



[2024] JMSC Civ.37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV06573

BETWEEN	WINSTON CHIN	CLAIMANT
AND	CAN-CARA DEVELOPMENT	1ST DEFENDANT
AND	CAN-CARA ENVIRONMENT LIMITED	2ND DEFENDANT
AND	THE MINISTER OF TRANSPORT WORKS AND HOUSING	3RD DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	4TH DEFENDANT

IN OPEN COURT

Ms. Stephanie Williams instructed by Henlin Gibson Henlin for the Claimant

Mr. Nigel Jones instructed by Nigel Jones and Company for the 1st and 2nd Defendants

Ms. Lisa White, Ms. Krista-Leigh Cole and Mr. Stephen McCreath instructed by the Director of State Proceedings for the 3rd and 4th Defendants

Heard: January 8 and 9, 2024 and March 15, 2024

Section 13 (3) (I) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 – Whether the right has been engaged – Breach of contract – Assessment of damages for breach of contract – Private nuisance – What is the remedy in damages for a claim in private nuisance.

CARR, J

Introduction

[1] Mr. Winston Chin (**Claimant**) is the owner of land located at Lot 502 White Water Meadows, Spanish Town, in the parish of Saint Catherine. The property was purchased by the Claimant in June of 2000. The land was formerly owned by the Ministry of Housing. In 1996 the Minister (**3rd Defendant**) entered into a joint venture agreement with Can-Cara Development Limited and Can-Cara Environment Limited (**1st Defendant and 2nd Defendant**) to develop the lots in the White Water Meadows area. Sometime in 2000 or 2001 Magil Construction Jamaica Limited entered into a co-development agreement as agents of the 1st Defendant to construct a sewage pumping station at White Water Meadows. The Claimant alleges that over the years since he has been in possession of his property there have been several problems with the sewage pumping station that has resulted in a nuisance to him. The 1st and 2nd Defendants have failed to act to have the situation rectified and the 3rd Defendant has failed in its duty to manage and monitor the project. He filed a claim in nuisance, breach of contract and sought constitutional relief for breach of Section 13 (3) (I) of the Charter of Fundamental Rights and Freedoms (**Charter**).

The Claim

[2] An amended claim form was filed August 22, 2016. The Claimant sought the following relief:

1. Damages.
2. A declaration that the Defendants have breached the Claimant's constitutional rights under section 13 3 (I) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.

3. Damages for breach of the Claimant's constitutional rights under section 13 3 (l) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.
4. A mandatory injunction requiring the Defendants and their servants and/or agents to prevent the discharge of sewage on or in the vicinity of the Claimant's property at Lot 502 White Water Meadows, Spanish Town in the parish of St. Catherine.
5. Interest pursuant to the Law Reform (Miscellaneous Provision) Act at such rate and for such period as the court thinks fit.
6. Costs, and
7. Such further and / other relief.

Developments since the filing of the claim

- [3]** At the pre-trial review on September 19, 2018, Jackson-Haisley, J made orders extending the time for the parties to comply with the case management orders made on March 6, 2017, failing which the parties' statement of case would stand struck out.
- [4]** The 1st and 2nd Defendants did not file any documents in keeping with that order, their statement of case was then struck out. They applied for relief from sanctions and after a hearing which spanned three days, Thomas, J ordered that their statement of case was struck out and entered judgment for the Claimant against the 1st and 2nd Defendants. The order sought by the Claimant at paragraph 4 of the Claim Form was also granted.
- [5]** The matter with respect to the 1st and 2nd Defendants was set for assessment of damages, and the matter involving the 3rd and 4th Defendants was set for trial.
- [6]** Counsel for the 1st and 2nd Defendants appeared on the first day of trial and indicated that he had filed an application to have his name removed from the

record, he had not served his clients with that application. In those circumstances Counsel was still on the record and was advised of this. Nonetheless, Counsel did not appear for the trial as he departed the court room and did not return. The matter involving the 1st and 2nd Defendants proceeded as a default.

- [7] Counsel for the Claimant outlined in submissions that she would be addressing only the issue of constitutional redress in respect of the 3rd and 4th Defendants, and she asked the court to grant an order that the Claimant is entitled to injunctive relief in the circumstances.

Discussion

Case against the 3rd and 4th Defendants

- [8] At the commencement of her submissions. Ms. White pointed out that the Attorney General was not a proper party to the claim. She referred to Section 3 (1) of the Housing Act which is set out below:

That for the purposes of this Act, the Minister responsible for housing (in this Act referred to as “the Minister” shall be a corporation sole by the name of the Minister of Housing and by that shall have perpetual succession with a capacity to acquire, hold and dispose of land and other property of what kind.”

- [9] It was submitted that the Minister by virtue of this section could be sued as a corporation sole and was therefore not a servant and/or agent of the Crown. There was no basis therefore for a court to find that the 4th Defendant was liable for any tortious acts or breach of duty with respect to the Minister. I have accepted her submission in this regard, and I find that the 4th Defendant cannot be held liable for the alleged acts and/or inaction of the Minister.

- [10] Ms. White also submitted that due to the principle of privity of contract the 3rd Defendant is not liable to the Claimant for any breach of a contractual agreement since the Claimant’s agreement to purchase the property was between himself and the 1st Defendant. It is my understanding of the arguments posited by Ms. Williams

that the 3rd Defendant had a responsibility to the Claimant to monitor the efforts of the 1st and 2nd Defendants in alleviating the nuisance. The failure to do so resulted in the breach of the constitutional right of the Claimant. The sole issue therefore in respect of the case against the 3rd Defendant is that of a breach of the Charter.

Has the Claimant's right under Section 13 (3) (l) of the Charter been infringed.

[11] Section 13 (2) of The Charter states:

Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –

(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges, or infringes those rights.

[12] Section 13 (3) (l) of the Charter provides as follows:

(l) the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage.

[13] Section 19 (1) and (3) of The Charter reads, in part, as follows: -

If any person, alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to same matter which is lawfully available, that person may apply to the Supreme Court for redress. The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

[14] The provisions of the Constitution commence with the principle that the rights as outlined in Section 3 are guaranteed in so far as the protection of those rights does not interfere with the rights of others. The Claimant has the burden of proving to this court on a balance of probabilities that his right to a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage has been, is being, or is likely to be contravened in relation to him. It is only after he has established this fact that the Court will move on to examine the question as to whether the breach is demonstrably justified in a free and democratic society.

[15] The Claimant in particularizing the breach of the Charter put forward the following:

1. The Defendants have caused and/or permitted human waste to pollute the air and land of the Development by failing to construct proper sewage infrastructure.
2. The Defendants have caused and/or permitted this pollution to continue unabated for eight (8) years.
3. The unrestricted flow and settling of untreated sewage in the Development constitutes a serious threat to the health of the homeowners including the Claimant insofar as there is the risk of disease.

In his witness statement on September 5, 2018, he outlined the following:

1. There was an overflow of sewage from the sewage pumping station constructed by Magil Construction Jamaica Ltd.
2. The overflow discharges into a drain which is situated 140 metres walking distance from his property.
3. When the sewage settles in the drain there is a foul and unpleasant odour which smells of human waste.

4. The smell would last for on average two to three days.
5. The settled sewage is an eyesore and has caused him embarrassment when he entertains visitors.
6. The drains have not been kept clean and free of vegetation.

[16] In support of his statement the Claimant exhibited photographs of what he alleges are the drains and the sewage. Ms. White objected to several photographs on the basis that there was no connection between them, and the actual premises owned by the Claimant. I note however, that the witness statement filed by Lanford Chambers on behalf of the Defendants has not challenged the evidence of the Claimant as to the concerns raised by him in respect to the overflow of sewage and its resulting effects. There is no doubt therefore that the Claimant has been affected in the manner described in his witness statement.

[17] Ms. Williams submitted that the 3rd Defendant was obligated to ensure the protection of the Charter right by the development of policies and procedure to ensure that the basic requirements were met. They also would be obligated to monitor and manage those who are in breach of any such right so that the breach may be remedied.

[18] It is in this context that the Claimant brings this action. His evidence is that despite many complaints to the authorities little was done to remedy the breach and the 3rd Defendant failed to monitor the development in accordance with the terms of the joint venture agreement. Lanford Chambers filed a witness statement on behalf of the 3rd Defendant. At paragraph 3 he stated:

“As part of its responsibilities, the TSU (Technical Services Unit) was required to examine the files in relation to each of the developments referred to in the report to ascertain their status and the nature with a view to having them addressed. In addition, in relation to the residents’ specific complaints about the overflow of sewage, the Ministry’s representatives

along with representatives of Magil Construction and the National Water Commission conducted a site visit to ascertain how best to address this issue. The Ministry has also been in constant communication with the third party, Magil to require them to carry out whatever work is necessary to address the residents' issues."

- [19] It was his evidence that the 3rd Defendant has always monitored the project to ensure its completion. The witness statement stood as evidence in chief, by consent, without the benefit of cross examination as the witness was not available for the trial.
- [20] It is accepted that in interpreting the provisions of the Charter, a generous and purposive approach is to be adopted. In examining the scope and ambit of the right I propose to deal with it in sections.
- [21] What is a healthy and productive environment? In the authority of **Ashton Evelyn Pitt v The Attorney General of Jamaica et al**¹ the Court of Appeal discussed the right under Section 13 (3) (l) and relied on an excerpt from the text **The Environmental Rights, Revolution, A Global Study of Constitutions, Human Rights, and the Environment** by David R. Boyd.

"The right to a healthy environment appears to embody both negative and positive aspects. There is a negative right to be free from exposure to toxic substances produced by the state or state – sanctioned activities. There is a positive right to clean air, safe water and healthy ecosystems which may require an extensive system of regulation, implementation, and enforcement as well as remediation efforts in polluted areas."

- [22] At paragraph 128 of the joint judgment delivered by Straw and Shelly-Williams JJ, a discussion ensued as to the author's distinction between substantive rights and

¹ [2019] JMFC Full 7

procedural rights. There being a substantive right to clean air, safe water and a level of environmental quality that does not jeopardize their health or well-being.

[23] The provision in the Charter does not conclude with the right to enjoy a healthy and productive environment. It goes on to address the enjoyment of this right in a particular context, in that there must be freedom from the threat of injury or damage from environmental abuse and degradation of the ecological heritage.

[24] Environmental abuse has been classified as the mistreatment of the natural environment by individuals, organizations, or governments. Examples include air pollution, deforestation, overfishing, the dumping of hazardous materials among others. Ecological degradation is defined as a change to the natural environment that is perceived to be deleterious or to have negative effects.

[25] At paragraph 129 of the judgment of **Ashton Pitt** in quoting page 35 of the text, it was stated,

...with respect to constitutional rights, "Even when the language of the text is strong and categorical, it is never understood to provide an absolute, ironclad guarantee." Just as the right to free speech is not a right to say, anything at any time or place, the constitutional right to a healthy environment would not be the right to pollution-free air, pure water, and pristine ecosystems.

[26] In this instance, the section specifically states that the enjoyment of the right is not to be curtailed by environmental abuse or the degradation of the ecological heritage. It is therefore not sufficient for the Claimant to indicate in his witness statement that there is a foul and unpleasant odour, and that the raw sewage is unsightly, he must establish that the flow of raw sewage and the odour emanating from it can be classified as environmental abuse or degradation of the ecological heritage.

[27] The Claimant has not provided any details of environmental abuse, degradation of the ecological heritage, threat of injury to himself or to his property in the form of

diseases. There is no scientific evidence or otherwise to establish this fact. Additionally, he has not indicated that he has suffered from health challenges arising from the odour caused by the overflow of sewage. Although it is accepted that the odour is unpleasant, it is my view that the protection afforded by the Charter requires more than an unpleasant smell to establish a breach of this right. In the circumstances, I find that based on the evidence the right enshrined under Section 13 (3) (l) of the Charter has not been engaged.

[28] It follows therefore, that there can be no award of damages under the Constitution, and the Claimant would not be entitled to injunctive relief as against the 3rd Defendant.

Assessment of Damages – 1st and 2nd Defendants

[29] There being no basis for a claim of damages for a breach of Section 13 (3) (l) of the Charter against the 1st and 2nd Defendants, what remains for assessment is the breach of contract and nuisance. The Claimant avers that he is entitled to damages for those breaches and provided an expert report to assist the court in the determination of a reasonable award for private nuisance.

[30] Mr. Kenneth Beckles provided two appraisal reports in relation to the Claimant's property. The first report bears a valuation date of April 9, 2019, and he assessed the market value of the property at \$17,000,000.00 without adverse influence and with existing adverse influence the value was \$14,000,000.00 (adverse influence being the smell and sight of the raw sewage). The second report bears a valuation date of December 14, 2023, the market value without adverse influence was \$25,000,000.00 and with adverse influence was \$20,000,000.00.

[31] He was cross-examined by Ms. White, and he agreed that he had not seen all the house before preparing the reports. He was questioned about the valuation methodology that was used. In his report he referred to the Contractors Method and the Income Approach. The Contractors Method estimates the cost to replace the existing improvements and depreciates to reflect the present age, condition

and obsolescence and the effect of external factors on the marketability of these improvements. The indicated market value he estimated was \$40,500,000.00 as is and the cured adverse influence value was \$47,700,000.00.

[32] In answer to Ms. White he agreed that the Contractors Method was used for churches, schools and heritage sites and not generally applied to residences on the market. He agreed that it is not appropriate for valuation but indicated that it was not used in his final opinion of the value of the property.

[33] It was his evidence that the Income approach was used to determine the value of an income bearing structure. He agreed that he had no instructions concerning any income earned by the structure and admitted that it was not used to value the house. Mr. Beckles told the court that he used the Comparative approach and that is how he came to the valuation of \$20,000,000.00 with adverse influence.

[34] In using the Comparative approach, he compared three properties within the area where the Claimant resided and three outside of the area of adverse influence. He was asked if based on the price range of the houses within the area of adverse influence which was between \$10,000,000.00 and \$15,000,000.00 and that of the properties outside the area of adverse influence which ranged between \$16,000,000.00 and \$21,000,000.00 if he would agree that the Claimant was not at a disadvantage, he disagreed.

[35] Ms. Williams in her submissions on this issue referred to the case of Pamela **Davis v. Mcquiney Card et al**². The judgment was delivered by Phillips, JA. In discussing the English case of **Hunter and others v Canary Wharf**³ the three types of private nuisance were defined as; nuisance by encroachment, nuisance by direct physical injury and nuisance by interference with a person's quiet enjoyment of the land.

² [2012] JMCA Civ 39

³ [1997] 2 All ER 426

The evidence outlined in this case places the Claimant in the third category. On a further examination of the case the distinction between an award for loss of amenity value and that of diminution of value was discussed by Lord Hoffman in the passage below.

...it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort...In the case of nuisances 'productive of sensible personal discomfort', the action is not for causing discomfort to the person but, ... for causing injury to the land. True it is that the land has not suffered 'sensible' injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction, and it is the diminution in such utility that he is entitled to be compensated...

Diminution in capital value is not the only measure of loss. It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not... the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. To some extent, this involves placing a value on intangibles. But estate agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case.

[36] Based on these authorities, the appropriate award to be made in cases of private nuisance where the damage is related to the Claimant's quiet enjoyment of his property is that of the diminution in the amenity value of the property. It is accepted that this is not capable of a mathematical calculation.

- [37] There are very few authorities on this area of the law. One such case is that of **Lionel Scott and Norma Pottinger v Syndicated Development Limited et al**⁴, in that case the claimants had suffered grave discomfort and embarrassment due to the seepage of water into their apartments caused by the Defendants, the court awarded the Claimants \$90,000.00 in damages suffered for 7 years and \$120,000.00 for 11 years respectively. The court also considered that the site of the nuisance was the Claimants' home and even in the absence of evidence, it was found that the acquisition of a home in Jamaica is a very great financial sacrifice. These awards now update to the sum of \$611,641.79 and \$815,522.39 respectively as at January 2024.
- [38] The facts of that case can be distinguished from the instant one. The damage to the property of the Claimants in that case was obvious. They had to deal with the effect of the water on the physical structure of their premises. In this case, the flow of the sewage is in the vicinity of the Claimant's property but not on the property itself.
- [39] The factual matrix of **Pamela Davis v Mcquiney card et al** is also different from the instant one. The matter was an appeal of the then Resident Magistrate Courts decision to award damages in the sum of \$250,000.00 for private nuisance. The respondents claimed that the appellant had blocked the road and right of way to their homes with the construction of a concrete wall, erecting light posts, depositing concrete blocks, and parking a truck across the roadway which had persisted for several years causing them inconsiderable inconvenience and hardship. The learned Magistrate had considered that there had been an easement of necessity and that the defendants' interference with it amounted to a private nuisance. The court agreed that the Magistrate was right to consider the malicious conduct of the Appellant, the fact that the nuisance lasted for several years, and the inconvenience and hardship suffered by the respondents as an indication of the

⁴ CLJ 264 of 1993

way in which the utility of the property would have been affected. This award now updates to \$486,467.24.

[40] In the Authority of **Errol Trowers v Noranda Jamaica Bauxite Partners Limited**⁵, the claimant filed a claim in nuisance, negligence, and breach of statutory duty with the complaint that the defendants engaged in mining activities near his property which generated dust, noise and vibrations that caused damage to him as well as his property. Guided by the approach to assessment in the authority of **Pamela Davis v Mcquiney Card (supra)**, the court considered the reasonableness of the defendant's conduct having regards to locality and the standard of comfort persons living in that community would reasonably expect the time and duration of the nuisance as it related to the noise, and the nature of the effects of the interference on the claimant. The court awarded general damages in the nominal sum of \$500,000.00 which updates to \$780,571.43.

[41] On an examination of the authorities and the principles to be adopted when assessing damages for private nuisance I find that the authority of **Errol Trowers** is the most useful. I have considered the defendants' conduct in this matter. Orders were made by Thomas, J requiring them to prevent the discharge of sewage on or in the vicinity of the Claimant's property. This has to date not been done. They have not made an appearance in this matter by way of a representative and the matter was undefended. I also consider the length of time that the Claimant has suffered with the smell and sight of the sewage. The claim form was filed in 2012 and this is now twelve years later. The evidence of the Claimant suggests that there were meetings between the Defendants and the residents and thereafter facilities were constructed, and efforts made to alleviate the problem, however, this was not successful. Despite the embarrassment suffered by the Claimant it is important to state that in these cases no award is to be made for the inconvenience

⁵ [2016] JMSC Civ. 48

suffered by the Claimant. In the circumstances, I find that an award of \$700,000.00 for diminution of amenity value is appropriate.

[42] With respect to the claim for damages for breach of contract, the overriding aim of an award in damages arising from a breach of a contractual obligation is to put the innocent party in so far as money can do it in the same position as if the contract had been performed⁶. The failure to perform the contract has resulted in a reduction in the value of the Claimant's property. I do not accept that the court should rely on the replacement cost of the property in determining the award of damages. The evidence of Mr. Beckles is that the property values within the area are between \$10,000,000.00 and \$21,000,000.00. The difference in value of the property as at the date of the last valuation was \$5,000,000.00. There is no evidence of the value of the property as at the date of the breach of contract or the date of the filing of the claim. The difference in value in 2019 was that of \$3,000,000.00. It is my considered view that an appropriate award for the loss the Claimant has suffered due to the breach of contract is the sum of \$5,000,000.00.

Order:

1. Judgment is entered for the Claimant against the 1st and 2nd Defendants.
2. General Damages is awarded in the sum of \$5,700,000.00 with interest at 3% per annum from November 27, 2012, to March 15, 2024.
3. Costs to the Claimant to be agreed or taxed.
4. Judgment is entered for the 3rd and 4th Defendants against the Claimant.
5. Costs to the 3rd and 4th Defendants to be agreed or taxed.

⁶ Robinson v Harman (1848) 1 Exch 850