

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT NO. M-200 of 1975

BETWEEN	DAISY ETHLYN McKOY	PLAINTIFF
A N D	LLOYD BURKE	FIRST DEFENDANT
A N D	STEVEN ALFRED PEYNADO	SECOND DEFENDANT
A N D	ELLEN GLORIA PEYNADO	THIRD DEFENDANT

S. C. Morris for Plaintiff

A. D. Manning for the First Defendant

Heard on: May 30, October 9, 1978, July 27 and 30, 1981

JUDGMENT

CAMPBELL, J:

The plaintiff by her Writ issued on 23rd October, 1975, claimed damages against the first defendant as builder, and against the second and third defendants as owners of premises adjacent to hers, as a result of a building constructed by the first defendant on the land of the second and third defendants which the plaintiff alleges has caused subsidence to her building with resultant structural damages.

The plaintiff claims damages for trespass, wrongful interference with her right of support, negligence and nuisance.

Interlocutory judgment was entered by the plaintiff against the first defendant on 10th March 1976 with express reservation of her right to recover damages and costs from the second and third defendants notwithstanding the judgment in default entered against the first defendant.

Hearing commenced against the second and third defendants on May 30, 1978 when Mr. Fraser of Gaynair and Fraser their Attorneys-at-Law asked for and obtained leave to withdraw from the case due to his inability to establish contact with his clients despite every reasonable effort to establish such contact. The case proceeded in default against these two defendants.

Mr. Morris in his final address invited me to determine liability only and if the second and third defendants are found liable to make an order that damages against them be assessed at the same time when damages is assessed against the first defendant. This I have agreed to do.

The plaintiff's evidence is that she is the registered owner of premises known as 23 Wellington Street, Spanish Town, St. Catherine. The premises was acquired in 1949. There was an old shack on the land, this was demolished and a building constructed thereon in 1950. The building housed a tavern, a grocery and a snack shop downstairs while upstairs comprised a dwelling house of three bedrooms, a living room and dining room and bath room. She migrated to the U.S.A. in 1964 leaving the premises in the caretakership of Messrs. Vernal Master and George Dias. She visited Jamaica in 1966 and found her building in good order and condition. She returned to the U.S.A. subsequently and in 1973 she received disturbing information from her agent which constitutes the genesis of this action.

George Dias, Vernal Master, Finlator Thorpe and Edgar Spence each testified on facts concerning 23 Wellington Street of which the plaintiff was informed. The evidence of George Dias and Vernal Master is to the effect that in 1973 the second and third defendants commenced building on No. 25 Wellington Street which is adjacent to and forms boundary with No. 23 Wellington Street. These defendants utilised the services of the first defendant, a building contractor. The first defendant in laying out the foundation of the building on No. 25 Wellington Street, dug a trench or excavation about 14 inches from the plaintiff's building on its northern side. The excavation which was about 1½ feet wide 2 feet deep and extended for the complete length of the northern side of the plaintiff's building, was left open resulting in its becoming filled with water which soaked under the plaintiff's building causing the tiles to sink, the walls to be rent or cracked, the beams to be tilted and the entire building to list towards the excavation. The second and third defendants were informed of the resultant damage and

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they referred Dias and Master to the first defendant saying it was his job.

Mr. Finlator Thorpe a one time chief draughtsman (design) of the Kingston and Saint Andrew Corporation and a person of undoubtedly wide experience in the building construction industry said he was requested to view No. 23 and No. 25 Wellington Street in July, 1977. He noticed that the building on No. 25 Wellington Street was much too close to the building on No. 23. In particular the northern adjacent walls of the two buildings was no more than 9 inches apart and in places was only 6 inches apart.

The closeness of the building on No. 25 to that on No. 23 affected the stress in the soil between these two adjacent premises. It affected the settlement of the building on No. 23 causing it to sink to find a new level. There was subsidence resulting in cracks to the walls, beams and lintels. There was equally lateral movement in No. 23 causing shift in the lintel connections to the walls and wave-like movements of the floor tiles.

Mr. Edgar Spence a technical officer attached to the engineering department of the Kingston and Saint Andrew Corporation said he had inspected the adjacent premises No. 23 and No. 25 Wellington Street when the foundation on No. 25 was dug. He said that the foundation trench dug for No. 25 was separated from No. 23 by a gap of only between 6 inches to 12 inches.

When he inspected, he had seen water in the trench, the soil content was mostly of sand and had very little stress to maintain support for the building on No. 23. The result was that the columns of the building on No. 23 had listed towards the trench excavation and the foundation of No. 23 was exposed. There was no "shoring up" to protect No. 23. The absence of "shoring up" caused earth movements under No. 23 resulting in the subsidence and structural damage.

On the evidence before me which I accept as credible I find as the a fact that <sup>the</sup> subsidence of the building on No. 23 Wellington Street was due to the excavation for the foundation of the building on 25 Wellington

Street. The excavation was too close to the building on No. 23. This excavation together with the absence of any "shoring up" caused soil movement under the building on No. 23. The movement was further facilitated by water which had been allowed to collect in the excavation seeping under the foundation of the building on No. 23.

The plaintiff pleaded in her Statement of Claim a right to have her building and land supported laterally and subjacently by the land of the defendants. This right she says derives from her having acquired a prescriptive right to the support of her building for over twenty years. The evidence is that the building has been on her land for over twenty years after which the defendants disturbed their land in a manner which took away the lateral support previously afforded to the plaintiff's building. This disturbance took the form of excavation for the foundation of a building which was subsequently erected on No. 25 Wellington Street.

The case of Public Works Commissioner and Angus and Company and Dalton v. Angus and Company Consolidated 1881 H.L. (1881 - 5 All E.R. Rep.) page 1 has authoritatively established that where a building has stood for twenty years, supported by the adjacent soil, it acquires a right to the support of that adjacent soil and no one has a right to take away that soil without putting an equivalent to sustain the building. This right was held by the Learned Law Lords as being an easement acquired by twenty or more years uninterrupted enjoyment, nec vi, nec clam nec precario. If damage results from this interference with the support from the adjacent soil, it is actionable and may also constitute a nuisance.

In the light of the principle of law established in the above case and in the light of the evidence which I accept as to the date when the plaintiff's building was constructed I hold that the plaintiff was entitled as pleaded to a right to support of her building. This right has been interfered with and damage has resulted, she is accordingly entitled to damages against the person or persons found to be liable for this interference with resultant damage.

The evidence adduced shows that the second and third defendants through the first defendant were negligent in making the excavation without shoring or otherwise propping up the plaintiff's land. However on the authorities the only duty owed by the second and third defendants to the plaintiff in relation to the work being done was to ensure that the lateral support to the plaintiff's land with the building thereon, in relation to which she had acquired the additional right of support, was not disturbed. This duty is independent of whether the excavation was done negligently or not. There is in my view on the facts of this case no separate cause of action in negligence independent of nuisance and or for loss of support.

The trespass averred in the pleading is not clearly established on the evidence. The only evidence in relation to this is that given by George Dias who said "I saw the contractor's workmen trying to patch the cracked wall". This wall was the wall of the plaintiff's house. There is no evidence that consent was at no time given for work to be done to rectify the damage to plaintiff's house. What is clear is that Mr. Dias did not like the way it was being done, he was further of the view that the building could not be repaired so he stopped the workmen. I accordingly find on this evidence that there was no trespass.

The duty of the second and third defendants as adjacent owners of No. 25 Wellington Street in relation to the plaintiff as owner of No. 23 Wellington Street was to ensure that any excavation on their land did not interfere with the acquired right of support enjoyed by the plaintiff's building. They cannot on the authorities of Dalton v. Angus and Hughes v. Percival [1883] (H.L.) (1881 - 5 All E.R. Rep.) page 44 escape liability for a breach of this duty by engaging someone else to do the excavation. Therefore the fact that on the evidence it was the first defendant who or whose workmen did the excavation does not exonerate the second and third defendants from liability for the ensuing damage.

I find that the second and third defendants did interfere with the right of support acquired by the plaintiff in respect of her building on No. 23 Wellington Street. This interference resulted in subsidence

which affected the use, occupation and or enjoyment by her of the said building. They are accordingly liable in damages for this interference with her right of support which in the circumstances also constitute a nuisance.

As requested by Learned Attorney for the plaintiff the damages against the second and third defendants are ordered to be assessed at one and the same time with the assessment of damages against the first defendant.

Costs of these proceedings awarded the plaintiff the same to be agreed or taxed.