[2024] JMSC Civ. 149

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

SU2024CV04094

BETWEEN	**ALEXANDER KENNEDY**	**1st CLAIMANT**
AND	**BRENDA KENNEDY**	**2nd CLAIMANT**
AND	**JERMAINE BENNETT**	**3rd CLAIMANT**
AND	**NIGEL BENJAMIN**	**1st DEFENDANT**
AND	**KINGSTON AND SAINT ANDREW MUNICIPAL CORPORATION**	**2nd DEFENDANT**
AND	**NATIONAL ENVIRONMENTAL PLANNING AGENCY (NEPA)**	**3rd DEFENDANT**
AND	**NIAVIV COMPANY LIMITED**	**4th DEFENDANT**

IN CHAMBERS
IN PERSON AND VIA VIDEO CONFERENCE (ZOOM PLATFORM)

November 13 and 18, 2024.

Ms. Caroline Hay K.C. with Mr. Zurie Johnson instructed by Caroline Hay for the Claimants/Applicants

Mr. Ransford Braham K.C. with Mr. David Johnson instructed by Samuda & Johnson for the 1st and 4th Defendants/Respondents

Ms. Ketha Silvera for the 2nd Defendant

Ms. Shanelle Johnson for the 3rd Defendant

Civil Practice and Procedure – Application for Injunction – Whether there is a Serious Issue to be Tried – Whether or Not the Claimant Has Established a Case with a Real Prospect of Success in Nuisance Against the 1st and 4th Defendants.

Civil Practice and Procedure – Application for Injunction – Whether Damages is an Adequate Remedy for the Claimant – Whether the Balance of Convenience Lies with the 1st and 4th Defendants or the Claimants in their Competing Interests to Enjoy the User of their Respective Properties.

Tort – Nuisance – Whether or Not the 1st and 4th Defendants Have Created a Nuisance on Property Not Their Own to the Disturbance of the Claimants – Whether there is Sufficient Evidence to Establish a Case with a Real Prospect of Success that the Alleged Damage Caused by the Acts of Construction by the 1st and 4th Defendants was Reasonably Foreseeable in all the Circumstances.

D. STAPLE J

BACKGROUND

[1] The Claimants contention is that they are in great peril as a consequence of a development taking place above their property by the 1st and 4th Defendants. The problem they now face is that construction of the multifamily complex by the 1st and 4th Defendants is practically complete and it is now simply finishing touches that are being applied.

[2] What is the peril? The Claimants contend that as a consequence of the development activities of the 1st and 4 Defendants, rocks have fallen from the Defendant's property, or have been caused to fall from elsewhere other than the Defendant's property and have destroyed a substantial portion of their home and there has been flooding of their homes whenever rain falls.

[3] The Claimants have now called upon the Court to injunct the 1st and 4th Defendants from completing or further carrying on any of the development works on the property pending the outcome of the trial of this matter.

[4] The 1st and 4th Defendants have resisted the application by the Claimants on a number of grounds including:

1) there is no serious issue to be tried in nuisance as between the 1st and 4th Defendants and the Claimants as the Claimants have failed to establish, at this stage, that the 1st and 4th Defendants had foreseen or could have reasonably foreseen the injuries that allegedly resulted to the Claimants from their construction;

2) damages would be an adequate remedy for the Claimants and the 1st and 4th Defendants are capable of satisfying the Claimants in damages;

3) the balance of convenience rests in the favour of the 1st and 4th Defendants; and

4) the relief sought is incapable of enforcement in the manner requested and so should not be granted in any event.

[5] The Court read and heard submissions from esteemed Kings Counsel on both sides and reserved its ruling. I have carefully considered the very thorough submissions and authorities presented and I am grateful to counsel for their assistance in this regard. No insult is made if I do not refer in detail to the submissions or authorities.

THE EVIDENCE

[6] The evidence for the Claimants comes from the 2nd Claimant primarily. She deponed to the fact she lives at 16 Glen Drive, Kingston 8 in the parish of St. Andrew. She lives with her adult son, her daughter and her husband in a 4-bedroom dwelling home. She has no title to the property, though the evidence suggests that she is the owner of same.

[7] She says that she and her husband have lived at that property for over 50 years.

[8] According to her, in or around 2020/2021 construction of a multistorey dwelling complex started on property that she asserts was adjoining their land. But this is not true. The property upon which the development has been erected is separated from their property by a strip of land. There is no evidence of whom owns this strip of land. The address for the development is 12 Glen Drive Kingston 8 also known as 3A Grosvenor Heights, Kingston 8.

[9] She asserted that the construction was taking place on top of "caves". She calls them caves. I do not. I have no evidence at this stage, that the word "cave" is an appropriate descriptor. This is because, according to the uncontradicted evidence of the 1st Defendant, the Claimant's son, Jermain Bennett, describes them as caverns carved out of the rock face by third parties who had been mining for marl.

[10] At paragraph 27, Mrs. Kennedy's evidence is that they have enjoyed the shelter and beauty of the natural caves in rocks for all the years they have lived there. She also stated that the enjoyed the facility of walking along natural long-established footpaths from their home up to Grosvenor Terrace. So there is clear evidence that the "caves" have been there for quite some time and before the construction began of the 1st and 4th Defendants' development.

[11] Mrs. Kennedy then asserts that sometime between November and December 2023, a boulder "*fell from the offending development* on top of my house and broke through the kitchen at the upper level." This is important as she has asserted that the boulder came from the development. This is mirrored at paragraph 17 of the Claimants' Amended Particulars of Claim filed on the 25th October 2024.

[12] This assertion is then modified by paragraph 19 where she said that the boulder fell either directly from the offending development or was dislodged by works undertaken at the offending development. She does not state from where the boulder would have been dislodged.

[13] It is also important to note that the Court takes judicial notice of the fact that a magnitude 5.4 earthquake struck Jamaica on the 30th October 2023. This would

have been just before the November/December period when the Claimants began experiencing the boulder falling.

[14] Mrs. Kennedy went on to assert that before this rock fall incident, there had never been any previous incident involving falling rocks on her home or flooding in the over 50 years that they had been in residence at that location.

[15] Aspects of paragraph 20 of her first affidavit were not considered as they were inadmissible. This would be the portion where she purported to speak to the fears and beliefs, not just of herself, but other neighbours without any basis for so stating.

[16] About 9-10 months after this first incident, there was a second and seemingly more serious incident in August of 2024 where more boulders had come crashing down on the roof of their house. According to her, it required a rescue team of neighbours, firefighters and policemen to extract her son from the rubble. There is no evidence from her as to the source of this rubble in this second incident.

[17] In her second affidavit, Mrs. Kennedy noted that since the granting of the interim injunction, there has only been “falling pebbles” and nothing more. But one of the interesting aspects of this case is that there haven’t been more than the 2 major rock falling incidents over the period of 1 year.

The Preliminary Report of Mr. Stead Williams

[18] Exhibited to the 3rd Affidavit of Mr. Chaddean Williams was the preliminary report of Mr. Stead Williams. Based on his curriculum vitae, he is quite an experienced structural architect and civil engineering consultant. He is not a geologist or an expert in rock formations and he has admitted his limitations in his preliminary assessment.

[19] His report makes an assumption about the source of the material that fell on the homes of the Claimants, so to that extent, I cannot place any reliance on same. In fact, his language suggests he himself may harbour some doubts. He stated at the

second paragraph under the heading “Preliminary Investigations” on page 2 of the report that,

> *“We are led to assume that the falling rocks and debris were the direct result of the construction even though (emphasis mine) the construction itself, subject to the Land Surveyor’s report, could be as much as 20 metres away.”*

[20] He also does not seem to factor in his initial assessment what role, if any, the earthquake of October 30, 2023 might have played in the rocks falling. This is significant in light of the evidence from the Claimants themselves that nothing was happening prior to the November/December 2023 falling incident.

[21] All of this I found rather odd. Counsel and experts would do well to heed the learning from the recent decision of the Privy Council in *Julian Washington v Rex*[1] and its timely reminder of how experts are to carry out their functions in assisting the Court.

[22] The report therefore does not represent any cogent evidence upon which the Court can act.

The Evidence for the 1st and 4th Defendants

[23] The 1st Defendant gave evidence on his own behalf as well as in his capacity as an officer of the 4th Defendant.

[24] He stated that they are carrying out a development on the property at 3A Grosvenor Heights. Initially there was a 10 foot wall at the southern end of the

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[1] [2024] UKPC 34

property that represented the boundary wall. But since 2021, there has been improvement to the wall and it is now more substantial.

[25] According to him, there is approximately 22 feet of land beyond the wall which forms a ledge. Importantly, he testifies that the ledge does not form part of their property and there is no construction that takes place on same. Further, the apartments themselves are another 30 feet or so inside of the fence. None of this evidence has been challenged.

[26] Beyond the ledge is a sheer drop to the ground. At the foot of the drop, he was able to see houses. According to him, the 3rd Claimant told him that sections of this rock face had been excavated by third parties creating caverns in the rock face. He said he was not aware of this fact until the 3rd Claimant told him. I found this curious as, from the photographs presented in his evidence as well as from the Claimants, the caverns are pretty obvious.

[27] This will have to be explored further on at trial, but at this stage one must wonder whether or not there was really a properly conducted property survey before construction began. For example, there were houses at the foot of the drop of which you knew. Surely, one would think that you would like to see what else is happening with the rock face as part of say, an environmental impact assessment. Of note, the 1st and 4th Defendants have not presented this document as part of their efforts to resist this application. Perhaps we will see it at some point.

[28] Fast forward two years into the construction. The 1st Defendant says that the Claimants approach him to complain that a boulder fell from the site onto their home and caused damage. The 1st Defendant refutes this allegation as he contended that the high retaining wall had not been breached. This was not challenged and I accept that evidence at this stage.

[29] The 1st Defendant also denied the allegations of flooding to the Claimants' property as he says he had never received any prior complaints of flooding from the Claimants or any other residents at the foot of the rock face. This is rather

interesting as the 1st Defendant did not shy away from acknowledging the complaint of the falling rock from the 1st incident. He could have easily denied that he was confronted or that he made attempts to contribute, but he did not. This enhances his credibility in this regard. Neither did the 2nd Claimant say in her affidavit that she or anyone had ever complained about the flooding to their properties.

[30] To his affidavit are attached the building permits and approvals received by himself for the property from the NEPA and the KSAMC. Also attached is the mortgage schedule for the mortgage given to an associated company which company on lent the proceeds of the mortgage to the 4th Defendant to finance the project. What this means is that the 4th Claimant's property is free (on its face) from any encumbrance (save a mortgage to the Real Estate Board).

[31] He also said that the Claimants' property *appears to be* situated, at least partially, inside of one of the caverns. He specifically denies that there are caves and insists that they are manmade caverns created overtime from third parties doing excavation work.

[32] The 1st Defendant exhibited a "report" from their own Professional Civil Engineer, Mr. Andrew Hammond, which detailed his observations about the "report" from Mr. Williams referenced in the Claimant's affidavit.

Mr. Andrew Hammond

[33] Mr. Hammond was engaged by the 1st and 4th Defendants to, among other things, undertake fortnightly site progress inspections of the development, conducting inspections of the reinforcement of the critical members before the poring [sic] of concrete, reviewing any design change requests made and monitoring construction methodology.

[34] His evidence, in his first affidavit, was that work started in or around November 2021 and the heavy excavation work was completed in late 2022 to early 2023. He describes in great detail[2] the pre-construction and construction work.

[35] In his professional view, sound engineering and construction processes were adhered to in the process. However, I must point out that Mr. Hammond could not qualify as an expert as he was expressly hired by the 1st and 4th Defendants to supervise the works. In that regard, he cannot be regarded as "independent" in any sense of the word. So his findings must be viewed in this light as he has an interest to serve.

[36] I must point out as well that I had no regard to paragraphs 14, 15, and 16 of his first affidavit as he is purporting to make findings of fact that are for the Court to determine and, especially concerning the "findings" in paragraph 16, he has no such expertise to give such opinions as far as I have seen his CV exhibited to his second affidavit.

THE GENERAL LAW ON INJUNCTIONS

[37] As this is an application for an interim injunction, the Court had regard to the well established guidelines from the celebrated cases of ***American Cyanamid Co v Ethicon Limited***[3] and the judgment of Lord Diplock. This was further affirmed in the local Privy Council decision of ***NCB Limited v Olint Corporation***[4] (hereinafter *Olint*). These considerations are:

(i) Is the Claimant's case frivolous or vexatious? Meaning, is there a serious issue to be tried?

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[2] See paragraphs 7-10 of his affidavit filed on the 11th November 2024.
[3] [1975] 1 All ER 504
[4] Privy Council Appeal No. 61/2008, April 28, 2009.

(ii) If the answer to the above is no, then the injunction ought not to be granted. If the answer is yes, then I must next consider whether or not damages would be an adequate remedy.

(iii) If there is no clear answer to the question of whether or not damages would be an adequate remedy to compensate either the Plaintiff or the Defendant, then I will go on to examine the balance of convenience generally;

(iv) If, after considering the balance of convenience generally, the Court is still unable to come to a definitive conclusion, and there are no special factors, it is advisable to have the status quo remain.

[38] In the case of ***Tapper v Watkis-Porter***[5] Phillps JA stated that, "An analysis of the balance of convenience entails an examination of the actual or perceived risk of injustice to each party by the grant or refusal of the injunction".

[39] Earlier in the said judgment at paragraph 36, she adumbrated and distilled the principles on the concept of the balance of convenience from the ***American Cyanamid*** and the ***Olint*** cases. I can do no better than to quote from the eminent jurist:

> *In considering where the balance of convenience lies, the court must have regard to the following:*
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> *(i) Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.*
>
> *(ii) If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice*

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[5] [2016] JMCA Civ 11 at para 37

occurring; and the relative strength of each party's case.

[40] At the end of the day though, the Court should try to take the course that will result in the least irremediable prejudice to either party[6].

THE ISSUES

[41] The issues, broadly speaking, are as follows:

(i) Is there a serious issue to be tried? Meaning is the Claimants' case one with a real prospect of success in nuisance as against the 1st and 4th Defendants in that that the rocks that fell on their home and damaged it were a reasonably foreseeable consequence of some action taken by the 1st and 4TH Defendants on their property that caused the result on the Claimants' property?
(ii) Is damages an adequate remedy for the Claimants?
(iii) If it is, then that is the end of the matter. If not, I will then go on to consider the question of the balance of convenience.

COUNSEL'S SUBMISSIONS

Ms. Hay

[42] Ms. Hay indicated that an expert, Professor Simon Mitchell, a sedimentary geologist with the University of the West Indies, is scheduled to inspect the site between 10:00 am and 11:00 am on November 13, 2024. This visit is to the "caves". The surveyor, Mr. Manderson, will be trying to attend at the property of the 4th Defendant between Tuesday and Thursday of the week of the 18th November 2024.

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[6] Id

[43] She stressed that the focus should be on what is pleaded as the Claimant's claim. Counsel referred to the Amended Particulars of Claim filed on the 25th October 2024. She highlighted the specific language in paragraphs 1(i)-(iii).

[44] So essentially, she argued that it is either that boulders fell from the 4th Defendant's land; or that the acts of the Defendants caused a chain reaction resulting in the boulders falling onto the Claimants' land.

[45] I note an inconsistency in pleading between paragraphs 17 and 19 of the Amended POC filed on the 25th October 2024. I also noted paragraph 25 where there is no statement in the Amended Particulars of Claim as to the location from which the boulder fell or was dislodged. I pointed out rule 8.9A of the CPR to Ms. Hay and that there is no pleading relating to the location and that this might have an impact.

[46] Ms. Hay submitted that there is some scope for flexibility when it comes to this. She also cited ***Sagicor Bank Jamaica Ltd v Taylor-Wright***[7] on the general point that a claim can be decided on a matter that was not pleaded once the substance of it was disclosed in the general sense.

[47] Ms. Hay argued, relying on ***Salmond and Heuston on Tort***[8], that nuisance can occur even in circumstances where the nuisance did not come directly from the Defendant's property, but were created elsewhere by the acts of the Defendant. She relied on ***Southport Corporation v Esso***[9]. The tort of private nuisance is made out if defendant uses his land *"or some other land"* in a way that causes damage to the claimant's land.

[48] She argued that the state of the land being built upon by the 4th Defendant is going to loom large in relation to causation. Did there exist a duty of care on the part of the 1st and 4th Defendants to properly ensure that the building was safe to erect

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[7] [2018] UKPC 12
[8] 21 Ed p. 56
[9] [1954] 2QB 182 per Denning LJ at page 196

and was safely erected? The answer is yes. But I pointed out to her that the undisputed evidence is that they have met their duty as far as they are concerned.

[49] When tasked by the Court on the absence of any expert evidence from the Claimants to buttress their position, Ms. Hay stressed that the parties are very far advanced in terms of getting their technical reports and expert reports before the Court. I asked counsel why it is that these expert reports etc. were not obtained before now given that their financial circumstances had not changed at all. Ms. Hay did indeed say that hindsight is 20/20, but she explained that there was tremendous effort made by the Claimants to resolve the issue outside of Court before today.

[50] In relation to the balance of convenience, Ms. Hay pointed out that there is an escalation clause contained in the agreement for sale mentioned in affidavit of Mr. Benjamin that could be utilized to offset the costs that might be occasioned by the delay. She argued further that there is no evidence as to exactly when the liability (as amortized) will be due and payable as the terms of payment are not known.

Mr. Braham's Counter

[51] Mr. Braham's opening salvo was that the Court is not in a position to grant an injunction pending evidence. If the evidence is not before the Court at this time, the Court cannot await the evidence. This is particularly so in the situation where the Applicant is not giving an undertaking as to damages.

[52] Mr. Braham highlighted paragraph 6 of the Affidavit of Mr. Benjamin. He argued that the evidence suggests that the caverns were not natural, but man made. He then highlighted paragraph 8. He highlighted 2 photographs (those that were just before the photo of the NEPA license), to show that there is really no clear indication of the Claimant's property.

[53] He emphasized that for nuisance, you must establish foreseeability. He referenced the corresponding paragraphs of his written submissions. He strongly urged the Court to find that on the evidence presented so far, there is nothing to suggest that the particular injuries and the alleged method of cause, could have been reasonably foreseen by the 1st and 4th Defendants.

[54] Mr. Braham argued that there is no evidence that even in the face of the injunction, that the rocks would not continue to fall.

IS THERE A SERIOUS ISSUE TO BE TRIED?

[55] As I said to Ms. Hay from day 1, there is a world of difference between correlation and causation. What we have from the Claimants so far is a lot of correlation, but they are noticeably thin on causation.

[56] However, the evidence shows that there is a serious issue to be determined as to whether or not the construction and continued presence of the 1st and 4th Defendant's building, in combination with other environmental factors, has materially contributed to the emergence and persistence of the nuisance.

[57] The celebrated case of *Sedleigh-Denfield v O'Callaghan*[10] shaped the law of nuisance. Lord Atkin defined nuisance as follows:

> *I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself. The occupier or owner is not an insurer, there must be something more than the mere hard done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient, but some degree of personal responsibility is required which is connoted, in my definition, by the word*

[10] [1940] AC 880

> *"use". This conception is implicit in all the decisions which impose liability only where the defendant has 'caused or continued' the nuisance.*

[58] The interference must not be trifling, but consequential in order to be unreasonable. And the duration of the interference is a relevant factor in determining whether the interference is trifling or substantial[11].

[59] As Ms. Hay helpfully pointed out in her speaking notes and emphasised in her oral arguments, the editors of Salmond & Heuston on Tort[12] make the point that the tort of nuisance arises if the nuisance is created by the defendant on land other than their own. They make the further point that a nuisance is usually created by acts done on land in the occupation of the defendant, adjoining or *in the neighbourhood* (emphasis mine) of that of the plaintiff.

[60] The UK Supreme Court in the decision of ***Coventry et al v Lawrence et al***[13] said that,

> *In **Sturges v Bridgman** (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey". **Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out. (emphasis mine)***

The Source of the Rocks and Flooding

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[11] See paragraphs 55-57 of the decision of Campbell J in *Hanson v ALCOA Minerals of Jamaica Inc* [2012] JMSC Civ 150

[12] 21 ed at p. 56.

[13] [2014] UKSC 13 at para 4 per Lord Neuberger P

[61] In this case, there is no evidence at this stage that the nuisance (the boulders or flooding) came from the property of the 1st and 4th Defendants. What counsel Ms. Hay has pivoted to, is asserting that the construction of the dwelling on top of the "caves" has resulted in the rocks falling from the rock face onto the Claimant's property.

[62] However, that is not what has been pleaded. Rule 8.9A states that a Claimant cannot rely on allegations of fact not pleaded. The suggestion was whether this limitation applied only at the substantive trial. But there is no such limiting words in the rule to confine this limitation only to the trial stage. It also makes perfect sense why not. Your pleadings outline the parameters of the case. They contain the substantial facts on which you are saying you have been wronged and form the basis of your claim for redress.

[63] It is on those factual assertions that a Defendant determines how to launch their defence. It is also why, if the facts change (as they well might), pleadings need to be amended to reflect the true nature of the factual basis of the claim so that a Defendant is not surprised.

[64] So to assert one thing in the pleadings, but another in the evidence, is not permissible in my view *once it is that there is a pleaded case*. Ms. Hay argued that in interlocutory proceedings hearsay evidence is permissible and so there is a degree of flexibility. But I disagree. The admissibility or no of evidence has little to do with you putting in the proper factual averments in the pleadings.

[65] In paragraph 17, of the Amended Particulars of Claim, the Claimants assert that the boulder "fell from the offending development on top of the Claimants' house and broke through the kitchen at the upper level…." There is, at this stage, no evidence of this assertion. There is also the uncontradicted evidence of the 1st Defendant that the boundary wall was not breached and so no boulder fell from their property.

[66] Then we have paragraph 19 which says that it is either that the boulder fell directly from the offending development or was dislodged by works undertaken at the offending development. But it is not stated from where the boulder was dislodged. The same statement is made at paragraph 25 in relation to the 2nd incident in August 2024.

[67] So the Defendant has met the case regarding the boulders etc coming from their property with such strong evidence, which isn't challenged. But the Claimants have raised the issue that the works being undertaken by the 1st and 4th Defendants dislodged the boulder. This pleading is rather loose, but does bear some resemblance to the argument raised by Ms. Hay.

[68] Learned Kings Counsel Hay did argue that the pleadings could be amended. But she would need permission for any future amendments, which permission may or may not be granted. I must also consider this application on the state of the case before me and not what might come[14].

[69] The provisional opinion of Mr. Williams I did not find to be helpful. Firstly, there is no mention therein of whether or not the earthquake of October 30, 2023 could have caused the first rock fall in November/December 2023. This, I find, to have been a material omission especially when one considers that the uncontroverted evidence of Mr. Hammond and Mr. Benjamin (incidentally supported by Mrs. Kennedy) was that nothing had been happening for the 2 years before when all of the heavy excavating etc had been taking place.

[70] In fact, according to Mr. Hammond, all the heavy excavation work was concluded by early 2023. The next major incident that could have caused movement was therefore the earthquake. To have left it out of his provisional report as part of his consideration was most curious.

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[14] See paragraphs 103-104 of *Shawn Marie Smith v Winston Pinnock* [2016] JMCA Civ 37

[71] That is then coupled with his *assumption* as to the source of the falling rocks which assumption was made having only spoken to the Claimants and the residents, but not the developer. His report is therefore speculative and not at all helpful at this stage.

[72] It is important also to remember, as Mr. Braham argues, that the Claimants must show prima facie evidence that the injury that resulted to them was a foreseeable consequence of the actions of the 1st and 4th Defendants.

[73] The context to this is that the 1st and 4th Defendants have put evidence before the Court, through the affidavits of Mr. Benjamin and Mr. Hammond, that they have obtained all the requisite permits, they have complied with best construction practices in the construction of the building, the boundary of their property is at least 22 feet from the edge of the ledge at the foot of which lies the Claimants' property and there had been no complaints about rocks falling or flooding (which was not pleaded incidentally) prior to November 2023 and after the earthquake.

[74] Something to note, however, is that the UKSC has stated in the *Coventry* case cited above, that, "…the mere fact that the activity which is said to give rise to the nuisance has the benefit of a planning permission is normally of no assistance to the defendant in a claim brought by a neighbour who contends that the activity cause a nuisance to her land in the form of noise or other loss of amenity."[15]

[75] The findings of the soil investigation report commissioned in November of 2023 by the 4th Defendant exhibited to the Affidavit of Mr. Benjamin raised some intriguing evidence. Under the heading numbered 3 titled "Geology" there is sub-heading 3.2 which is titled Geological Structure. There it states that the Mannings Hill southwest to northeast trending geological fault line is located in close proximity to

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[15] See n. 13 at para 94. For a general discussion leading up to this conclusion (which is quite important to read in my view) see from para 77.

the southern boundary of the property. Of note, this southern boundary is in the vicinity of the ledge and rock face.

[76] The report goes on to state that though this is a minor fault zone, it notes that it does represent a zone of weakness along which displacements can be induced. It also notes that minor faults are responsible for increased shearing, jointing, and fracturing of rocks which reduces the overall competency of the limestone rock mass.

[77] This rock face was already majorly compromised due to the excavation works resulting in the caverns in the rock face. On top of this was the very serious earthquake. This evidence suggests that the Claimants were under a ticking time bomb. It also shows that the construction was being done in close vicinity to a fault line and on the edge of a precipice with residences at the foot of the cliff.

[78] The evidence confirms that the 1st and/or 4th Defendants did not know about the caverns in the face of the ledge before they began their construction in 2021.

[79] The report was commissioned in November of 2023. But why wouldn't it have been commissioned before construction started? In the 2017 Kingston and St. Andrew Development Order, under the Manor Park Local Area Plan, policies MP H11 and MP H12 are particularly relevant to this situation. They state as follows:

> *POLICY MP H 11 Where housing development proposals are being contemplated **in potentially hazardous areas** (emphasis mine) the local planning authority will require the submission of technical documents such as an engineer's report for consideration of the application.*
>
> *POLICY MP H 12 Housing development will not be allowed on land that is steep and unstable, vulnerable to erosion, slippage, subsidence, flooding or other natural hazards or which will involve costly extra ordinary precautions by government to safeguard (See Main Cross Reference Policy SP H24–SP H25 and Appendix 23).*

[80] The Manor Park Local Planning Area comprises includes the community of Armour Heights where the 1st and 4th Defendant's development is taking place.

[81] Of note, the same report points out that the construction site itself was on solid ground and capable of supporting the structure. But, in my view, it wouldn't end the matter because nuisance can occur even if you are doing what you are lawfully entitled to do on your property if your action results in substantial interference with adjoining property.

[82] There is also heavy dispute about whether the holes in the rock face are caves or caverns created by excavation and there is no evidence of the depth of the caverns.

[83] So they assert that they Claimants have not shown that, on the state of their case at this stage, that it was reasonably foreseeable that the construction works would have caused damage of the nature and type allegedly suffered. I do not agree.

[84] The commissioned November 2023 report does not address the question of whether or not the construction works would have likely had an impact on the people at the foot of the ledge.

[85] An interesting case I came across was *Leaky et al v National Trust for Places of Historic Interest or Natural Beauty*[16]. The facts bear a remarkable similarity to the case at bar.

[86] The Defendants owned lands on which stood a conical hill in close proximity to the Claimant's land on which were dwelling houses. From time to time, through natural weathering, there would be slippages of material from the hill. A long period of drought opened a crack in the hill which was brought to the attention of the Defendant by the Claimant. The Defendant responded that he had no obligation to

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[16] [1980] 1 All ER 17

do anything. Weeks later, there was a large fall of the bank onto the land of the complainer. The Defendant refused to undertake the cost of clearing the land and the institution of protective works.

[87] The Plaintiffs issued a writ (there was no express pleading in negligence), seeking an injunction for the Defendants to clear the land, to prevent future falls of earth. The judge held that the Defendants were liable in nuisance. The Defendants appealed, contending that there was no liability owed to an adjoining owner where natural mineral material encroached or threatened to encroach onto adjoining lands causing damage. A further contention was, if there were a liability, it was in negligence and not in nuisance.

[88] On Appeal, the Court of Appeal dismissed the appeal. The Court of Appeal held that there was a general duty imposed on occupiers in relation to hazards occurring on their land, whether the hazards were natural or manmade. A person on whose land a hazard naturally occurred, whether in the soil itself, or in something on or growing on the land, and which encroached or threatened to encroach onto another's land thereby causing or threatening to cause damage was under a duty, if he knew **or ought to have known of the risks of encroachments** (emphasis mine) to do what was reasonable in all the circumstances to prevent or minimize the risk of the known or foreseeable damage or injury to the other person or his property and was liable in nuisance if he did not.

[89] So the questions are:

a. What are the risks associated with building such a large structure in such close proximity (around 50 feet based on the evidence) to a minor fault line, in circumstances where there is a ledge in the vicinity of the fault line, where the face of the ledge has been compromised by major caverns and where there are persons living at the foot of the ledge almost in the cavern? And

b. Was the risk of damage of the type alleged foreseeable in all the circumstances (including but not limited to what I stated in a. above) as a consequence of the construction works (both whilst they were ongoing and

as it will persist), meaning, were they capable of being known by the 1st and 4th Defendants before construction?

[90] There is no evidence of the scope, findings and conclusions of the environmental impact assessment for the works being carried out by the 1st and 4th Defendants. It can be inferred that one was carried out as there were permits granted from NEPA and the KSAMC and such permits ought not to be granted without there being an EIA. But the assessment was not exhibited and so we do not know its scope. One would have thought that the 1st and 4th Defendants would have produced same.

[91] So I find that it is more likely than not that there are serious issues to be tried on the evidence.

IS DAMAGES AN ADEQUATE REMEDY?

[92] Despite K.C. Hay's assertion that damages would not be an adequate remedy for the Claimants, it is my view that it would be an adequate remedy on the balance of probabilities.

[93] If the Claimant's claim is correct, it would suggest that the entire internal structure of the ledge and underneath the 1st and 4th Defendants' structure is seriously compromised. This makes it that the properties at the foot of the ledge are in serious danger now and for the foreseeable future so long as the structure exists.

[94] One of the remedies being sought by the Claimants is their temporary removal from the location until remedial works can be completed. However, there is no evidence, at this stage, that remedial works (if necessary) are appropriate or economically feasible. In other words, the Claimants have not shown any evidence, at this stage, on the balance of probabilities, that they would be able to remain at the premises at the end of the Claim.

[95] Since that is the case, at this stage the only remedy that I can see they would be entitled to would be Damages. They would have to receive compensation for the loss of their property along with attendant costs for having to move and to be put back in a similar position or as close to it as money can achieve. All of this sounds in damages that are more than quantifiable.

[96] The property being held by the 4th Defendant is, as far as I see it, unencumbered. So it does have an asset. In those circumstances, I am satisfied that the 1st and 4th Defendants would be able to meet the damages that may be awarded to the Claimants.

WHERE DOES THE BALANCE OF CONVENIENCE LIE?

[97] It is my view that the balance of convenience lies with the 1st and 4th Defendants.

[98] The structure is substantially complete and all that is to be done is just internal work to the various units. This does not suggest that the nature of the work remaining would or should pose any significant threat of earth movement to cause the level of interference already experienced by the Claimants.

[99] Indeed, one might consider that the essential nuisance of which the Claimants now complain is the very presence of the structure itself. In a real sense therefore, the horse has already bolted from the barn and there is no way of getting it back in at this point.

[100] As Mr. Braham rightly argued, there is no interim relief that can be granted to facilitate the temporary relocation of the Claimants on the terms sought in the application. The parties cannot be forced to agree. Nor does the Court have any evidence of any costs associated with such a move. It would be, in my view, for the Claimants to undertake their relocation and seek to recover those costs in the claim itself.

[101] This exercise is substantially more convenient than asking the 1st and 4th Defendants to shut down the remainder of the project. Ms. Hay strongly advanced the argument that the 1st and 4th Defendants are potentially covered by escalation costs that they may add to any agreements for sale. But the Court does not have the precise escalation figure nor any other figures on which it could make such a finding at this stage.

[102] Learned Kings Counsel Hay also raised the possibility in her oral arguments and speaking notes that the Court could consider lifting the injunction if the 1st and 4th Defendants found alternate accommodation for the Claimants. She cited the *Coventry* case as authority for this principle. However, I must confess that having read the case, I did not extract that principle from same. The Supreme Court was simply explaining the effect of the permanent injunction imposed by the trial judge and when the injunction would start to run in the circumstances of that case. Their Lordships, in my humble view, were not purporting to lay down and did not lay down, any legal principle.

CONCLUSION

[103] It is my view that there are serious issues to be tried between the Claimants and the 1st and 4th Defendants. However, in my view, damages would be a more than adequate remedy for the Claimants and I find that the 1st and 4th Defendants have the means to compensate the Claimants should the Claimants prevail at trial.

[104] It is also my finding that in all the circumstances, the balance of convenience is in the favour of the 1st and 4th Defendants.

DISPOSITION

[105] The interim injunction granted on the 5th November 2024 and extended to this day is not renewed.

[106] The Applications sought in the Claimants' Amended Application for Court Orders filed on the 25th October 2024 are refused.

[107] Costs to be in the Claim.

[108] Claimants' Attorneys-at-Law are to prepare file and serve this Order on or before the 29th November 2024 by 4:00 pm.

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D. Staple
Puisne Judge