JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 11/2005

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.

BETWEEN	**BEE HOMES LTD.**	**APPELLANT**
AND	**CREGTON POLLOCK**	**1ST RESPONDENT**
AND	**MAUREEN POLLOCK**	**2ND RESPONDENT**

Lawrence Haynes, for the appellant.

Miss Carol Davis, for the respondents.

November 21, 22, 29, 2005; March 21 & July 28, 2006

PANTON, J.A.

1. On Christmas Eve, 2004, Sykes, J.(Ag.) (as he then was) entered judgment in favour of the respondents (the Pollocks) against the appellant (Bee Homes) in the sum of $16,640,300.00 with interest at 6% per annum

from December 16, 2002, to November 26, 2004. Bee Homes, in its amended notice of appeal, sought the following:

> (i) the setting aside of the award; and
>
> (ii) the remission of the matter with directions to admit and consider the further evidence of its expert and then to make a fresh assessment.

2. As an alternative, Bee Homes sought an order for this Court to hear "further evidence" from their expert witness and then for this Court "to substitute its own assessment" in place of that made by Sykes, J. As a further alternative, Bee Homes sought "a specific order directing the respondents to transfer the fee simple interest (in the property) in exchange for the payment of the assessed replacement value of Fifteen Million Dollars ($15,000,000.00)". Having heard the arguments, we made an order in terms of the last stated alternative, and now give in writing our reasons for so doing.

3. In their amended statement of claim, the Pollocks who are Jamaicans living in London, England, asserted their proprietorship of lot 59 South Sea Park, Whitehouse, Westmoreland, whereon Bee Homes designed and built a house for them. The Pollocks contended that due to improper designing of the house and the negligent construction of drainage facilities, there has been

severe flooding of the premises and the house has become uninhabitable. They claimed that they had suffered loss and damage, and listed what they described as "particulars of special damage". These particulars included the house, stated at a value of J$20,612,000.00 and household items totaling J$3,544,000.00.

4. In witness statements that provided a platform for cross-examination at the trial of the claim, the Pollocks complained of the traumatic experience that they had due to flooding of their house. Indeed, they stated that in 2002 the flood waters rose to about five feet inside and outside the house, and that since May 2002, the house had been flooded on thirteen separate occasions. They said:

> "Under these circumstances it had become impossible for us to reside in the house as we had planned to do. We have had to abandon the house and return to England for residence which is not what we had previously intended." (see page 117 paragraph 11 and page 133 paragraph 10 of the record)

5. The Pollocks engaged the services of Mr. Michael Donovan Pennycooke, who holds the degree of B. Eng. (Civil) from Concordia University, Montreal, Canada. He has practised as a civil engineer in public and private sector construction in Jamaica since 1979. His work experience,

as chronicled in his witness statement, is impressive. He prepared a report which was admitted as an exhibit at the hearing of the claim. He expressed the opinion that the Pollocks' residence will continue to experience flooding even from relatively minor storm events as there is no drain available to take water from their property and their house is sited in a land depression. He said that the Pollocks will never be able to:

> (a) comfortably park a vehicle in their car port; or
>
> (b) comfortably sleep in their house,

as overnight rains could lead to flooding and destruction of their vehicle, or cause them to be marooned in the upper floor as the ground floor may be flooded. He concluded that, "all factors being considered, this house is not fit for habitation and will have to be abandoned" (page 96 of the record).

6. The Pollocks also engaged the services of Major Victor Beek, O.D., J.P., who is a valuator, quantity surveyor and realtor. He prepared a report in which he stated that the area in which the house was located was one which comprised "ocean front lots, resort cottages, and palacious (sic) residential homes, mostly occupied by returning retired residents". He estimated the value of the "building in this sub-division" as varying between eight and twenty-five million dollars. He opined that the ground floor

section of the building owned by the Pollocks will always be subject to flooding because of the lay of the land and that of the adjoining lot of land, and that repairing the damage to the existing building would be foolhardy. (see p.107 of the record).

7. Sykes, J. had no difficulty in delivering judgment in favour of the Pollocks. In paragraph 72 of his reasons for judgment, he stated:

> "Given the repeated history of flooding since 1998 and the severe flooding in May/June 2002 in my view it is unreasonable to expect the claimants to repair the ground floor and continue living in the house. The evidence is that because of the repeated flooding the claimants have not lived there since 2002. No one has lived there since because of the fear of flooding. The only remaining question is, what is the replacement value?" (p. 297 of the record)

In determining the replacement value, he relied on the evidence of Mr. Fairbourne Maxwell, an appraiser and real estate consultant.

8. The Pollocks were not aggrieved by the learned judge's decision as they filed no appeal. Indeed, the submissions advanced on their behalf before us specifically expressed approval of the award of the replacement value. They were happy because the learned judge had awarded to them that which they had sought – the replacement value of the property. However,

Bee Homes challenged the judgment. Upon the matter coming on for hearing, Bee Homes conceded liability, and restricted its challenge to the fact that an award had been made giving the Pollocks the full replacement value yet, apparently, the Pollocks were being allowed to keep the property which had been declared unfit for habitation. This Court indicated to the Pollocks, through their attorney-at-law, that if they wished to keep the property, it would seem that they could not have the full replacement value. They were invited to enter into discussions with Bee Homes with a view to arriving at a sum that was less than the replacement value if they wished to retain the property. The invitation was not accepted.

9. The question for determination is whether the Pollocks are entitled to the full replacement value as well as to the property that is being replaced. In my view, they are not. The principle that guides the award of damages in a situation such as this is that the injured party is entitled to be put in the position he would have been in had there not been the injury. In **Liesbosch Dredger v. SS Edison** (1933) A.C. 449 at 463, Lord Wright said:

> "In these cases the dominant rule of law is the principle of restitutio in integrum."

Lord Blackburn, more than a century ago in **Livingston v. Rawyards Coal Co.** (1880) 5App. Case 25 at 39, put it this way:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

In the instant case, the replacement value has been determined on the basis of evidence provided by the Pollocks. If there is replacement, then retention of that which is being replaced would result in over compensation. The Pollocks have suggested that they would consent to the transfer of the lot if Bee Homes agrees to construct the replacement house. This does not appear to be a suggestion with which the Court can treat, as that would involve the making of an order for Bee Homes to enter into another contract with the Pollocks. In the circumstances, we allowed the appeal in part by providing for the transfer of the property in return for its replacement value.

SMITH, J.A

I agree and have nothing further to add.

K. HARRISON, J.A:

1. On the 24th December 2004, Sykes, J., delivered judgment in favour of the Claimants ("Respondents") awarding them damages in the sum of Sixteen Million Six Hundred and Forty Thousand Three Hundred Dollars (($16,640,300.00) with interest thereon at the rate of 6% per annum in respect of a claim brought against the Appellant for the negligent construction of a house at premises known as 59 Southsea Park, Whitehouse, in the parish of Westmoreland. Of this sum, the learned judge made an award of Fifteen Million Dollars ($15,000,000.00) as the replacement value of the Respondent's house which had become uninhabitable due to flooding.

2. We delivered judgment in the matter on the 21st March 2006, and promised then to put our reasons in writing. This is a fulfillment of that promise.

The background to the litigation

3. The Respondents are registered proprietors of that parcel of land known as Lot 59 Southsea Park, registered at Volume 1190 Folio 462 of the Register Book of Titles. They had bought the land from the Appellant in 1989 whilst they were residing in England.

4. It was a term of the agreement for sale that the Appellant would construct a dwelling house on the said land for the Respondents. The house did not remain habitable for long after the Respondents obtained possession of same. There was flooding whenever it rained and this was due to (a) the faulty construction of a drain by

the Appellant in or about 1998 in close proximity to the Respondents' premises; (b) the house was built at a low point of the land without a proper floor level; and (c) a sinkhole that was situated on the property was unable to cope with the excess flow of water.

5. In a further attempt to correct the flooding, the Appellant constructed a storm water drain to take away the excess water but this drain did not solve the problem. As a consequence, the Respondents had to vacate the premises. They filed a suit in the Supreme Court against the Appellant and claimed damages for negligence and/or breach of contract. The Respondents alleged inter alia, in the Statement of Claim that because the house was susceptible to flooding it became un-inhabitable in or about 2002.

The Notice and Grounds of Appeal

6. An Amended Notice of Appeal was filed and it states as follows:

> " 1. Details of the Order appealed are:
>
> (a) The award of damages to the Respondents (Claimants) in the sum of Sixteen Million, Six Hundred & Forty Thousand Three Hundred Dollars (($16,640,300.00) with interest thereon at the rate of 6% per annum.

2. The following findings of fact and law are challenged:

(a) That the Respondents' home was uninhabitable and should therefore be condemned and the replacement value awarded as damages.

(b) Findings of Law

(i) That the Appellant/Defendant was not entitled in law to adduce further evidence at the trial to show that the ongoing drainage works spoken of by both the Second Respondent (Claimant) and the witness Pennycooke was completed and the effect thereof on the Respondent's property.

(ii) That as a matter of law a visit to the locus would not be helpful in the absence of the available further evidence on the completed drains.

3. The Grounds of Appeal are:

(a) That the learned trial judge fell into error when he refused the Appellant's application to adduce further evidence from the witness R. L. Harrison to show the conditions which currently obtained on account of the completed drainage works. That in so doing he deprived himself of crucial evidence which would have assisted him in coming to a fair assessment of the damages suffered by the Respondent (sic)

(b) That his findings that the house was uninhabitable was erroneous and consequently the award of $15,000,000.00 as replacement cost is excessive. Further assuming the award is correct the learned trial judge erred in not making a

specific order for the property (that is Lot 59 South Sea Park) to be transferred to the Appellant (Defendant) in exchange thereof and thereby left the impression that the Respondents were entitled to both the property and the said award which would be unjust and unconscionable.

(c) The learned trial judge erred in refusing the Appellant's application to visit the locus and thereby deprived himself of an opportunity of assessing the real evidence which would have assisted him in his determination as to whether the premises was subject to repeated flooding and therefore uninhabitable.

4. Order Sought:

(a) That the award of damages to the Respondents (Claimants) in the sum of Sixteen Million, Six Hundred and Forty Thousand, Three Hundred Dollars (($16,640,300.00) be set aside and that the matter be remitted to the learned trial judge with directions to admit and consider the further evidence of the Appellant's expert on the effect of the completed works and any evidence in rebuttal (if necessary) and to proceed upon a fresh assessment upon the basis of all available evidence.

Alternatively

(b) That the appellant be granted leave to adduce further evidence before this Honourable Court from the expert witness Mr. R. L Harrison and that this Honourable Court be at liberty to proceed to substitute its own assessment for that of the learned trial judge on the basis of all the available evidence.

Alternatively

(c) That this Court should make a specific order directing the Respondents to transfer the fee simple interest in premises situate at Lot 50 South Sea Park, Westmoreland in exchange for the payment of the assessed replacement value of Fifteen Million Dollars ($15,000,000.00)."

The Submissions

7. Liability was not an issue in this appeal. Mr. Haynes conceded that the learned trial judge was correct in finding that the drain was the effective cause of the flooding. He made some submissions in respect of grounds (a) and (c) but decided in the course of his submissions not to continue with them. He therefore concentrated on the amended ground (b).

8. Mr. Haynes submitted that it would be unjust and unconscionable for the Respondents to be awarded damages in addition to retaining the property. He submitted that the Respondents were grossly compensated since the object of an award of damages in negligence was to put the injured party in the same position as he would have been in had he not sustained the injury. In the circumstances, Mr. Haynes submitted that this Court ought to apply the equitable principle of subrogation to the facts of this case because the Respondents would be unjustly enriched should they be allowed to retain the property. He referred to and relied on the case of ***Castellain v Preston*** (1883) 11 QBD 380.

9. Miss Davis submitted on the other hand, that the principles of "salvage" and "subrogation", applied only to contracts of indemnity, principally in insurance law, and were not applicable to the law of tort.

10. Miss Davis also submitted that since a counterclaim was not filed by the Appellant and it was not alleged that the Respondents had committed any illegal act, this Court had no jurisdiction to make a specific order for the property to be transferred to the Appellant. She submitted that no question of an exchange arose, since the judgment was in respect of damages for negligence and not one in respect of a contract of sale. She relied upon the cases of ***Hollebone v Midhurst & Fernherst Builders*** [1968] 1 Lloyd's Report 39; ***Harbutt's Plasticine Ltd. v Wayne Tank & Pump Co. Ltd.*** [1970] 1 All E.R 225 and ***Dominion Mosaics & Tile Co. Ltd et al v Trafalgar Trucking Co. Ltd. et al*** [1990] 2 All E.R 246. She argued that these cases establish that prima facie the measure of damages for all torts affecting land is the diminution in value to the plaintiff or, in the case of a plaintiff in possession with full ownership, the cost of reasonable re-instatement.

The determination of the appeal

11. I turn first to the subrogation issue. Subrogation is in essence a remedy, available in a variety of situations, which provides in effect for a transfer of rights by operation of law from one person to another against a third party in order to prevent

unjust enrichment. In a familiar passage Lord Diplock had this to say in ***Orakpo v Manson Investments Ltd.*** [1977] 3 All ER 1 at 7:

> "My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law. There are some circumstances in which the remedy takes the form of "subrogation", but this expression embraces more than a single concept in English law. It is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances. Some rights by subrogation are contractual in their origin, as in the case of contracts of insurance. Others, such as the right of an innocent lender to recover from a company moneys borrowed *ultra vires* to the extent that these have been expended on discharging the company's lawful debts, are in no way based on contract and appear to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment.
>
> This makes particularly perilous any attempt to rely on analogy to justify applying to one set of circumstances which would otherwise result in unjust enrichment a remedy of subrogation which has been held to be available for that purpose in another and different set of circumstances." (emphasis supplied)

12. In the said ***Orakpo*** case (supra) Lord Edmund-Davies said at page 14:

> "Apart from specific agreement and certain well-established cases, it is conjectural how far the right of subrogation will be granted though in principle there is no reason why it should be confined to the hitherto-recognised categories ..."

At page 12 Lord Salmon in the same case went so far as to say:

> 'The test whether the courts will apply the doctrine of subrogation to the facts of any particular case is entirely empirical. It is, I think, impossible to formulate any narrower principle than that the doctrine will be applied only when the courts are satisfied that reason and justice demand that it should be."

13. Diplock, J (as he then was) in ***Yorkshire Insurance Co. Ltd. v Nisbet Shipping Co. Ltd.*** [1961] 2 All ER 487 said:

> "In my view this case turns on what is meant by the word "subrogated" in this context. The doctrine of subrogation is not restricted to the law of insurance. Although often referred to as an "equity" it is not an exclusively equitable doctrine. It was applied by the common law courts in insurance cases long before the fusion of law and equity, although the powers of the common law courts might in some cases require to be supplemented by those of a court of equity in order to give full effect to the doctrine; for example, by compelling an assured to allow his name to be used by the insurer for the purpose of enforcing the assured's remedies against third parties in respect of the subject-matter of the loss. " (emphasis supplied)

14. In ***B Liggett (Liverpool) Ltd. v Barclays Bank Ltd.*** ([1928] 1 KB 48 at 61, Wright J said:

> "...consistent with the general principle of equity, that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity..." (emphasis supplied)

15. In ***Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co. Ltd.*** [1990] 2 All ER 246 at page 249, Taylor LJ said:

> 'The basic principle governing the measure of damages where the defendant's tort has caused damage to the plaintiff's land or building is *restitutio in integrum.* The damages should be such as will, so far as money can, put the plaintiff in the same position as he would have held had the tort not occurred. In applying that principle to particular cases, the problem has been whether *restitutio* is to be achieved by assessing the diminution in value of the damaged premises or the cost of reinstatement or possibly on some other basis." (emphasis supplied)

16. In the present case, the Respondents had alleged in the statement of claim that the property had become uninhabitable and that they were therefore seeking compensation for the appellant's negligence. The value of the house was pleaded as $25,000,000.00. The learned judge found that because of repeated flooding, the respondents could not continue to live in the house. He further found that it would have been unreasonable for them to repair the house. The learned trial judge also had the benefit of the expert valuators' evidence and finally decided that the respondents should be awarded the replacement value of the damaged property. He assessed that value at $15,000,000.00. Clearly, the facts of the instant case, are distinguishable from those in ***Harbutt's Plasticine Ltd. v Wayne Tank and Pump Co. Ltd.*** [1970] (supra) ***Hollebone v Midhurst & Fernherst Builders*** (supra) and ***Dominion Mosaics and Tile Co. Ltd. v Trafalgar Trucking Co. Ltd.*** (supra).

Conclusion

17. In the circumstances, the Respondents, in my view, were put back in a position where they could replace the present structure. It would therefore be inconsistent with the general principle of equity if they were allowed to retain the property. There is no justification for this Court to depart from the standard form of assessment of damages where a party is found liable for negligence. To do otherwise, would result in an award being made beyond the value of the loss sustained by the respondents at the date of the injury.

PANTON, J.A.

ORDER:

It was for the above reasons that the Court made the following order:

1. Appeal allowed in part.
2. Order made in terms of paragraph 4 (c) of the amended notice of appeal filed on November 23, 2005.
3. The respondents are hereby directed to transfer the fee simple interest in the premises situated at Lot 59, South Sea Park, Westmoreland, in exchange for the payment of the assessed replacement value of $15,000,000.00
4. The respondents are to sign a registrable transfer of the said land within three months of the date hereof. In the event that the respondents refuse to sign the registrable transfer or other relevant document related

to the transfer, the Registrar of the Supreme Court is empowered to sign same.

5. The appellant is to have half of the costs of the proceedings, such costs to be agreed or taxed.