 2003 she received three documents for the Defendant's Legal Department:

- a. A letter dated 10th June 1999 comprising two pages addressed to the Director/Chief Engineer WASA from Mr. Vishnu Gyan;
- b. A copy of a hand written letter dated 21st July 2003 comprising one page from Mr. Vishnu Gyan addressed to Mr. Errol Grimes, CEO WASA;
- c. A cadastral sheet for Central Park Limited Phase 1A.

[35] Ms. Agimudie testified that a perusal of the records showed the letter dated the 10th June 1999 was received by the Defendant on the 22nd July 2003.

Cross examination of Wendy Agimudie

[36] This witness was briefly cross examined and did not add to the evidence contained in her witness statement.

Witness Statement of Leon Toppin

[37] Mr. Toppin was a Project Manager employed by WASA; in 2003 he was the Surveys Superintendent in charge of the Surveys Department.

[38] He testified that in August 2003 he was instructed to conduct a survey of the Claimant's premises in order to determine whether the 100mm waterline was within the boundary of Mr. Gyan's property.

[39] Prior to conducting the survey, Mr. Toppin obtained copies of all relevant plans and drawings from Land and Survey Division and gave notice of the survey to Dr. Gyan. On the 2nd September 2003 Mr. Toppin and his crew conducted a survey on the Claimant's premises in his presence and with his consent. Mr. Toppin observed that the Claimant was erecting a wall along the eastern side of his property boundary 'which enclosed the 100mm waterline.'

[40] Mr. Toppin gave the data collected during the survey to the Defendant's draughtsman who prepared a survey plan. He checked the plan against the data collected and was satisfied that the survey plan aforesaid was a correct representation of the data collected during the survey at the Claimant's premises.

[41] He testified that the waterline was within the Claimant's boundary and had not been laid by WASA.

Cross examination of Leon Toppin

[42] In answer to Counsel this witness clarified that he visited the Claimant's property in order to determine whether the 100mm waterline was within the boundary of the Claimant's property. Mr. Toppin asserted that the pipeline shown on a dotted line on the plan marked 'L.T.1' represents a WASA line passing within the Claimant's boundary. He acknowledged that he did not say in his report that the pipeline belonged to WASA. This contradicted his evidence in chief that the said pipeline had not been laid by WASA. This statement also contradicted the Defendant's plea that the pipeline had not been laid by WASA.

Witness Statement of Andy Ragoobar

[43] Mr. Ragoobar is a Senior Projects Manager, Emergency Systems by the Defendant. He testified that in 2003 he was an Engineering Technician.

[44] He related that on the 19th July 2003 at approximately 8:30 am he received a report of a leak on the Claimant's premises from the Regional Manager South. He went to the said property where he met the Claimant who took him to the site of the leak located on the northern side of his property. Mr. Ragoobar noted ongoing construction of a wall in the vicinity of the leak and he stated that the Claimant informed him that the workers were augering the foundation for a fence wall.

[45] This witness observed that the water was gushing quickly and flowing into the storm drain; there were no signs of waterlogging or mosquito infestation.

[46] He testified further that on the 20th July 2003 the Carlsen Field Crew led by the zone manager responded to a call of a broken water main at the Claimant's premises and repaired it. A job case was created for this repair and it was annexed to Mr. Ragoobar's witness statement.

[47] The Claimant requested that the water main be removed from his property and this was done two days later. He visited the Claimant's house on 6th July 2005 and observed that it was repaired.

Cross examination of Andy Ragoobar

[48] This witness asserted that the leaking pipeline that he found on the Claimant's premises was a WASA main. He based his conclusion on the fact that the water was clear and smelled of chlorine. Mr. Ragoobar also stated that his boss would only send him on a WASA job. Oddly, this witness could not say whether the pipeline was within the Claimant's boundary.

[49] Mr. Ragoobar confirmed that the following day the Defendant's workers isolated the line that was gushing water and redirected the water so that it no longer flowed through the line. He could not say, however, that this was done because the line was on Dr. Gyan's property.

ISSUES

[50] The following issues fall to be determined:

- a) Is this action statute barred?***
- b) Has the Claimant established a causal link between the damage sustained on his premises and the leak on the Defendant's water line?***
- c) Is the Defendant liable in nuisance for any damage sustained by the Claimant?***
- d) Does the rule in *Rylands v Fletcher*⁶ apply?***

⁶ 1868 LR 3HoL 330

Issue (a)

Is this action statute barred?

[51] **Section 3** of the **Limitation of Certain Actions Act Chap 7:09** provides:

“3. (1) The following actions shall not be brought after expiry of four years from the date on which the cause of action accrued, that is to say:

(a) Actions founded on contract (other than a contract made by deed) on quasi-contract or in tort;...”

[52] The onus, therefore, was on the Claimant to make out a case in negligence against the Defendant by proving on a balance of probabilities that he sustained damage as a result of the negligent acts by the Defendant within four years of the date of the claim.

[53] The Claimant pleaded that from or about the year 2000 or prior the Defendant’s water main or line burst and/or began to leak on the eastern boundary of his land. This water percolated onto his premises. However, the damage which he set out in the Particulars of Damage is not referable to his pleading with respect to when it occurred.

[54] In his letter dated 10th June 1999 addressed to WASA (which the Defendant denied receiving in 1999), the Claimant sets out the damage to his property which occurred in 1994:

- i. A hole 10 feet by 10 feet by 5 feet deep in the north eastern corner of the property;
- ii. A smaller hole 5 feet by 5 feet by 3 feet between Lot 93 and 94.

He also indicated that there was no land erosion on his Lot (84) and Lot 83. He complained in that letter that the owner of Lot 83 had occupied a drain reserve in the development and had erected structures on it. As a result, surface water from his property could not enter the tunnel drain under the drain reserve.

[55] Under **Particulars of Damage** the Claimant itemized the damage to his property which included:

- i. Perimeter wall crack in several areas along the length of the wall;
- ii. Perimeter slab of the building settle at north eastern corner of the house;
- iii. Cracks in several areas in the walls of the building;
- iv. Drain at the north eastern corner of the building has a crack across its width;
- v. A 'crate' at the north eastern corner of the property;
- vi. A hole in the ground in the vicinity of the cracked out fall drain.

[56] There is no pleading by the Claimant as to when the damage outlined above occurred. Of note is the fact that in 1999 he only complained about holes that had been created in 1994 and the inability of surface water to flow out of his property into the tunnel drain. There was no allegation about cracks along his perimeter fence or in the walls of his house. There is no evidence of further correspondence on this issue between 2000 to 2003 when the next even occurred which was the discovery of the leaking water main. It was incumbent upon the Claimant to plead the date when this damage occurred. At the time when the leaking water main was discovered the Claimant was in the process of

carrying out repair works on the eastern perimeter fence wall⁷. However, the Claimant gave no admissible evidence that the damage to the wall was caused by the negligence of the Defendant within the limitation period.

[57] In his Amended Statement of Case, the Claimant pleaded⁸ that from or about the year 2000 **or prior to same**, the Defendant's water main burst and began to leak on the Claimant's eastern boundary of his property. However, there is no evidence to support this pleading. To the contrary, from the Claimant's own case there was water from another source on his land – rain/surface water which could not flow out to the drain because the occupier of Lot 83 had built structures over the reserve drain. As well, there were several holes which appeared on his property in 1994 as well as a hole between Lot 93 and Lot 94 also in the same year.

[58] In **Rameshwar Maharaj & Anor v Andrew Johnson & Ors**⁹ Mr. Justice Rajkumar (as he then was) opined¹⁰:

“50. The Court analysed the law relating to limitation in cases of tort as follows:

(i) a cause of action in tort can accrue for the purposes of limitation without the claimant being aware of it;

(ii) the existence of actual damage for these purposes does not therefore depend on the claimant's state of knowledge in relation to the breach of duty or its consequence but on whether the breach has in fact caused actual loss;

⁷ Witness Statement of Vishnu Gyan, para 5

⁸ Amended Statement of Case, para. 5

⁹ CV 2012-00789

¹⁰ Paras 50-52

(iii) in determining whether actual damage has occurred, one must assume, that the claimant was aware of the breach at the time of its commission and assess the impact of that breach on the claimant's property or other assets at that date.

*51. The Court accepted in full the reasoning of the **Bell** case on the question of whether or not the Defendants owed a continuing duty to the Claimant. It concluded that no special facts were pleaded to support the claim in this regard...*

52. It held that even if the duty owed by the solicitors was a continuing one of the kind alleged, that duty could make no difference to the time when the limitation period began to run in a cause of action founded in tort because the cause of action accrued when loss was first suffered as a consequence of the breach of the alleged continuing duty."

[59] On the facts before me it would appear that the Claimant suffered damage to his property before the year 2000 which would be outside the limitation period to ground the claim for the tort of negligence or nuisance. He had pleaded no facts nor adduced any evidence to support the contention that the damage in respect of which this claim is based occurred during the limitation period.

[60] I therefore hold that the claim is statute barred. This is sufficient to dispose of this case. I will, however, consider some of the other issues enumerated above.

Issue (b)

Has the Claimant established a causal link between the damage sustained on his premises and the leak on the Defendant's water line?

[61] As noted above apart from his plea that from the year 2000 or earlier the Defendant's water main burst and began leaking on the eastern perimeter of the Claimant's property and percolated onto his land, there was no other pleading to support the allegation that it was water from the Defendant's water main which caused the damage complained of by the Claimant. No admissible evidence was adduced by the Claimant to support this contention. In proof of his claim that water from the Defendant's line percolated his land and caused damage to the structures thereon, it was necessary, in my view, that the Claimant adduce admissible expert evidence in support of his case. This was not done. He attempted to put in a report from a company **Consulting Engineering Associates Limited** but this report was struck out on the basis that it did not comply with **Civil Proceedings Rule 33**. Additionally, the report was unsigned, undated and there was no indication as to the qualification of the person or persons who prepared this report. The court had to determine the source of the water which caused the alleged damage to the Claimant's property. Further, as noted above, there were two possible sources of water on the Claimant's land – rainfall runoff as well as water from the Defendant's pipeline. In the circumstances, expert evidence was required in order to assist the court in determining on a balance of probabilities whether water from the Defendant's pipeline caused damage to the Claimant's property¹¹.

[62] This case is similar to the **Harvey Nichols** case cited above in that there was no direct evidence as to the origin of the water that had caused the alleged damage to the Claimant's walls and perimeter fence. In the absence of this evidence and assuming that the claim had been brought within the limitation period, I am unable to determine on a balance of probabilities that it was water from the Defendant's main which percolated onto the Claimant's land and caused the damage which is the

¹¹ *Harvey Nichols & Co. Ltd v Thames Water Utilities Ltd* 1999 All ER (D) 1272

basis of this claim. In the circumstances I hold that the Defendant has failed to prove that his premises was damaged by water that originated either entirely or substantially from the Defendant's main.

Issue (c)

Is the Defendant liable in nuisance for any damage sustained by the Claimant?

[63] In the case of **Department of Transport v North West Water Authority**¹² the House of Lords, adopting the propositions of Webster J at first instance¹³ opined:

“(1) In the absence of negligence, a body is not liable for nuisance which is attributable to the exercise by it of a duty imposed on it by statute;

(2) It is not liable in those circumstances even if by statute it is expressly made liable, or not exempted from liability, for nuisance;

(3) In the absence of negligence, a body is not liable for a nuisance which is attributable to the exercise by it of a power conferred by statute if, by statute, it is not expressly either made liable, or not exempted from liability, for nuisance;

(4) A body is liable for a nuisance by it attributable to the exercise of a power conferred by statute, even without negligence, if by statute it is expressly either made liable, or not excepted from liability for nuisance.

¹² 1983 3AER 273

¹³ 1983 1 AER 892

[64] I have already held that the Claimant has not established on a balance of probabilities a causal link between the damage to his property and any negligence of the Defendant. The **Water and Sewage Act** Cap 54:40 does not make the Defendant liable, in the absence of negligence, for any nuisance attributable to the exercise of any power conferred on it by the **Water and Sewage Act**. The Act neither makes the Defendant liable in nuisance nor exempts it from liability for nuisance. Accordingly, in the absence of negligence, it could not be made liable for nuisance¹⁴.

[65] In **Geddis v Proprietors of the Bann Reservoir**¹⁵ Lord Blackburn opined:

“For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, ‘negligence’ not to make such reasonable exercise of their powers.”

[66] I note that the Fourth Schedule¹⁶ of the **Water and Sewage Act** provides for compensation to a land owner where any damage is caused to his property by reason of the laying or repair of such main by an undertaker licensed by the Water and Sewage Authority. Where there is a dispute as

¹⁴ Department of Transport v North West Water Authority supra

¹⁵ 1878 3AC 430 at pgs. 455-456

¹⁶ (4) Where the undertakers, in the exercise of their powers under this paragraph, lay a main in, on or over any land not forming part of a street, or inspect, repair, alter, renew or remove a main laid in, on or over any such land, they shall from time to time pay compensation to every person interested in that land for any damage done to, or injurious affection of, that land by reason of the inspection, laying, repair, alteration, renewal or removal of the main. Any dispute as to the amount of compensation to be paid under this subparagraph shall be referred to arbitration.

to the amount of compensation to be paid, the section provides that this issue shall be referred to arbitration.

[67] I agree with the submission of the Defendant that the fact that Parliament made provision for compensation where damage was caused to a landowner by the existence of a main on its premises, indicates that Parliament foresaw that damage could arise from the statutory duty given the Defendant to lay, inspect or repair mains where those mains were laid over privately owned land. The legislature thereby provided for the compensation where a possible nuisance could arise from the execution of its statutory duty imposed upon the Defendant. In such circumstances, the Claimant could not pursue a claim for negligence against the Defendant.

Issue (d)

Does the rule in Rylands v Fletcher apply?

[68] The Authors of Halsburys Laws of England¹⁷ describes the rule in **Rylands v Fletcher** thus:

“A person who, for his own purposes, brings onto his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape.”

The Authors opined further that the occurrence of damage as a result of the escape should have been reasonably foreseeable before liability can be imposed. It should be noted that the rule applies only to a non-natural user of land. It does not apply in cases where there is statutory

¹⁷ 5th Ed. Vol 78 para 148

authority. As noted earlier, clear terms must be used in a statute in order to impose strict liability for nuisance¹⁸.

[69] The Act under consideration in this case, the **Water and Sewage Act**, does not impose liability for nuisance against the Defendant in giving effect to its statutory obligations. In the circumstances I hold that the Defendant is not liable in nuisance for any alleged damage occasioned the Claimant.

CONCLUSION

[70] Having regard to my findings above I hold that the Claimant has not established a case, on a balance of probabilities, in either negligence or nuisance against the Defendant.

[71] I therefore Order:

1. The Claimant's case against the Defendant is dismissed;
2. The Claimant to pay the Defendant's costs to be assessed by Registrar in default of agreement.

Joan Charles

Judge

¹⁸ Hammond v St. Pancras Vestry 1874 LR 9CP 316, Smeaton v Ilford Corp 1954 Chancery 450