As THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2018-04362

Between

NEIL BYNOE

VERTRA BYNOE

Claimants

And

ROLAND RAMDIAL

(incorrectly sued as NICHOLAS RAMDIAL)

INDIRA RAMDIAL

Defendants

Appearances:

Claimants: Ancil Moses

Defendants: Martin George instructed by Crystal Sambrano

Before the Honourable Mr. Justice Devindra Rampersad

Date of delivery: March 22, 2024

JUDGMENT

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Introduction

1. The parties are neighbours with the claimants' property lying to the west of the defendants' at a lower incline. The area slopes downhill from the east to the west and also from the north i.e. the front, to the south i.e. the back. They share a common boundary (the claimant's eastern boundary and the defendant's western boundary). The two properties are situated on the southern side of the road known as Windsor Heights, which ascends going past the claimants' property then the defendants' property as one ascends.

2. In or about the year 2008, the defendants started foundation works towards the construction of their wall, enclosing the defendants' property.

3. In or around 2008, the claimants also started construction of their home which continued during 2008 and 2009. The defendants, however, did no further work on their property after 2008 and left a standing base construction for their perimeter wall.

4. In or around 2011, the first claimant informed the first defendant that he intended to enclose his property with a boundary wall. The first defendant informed the claimants that they should continue the boundary wall on the foundation that was already constructed. A swimming pool was also constructed by the claimants in 2014.

5. In or around 2017, the claimants stated that the defendants started working on the foundation of their property and negligently piled all the soil cleared from their land onto the boundary wall that separated the two properties causing the same to crack towards the southeast boundary. Water from the defendants' property started flowing through the cracks creating a nuisance. The claimants say that the first named defendant was told about this, he visited their property and witnessed the flow of water and the cracks but did not take any action

to prevent the flow of water onto their property nor to remedy the nuisance created. The defendants, however, did cease work on their property.

6. The claimants' contention is that that the defendants' action caused stress to their wall which it was never constructed to bear, and as a result, caused cracks to it. Further, water was allowed to flow through those cracks from the defendants' property onto their land thereby causing damage to their property.

7. The defendants admitted that the claimants complained about the cracks on the boundary wall but denied any negligence. Instead, the defendants said that any water present on their land was as a result of surface rainfall. In order to address the issue of the cracks on the boundary wall, the first defendant conducted works to reinforce the boundary wall.

8. In or around March 2018, the claimants constructed a car port on the property and repainted their home and walls. Around that same time frame, the claimants said, and the defendants admitted, that the defendants re-commenced work raising the boundary wall separating the two properties approximately two blocks higher and constructing a wall behind the first wall running parallel to it. The claimants also repaired the cracks in the boundary wall. The defendants admitted the work that was done.

9. The claimants went on to say that after completing the wall, the defendants started digging trenches with that work progressing very slowly. The trenches would sometimes cave-in and remain filled with water for days after rainfall and during that time, which was not identified specifically in the statement of case, the claimant said they started noticing increased saturation and general sogginess in their backyard and as time progressed, they noticed a slight tilt in their

swimming pool towards the areas of saturation. They also saw further cracks along the boundary wall and, as rainfall increased, they saw water rushing through the cracks onto their property.

10. In response, the defendants denied the allegations with respect to the trenches and said that they did not know whether the allegations about the increased saturation, the general sogginess and the tilt in the swimming pool along with the further cracks and water gushing through those cracks were true.

11. The claimants went on to plead particulars of nuisance and or negligence resulting in the continuous flow of water from the defendants' property causing the claimants' walls to crack, resulting in the sinking and cracking of the backyard earth of their property, the sinking of the concrete platform between their back wall and the pool, the cracking of the ground surrounding the swimming pool, the leaning of the back wall and the cracking of the south western wall of the property. Those particulars are important and are set out below:

    11.1. The defendants failed to install waste pipes to take the flow of water away from their property;

    11.2. They failed to install surface and underground drainage on their property;

    11.3. They failed to install weep holes to the rear and side perimeter walls;

    11.4. They failed to install well directed surface drains on their property;

    11.5. They failed to install any water control mechanism on their property;

11.6. They failed to cast a concrete area around the side of their property;

11.7. They failed to take any other steps necessary to abate the nuisance;

11.8. They loaded excessive dirt onto the perimeter wall, creating excessive downward forces in areas forming direct brick in the wall and drop in its base.

12. The parties relied on their own expert reports. The claimants relied on the report done by Mr. Rakesh Sookoo, who was described as a licensed engineer in the statement of case, of Iere Concepts Limited. Mr. Sookoo visited the property on 27 October 2018 and prepared his report on 14 November 2018. The defendants relied on the reports done by Atlantic Project Consultants Limited, Engineers, dated 12 December 2018, 8 January 2019 and 30 July 2019.

13. The claimants have sought the following relief as a result:

13.1. A declaration that Mr. Roland Ramdial, erroneously sued as Mr. Nicholas Ramdial and Mrs. Indira Ramdial are not entitled to keep their property which is situate at No. 9 Windsor Heights, Bye Pass Road, Arima, in the island of Trinidad, in the Republic of Trinidad and Tobago, in such a manner as to allow and continue to allow the escape of water from the defendants' property to flow onto the claimants' property situated No. 7 Windsor Heights, Bye Pass Road, Arima, in the island of Trinidad, in the Republic of Trinidad and Tobago;

13.2. An Injunction to restrain the defendants whether by themselves, their servants and or agents from allowing and or causing and or continuing to cause the escape of water from their property from flowing onto the claimants' property

causing loss and damage to the claimants' property and continuing to be a nuisance to the claimants;

13.3. An injunction restraining the defendants, whether by themselves their servants and or agents or otherwise howsoever, from continuing to maintain and keep their property so as to be a nuisance to the claimant;

13.4. An injunction restraining the defendants from doing any further construction work on their property, until the nuisance created is abated;

13.5. An order compelling the defendants to immediately install a proper drainage system on their property, and also to construct and install weep holes in their boundary walls, to allow for the flow of water from their property;

13.6. The sum of Three Hundred and Fifteen Thousand Dollars ($315,000.00) for construction required to reinstate the claimants' property to the condition it was in prior to the defendants' nuisance and or trespass and continuing;

13.7. Costs for professional services in the sum of Eleven Thousand Two Hundred and Fifty Dollars ($11,250.00);

13.8. Damages for trespass and or nuisance and or negligence;

13.9. Costs;

13.10. Interests; and

13.11. Such further and or other relief as the Honourable Court may deem fit.

The Issues

14. The first issue in this matter is the source of the water allegedly entering onto the claimants' land thereby allegedly causing damage. The second major issue is, assuming that the claimants can prove the incursion of water from the defendants' property, whether the claimants suffered damage and whether the extent of the damage alleged is attributable to this incursion of water.

15. It is important to analyze the expert evidence on both sides first to get a feel for what the experts are saying. An important aspect of this case is the effect of an earthquake that occurred in August 2018 and the court has to look to see what evidence there was before the earthquake to show when the damage started in relation to the earthquake.

The Experts

16. On 26 November 2022, the court granted permission for the defendants to call Dr. Myron Chin, Consultant of Atlantic Project Consultants Limited as an Expert Witness at the trial of this matter and to put into evidence and Expert Report from Dr. Myron Chin pursuant to Part 33 of the Civil Proceedings Rules, 1998, as amended. This was made under a Notice of Application that was filed on 31 March 2022 by attorney-at-law for the defendants and followed a Hearsay Notice that was filed on 31 January 2022, in respect of which, no counter notice was filed pursuant to Part 30.7 of the CPR. Dr. Chin was not called as a witness at the trial and the report formed part of the evidence before this court without objection.

17. An application was made by the claimants to put in their own expert evidence on 4 October 2022 and was struck out at the hearing held by this court on 13 October 2022 on the ground that the application was out of time since all pretrial applications had to have been filed by 31

October 2022 and the order for doing so carried a sanction that no such application would have been entertained after that date but there was no such application for relief from sanctions. There was also no appeal ofthat

decision and no further application was made to the court for relief from sanctions.

18. The court was therefore left only with the evidence of Mr. Rakesh Sookoo for the claimants in relation to any alleged expertise. Mr. Sookoo described himself as having been trained in construction and construction management and related disciplines. He said he had over 27 years of experience in that field. He provided copies of certificates from:

18.1. The University of the West Indies from which he obtained a degree of Master of Science in Construction Management dated 28 September 2017;

18.2. Henley Management College from which he obtained a Certificate of Study in Foundations of Management in January 2008;

18.3. San Fernando Technical Institute from which he obtained:

18.3.1. A Civil Engineering Technician Diploma dated December 1997

18.3.2. A BTEC Higher National Certificate in Civil Engineering Studies dated July 2000;

18.3.3. A BTEC Higher National Certificate Level 5 in Civil Engineering Studies dated July 2006;

18.4. Cipriani College of Labour and Co-Operative Studies from which he obtained a diploma in Project Management for studies done during the period September 2000 to July 2002.

19. Mr. Sookoo gave a detailed resume of his involvement as a senior project manager and the managing director of Iere Concepts Limited from 2006 to present. He described his role to be, amongst other things, providing input to the engineering designs, executing construction supervision activities such as variation management, claim management, project delivery, commissioning, quality assurance and cost control. As the senior project manager, he spoke about being involved in resolving design problems, implementing corrective actions, calculating resources required, establishing standards and protocols and a host of other roles and responsibilities.

The Site Visit Conducted by the Court

20. A site visit was conducted by this court on 24 July 2019 with Mr. Sookoo and Dr. Chin being present. Certain observations were made by the court in the presence of the parties and the experts. At the end of that hearing the court spoke to the experts present to do two things – to collaborate to come up with a plan to solve the existing problem between the two parcels of land and secondly, to come up with an estimate to repair the claimants' land. The second defendant had at that time insisted that she would not be interested in the latter since she was of the view that the damage was caused by the earthquake. It was then recorded by the court that the experts would prepare a joint report with a view to resolving the existing alleged drainage issue.

21. Subsequently, at the hearing held on 12 December 2019, the court was informed that the defendants were not prepared to engage any further in trying to resolve the matter since the exercise suggested was not

bringing the parties closer, but was instead, driving them further apart. The claim had started at $315,000 and it was then being alleged that the cost of repairs had risen to $470,000 and therefore the defendants were not interested in continuing the conversation.

22. The matter therefore then moved on for trial.

Is There An Issue Of Water Entering Onto The Claimants' Land?

23. This was a matter pleaded by the claimants in their amended statement of case and it is important to note the defence thereto.

24. At paragraph eight of the defence it was pleaded:

"… Any water present on the lands was as a result of surface rainfall which drained into the back of the property into a nearby ravine…"

25. At paragraphs five and six of the amended statement of case, the claimants pleaded that the boundary wall between the two properties started cracking because of the piling of soil against that wall, as a result of which, water started flowing through the cracks on to the claimants' property. The claimants said that upon discovering the cracks and noticing the flow of water, they immediately contacted the first defendant who visited the property and witnessed the flow of water and the cracks created as a result of his actions. The defendants then ceased work on their property that they had begun in or around 2017. In response, the defendants said that the claimants did complain about the cracks on the boundary wall but did not go on to admit complaints about the flowing of water through the cracks or visiting the claimants' land and seeing the flow of water.

26. At paragraph 15 of the defence, however, the defendants went on to say:

"… The flow of water from the Defendants' property on to the Claimants' property has not been occasioned by the actions of the Defendants, but rather by an Act of God amongst other courses including but not limited to the flow of surface water and the natural flow of underground water onto the Claimant's land…."

27. Quite obviously, the defendants accepted on the defence that there was a flow of water.

28. The claimant's pleaded in the particulars set out above that the defendants were negligent in failing to install any water control mechanism on their property which included failing to install waste pipes to take the flow of water away from the claimants' property, failing to install well directed surface drains on the property and failing to install surface and underground drainage on their property and weep holes to the rear and side perimeter walls.

29. The first named claimant, in his witness statement, spoke about the work that the defendants began in or about 2017. That included piling large volumes of earth excavated and cleared from their property onto their side of the common boundary wall. Photographs of the same were provided. He said that when he had constructed that wall along the common boundary, he did not imagine nor intend that the wall would be a support for large volumes of soil that the defendants had placed against the wall. After that had occurred, the first claimant said that the wall began to crack toward its southern end and towards the south eastern end of *his* property. He then said that whenever rain fell, water flowed from the defendants' property through the cracks on the wall causing grave discomfort. It would often flood their backyard and a video recording of the same was provided.

30. In cross-examination, the first claimant was not very convincing with respect to exactly when the mounds of dirt were pressed up against

the wall. His answers in that regard were rather equivocal. The doubt arose when counsel for the defendants asked about the alleged building of a parallel wall by the defendant. It was suggested that the parallel wall could not have been built if there were mounds of dirt all the way up to the boundary wall. At first, the first claimant said that the parallel wall was built on top of the mounds of dirt because the dirt had settled and then he accepted that the defendants' parallel wall was not built on the mounds of dirt and that the mounds of dirt were not against the boundary wall when the parallel wall was built. He seemed to try to rely upon a previously unstated differentiation between "mounds of dirt" and "huge mounds of dirt" but this this differentiation was not made clear and, in any event, he eventually accepted that the huge mounds of dirt were not present after March 2018.

31. For the first time, however, in cross-examination, he mentioned that the parallel wall was not built along the entirety of that existing boundary wall but extended for only 20 feet or so. It was suggested to him that he was now fabricating that evidence since he had not mentioned it in his witness statement but this was denied by him.

32. The first defendant stated that he did not build a new parallel wall but sought to reinforce the existing boundary wall. According to him in cross-examination, he verified in his mind that the wall could have taken the weight of the dirt. This suggests that he knew that he was going to pack dirt against the boundary wall as alleged by the claimants, he did do so, and he was of the view that the wall *could* bear that pressure. This impression that he had was not supported by any expert or scientific opinion.

33. The first claimant went on to confirm that he complained to the first defendant who did visit the premises and to whom the cracks and the large volumes of water which was at the time flowing were shown. He said that he pointed out to him that that was typical each time rain fell.

Nothing was done to alleviate the problem except that work stopped on the defendants' land.

34. In or about March 2018, the claimants constructed a carport and repainted their home and shortly thereafter, the defendants once again began work on their land. After they began, they dug trenches and the first claimant said that he observed an increase in the flow of water coming from the defendants' land onto his land. He spoke about noticing that the soil on his property became saturated with water from the flow and became soggy in the backyard area. Without defining a specific time line, the first claimant said that the flow of water continued unabated onto his property and he began observing a shift in the form of a slight tilt in his swimming pool in an area that was saturated with water.

35. The first defendant, in cross-examination, said that water from his property would drain towards the back of it i.e. to the south but eventually went on to accept that water would flow from his onto the claimants' property although he said it was "no big set of water". This obviously supported the claimants' case.

36. During cross examination, the defendant admitted to placing dirt against the claimant's wall and further admitted that he did not have the requisite permission to do so. It is clear that the defendant failed to install a proper mechanism on his land to capture the natural water flow from his land onto the claimant's land which he had a duty to do.

37. Mr. Sookoo gave the following evidence in his report[1]:

"1. Rain water run-off from adjacent property located east of #7 has nowhere to exit into be it any natural or other control watercourse as

[1] Page 416 of the Trial Bundle – the Iere Concepts Limited report dated 14 November 2018

construction works presently ongoing has no provision for capturing and controlling its water via drains, pipes or otherwise

2. Walls without adequate weep holes (none in some areas) have been constructed on same adjacent lands thus forming a catchment pool for water with no exit other than areas described in items listed under 'B'

D. The Solution

1. Rain water run-off from adjacent property located east of #7 must be collected and controlled by its owner immediately preventing flow into and onto #7 as further damage is imminent and potentially disastrous.

2. Structural stabilization and repairs of soils and drainage affected must be done to prevent further soil settlement, structural displacement and structural cracking."

38. In cross-examination, Mr. Sookoo admitted that he did not himself observe water escaping onto the claimants' property nor did he have any proof before the court showing water pooling or escaping from the defendants' property. Neither did he have any evidence before the court to show that rainwater had nowhere to exit. He also accepted that he was not in a position to say whether the damage was caused by water from the defendants' property. He did not do any soil testing or concrete testing. However, it is obvious that, apart from the scientific testing which he was not trained to do by way of any speciality, Mr. Sookoo was free to have reported on what he saw on the land as he did.

39. In his reports, Dr. Chin noted:

"The 30 feet long section of retaining wall which was built by the Ramdials along the boundary line and separates Lot #7 from Lot #9 does

not contain any weep holes to allow for drainage into the Bynoe's property…"[2]

"The boundary wall that separates the two properties has since shown signs of failure which has allowed for the increased flow of water across the property boundary"[3]

"It was suggested at the site visit that the south-western corner of the property does not drain adequately and as such improvements are needed in this particular area. This can be achieved through the creation of temporary drains to channel from the south-western corner to the closer discharge point on the southern boundary. These drains can be concrete slipper drains or small masonry box drains. Once the finished levels of the site are established upon completion of the main structure, permanent perimeter drains can replace the temporary drains as these will be at the correct invert levels to ensure proper flow."[4]

"The boundary wall separating the two properties has shown early signs of failure and these cracks that have appeared act as channels for any excess water to permeate and flow through …" [5]

"Improvements to the existing drainage network on the Ramdial property should be made to ensure that surface runoff does not cross the boundary and enter the Bynoe Property."

Conclusion

40. Having regard to the evidence set out above, the court has no hesitation in holding that water from rainfall did, and would continue to, flow from the defendants' lands onto the claimants' lands. That flow of water is obviously a nuisance and would not abate naturally and

[2] Page 528 of the Trial Bundle - the first report done by APCL dated 12 December 2018
[3] Page 561 of the Trial Bundle - the third report done by APCL dated 30 July 2019
[4] Page 563 of the Trial Bundle – Ibid
[5] Page 564 of the Trial Bundle – Ibid

requires the defendants to take positive steps as suggested by both Dr. Chin and Mr. Sookoo to develop a proper drainage system.

41. On top of that, as Dr. Chin has suggested, proper arrangements have to be made for the repair of the boundary wall. It is reasonable to conclude that the earthquake, as an Act of God, and bearing a high magnitude of 7.3 would have also added to the damage caused to the wall. That does not detract from the fact that there still is a duty on the owner and occupier of the lands to prevent a nuisance escaping from the same especially in light of the mere fact that the properties are built on a hill which has a steep gradient and therefore a natural angle for run-off water ought to be a natural factor which the claimant would have been aware of. Dr. Chin has said that because the defendants levelled their lands, the gradient and therefore rate of runoff would have been positively impacted but no consideration seems to have been had in respect of any runoff from lands higher than the defendants' which would obviously collect and pool on the defendants levelled land as far as this court is concerned. However, the defendant ought to also be held partially negligent for the damage being caused to the claimant as he clearly did not put sufficient measures in place at the time and therefore, was inadequate having regard to the duty of care that he owes to the claimant.

42. The court goes further to say that a proper evaluation ought to be done by a qualified engineer to confirm whether the current boundary wall can continue to serve its intended purpose or would require reinforcement especially in light of the fact of the defendants' intention to build on their lands with the possible attendant increase in pressure being exerted on the said boundary wall.

Did the Water from the Defendants' Land Cause the Damage Claimed?

43. The damage done and remedial work required to and for the claimants' property was set out at paragraph 19 of the amended statement of case:

"a) Repairs to the perimeter wall at eastern side property boundary, which forms garage space.

b) Perimeter wall at south side property boundary is no longer vertically true and is now leaning back inside the property with visual and measurable drop showing soil slip and wall base movement.

c) Swimming pool structure is sunken toward the south side but no signs of cracks visible.

d) Swimming pool tile detects around and casting is cracked in numerous locations vertically displaced and undermined with hollowed out sections visible and washed out.

e) Swimming pool plumbing located under and around the pool deck is compromised with leaks, damaged and pulled out joints making the system unstable.

f) Yard grass spaces show signs of undermining and under wash with vertical displacement and creep.

g) Other areas external to the building shows cracks and signs of under-wash and creep."

44. The pictures presented to the court in the evidence in this matter present a seemingly catastrophic scene with the claimants' retaining wall at the back i.e. at the South of their property, to be almost completely collapsed.

45. The burden that the claimants have is to show on a balance of probabilities that the flow of water from the defendants' property onto theirs caused the damage.

46. Rakesh Sookoo was cross-examined about the fact that he was not in fact a qualified civil engineer or professional otherwise. However, it is clear from his evidence that he has experience in the construction industry as a project manager. That experience is set out above. His report is dated 14 November 2018.

47. His report spoke about him deducing from visual inspection that the construction of the residential dwelling house owned by the claimants was well-built. He spoke about the perimeter boundary walls being solid cast with stiffeners appropriately placed. He mentioned that the soil type appeared to be sedimentary shale like alluvial with high bearing capacity, well-drained with the low moisture content, stable with high angle of repose. He said that the drainage is both surface and underground with graded grass spaces, properly sloping flat castings, where directed surface drains, adequate weep holes to the rear and side perimeter walls. It is clear from cross examination, however, that, apart from the said visual observations, no measurements were taken and no actual scientific analysis of these findings was done.

48. He opined that rain water run-off from the defendants' adjacent property has nowhere to exit – whether any natural or other control watercourse – since the construction works then going on had no provision for capturing and controlling its water via drains, pipes or otherwise. He spoke about the extra loading of perimeter walls to the east with the attachment of bulk concrete structure from the defendants' property adding to excessive downward forces in areas forming a direct break in the wall and a drop in its base. He also mentioned that, apart from the boundary wall between the two properties not having adequate weep holes, he said that water captured in the defendants' lands now runs through the claimants'

making its own flow path through the walls, under its base, under the pool deck, under the rear perimeter wall and in numerous areas.

49. In cross-examination, he said that:

49.1. He did not receive permission from the defendants to go onto their property,

49.2. He got all of the information that he used from the claimants and never sought any from the defendant,

49.3. He did not mention any angle or gradient of the land,

49.4. He did not use architectural drawings,

49.5. He did not come to the conclusion that the claimants' home was well constructed by means of any test but, rather, only by a visual inspection,

49.6. He did not do any soil test or concrete test,

49.7. He did not have any idea of the steel, foundation bed for the house, or pool and did not know if those were properly constructed,

49.8. He did not observe any water actually escaping onto the claimants' property,

49.9. He had no evidence to show water pooling or escaping from the defendants' property;

49.10. He did not himself observe any water escaping onto the claimant's property,

49.11. He had nothing before the court to show that the rainwater had nowhere to exit,

49.12. He had no supporting evidence in his report,

49.13. He did not have any measurements of the width and height of the wall to define any height to weight ratio and he took no measurements for the report,

49.14. He had no measurements of the gradient in terms of degrees and did not measure the drop,

49.15. He conducted no tests to determine if the retaining wall was safe,

49.16. He could not say that any damage he saw was caused by any water from the defendants' property.

50. Based on all of this information elicited expertly from a well-prepared cross examiner, it was obvious that Mr. Sookoo could not assist the court with respect to the cause of the damage that he saw on the claimants' property. As a result, and having regard to all of the circumstances, the court cannot place any weight whatsoever on Mr. Sookoo's report in support of the claimants' burden of proof.

51. On the other hand, Dr. Chin, who was not before the court for cross examination, gave information about the soil based on a general map entitled "Trinidad Soils Map" and went on to advise that a proper geotechnical survey be conducted to determine the exact type of soil that was involved. He spoke about the area having sandy clay loam with a micaceous for lights lithology which has free internal drainage[6] with reference to the said map. He did speak about upon visual inspection of the soil, however, revealed a heavier clay content indicating that the land was susceptible to slippage. He spoke about a deep layer of soft soil to the surface and quoted the first defendant who mentioned that he had excavated approximately 9 feet in depth before he met harder

[6] Page 545 of the Trial Bundle

soil below[7] . He then spoke about the information he received from the first claimant about the retaining wall at the back of his property and based on that information, he came to the conclusion that the majority of the claimants' retaining wall at the back with its auger piles sit within the soft upper layer of soil indicating a lack of proper engineering design. This evidence was uncontroverted.

52. He then spoke about the claimants' backyard being graded towards the retaining wall without a proper drainage outlet. He said because there was excessive concrete coverage on the claimants' land, there was the increased velocity of surface water runoff with the absence of an appropriate drainage outlet causing the water to seep into the soil behind the wall. He also said that the claimants had failed to install a proper filter layer behind their wall therefore this all became easily saturated and additional hydrostatic pressure was applied to the wall. He said that the ingress of water through the fractures in the pool and walkway surrounded it would have also increased the hydrostatic pressure on the already failing wall[8].

53. He spoke about the swimming pool situated just 5 feet away from the back retaining wall on the claimants' property at an elevation which would exert a pressure on the said wall. This, he said, became especially significant during the earthquake which occurred on 21 August 2018 which was uncontroversially stated to have been one that measured 7.3 on the Richter scale which caused significant damage throughout various parts of Trinidad and Tobago and which the first defendant said caused the cracking in his wall and the claimants' back wall[9]. The thing is, however, evidence from the claimants was that the crack appeared before the earthquake in August 2018. In fact, the claimants' evidence was that the crack showed up in 2017 when the dirt was piled up

[7] Ibid.
[8] Ibid.
[9] Page 530 of the Trial Bundle

against the wall and complaints were made about it since then. Therefore the court does not agree that the crack in the wall only manifested after the earthquake although the court accepts that it may be that the crack became worse after the earthquake which was of significant magnitude. In fact, Dr. Chin stated that, according to the first defendant, the structural cracking in his wall and his neighbour's back wall were further compounded by the earthquake[10] suggesting that the cracks existed before and the earthquake went on to exacerbate the cracks.

54. The factors mentioned above by Dr. Chin were the factors he said that caused the retaining wall to bend resulting in failure and creating the extensive settlement of the walkway surrounding the pool and the resulting cracks seen in the backyard. He said that that too may have also contributed to the cracking on the back wall of the garage.[11]

55. When he viewed the boundary wall between the parties, he said that there was no steel/very minimal steel reinforcement present and he said that the evidence suggested that those cracks were due to the discontinuities/lack of reinforcement particularly where the wall meets the columns. He went on to say that additionally, the load imposed by the fill material and the natural susceptibility of the land to slippage may have been the most likely contributing factors to these cracks. Bar the intervention and exacerbation of the situation by the earthquake, the opinion expressed by Dr. Chin was consistent with the claimants' case in relation to the causation of the crack insofar as it related to the load of the defendants' backfill against the wall.

56. Crucially, Dr. Chin was of the view[12] that:

[10] Page 547 of the Trial Bundle
[11] Page 546 of the Trial Bundle
[12] Page 547 of the Trial Bundle

*"In fact, all of the damages as listed below **would have inevitably worsened as a result of that earthquake and the heavy rainfall** which persisted in the days following the earthquake: –*

1. *Damage to the boundary wall and pillars;*
2. *Damage to flooring and back wall of adjacent garage;*
3. *Sinking and cracking of the Bynoe's backyard;*
4. *Sunken concrete platforms between back wall and pool;*
5. *Cracks on the ground surrounding the pool;*
6. *Cracking of the pool walls*
6. *Bulging of Bynoes' back boundary wall;*
7. *Cracks on Bynoes' south western wall."*

[Emphasis added]

57. However, in apparent contradiction, Dr. Chin went on to say[13]:

*"Based on the foregoing it is appropriate to conclude that the damage listed above is **not due to the flow of water** from Mr. Ramdial's property but, as evidence suggests, it was more likely a result of the compounded effect of a number of factors:*

- *The land being prone to slippage.*
- *The inadequate design of the Bynoes' retaining wall to withstand the loads imposed by the nature and characteristics of the existing soil.*
- *The additional forces exerted on the Bynoes' retaining wall due to the construction of the pool next to the wall, excessive concreted curtilage, inadequate surface drainage and the absence of a proper retaining wall to withstand. "*

[13] Page 548 of the Trial Bundle

[Emphasis added]

58. The court says that there was apparent contradiction because Dr. Chin accepted that there were cracks in the wall and accepted that the load imposed by the fill material from the defendants' land, along with the susceptibility of the land to slippage, and the poor construction of the boundary wall between them, contributed to those cracks which were compounded by the earthquake. He also accepted that the cracks existed and were compounded by the earthquake following which there was heavy rainfall which worsened the damages he listed out, as set out above. Obviously, in all of those circumstances, heavy rainfall led to the flow of water from the defendants' property into the claimant's' property which was inadequately drained and improperly configured to handle the drainage of the water because of the excessive concrete paving and the poor design of the retaining wall.

59. In fact, even though he spoke about the damage not being caused by water flow from the defendants' land, the third factor mentioned:

"The additional forces exerted on the Bynoes' retaining wall due to the construction of the pool next to the wall, ***excessive concreted curtilage****,* ***inadequate surface drainage*** *and the absence of a proper retaining wall to withstand."*

[Emphasis added]

The highlighted elements of "excessive concreted curtilage" and "inadequate surface drainage" are obviously derived from or pertain to water flow and he himself spoke about water flow through the cracks.

60. So that the totality of the credible evidence that the court has supports the following findings:

60.1. The defendants backed earth fill onto the boundary wall between the claimants and the defendants toward the end of

2017 - this was corroborated by information presented by Dr. Chin in his report and the court believes the first claimant's evidence in that regard;

60.2. That boundary wall was not properly constructed to take such a load which resulted in cracks developing;

60.3. The first claimant informed the first defendant of these cracks and the court accepts that he showed the first defendant water flowing over into his property following which the first defendant ceased the work on his land. No other cogent reason was given for the work having stopped especially since the first defendant acknowledged that complaints were made to him at that time. He denied going over into the claimants' land and seeing any water flowing but the court does not believe that evidence and prefers the claimants account of what happened which therefore caused the stoppage of work on the defendants' land;

60.4. In August 2018, there was a significant earthquake which measured 7.3 on the Richter scale and which exacerbated the problem with that wall. There was no significant cross-examination of either the first claimant or the first defendant on this and even though no independent scientific evidence was presented in respect of the earthquake, the court can take judicial notice of that fact as it was widely felt and written about at the time;

60.5. Dr. Chin specifically spoke about there being heavy rains which caused a considerable amount of water to crossover from the defendants' lands into the lower land belonging to the claimants through the very same crack in the wall. Obviously, this would have been information he gathered from the parties.

Neither of the main witnesses for the parties mentioned this otherwise and it was not tackled by either side in cross-examination. However, in his affidavit in support of an application for injunctive relief filed on 21 November 2018 which forms a part of the record of these proceedings[14], at paragraphs 13 and 26, the first claimant spoke about increased rainfall which required immediate action to prevent damage. The court therefore holds that there was heavy rainfall at the time which further exacerbated the flow of water;

60.6. Up until now, the defendants have not taken any steps to install any drainage on their land;

60.7. Dr. Chin pinpointed the following factors, which are unchallenged:

60.7.1. The land being prone to slippage – he explained his observation of the soil and his information derived from the parties on that;

60.7.2. The inadequate design of the Bynoes' retaining wall to withstand the loads imposed by the nature and characteristics of the existing soil – there was absolutely no challenge to this evidence. Mr. Sookoo gave no opposing evidence based on cogent analysis and/or testing;

60.7.3. The additional forces exerted on the Bynoes' retaining wall due to the construction of the pool next to the wall, excessive concreted curtilage,

[14] See ***Craven v Smith*** (1869) LR 4 Exch 146; and ***Halsbury's Laws of England Civil Procedure*** (Volume 11 (2020), paras 1–496; Volume 12 (2020), paras 497–1206; Volume 12A (2020), paras 1207–1740)18. Evidence (6) Judicial Notice710. Practice which says:

> *"The court is entitled to look at its own records and proceedings in any matter and take notice of their contents even though they may not have been formally brought before the court by the parties"*

inadequate surface drainage and the absence of a proper retaining wall to withstand the forces.

61. At this point, it is necessary to discuss the law in respect of this area.

The Claimants' Submissions

62. The claimants relied on ***Windfield and Jolowicz***[15], ***Glanville and Walcott v Heller Security Services 1996 Ltd***[16], ***Namdevco v Davindra Maharaj***[17] , ***Clerk and Lindsell on Torts***[18]and ***Drake v Harbour***[19] as it relates to the tort of nuisance.

63. The claimants stated that the defendant placed large amounts of dirt against their wall. Further, the defendant allowed water to flow from his land onto the claimants' land. The evidence for the defendant himself is that he failed to install any mechanism whatsoever on the western side on his land to capture water from his land going on to the claimants' land. Moreover, the first defendant admitted that water flows onto the claimants' land from his lands unimpeded although he said it was an insignificant amount, which the court does not accept.

64. The court must determine in light of the evidence whether there was interference by the defendant with the claimants' enjoyment of their land. The claimants alleged that the defendants' interference was the cause of the damage to their land.

65. As it relates to damages to be awarded, the claimants submitted and provided a cost of repairing their property in the sum of $470,250.00. Additionally, the claimants paid the sum of $11,250.00 to retain Iere Concepts Limited.

[15] 15th Edition
[16] CV2013-03429
[17] Civil Appeal No. 72 of 2015
[18] 22nd Edition
[19] (2008) EWCA Civ 25

66. The claimants also submitted that they should be awarded both sums amounting to $481,500.00 plus costs in the matter.

The Defendant's Submissions

67. The defendant stated that Mr. Sookoo's report ought not to be considered as in the preparation of his report, he failed to consider whether the damages which were caused to the claimants' property may be a result of the poor construction works by the claimants or as a result of the natural gradient and nature of the land for underground water-flow, he failed to conduct any tests or consider the soil conditions which could contribute to the fact that other houses which are built on the slope on Windsor Heights have experienced damage by shifting soil conditions.

68. The defendants also argued that the claimants have failed to prove that the defendants have negligently or otherwise caused the flow of water from their property to enter into the claimant's property resulting in damages.

69. The authorities of ***Guerra v the Attorney General of Trinidad and Tobago***[20], ***Trinidad and Tobago Electricity Commission v Jackson and Brute***[21], ***Neckles and Ali v Forrester et al***[22], ***Glanville and Walcott v Heller Security Services 1996 Ltd***[23], ***Mohammed et al v Mohammed and Amcoweld Engineering Services Ltd***[24] were all relied on.

70. The defendants also argued that some of the damages which occurred to the claimants' property were as a result of the 7.3 magnitude earthquake which occurred on 21 August 2018. Further, the said earthquake ought to be regarded as an Act of God in law as it amounts

[20] TT 1994 HC 85
[21] HCA No. 2234 of 1985
[22] TT 2016 HC 256
[23] CV2013-03429
[24] CV2008-01297

to an operation of natural forces so unexpected that any consequence arising from it must be regarded as too remote to have any foundation for any legal liability by the defendants to the claimants.

71. By constructing on a hill which has a steep gradient and a natural angle for run off of underground waters in their direction, the claimants must have known and assumed the risks consistent therewith and inherent thereto. Therefore it is arguable that the claimants were aware or ought to have been aware that the land in the Windsor Heights area is prone to slippage.

The Court's Further Concern

72. Notwithstanding the matters set out above, the court bears in mind that there are three kinds of wrongful interference by nuisance: nuisance by encroachment; nuisance by direct physical injury and nuisance by interference with a person's quiet enjoyment of the land[25]. In the case of ***Winston Adams v Steve Waldron***[26], in a case involving water runoff from a neighbouring property, Rahim J said[27]:

"33. A private nuisance is an unlawful interference with the private use and enjoyment of land or rights over land. To be unlawful, the interference must be substantial and the claimant must have suffered actionable damage: Common Law Series: The Law of Tort 3rd Edition. Chapter 22: Nuisance, Part B. Private Nuisance para 22.9. Interference is substantial if in all the circumstances the Claimant cannot reasonably be expected to put up with it. Further, "abatement" is the summary removal or remedy of a nuisance by the party injured without having recourse to legal proceedings: Halsbury's Laws of England 5th Edition Volume 78, para 214.

[25] Halsbury's Laws of England Vol 97A (2021) 5th ed para 192
[26] CV2010-03625
[27] At paragraph 34-36

34. It is reasonable to expect a level of water runoff from land situate on the higher plain to that on the lower plain. However, it is quite possible for such runoff to become a nuisance, within the legal definition, if such water runoff is not monitored and/or controlled. The court finds therefore that water runoff onto a person's property may amount to a substantial interference with that person's use and enjoyment of land in particular circumstances, one such circumstance being where the runoff is excessive.

35. Although the natural gradient of the land in this case allows for the flow of water in the direction of the Defendant's property, it is reasonable to conclude that the additional use to which the Claimant has put his land (by way of the addition of the shed on that part of his land where the downward slope towards the Defendant's land begins) would have made this natural flow more intense. This, it appears from the evidence, was done without the addition of a drainage system to facilitate such increase in flow resulting ultimately in the interference with the use by the Defendant of his land. Besides proper drainage being a matter of practical sense, the need for drainage is evident from the recommendations of Anthony Henry of Anthony Henry & Associates Co. Ltd ."

73. In this case, the court has found that the defendants did work on their land, piled up dirt against the wall between themselves and the claimants by reason of which cracks developed and water flowed through those cracks. The defendants failed to contain the water emanating from their land, which was exacerbated by heavy rainfall at the time, by channelling the same into a drainage system designed to take away the same and prevent the water from entering the claimants' property. Dr. Chin spoke about the need for a drainage system to be implemented – both on a temporary and then a more permanent basis.

74. The defendants have sought to rely on the poor construction of the claimants' retaining wall and the boundary wall between themselves along with the earthquake that occurred in August 2018 to explain that they were not liable for the damage. The latter, which they claimed to be an Act of God, was especially relied upon in an effort to exonerate them because of that circumstance.

75. However, the expert evidence is that the earthquake *compounded* that which already existed i.e. a compromised boundary wall through which water was running. Further, the court accepts that water flowed over in large quantities from the rainfall having regard to the unchallenged evidence in that regard before the court on the record. Obviously, that water impacted the claimants' property in an exaggerated way because of the several construction flaws identified by Dr. Chin. Even though the first claimant spoke about trying to patch the crack in the wall, there has been no plea by the defendants that the claimant failed to mitigate their losses[28] or any proof in that regrad by the defendants upon whom the burden to do so lies.

76. The concern that the court has is the effect of the several construction flaws which was unchallenged. It is obvious that the movement and failure of the retaining wall at the back of the claimants' property caused massive damage as the portion of land between the pool and the wall has moved downhill significantly thereby compromising the pool support and the lands to the south of the pool.

77. In that regard, the court considered the application of the "The Eggshell Skull Rule".

[28] ***British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London, Ltd*** [1911-13] All ER Rep 63

Egg Shell Skull Rule

78. In tort, a defendant who commits a wrong must compensate a claimant for all damages arising out of the wrong that was reasonably foreseeable and must take the victim as he finds him.[29]

79. In ***Buckley – The Law of Negligence and Nuisance (Common Law Series)***[30]***,*** it was stated that the rule that the defendant takes the claimant as he finds him appears to be confined to personal injury cases, presumably on grounds of policy, and does not extend to cases of damages to property.

80. However, it was stated in ***Halsbury's Laws of England***[31]:

> *"In tort, a defendant who commits a wrong must take the victim as he finds him. It is no answer to a claim for damages to say that the victim would have suffered no or less injury if he had not had, for example, an 'eggshell' skull (or, in the case of psychiatric injury, an 'eggshell personality'), even if that particular characteristic was not foreseeable: similarly with other unusual susceptibilities in the claimant, including impecuniosity and cash-flow problems.*
>
> ***The principle applies equally to damage to property*** *and in commercial cases."*
>
> *[Emphasis added]*

81. The point was further discussed in ***Tort: The Law of Tort (Common Law Series)***[32]

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[29] See ***Hay (or Bourhill) v Young*** [1943] AC 92 at 109

[30] Part one – "The structure of the modern law of negligence", Chapter 3 Causation and remoteness, C The foreseeability test, Effect of extraneous circumstances, "The egg-shell skull' rule, Not applicable in property cases.

[31] Damages (Volume 29 (2019))7. Measure of Damages in Tort(1) General Principles(ii) Remoteness of Damage410. Condition of the claimant: defendant takes his victim as he finds him.

[32] Chapter 14 Negligence: Causation and Scope of Responsibility D Causation in law Intervening natural events at paragraph [14.43]

"In general, where the claimant has to deal with the situation created by the defendant's lack of care, the courts will not be too ready to say that problems encountered due to intervening natural events are of an unforeseeable type, or that the causal link running from the defendant's negligence to the claimant's new problems has been broken. So where poor navigation by the defendants' ship demolished part of the claimants' harbour works, and the unforeseen condition of the harbour bed meant that the repair work was unexpectedly expensive, the defendants were nonetheless liable for the full cost. However, where subsequent natural events completely change the picture, the courts may be inclined to hold that the defendant's responsibility has ceased, either on the ground that the new situation is unforeseeable, or that the new events are effectively a new beginning, making the causal effect of the defendant's behaviour a mere part of the history."

82. Reference is made to the discussion on the topic on this proposition in the case of ***The Sivand*** [33]. In that case, the defendants' vessel, the *Sivand*, damaged harbour installations owned by the plaintiffs as the result of negligent handling. The plaintiffs engaged contractors to carry out the repairs. An unforeseen event occurred in the course of the work in that the barge engaged in the repair work capsized as a result of the seabed and the subsoil proving unable to support the weight of one of its legs. The capsizing of the barge resulted in it becoming a total loss and caused an increase in the payment due to the contractors which the plaintiffs sought to recover from the defendants. The English Court of Appeal held that the parties could not have reasonably foreseen the state of the seabed and soil in that area but reached to the conclusion that the defendants were still liable. Evans LJ said[34]:

[33] [1998] 2 Lloyd's Rep 97, CA (unusually heavy expenses in carrying out repairs to damaged dock installation)

[34] At page 106, at the top of the second column.

"This is, in effect, for the purposes of legal analysis a "thin skull" type of case. The factor which increased the cost of repairs and therefore the amount of damages cannot be regarded as an independent, supervening cause.

83. He added that the matter is one of causation, assessed on a common sense basis, and that it might have been different if there were some extraneous cause of the loss, such as "*some unexpected natural events such as an earthquake*"[35]

84. In ***Overseas Tankship UK (Ltd) v Morts Dock and Engineering Co Ltd, The Wagon Mound[36],*** the Privy Council held that the concept of 'foreseeability' should be used to determine the extent of the ensuing harm for which a defendant, who had been careless, should be held liable. The Board in that case refused to impose liability on the defendant ship owners when oil, carelessly discharged from one of their ships, was ignited in a manner taken to be unforeseeable and a conflagration resulted in which the plaintiffs suffered damage. In so holding, the Board disapproved the well-known decision of the Court of Appeal, 40 years earlier, in *Re Polemis, Furniss Withy & Co[37].*

85. In ***The Wagon Mound,*** the proposition was established that "*for an act of negligence which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, so long as they can be said to be "direct"*.[38]

86. To foresee possible harm to persons such as the claimant is insufficient, the defendant must, in principle, reasonably foresee harm of the kind

[35] Ibid., at the top of the first column in paragraph (B)
[36] [1961] AC 388, [1961] 1 All ER 404
[37] [1921[3 KB 560
[38] [1961] AC 388, [1961] 1 All ER 404, page 389

which in fact ensues. In ***Cross v Highlands and Islands Enterprise***[39]***,*** Lord Macfayden stated:

''It is, in my view, clear that if the injured party suffers no loss of a reasonably foreseeable type (or, to put the matter another way, if the only loss suffered is of a type that was not reasonably foreseeable), damages will not be recoverable (The Wagon Mound)*. But if reasonably foreseeable injury is caused, the wrongdoer is liable not only for that reasonably foreseeable injury, but for any complication, development or result of that foreseeable injury, even if the complication, development or result is itself unforeseeable. That principle, the so-called "thin skull" rule was stated by Lord President Clyde in McKillen v Barclay Curle & Co Ltd[1967] SLT 41 at 42 …''*

87. The egg-shell skull rule in negligence goes to 'culpability, not compensation': if the claimant succeeds, quite apart from his hypersensitivity, in establishing substantial interference, then he can recover even for consequential damage that he sustained only because his use of land was exceptionally vulnerable.[40]

88. There is no general rule in nuisance claims that where an escape of material from a defendant's land occurs and causes damage to the claimant's land that the defendant is liable regardless of the foreseeability of the escape or the nature of the harm caused.[41] However, where the defendant's negligence physically impacts on the claimant in some foreseeable way, the defendant is liable for all of the consequences of the impact. It is not open to the defendant to argue that the claimant was unforeseeably vulnerable.

89. At the virtual hearing held on 27 February 2024, the court indicated to the parties its reliance on the Egg-Shell Skull principle and its

[39] [2001] IRLR 336
[40] See ***McKinnon Industries Ltd v Walker*** [1951] 3 DLR 577.
[41] ***Northumbrian Water Ltd v Sir Robert McAlpine Ltd [2014] EWCA Civ 685, 154 ConLR 26***

applicability in the instant matter. The parties were given an opportunity to file supplemental submissions in relation to same which have been summarised below.

The claimant's supplemental submissions

90. The claimant relied on the report of Atlantic Project Consultants Limited (APCL) and contended that the boundary wall between the two properties was not designed as a retaining wall. Further, the defendants are not able to argue the inadequacy of the wall as a means of escaping liability. This is so especially when the duty was on the defendant to take care of their runoff water by adequate drainage, or at least prevent it from going into the claimant's property, especially so having regard to the gradient of the land which slopes downward towards the claimant.

91. The eggshell principle states that the defendant would be liable for the result of his tort even though the average claimant may not have suffered the same severity of damage as a man with an eggshell state.

92. The authority of ***Smith v Leech Brain Co Ltd***[42] was relied on to state that the defendant is liable for the full extent of the injury caused and it is not defence to say that a man is usually susceptible.

93. It was submitted that the land in the area is slippage prone and the claimant must be taken as they are. The findings of the report is that the water on by Bynoe's land "increased in velocity causing the water to seep behind the wall." Therefore it is only reasonable that more water will result in an increased velocity and more seepage behind the wall. It simply cannot be that the claimants had an obligation to design a wall to cater for the defendant's negligence. The principle also

[42] (1962) 2 QB 405

imposes liability for consequences which the defendant foresaw or ought to have reasonably foreseen.

94. From the evidence of the defendants' witness, Mr. Ramdial, he was well aware of the nature of the land, in that he too built a retaining wall to the back of his land, the integrity of which he boasted about, yet still he had to admit that there was shifting on his land also. When pressed, he stated that the nature of the land is shifting land and this would point to the fact that he foresaw or ought reasonably to have foreseen the damages in the nature of what the claimant suffered and is liable for the full extent of same.

The defendant's supplemental submissions

95. The authorities of ***Ramsaran v Ramnath***[43]***, Mano v Dwarika***[44]***, Syne v Bank of Nova Scotia***[45] were quoted.

96. The defendant stated that the Egg Shell Skull principle does not have any applicability to these circumstances for the following reasons:

96.1. The claimants failed to plead any particulars with respect to the Egg Shell Skull principle in its amended statement of case filed on 16 April 2019.

96.2. The claimants pleaded that due to the continuous flow of water from the defendants' property onto the claimants' property, the claimants' boundary wall, which was reconstructed by them in 2011, started to crack and their backyard earth started to sink and crack. The claimants have also pleaded that they discover new cracks daily as this is all due to the defendants' negligence and or nuisance.

[43] TT1984 HC 106
[44] TT 1996 HC 73
[45] ***Trinidad and Tobago Ltd TT 1991***

97. The claimants have failed to consider any aspect of the egg-shell skull principle in their pleaded case, which demonstrates that a defendant who commits a wrong must take the victim as he finds him. Further, there has been no pleading to the effect of demonstrating that they had a usually thin skull and or an eggshell skull nor any pre existing weakness which renders them more susceptible to damages.

98. Rather, the defendants have pleaded that the claimants assumed all of the responsibilities and liabilities associated with the reconstruction of the boundary wall. The claimants are well aware that their property is located on a slope in the Windsor Heights area but chose not to place any weep holes or use proper engineering design when they reconstructed the said boundary wall.

The Cause of the Damage

Damage to the Retaining Wall and the Pool

99. As mentioned before, Dr. Chin criticized the construction of the walls involved comprising the boundary wall and the claimants' retaining wall at the back without riposte. That, together with the nature of the soil which he opined was prone to slippage, meant that it may have just been a matter of time before the retaining wall, at the very least, failed. From his evidence, two factors acted as a catalyst compounding the situation – the inflow of water from the defendants' land which was not properly handled or contained on the claimants' land and the earthquake. As mentioned, the effect of the latter was not explored or tested with the parties in cross-examination. He said in his witness statement that the claimants' damage happened after the earthquake but it was clear that the issue of the influx of water arose before as mentioned.

100. Mr. Sookoo visited the site on 27 October 2018 – about two months after the earthquake. By that time, signs of failure of the retaining wall

were present along with other evidence of cracking and compromise of the area, especially around the swimming pool and the plumbing in particular. He came to a conclusion about the cause but the court has already discounted his report for the reasons given above.

101. Dr. Chin visited the defendants' site on 10 December 2018 together with the defendants and also visited the claimants' property on 19 December 2018. At that site visit, he spoke about the claimants' retaining wall failing and cracks in the area of the swimming pool, together with cracks on the boundary wall. He also attended the site on 24 July 2019.

102. The court is of respectful view that there is no cogent scientific evidence to support the contention that the inflow of water from the defendants' property was of such magnitude and effect as to have caused the extent of damage as claimed by the claimants. There is no evidence of continuous flow on a daily basis such as, for example, a burst water pipe gushing water at an unnatural rate. What the court has is evidence of rainfall at a particular time just after an earthquake in a slippage prone area. There is no cogent evidence of the state of the retaining wall prior to the earthquake to suggest that but for the water flow from the defendants' land, the wall would not have been compromised. The court cannot isolate the water as being a cause[46] of the failure of the retaining wall with the other factors being ancillary thereto. Mr. Sookoo accepted that and Dr. Chin posited the same. It is unfortunate that the earthquake occurred at the time that it did making it difficult to attribute blame to the flow of water but, having regard to what Dr. Chin said, the damage seemed consistent with the earthquake being the main cause. The court got the impression that

[46] Halsbury's Laws of EnglandNegligence (Volume 78 (2018))1. General Principles of the Law of Negligence(1) Nature of Negligence(i) In General: the Notional Duty to Take Care3. Causation.
"The claimant must prove that the defendant's wrongdoing was a cause, although not necessarily the sole or dominant cause, of his injuries"

even though there was water flowing over into the claimants' land, it really was the earthquake which caused the extent of damage to the retaining wall and the area around the pool which Mr. Sookoo and Dr. Chin saw in the latter half of 2018.

103. The first correspondence in respect of the damages to the claimants' property from the lawyer was dated 9 November 2018 – after the earthquake. As mentioned, all of the independent witnesses went after the earthquake as well.

104. Unfortunately, therefore, notwithstanding the inflow of water, which the court has accepted, the court cannot say that that inflow of water caused the damage to the extent that the claimants complain of.

105. The evidence is that the retaining wall was built since 2015 and that there is no evidence from either side of any failure or compromise to it until 2017/2018 when the issue with the water arose in relation to the defendants' land. On a balance of probabilities, it may just be a matter of coincidence that the wall began failing at the same time that the water issue arose but it is more likely than not that the earthquake rendered the retaining wall in question unreliable and compromised. Once the claimants' south retaining wall was compromised and began failing and moving, it would obviously mean a similar movement of the land around the swimming pool towards the failing wall causing the cracking and other matters seen. To say that that water caused the failure of the retaining wall to the south without considering the pressure which Dr. Chin spoke about in relation to the swimming pool along with the other factors of the land being prone to slippage and the type of soil that was involved would be an incomplete analysis and there was no such evidence in support of the claimants' position.

106. To be clear, in the absence of definitive proof on a balance of probabilities that the water was the cause of the failure, the court cannot accede to the claimants' claim as put forward.

107. There is therefore no cogent evidence placing the inflow of water to be the culprit.

Damage to the Garage/Carport Area

108. The position is different with respect to the damage in the garage area, though.

109. There is no doubt in the court's mind that water came across into the claimants' land causing sogginess between the boundary wall and the area where the swimming pool. Dr. Chin spoke of the compromise in the garage wall possibly arising from the failing retaining wall but he was less definitive about this and was also less convincing in his report. The court accepts on a balance of probabilities that the combination of the soil piled against the boundary wall along with the water flow from the defendants' land caused the cracking and failure of the garage wall area.

110. The court therefore finds that the defendants are liable for the same having regard to the evidence before it of a boundary wall which was not designed to take these loads and which must, on a balance of probabilities, have been compromised by the water flowing and pooling in the area below where the garage/car port is.

111. Mr. Sookoo gave unchallenged evidence as to the cost of doing these repairs. In his initial report dated 1 November 2018, Mr. Sookoo indicated remedial work had to be done. He reviewed the same in a later report dated 25 July 2019 as follows. In the analysis below, there are two columns introduced for ease of reference showing what has

been claimed on the items that have been allowed and what would be awarded in respect of that item:

Item		Claimed	Awarded
111.1.	Garage wall works - To jackhammer and remove all cracked out concrete and block work affected by drop in ground from the adjacent lands and boundary wall affected, reinforced same and re-cast with masonary plaster works, painting, waterproofing and the like all related to said. The wall is waterlogged on the adjacent lands and water has no point of exit flow hence extra weight and increased liquid acting effects of the soil thus leading to drop in slide of soils in contact with same.	54,000.00	54,000.00
111.2.	Crack repairs - To open up and mend cracks with specialized crack repair mortars and or epoxy based materials to prevent water ingress – (note that crack repairs must be done all thru the thickness of same wall to counteract active water		

	pressures from property adjacent)		
		18,000.00	18,000.00
111.3.	Box drain – excavate and construct 2’ x 3’ deep reinforced concrete box drain approx 10 m long with granular rubble like underbase for water ingress be it due to late developing cracks from same wall and or under seepage from percolation of adjacent property – the box drain needs to be exited be it through the property back or can be later continued along same back wall perimeter and exited into the common waterway outside of the property presently earthen	42,000.00	42,000.00
111.4.	Earth works and box drain extended - to compact with jumping jacks etc. to stabilize the now loose areas and construct new 2’ x 3’ deep box drain with rubble surround all piped thru the back wall now having to be cored and flow controlled via piping along back to natural paths		
		48,000.00	48,000.00

111.5. Pool works - As mentioned, this will not be allowed.

111.6. Boundary wall rear side - As mentioned, this will not be allowed

111.7. Back of property drain - This will not be allowed as it goes to the rear boundary wall and its integrity which the court is not found to be part of the damages arising.

111.8. Yard reinstatement - The soil and the yard has experienced gushing water from rains from the adjacent land due to the failed waterlogged wall. The yard must be re-compacted and made back up to levels with topsoil and appropriate stabilization aggregate like materials allowing for on the surface drainage.

10,000.00 10,000.00

111.9. Make good works - The walls and other areas affected must all now be power washed, sealed with silicones and sealants and surfaces re-

painted.

33,000.00 11,000.00

111.10.

Clean-up works: The property has to be cleaned up from the water runoff on all items of property not mentioned by damage due to effects must be restored as best as including walls, landscaping, aprons and other parts of the house, wall and pool structures.

18,000.00 6,000.00

TOTALS **$223,000.00 189,000.00**

112. The last two items include areas which overlap with the portions allowed by the court on those that were not i.e. the immediate area behind the boundary wall on the one hand and the pool and back retaining wall on the other. Doing the best that the court can, it will allow one third of the costs mentioned therein having regard to the fact that the area around the pool is larger than the area at the foot of the boundary wall.

113. As a result, the court will award the claimants $189,000.00 as costs for damages for nuisance.

The Orders

114. The court will grant the declaration sought by the claimants along with the injunctive relief and orders sought in support thereof.

115. The relief for the payment of construction costs to reinstate the retaining wall and the area around the pool is dismissed for the reasons given above.

116. The court will however grant the relief for payment of the costs of repairing the garage wall and the area around it together with the building of the drain mentioned amounting to the total sum of $189,000.00.

117. The court will grant the order for the professional services rendered by Mr. Sookoo in the sum of $11,250.00 since his intervention was rendered necessary for an independent analysis of what had occurred on the claimants' property. But for these proceedings, those costs would not have been incurred.

118. It is therefore ordered that:

118.1. A declaration is granted that Mr Roland Ramdial, erroneously sued at Mr Nicholas Ramdial and Mrs Indira Ramdial (the defendants) are not entitled to keep their property which is situate at No. 9 Windsor Heights, Bye Pass Road, Arima in the island of Trinidad, in the Republic of Trinidad and Tobago, in such a manner as to allow and continue to allow the escape of water from the defendants' property to flow onto the claimants' property situated at No. 7 Windsor Heights, Bye Pass Road, Arima, in the island of Trinidad, in the Republic of Trinidad and Tobago;

118.2. An injunction to restrain the defendants whether by themselves, their servants and or agents from:

118.2.1. Allowing and or causing and or continuing to cause the escape of water from their property from flowing onto the claimants' property causing loss

and damage to the claimants' property and continuing to be a nuisance to the claimants;

118.2.2. Continuing to maintain and keep their property so as to be a nuisance to the claimant;

118.2.3. Doing any further construction work on their property, until the nuisance created is abated;

118.3. An order is granted compelling the defendants to immediately install a proper drainage system on their property and also to construct and install weep holes in their boundary walls, to allow for the proper control and flow of water from their property;

118.4. The defendants shall pay to the claimants the sum of

118.4.1. One Hundred and Eighty-Nine Thousand Dollars ($189,000.00.00) for damages for nuisance created by the defendants together with interest thereon at the rate of 2.5% per annum from 21 July 2020 to date;

118.4.2. The costs for professional services in the sum of Eleven Thousand Two Hundred and Fifty Dollars ($11,250.00) together with interest thereon at the rate of 2.5% per annum from 20 November 2016 to date;

118.4.3. The prescribed costs of the claim quantified by the court in the sum of $41,901.81.

119. There will be a stay of execution on the judgment herein until 21 June 2024.

120. The issue of the costs of the notice of application for injunctive relief is reserved and will be dealt with in chambers after receiving the respective positions from both sides in relation in relation to the same. The court notes that counsel for the defendants has indicated that since no order was granted and the court had attended the site visit in person that events overtook that application and the fairest outcome should be that there be no order as to costs. Counsel for the claimants needed time to confirm his instructions in that regard and notify the court of the same by 4 PM today.

/s/ D. Rampersad J.

Judge