

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. **CV 2018-01940**

BETWEEN

BORDE RAMLOGAN

Trading as

“BORDE RAMLOGAN AND SONS”

Claimant

AND

NIRANJAN RAMLOGAN

Defendant

Before the Hon. Madam Justice C. Gobin

Date of Delivery:

Appearances: -

Mr. Anand Ramlogan SC, Mr. Alvin Paraingsingh instructed by Ms. Chelsea Stewart for the Claimant

Mr. Stepan Mungalsingh instructed by Ms. Abigail Roach for the Defendant

JUDGMENT

1. The owner of lands through which a natural watercourse flows (a riparian owner) is entitled to an unimpeded flow of water to and from his lands. Mr. Bill Ramrattan, Structural Engineer, and expert witness defined a natural watercourse as

*“any brook river, stream, lake or pond **that is naturally occurring**. A man made ditch is not and therefore the distinguishing factor **is what is naturally occurring**”.*

The central issue in this case is whether a natural watercourse exists on the ground traversing the Claimant’s and the Defendant’s lands.

Background

The Claimant’s case

2. The Claimant, Borde Ramlogan and the Defendant, Niranjana Ramlogan are the owners of two adjoining parcels of land situate along the Eastern Boundary of the Southern Main Road, Chase Village, Carapichaima. For ease, I shall respectfully refer to them by their first names. Borde claims that at “all times there existed a **natural watercourse** which provided drainage and acted as a filtration system preventing the development of a catchment area on his premises and the neighbouring lands”. He claimed the natural watercourse “filtered into an underground box drain which facilitated the ease of water through his premises and the neighbouring lands”.
3. These proceedings for damages in nuisance and other declaratory reliefs, commenced on May 29, 2018 with an urgent application for a mandatory injunction compelling Niranjana to restore the watercourse by removing blockage placed by him to allow the free flow of water. Borde claimed that Niranjana had done certain earthworks on his lands in November 2016 which blocked the exit point of the underground box drain. The obstruction caused water to back up into his lands especially during heavy periods of rainfall. This caused severe flooding in the warehouse from time to time, and as a result he suffered property damage and financial loss

in the sum of \$1,621,393.56. He was particularly hard hit during the course of tropical storm Bret in August, 2017.

The Defendant's case

4. Niranjan has, from the inception, denied the existence of a natural watercourse running across both plots. He claimed that Borde illegally developed his property in 2014 by adding a huge extension to his existing dwelling house, a shed/warehouse from which he conducts his auto parts business under the name Borde Ramlogan and Sons among others. In the course of this construction Borde built an underground box drain which collected his surface and rain water and wrongly discharged it into the southern boundary of his lands. Borde admits constructing the box drain.

5. Niranjan did not deny blocking the outflow. He claimed to be entitled to do so because Borde's land development included a solid foundation which raised the level of his plot. He claimed that as a result of the works and the construction of Borde's box drain, the increase in outflow and the concentration of water channelled by it caused ponding on his plot, especially during the rainy season. This ponding created a health hazard. It caused a mosquito infestation and could encourage an environment for snakes and caimans to inhabit and it further threatened the support of a building on it. He was therefore entitled to and took steps to protect his property by backfilling and raising the level of his own land. He admits that in the course of the works the box drain was indeed blocked. He claimed he did his works after he had consulted with Public Health Officials as to what he should do to prepare for a bar license application. He needed to deal with the water pooling on his lands and to make it safe for patrons.

6. The parties have strong family connections to the lands and have been familiar with it for most of their lives. Borde claims to have lived on his plot for most if not all of his years. Niranjan may have done so for some time as a child but even when he did not actually live there, he visited his grandfather and other relatives, in what I believe was their ancestral family home.

Very early on, in the course of case management, directions were given for the early trial of the matter on liability. The issue of whether there was a natural watercourse traversing both parcels was identified as the main issue.

The Intervention of Local Authorities

7. The problem which led to this litigation began some time in 2016 at a time when there was a pending boundary dispute between the parties, in court. Within days of Niranjana starting his landfill works, on 18/11/2016, Borde lodged a formal complaint with the Couva/Tabaquite/Talparo Regional Corporation, that the watercourse had been blocked. As a result of Borde's complaint, visits were made by representatives of the Corporation as well as from the Drainage Division of the Ministry of Works and Transport.

8. On 22/11/2018 the Corporation issued a Notice pursuant to section 145 of the Municipal Corporations Act calling upon Niranjana to remove the obstruction to the drain. The notice was in this form –

REPUBLIC OF TRINIDAD AND TOBAGO

Couva/Tabaquite/Talparo Regional Corporation
Railway Road, Couva. Phone:636-1872/1717 Fax: 636-9161

Ref No. 015

ENGINEER'S NOTICE FOR OBSTRUCTION OF DRAINS

NAME: NARANJAN RAMLOGAN

ADDRESS: 27 2nd STREET, SAN JUAN

**OCCUPIER AND PERSON IN POSSESSION OF THE LAND LOCATED AT: 570
COUTHEN MAIN ROAD, CHASE VILLAGE, CARAPICAIMA.**

TAKE NOTICE that you have contravened section 145 of the Municipal Corporation Act No. 21 of 1990 by impeding free flow of water.

ALSO TAKE NOTICE that you are hereby required within fourteen (14) days after receipt of this Notice to show cause in writing, **why the unauthorised obstruction of the drain**, located at 570 SOUTHERN MAIN ROAD, CHASE VILLAGE, CARAPICHAIMA should not be removed.

Section 145 of the Municipal Corporation Act No. 21 of 1990 (hereinafter referred to as “The Act”) states:

A person who impedes the free flow of water in—

(a) any ditch, drain or water course in or adjoining any street within a Municipality;

(b) any ditch, drain or water course on any land into or through which water from any such street flows or any ditch, drain or water course under any such street, (is guilty of an offence and liable to a fine of one thousand dollars and to a further fine of one hundred dollars for each day the offence continues after conviction).

Now therefore, the Council as the Authority under section 163 (1) of the Act do hereby serve you notice that you are required within **fourteen (14) days** by a statement in writing under your hand addressed and duly served upon the Council to **show cause** why such building or such works should not be removed, altered or pulled down.

If you fail to comply with this Notice on or before the said fourteen (14) days or fail to show sufficient cause why the obstruction of the drain should not be removed, altered or pulled down by your statement, the Council may remove, alter or pull down the said building or other structure or works (**Section 163 (1)**), after notification to you of its decision on your statement, if any; or after notification to you of its decision.

FURTHER TAKE NOTICE that if you to fail to forthwith comply and maintain compliance of this notice served to you, such failure renders you liable to a fine of one thousand dollars (\$1000.00) and to a further fine of one hundred dollars (\$100.00) for every day during which you continue or permit such work as the case may be, granted by the Municipal Corporations’ Act (Act No. 21 of 1990), Section 145. Failing to do so, this will be undertaken by the Corporation at a cost to be incurred by you.

Kimberly Baptiste
Engineering and Survey Officer
Couva/Tabaquite/Talparo
Regional Corporation
22/01/2018

.....
Chief Executive Officer
Couva/Tabaquite/Talparo
Regional Corporation

9. In an immediate response to the notice, Niranjana wrote to Ms. Baptiste insisting that there was no drain or watercourse crossing his property. He enclosed copies of survey plans drawn by the following licensed surveyors:-

Mr. Nasser Abul – 08/02/1990 (of Borde's plot)

Gregory Jardine – 24/09/1999 (of Niranjana's predecessors)

Lizabith Ann Hamilton – 15/04/2014 (of Niranjana's).

He pointed out that none of these plans showed a watercourse traversing the two parcels. The Corporation took no steps toward enforcement thereafter.

The claims for Declaratory relief under the Municipal Corporation Act

10. In addition to his claim for damages in nuisance in these proceedings, the Claimant relied on the issuance of the notice above, to support his claims for the following specific declarations.

(1) A declaration that the Defendant's actions of backfilling the lands neighbouring that of the Claimants, thereby blocking the Natural Drainage Watercourse was in Direct Contravention of S. 145 of the Municipal Corporation Act Chap. 21 of 1990

(2) A declaration that by virtue of the Defendant's breach of S. 145 of the Municipal Corporation Act Chap. 21 of 1990, the Claimant has suffered degradation, substantial drainage due to flooding and the consequential devaluation and destruction of the Claimants private and commercial goods.

11. This part of the case can be determined summarily. These reliefs were claimed on the premise that:-

(1) S.145 of the Act was applicable.

(2) the mere issuance of the notice settled the question of the existence of a natural watercourse.

Having considered the terms of S.145 I find that these claims were misconceived.

12. S.145 provides:-

145. A person who impedes the free flow of water in—

(a) any ditch, drain or water course in or adjoining any street within a Municipality;

(b) any ditch, drain or water course on any land into or through which water from any such street flows or any ditch, drain or water course under any such street, is guilty of an offence and liable to a fine of one thousand dollars and to a further fine of one hundred dollars for each day the offence continues after conviction.

The section provides for different ways of committing an offence of impeding the flow of water. The notice to Niranjana specified blockage of a "drain" as opposed to a ditch or a watercourse. Even on the face of it therefore it did not support the Claimant's case that Niranjana had blocked a "natural watercourse".

13. But in my opinion the Corporation had no jurisdiction even to issue the notice in the circumstances of this case. There was no allegation of obstruction of the flow of water "in a ditch, drain or watercourse adjoining a street" within the contemplation of the Act. Neither was there a complaint of obstruction of the flow "into a street" or from "under any street". At all times this was a complaint of interference with a natural watercourse on private property. In the circumstances, I hold that S.145 of the Municipal Corporations Act Chap. 21 of 1990 is inapplicable and I attach no weight or significance to the issuance of the notice.

The claim in Nuisance

14. The sole claim which remained was one of damages for Nuisance and this required the factual determination of whether there was a natural watercourse traversing the properties. On this issue the Claimant relied on:-

(1) His witness statement to which were attached several documents including:-

(a) A planimetric map,

(b) An aerial photograph of drainage mapping,

(c) Documents indicating action/findings/recommendations of the Corporation in response to his official report on the obstruction.

(2) the expert report and evidence of Mr. Bill Ramrattan, Structural Engineer.

(3) the evidence of Mr. Patterson Dick, Supervisor Drainage, Ministry of Works and Transport who was summoned under Part 40 to assist the court on some documents produced by Borde.

15. The Defendant relied on his own witness statement and that of his sister Neroupa, who in addition to her witness statement provided photographs and video footage of the area of the exit point of the alleged watercourse on Niranján's plot, prior to the year 2016.

16. Sometime after the close of the evidence a site visit was conducted. Mr. Dick was good enough to attend to assist the court. Borde was out of the country, but was represented by his daughter Dinelle. At a hearing following the visit and after I had seen the box drain on the ground, I enquired as to whether the Claimant would provide the building plan or the drawings for the extension and the warehouse, which I thought might assist. I did not request any further survey plans. Thereafter Borde's daughter, Dinelle Ramlogan sought leave to file a witness statement to which there were attached for the first time, several survey plans. She purported to provide explanations of them and sought to put them in the context of what would have been observed by the court and parties on the site visit.

17. I had not invited any further witness statement. I viewed this as an attempt to introduce evidence that on the face of it would have been available before the trial. It was a late attempt in my view to provide additional evidence on the central issue in the case. I was not prepared to consider the contents of the witness statement. I also declined the claimant's invitation to have Mr. Dick return to court to give further evidence after the site visit. I did not consider it necessary. If those applications were not formally dealt with, I indicate now that I was not prepared to entertain them.

Finding/no natural watercourse

18. The resolution of the factual issue as to the existence of the natural watercourse turned on the credibility of the witnesses and the contents of the documents and the more contemporaneous photographs and video footage, and my own observations on the ground. I noted generally that the Claimant's case appeared to be shifting to one of the existence, not

of a “natural watercourse”, but of a natural drainage path which in my view, is not one and the same thing.

19. Having considered the evidence I find that the Claimant’s claim of the existence of a natural watercourse must be rejected and his claim has to be dismissed with costs. The following are my reasons:-

Assessment of credibility/the evidence

20. Borde at all times admitted that he had constructed an underground box drain to facilitate the ease of the flow of water under the solid concrete foundation of the warehouse. On the site visit I saw the drain in the warehouse. It was visible at points at which manhole covers had been removed. It appeared to be at least a metre deep. It is a paved defined channel. Borde’s expert, Mr. Ramrattan was clear in his correspondence, that a man made ditch, or I would add, a man made box drain, is not a naturally occurring feature. This alone could have settled the issue in the defendant’s favour.
21. The Claimant claimed that the “natural watercourse” is what provided drainage across several properties. The Defendant, on the other hand said that all the properties had drains running east to west to carry water on the Southern Main Road. The plan produced by Mr. Ramrattan confirmed Niranjan’s assertion that there is one such drain on his property, and two such drains appear on Borde’s plot at the base of the inner walls on both his Northern and Southern Boundary lines. The site visit confirmed that those drains on Borde’s property are quite shallow, but I believe their capacity was severely and deliberately reduced during the construction of the foundation and the underground drain. The foundation was sloped almost imperceptibly to change the direction of the flow of water away from the street and unto the box drain to be discharged on the Defendant’s property.
22. The credibility of Borde’s claim to the unimpeded flow of water has to be viewed in light of his having flouted every law that is aimed at regulating the development of property and

particularly drainage. His witness Mr. Ramrattan put it best when in answer to the court he said *“the statutory authorities tend to stop or they should stop illegal actions but people violate this thing, everything, we do things arbitrarily in this country”*. Mr. Ramrattan could well have been describing Borde’s conduct in this whole business and raises a question as to why his illegal actions were allowed to continue. He made no application under S.8 of the Town and Country which is mandatory.

23. Borde failed to comply with S.36 of the Public Health Ordinance Chap 12 No.4 thereby excluding the involvement of the Corporation and its jurisdiction to deal with his drainage proposals. The relevant provisions of the act SS.36, 37 and S.55 are set out. The provisions are:-

36. (1) No owner of any land wheresoever situate shall utilise such land for the erection of buildings or lay out such land into building lots, without having obtained the previous approval in writing of the local authority.

(2) The application for the approval of the local authority shall be in writing and shall be accompanied by a plan in duplicate of the buildings to be erected and in the case of building lots, of the land, prepared, if so required by the local authority, by a Licensed Land Surveyor from an actual survey on the ground. Such plan shall show –

- (a) contours of the land at such vertical intervals as the local authority may require
- (b)...
- (c)...
- (d) the course of the proposed drainage;**
- (e)...

37. (1) After consideration of the application and plan, the local authority may refuse the application or approve of the same either unconditionally or subject to such modifications or alterations to the plan as the local authority may think necessary or desirable. Approval of the application and plan shall be evidenced by the signature of the local authority on the plan, one copy of which shall be returned to the applicant.

(2) The refusal of the local authority to the approval of any application and plan submitted under section 36 or any modifications or alterations made thereto shall only be permissible on the following grounds, -

- (a)

(b) inadequacy of the measures taken by the owner for filling in or leveling the area for the general drainage of the area;

(c) inadequacy of the proposed drainage of the building or building lots;

(d).....

(e)...

(f)...

55. (1) Every dwelling-house shall be provided **with a sufficient privy and proper drains for the efficient carrying off of storm and slop water to the satisfaction of the local authority.**

(2) No dwelling-house shall be erected or rebuilt, nor shall any building be occupied as, nor be converted by alteration into, a dwelling house, unless the same is provided with **a sufficient privy and proper drains for the efficient carrying off of storm and slop water to the satisfaction of the local authority.**

(3) Every person who does or causes to be done anything in contravention of this section shall, for every such offence, be liable to a fine of ninety-six dollars.

24. Before he constructed the box drain directing the flow of water to Niranjan's land, Borde failed to follow the procedure stipulated under S.39 of the Ordinance which was applicable.

39. (1) **Any person interested in land, including an owner or occupier or any encumbrance thereof who desires to drain the same, or any local authority who think it expedient to drain any lands within their district whether vested in them or not, and in order thereto deem it necessary that new drains should be opened through lands belonging to another owner should be cleansed, widened, straightened, or otherwise improved, may apply to such owner, who is herein referred to as the adjoining owner, for leave to make such drains or improvements in drains through or on the lands of such owner.**

(2) Any such application as aforesaid shall be by notice in writing under the hand of **the applicant** or the local authority, as the case may be, and shall be served on the owner, and also on the occupier, if the owner be not the occupier, in manner in which notices are required to be served on owners and occupiers under this Ordinance. **The notice shall state the nature of such drains or improvements in drains, be accompanied by a plan, on which the length, width, and depth of the proposed drains or improvements in drains shall be delineated, and the approval in writing of the local authority are not the applicants, and shall further state the compensation, if any, which the applicant proposes to pay.**

25. Still further, Borde managed to ignore the relevant provisions of the Municipal Corporations Act which were also applicable. S.158(1) S.168 and S.169 provide:

158. (1) Every addition to or alteration of any building within a Municipality, and **any other work made or done** for any purpose in or upon any such building, **shall, so far as regards such alterations or additions, or such other work, be subject to the provisions of the Town and Country Planning Act**, to the provisions of this Part and of the Building Regulations and of any other written law applicable to such Municipality.

168. Any person who in any Municipality—

(a) erects or alters any building without having the plans thereof approved by the Council;

(b) erects or alters any building or alters any building in any wise contrary to the plans and sections which have been approved by the Council; or

(c) otherwise offends against any of the provisions of this Part or of any Regulations made hereunder if no penalty is elsewhere prescribed, is liable for each offence to a fine of one thousand dollars and, in the case of a continuing offence, to a further fine of one hundred dollars for every day during which such offence continues after notice thereof from the Council.

169. No building may be constructed within a Municipality over any drain, ravine or storm-water channel, unless specifically agreed to by the Council and upon such conditions as the Council may consider necessary to impose.

26. Even after the Corporation issued a show cause notice notifying him of a violation of S.46 SS (1) of the Public Health Ordinance while his construction works were in progress, Borde ignored the notice and continued erecting without the consent of the Couva/Tabaquite/Talparo Regional Corporation. He completed a structure which is three levels high in some parts. The roof of the warehouse extends and falls squarely on Borde's northern and southern boundary lines. There is no building line setback. He raised the level of the ground with a solid foundation. He paved the area in front of the dwelling house to accommodate parking spots off the Southern Main Road. These actions were bound to interfere with the flow and concentration of surface run-off from lands to the south and from my observations, even from the Southern Main Road, in front of the property where the drains appeared to be somewhat shallow.

27. The issuance of the show cause was raised in the Defence. Borde admitted receiving the notice but said it was irrelevant to the proceedings. It is difficult to understand how the Claimant could adopt the position that the absence of approvals from the relevant statutory agencies charged with the responsibility of regulating land development, and particularly the adequacy of drainage facilities could be irrelevant especially in light of the Defence in which it was averred:

Paragraph 3 (iii) the Claimant has no planning permission to develop, build, engineer or use the Claimants land as a commercial building under the Town and Country Planning Act.

(19) The Claimant failed to provide adequate drainage for his illegal commercial building, and it was unreasonable for the Claimant to expect the Defendant to allow the Defendant's land to operate as a flood plain continuously...to the detriment of the Defendant, to provide drainage to the Claimant. The Defendant avers that the Claimant created his own loss.

The matters raised in these paragraphs of the defence were relevant to issues of causation as well as to the general defence of the Defendant being entitled to protect his property from damage caused by the unusual discharge of water from Borde's property, whether it was as a result of rain or otherwise against a common-enemy, flood waters. **(Neild and Anor v The London and North Western Railway Company [1874] LR Ex.(4)**

28. The Claimant's conduct was indicative of a mind-set of a disregard for law and the regulations and his legal obligations to neighbours which did not find favour with the court. But it explained why Borde was left to rely on a somewhat thin case of the existence of a "natural watercourse" to substantiate his claim. Having ignored the laws which were designed to ensure compliance with proper drainage and building supervision by the relevant authorities, he could only rely on "riparian rights" to shift the blame for the consequences of his own illegal actions from himself to his neighbour.

29. To return to the evidence, Borde produced documents purporting to have emanated from authorised departments to support his claim. The production of the Planametric did not help

his credibility. This document was introduced at paragraph 5 of the reply to the defence in response to the denial of the existence of the watercourse in the words of the pleadings:

“to confirm same by virtue of the 1970 Planometrics Map of the Town and Country Planning Division which exhibits the natural watercourse”.

30. The Defendant served a notice requiring the maker of the map or a person from the Division from which it emanated to attend at the trial to explain it. The Claimant could produce no one to explain it. When he was asked about it, Borde admitted he had imposed writings and notifications on what was supposed to be an official document. And quite significantly in my view the impositions were not in hand, but they were made to appear to form part of the document. The “plan” bore a date 19th January, 2018 which was mere months before this claim was filed in May 2018 which begs the question – why if it had been produced then, was no official available to explain it. In the right hand column of the document this reference appeared –Map Request- Drainage Complaint T59/1715/2014.

31. I have drawn adverse inferences from the failure to produce any officer from the Town and Country Planning Division to verify and explain the document. I believe what might have been the original record related to a complaint made in the year 2014, even before Niranjan had done the works complained of. In my assessment this document may well have been tampered with to mislead the court. The document was shown to Mr. Dick, Drainage Supervisor, while he was in the witness box. He claimed to have no knowledge of such a document. What he did explain was that a planametric plan would show contours of the land, but it would not indicate the location of a natural watercourse as Borde claimed it did and as he intended to prove.

32. As part of his evidence Borde also produced an aerial photograph which he described as “an aerial view of drainage mapping in the general area of the parties’ and neighbouring lands, which he claimed “was provided by the Corporation”. If this was an official document, provided on a proper request by a citizen and so critical to the main issue in this case, it is again

surprising that no-one from the drainage department at the Corporation was called to explain it. The Claimant was content simply to produce the photograph without more.

33. On the photograph there were markers indicating “Borde Ramlogan site” and “Drainage Complaint Site” and the numbers T5 2031-2013 appear. There are three yellow pins indicating three sites. When Mr. Dick was shown the photograph, he again immediately disclaimed all knowledge of it. This was a gentleman from the drainage division of the Ministry who had been summoned to assist the court because he “had been involved in the matter”. I would have expected him to be familiar with aerial drainage photographs, which I expected would have shown the network of Corporation drains. If he had investigated a drainage complaint in that area he should have come across this document, whether the drain in issue was a Corporation drain or not.
34. When he said he knew nothing about it, Mr. Dick was asked to assume that what was indicated on the aerial photograph as Borde’s property, was in fact his. He was then invited to map what he himself had described as a drainage path or watercourse. Mr. Dick imposed some arrows to indicate the path of the flow of water leading from the south, through the parties’ lands. He began abruptly on a roadway south of the block with Borde’s land. But the arrows ran in a northerly direction clear of the eastern boundary of Borde’s warehouse. The arrows did not cross or join Borde’s warehouse. The path he mapped did not join what would have been box drain entering the southern side of the warehouse foundation.
35. The reference T5 2031-2013 appeared to me to refer to a 2013 drainage complaint, and as I observed above, the pins indicated three, not one complaint. In addition to Borde’s there were two others, and one of them is actually located on the outside of the southern wall of the warehouse. If that was the location of a drainage complaint, it does suggest that there was no free flow of water from the property on the south onto Borde’s property via a natural watercourse. The photograph which as annexed to Mr. Ramrattan’s report which purported to show “the drainage path” south of the Bordes’ building appears to be consistent with what

is reflected on the aerial photograph as a drainage complaint site on a 2013 document. The photograph shows water collecting but does not indicate the connection point “B” – indicated on Mr. Ramrattan’s map. This was a critical location. Borde’s case was that water from the south (shown in the photograph) flowed through an earth drain into his underground box drain.

36. The Claimant further produced a bundle of documents including internal exchanges between persons at the Corporation relative to the complaint against Niranjan’s obstruction. A memo from Engineering and Survey Officer, Kimberly Baptiste dated 28/11/2017 indicated that Borde’s complaint had been investigated. In her report she wrote:

“It is noted that a concrete drain is constructed through his (Borde’s) property exit through the adjacent property which is alleged to be blocked and continues through the other property adjacent to it”.

Ms. Baptiste was clear

“However, no watercourse was identified on any cadastral”.

Despite this conclusion Ms. Baptiste indicated that the matter was referred to the Drainage Division because:

“Drainage had previously investigated the matter and determined that there is indeed an existing watercourse which was blocked”.

37. The inconsistency in Ms. Baptiste’s findings and that of the Drainage Division is inexplicable. The lack of clarity and I daresay credibility is compounded by the report of the onsite investigator to which Ms. Baptiste may have been referring. Ms. Reece of the Drainage Division had indeed visited Borde’s site on 02/02/2017 when she made the following observations:-

(1) The watercourse of the concern is the tributary of the Chandergore River. (Then a line is drawn across the words Chandergore River and the words “interlot drain” are penned in). That change is not initialled, however the report continues: “the river runs along the western side of the Ramlogan’s property. The complaint is requesting to have the tributary reopen.....

38. This document raised a serious question as to its authenticity or whether the person who prepared it had actually visited the site. Neither party had suggested that the Chandergore River was located anywhere near the Claimant's western boundary or that the watercourse was a tributary of it. The Claimant did not produce Ms. Reece at the hearing. Instead it was suggested that Mr. Patterson Dick, Senior Drainage Officer would be a person who would be able to assist the court, and on the urgings of Senior Counsel for the Claimant I issued a summons to Mr. Dick under Part 40.6.

Evidence of Mr. Dick

39. Mr. Dick was asked about Ms. Reece's unavailability. He confirmed that she was still employed with the Ministry but in a different department. This was not satisfactory given the importance and relevance of her report to the central issue. When he was asked about Ms. Reece's findings which were somewhat strange in the context even of the Claimant's case, and about the change from assertion that "the watercourse" was a tributary of the river, to it being an interlot drain, Mr. Dick explained that at the time she made the report, Ms. Reece was new to the division and she had made some mistakes because she was unfamiliar with the area. This was even less satisfactory.

40. I was not satisfied with the explanation for Ms. Reece's unavailability and I have drawn adverse inferences from the Claimant's failure to produce her. I regret that the explanation that she made a mistake, was not sufficient to put the matter to rest. From the further report dated 28/02/2017 it emerged that Mr. Dick himself had visited the premises on 28/02/2017, less than four weeks later, with Ms. Reece, in relation to the same complaint. On that visit they met Borde's daughter at the site. By that date, Mr. Dick must have already had sight of Ms. Reece's first report which had contained the obvious errors that he attributed to her inexperience. He did not seek to rewrite or amend that original report. He did not indicate whether he is the one who identified what was found as an "interlot drain". He referred to Ms. Reece's letter of 06/02/2017 in his own of 19/05/2017. The credibility of the reports and the investigations

generally, was undermined because these inconsistencies were not sufficiently explained. They appeared in my view to be irreconcilable.

41. Mr. Dick was of little assistance on the “Planametric Map”, and on the aerial photograph. His location of the watercourse which he mapped on the photograph was inconsistent with Borde’s case. Essentially he sought to establish that as a result of the construction of a housing development further south, contours of the land in the area would have change causing a natural flow of water across Borde’s property into **Niranjan’s**. He concluded this mainly from his knowledge of the area and because the establishment of the housing development would have increased surface water run-off in the direction of the parties’ lands. He said because of this, water found its way from the development across other lands into Borde’s, and then on to Niranjan’s via **the natural drainage** path.
42. Mr. Dick attended the site visit and helpfully explained some of the landmarks. He assisted in finding some water which had collected under some very dense shrubbery about two lots south of the Borde’s property, just across a roadway which was shown on the photograph. Mr. Dick, had previously in court, during the course of his evidence, highlighted that point on the roadway. If the water at the bottom of the shrubbery was part of the “interlot” drain which he claimed was the source of the water, there was no evidence of a defined channel leading to the inflow point of Borde’s underground box drain. I found no real evidence to connect that water with what was described as the natural earthen drainage leading to the box drain on Borde’s premises. The site visit did not establish this. In order to fit it in the definition of a “natural watercourse” Mr. Dick attempted to label the interlot drain/box drain, a stream but I reject that.
43. What amounts to a stream has been considered in the case of **M’Nab v Robertson and Ors** [1897] AC 129 at 134-135. Lord Watson defined the word “stream.

According to my apprehension the word “stream in its primary and natural sense, denotes a body of water having, as such body, a continuous flow in one direction.

It is frequently used to signify running water at places where its flow is rapid, as distinguished from its sluggish current in other places. I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface; but, in my opinion, water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream.

Lord Shand (at page 138) stated:

I think the term "streams" necessarily means flowing water, and not water which oozes from a piece of marshy ground, and that unless water flows more or less in a channel, and continuously, it cannot be described as water that flows in "streams" leading to ponds.

Expert report of Mr. Ramrattan

44. The Claimant relied on the evidence of the expert Mr. Bill Ramrattan, Civil Engineer, who produced a report after a site visit on 27th August 2017. His expertise is not in dispute but the value of his evidence on the main issue had to be determined. Mr. Ramrattan's brief was "to establish the path of a natural drainage channel in the area of Freeport and to determine the consequences of Blockage to existing Drainage Channels that can cause flooding". His team conducted topographical surveys essentially to measure the height of the ground of the adjoining parcels and then based on the measurements he concluded that water would "naturally" flow from Borde's parcel to Niranjana's then onwards into a box drain across a third parcel into a street drain.
45. I note here that no other landowner through whose property the alleged watercourse passes, was called to support Borde's case. After living there for all of his life Borde did not know who owned plot 1, immediately on his southern boundary. The owner north of Niranjana who would have been adversely affected by the Defendant's actions in blocking the alleged watercourse was not involved in this case, even while it is alleged that that owner has a box drain which connected to the natural outflow on Niranjana's plot.

46. Mr. Ramrattan was not asked to address the central question in this case about the existence of a natural watercourse. In a response to joint questions from attorneys in the course of this case he stated very clearly that he was not asked that question, that he was in fact qualified to answer it, but that to do so would require further topographical surveys to be done. He was open to the assignment.

The excerpt from his letter dated 5th November 2018 makes it clear:

*“..... **A man made ditch is not and therefore the distinguishing factor is what is naturally occurring. That can be determined by doing topographic surveys which I am disposed to undertaking.***

*In my report it was assumed to be so in seeing the natural abandoned state of the neighbouring lands. **To determine if the drainage channel was natural, I would have to get permission from adjoining land owners to undertake topographic surveys and that was beyond my scope at the stage of the report. A natural watercourse and natural drainage channel would be tantamount to be the same thing.***

I was advised by Mr. Borde Ramlogan that he met that drainage channel there before he built his structure.

47. The Claimant made no application for Mr. Ramrattan to revisit the assignment to answer the main question. In the circumstances Mr. Ramrattan’s report was considered to be of limited assistance. Mr. Ramrattan did however indicate candidly even in relation to what he was asked, that in coming to his conclusions he made assumptions (critical in my view) based on Borde’s instructions including about the general lay of Borde’s lot and about the foundation and the natural contours of his lot, about the location of the original drainage path and Borde’s assertion that the box drain was a continuation of it.

48. In his commentary on the topography he records:

“The survey found a natural drainage path running south to north”.

He relied on photographs which were taken by Borde, even prior to his visit on August 27th, 2017 “the perils caused. Photograph II in Appendix III was labelled “Drainage Point South of Buildings”. There is no evidence as to when this photograph was taken or exactly what it was

intended to show. While it was attached to Mr. Ramrattan's report, no nexus has been established between what is shown there and what appears on the map drawn by Mr. Ramrattan. The photograph shows water pooling outside a building. This did not indicate whether what it depicts is the "earthen drain" or more importantly how this actually connected to the underground box drain. This may have well been one of the 2013 drainage complaint sites shown in the aerial photograph. I simply do not know. Mr. Ramrattan accepted that he was unable to say whether Borde had diverted whatever drainage channel may have existed previously into his box drain.

49. When he was asked questions by me about how one would go about locating natural watercourses in Trinidad generally, Mr. Ramrattan's answer was simple. They would be indicated on plans lodged with the Director of Surveys. Had he been asked to indicate whether one existed on these lands, one of his team members would have had to confer with a licensed land surveyor. He did not do this in this case. And as I said before, no plan produced by any licensed surveyor indicated a natural watercourse.

50. Before I leave Mr. Ramrattan's evidence I note that in the report under the heading "Conclusions and Recommendations" he stated:-

"The obstruction and or impediment of a Natural Drainage Channel without the approval of the Public Health or the Ministry of Works and Transport Division is a violation of S.17 of the Waterworks and Conservation Act Chp. 54:45".

51. This was not the first time that this Waterworks Act was being raised. In a letter dd. 03/11/2017 to the Corporation, the Claimant's attorney had asked a specific question about whether Niranjana had obtained permission pursuant to S.16 (2) of this Act and whether Niranjana had obtained permission to block the watercourse. I therefore decided to look at the provisions. S.16 of the act deals with "controlled channels" and is inapplicable. There is no evidence that the alleged watercourse is a "controlled channel" declared to be so by Order of the relevant minister.

52. Section 17 provides a procedure to be followed when the “competent authority needs to take action in certain circumstances to deal with interference with water channels, drainage etc”. There is no evidence as to who is “a competent authority”. Further there is no evidence that the section 17 procedure was engaged. In the light of this, Mr. Ramrattan’s observations on section 17 are irrelevant. The conclusion that Nirranjan’s actions violated section 17 however reflect on the independence of the report, and the matter of the weight that should be attached to it.

Section 17 provides as follows:

17. (1) Whenever the competent authority is of opinion that any of the circumstances hereinafter set forth exist in relation to any watercourse, channel, drain or outfall for water, and that by reason of such circumstances the natural flow of water (whether flood water or otherwise) is being or is likely to be materially diverted, obstructed or impeded at any point, or erosion or flooding at any point is being or is likely to be caused, the competent authority may by notice in writing served on the owner of the land in relation to which the circumstances exist give such directions (including the directions prohibiting any act or requiring action to be taken within such reasonable time, not being less than seven days, as may be specified in the notice or such further time as the competent authority may allow in special circumstances) as he may consider expedient for avoiding the continuance or likelihood of the consequences mentioned above.

(3) The circumstances contemplated by subsection (1) are that—

(a) a bridge, culvert, dam, weir or other like structure, over, in or under (as the case may be) the watercourse, channel, drain or outfall for water has been constructed, rebuilt, altered or added to or is in course of being, or is intended to be constructed, rebuilt, altered or added to;

(b) the banks or bed have been, or are in the course of being, or are likely to be, materially altered by any means, including the digging, moving or taking away of mud, stone, sand or gravel therefrom;

(c) any action (including the removal of scrub, vegetation or undergrowth from the banks or from lands adjoining the banks) has been, or is in the course of being, or is intended to be, taken at any point of the watercourse, channel, drain or outfall for water, which is likely to lead (whether at that point or elsewhere) to any material alteration of the banks or bed;

(5) If any directions under this section are contravened, the competent authority and persons acting by his authority may enter upon the land and carry out the work specified in the directions or, in the event of a direction containing a prohibition, carry out such work as may be appropriate to enforce the prohibition

or to restore the watercourse, channel, drain or outfall for water or its banks or the adjoining lands, as the case may be.

53. Mr. Ramrattan referred to Borde's action as "improvements", while at the same time he sought to identify Niranjan's conduct in blocking the outflow on his land as a violation. Even on Borde's case, he had done several things contemplated by section 17 (3). He had built a huge shed over a watercourse or drain. He had changed an earthen drain to a concrete box drain. He had altered the bed, the depth and the original banks in order to create or design a box drain. It is in this context when he was asked by me whether it was permissible to do what Borde did, building over a natural watercourse the Mr. Ramrattan had made his pointed comment about violations of the regulations.

54. Neither Mr. Ramrattan nor Mr. Dick appeared to factor into their investigations of what caused the Claimant's problem, that it might have been Borde's own violations of all the laws designed to avoid unregulated development and his neglect to provide proper drainage. Both appeared to limit their investigations to the identification of a drainage path, and the natural flow of water from higher elevations downstream. Both their opinions came down to this; that the levels of the neighbouring lands were higher than Mr. Borde's and his was higher than Niranjan's. Though the levels were not discernibly much higher, certainly not to the naked eye from what I could see, drainage from higher to lower lands was natural. This is accepted as a matter of common sense. But a natural drainage path in undefined channels and a natural watercourse are not the same thing. This was not a case about a natural drainage path. It was about the existence of a natural watercourse, in a well-established and defined channel.

55. I have found the following passage from Oyez Practice Notes "Water Rights including Fishing Rights" by A.S. Wilson to be helpful in supporting my view that they are not the same.

Surface Drainage Water

*Water which flows over the ground discontinuously without reference to a defined channel and with no visible banks or margins has none of the attributes of a natural watercourse and does not give rise to riparian rights of easements: it was decided in **M'Nab v Robertson [1897] A. C.129, H.L.Sc.**, that water percolating through the*

*ground from marshy land to a pond was not water in a stream. A similar decision was given in an earlier case (**Rawstron v Taylor (1853), 11 Ex. 369**) to the effect that water which squanders itself over an undefined area, such as surface water the supply of which is casual and its flow following no regular or definite course, is not a watercourse.*

56. On the evidence I find that the Claimant took a decision to construct a box drain to channel surface water from his premises after he raised his foundation, changed the contours of his plot, and deliberately directed run-off from the front of the building and all areas of his plot. The channelling significantly increased the amount and concentration of water flowing on to Niranjana's lands especially during times when torrential rains create a super abundance of surface water. The evidence fell far short of establishing a "natural watercourse".

The Defendant's Evidence

57. Where there were conflicts in the parties' accounts, I preferred the evidence of the Defendant and his witness on the central issue in the case. I attached significant weight to the video footage provided by Neroupa Ramlogan which showed the physical state of Borde's and Niranjana's lands along the Northern Boundary and almost the entirety of Niranjana's tract prior to 2014. The footage provides evidence of the state of the lands in 2014 long before these proceedings were contemplated. The more contemporaneous record disclosed no evidence of a drain, ditch or watercourse traversing Niranjana's plot.

58. Landowners are required to comply with all land development laws, building codes and regulations and drainage obligations. A landowner situate on higher ground is not entitled to simply rely on the contours of his lands to flood his neighbouring lands. On the evidence I have found no natural watercourse traversing the parties' lot. The Claimant has no riparian rights relating to the flow of water across his premises. Niranjana was entitled to take the steps that he did to protect his property.

Determination

59. The claimant's case is dismissed with costs to be paid by the claimant to the defendant on the prescribed scale added in the sum of TT\$140,069.67. The Claimant is to pay costs of the injunction to be assessed by the Master in default of agreement.

Carol Gobin
Judge