IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMON LAW

SUIT C.L. M086 OF 1975

BETWEEN	MICHAEL McNAIR	PLAINTIFF
AND	THE KINGSTON AND SAINT ANDREW CORPORATION	DEFENDANT

Mr. Earle DeLisser and Miss Kay Bennett instructed by Orville Cox and Co. for Plaintiff.

Dr. Lloyd Barnett and Mr. Howard Malcolm for the Defendant instructed by Miss E. Norton of Messrs. Dunn, Cox and Orrett.

Hearing on 9th, 10th and 11th July 1979

J U D G M E N T

Bingham J.

In the quiet suburbs of upper Saint Andrew there is an area known as Barbican Heights. In this area there is a road known as Ridgeway named no doubt because of the steep incline which leads from the road level to the top of the land where most of the houses are constructed. To the south of the roadway and in particular to the southern section of the road as it runs by the Plaintiff's premises there is a gully. This claim arises out of an incident which the Plaintiff alleges took place on 21st November, 1974, while a retaining wall was being constructed to the southern section of this roadway.

It is common ground that this retaining wall was being constructed by the Defendants in order to prevent the further cutting away of the roadway to the southern section which had been damaged by the "Gilda" rains and that this was part of their duty as the Authority responsible for the maintenance of the roads in the corporate area.

The Pleadings

The Statement of Claim

In paragraphs 1 - 3 a history is given of the Plaintiff's premises at 8 Ridgeway from its construction in 1969 up to November 1974.

In paragraph 4 mention is made of the building of a retaining wall to the south of Ridgeway by the Defendant.

In paragraphs 5 - 7 it is alleged that "on 21st November 1974 the Defendants by its servants and or agents entered on the Plaintiff's land and used a traxcavator to cut, dig down and remove a portion of his land, which earth was used as backfill for the retaining wall being built to the southern side of the road opposite to the Plaintiff's land". By reason of this cracks appeared in the Plaintiff's land and driveway followed by slipping and subsidence.

In paragraphs 8 - 10 mention is made of the steps which it is alleged that the Plaintiff took to bring what had happened to the notice of the officials of the Defendant Corporation and the events which took place following the slippage and the remedial work done.

In paragraph 11 the particulars of the Negligence alleged are set out, and finally in paragraph 12 the cost of the remedial work which the Plaintiff undertook is set out.

The Defence

In paragraph 2 the Defendants admitted that they by their servants and or agents carried out the building of a retaining wall to the southern section of Ridgeway.

In paragraph 3 it is admitted that "the Defendants, servants and or agents entered the Plaintiff's land for the purpose of removing friable soil which formed part of the driveway but statedthat this was done in order to protect the workmen constructing the wall".

In paragraph 4 it was denied that the soil removed was used for backfilling of the retaining wall being built.

In paragraph 5 it was denied that the damage to the Plaintiff's land was caused by the allegation as set out in paragraphs 4, 5 and 6 of the Statement of Claim.

Paragraphs 7 and 8 set out the extent of the remedial action promised to the Plaintiff and refers to the building of the retaining wall to the section to the western slope of the Plaintiff's land where the slippage had occurred.

In paragraph 9 there is a general denial of negligence on the part of the Defendants and an allegation of negligence on the part of the Plaintiff and the particulars are set out.

General Observations

From the Pleadings it is of some significance that the Defendants in paragraph 3 of their defence have not specifically denied:-

(a) That a traxcavator was used to remove soil from the Plaintiff's land, but say that this soil was friable which in ordinary language means easily crumpled.

(b) It was admitted that this removal was done by the Defendants, servants and or agents while building a retaining wall for which the Defendants were responsible.

As the case for the Plaintiff stood therefore at its commencement he had to establish on the evidence he adduced:-

(i) That a portion of his land was removed by the Defendants, their servants and or agents.

(ii) That this caused damage to his land and his driveway followed by a slipping and subsidence of the land and driveway.

The Evidence

On 21st November 1974 the Plaintiff was asleep at his home when he was awakened around 3.15 A.M. by the sound of a traxcavator and this sound kept him awake until around 5.30 A.M. The sound then stopped and the traxcavator drove up his driveway. The driver spoke to him while he was in the area of his dining-room and requested to use his phone to report a broken main and upon being told that he had none then drove away. He awoke later in the morning and left for work about 7.30 A.M. On turning down the road to the left of his driveway he did not observe anything unusual, but about 11A.M. while at his work place he got a phone call from his neighbour Tommy Lyeow and as a result he returned home immediately.

On his arrival there was the same traxcavator with the same operator, who had spoken to him earlier in the morning, on it. It was being used to cut and remove soil from underneath his driveway. He watched it in operation for about two to three minutes during which period the traxcavator was scooping up the soil and using it to throw behind a contructed retaining wall which was being made of lime stone on the southern side of the roadway. The Plaintiff then complained to Mr. Victor Smith, the Contractor who was on ~~side~~ site after which some effort was made to remove some of the loose earth which had been removed by

means of shovelling back to the section of the Plaintiff's land. The traxcavator then stopped working.

According to the Plaintiff some 15 feet of the earth along the western slope of the frontage of his land had been removed, and this went further into the slope for a distance of about 6 to 7 feet. This is the general area in which the slippage occurred and where the retaining wall is now constructed.

The visit to the locus revealed that the remainder of the frontage to the western section of the Plaintiff's land, save and except the area where the retaining wall is, is still covered in vegetation. The soil in this area appears quite stable and there has up to the date of this visit been no physical evidence to suggest that slippage has taken place in the remainder of this area. The slippage occurred in the area where according to the two experts Mr. Henny and Mr. Gabay there was the greatest overburden.

Dr. Barnett has made some issue of the Plaintiff's evidence that "the traxcavator was being used to cut and remove soil from under his drive-way". The evidence in the case points to the fact that the slippage which affected the western slope started at least 20 to 30 feet from the Plaintiff's driveway as one proceeds up Ridgeway. In considering this aspect of the evidence it is important to note that the Plaintiff did not allude in his pleadings to any earth being removed from under his driveway. Neither is there any reference in letters (Exhibit 1, 2, and 4) which were written to the Defendants of this section as being the area from which the earth was removed. The reference to driveway first appeared in the Defendants defence where it is alleged that "the Defendants, servants and or agents entered the Plaintiff's land for the purpose of removing the friable soil which forms part of the driveway".

In giving evidence the Plaintiff stated that "the traxcavator was picking up the earth from the side of the road by my driveway". He had earlier said that "the traxcavator was being used to cut and move away soil from underneath my driveway". This bit of evidence in the light of the Plaintiff's latter testimony makes it clear that he did not see the traxcavator actually digging into his land and this was confirmed

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by his evidence further on when he stated "when I saw the traxcavator working at 11 A.M. it has already done its digging".

The Plaintiff was no doubt very shocked and horrified by what he said he saw and his subsequent conduct tended to bear this out. His evidence in this regard is unchallenged. He first of all tried to contact Mr. Gabay the City Engineer in person, that same day but was told he was off the Island. This was confirmed by Gabay's evidence that he was away during that period and up to about 3rd or 4th December. He managed to contact Mr. Harper, the Superintendent of Roads and Works for the area including Ridgeway. He promised to come and have a look at what had happened. There were actually some three telephone calls made by the Plaintiff to Mr. Harper within the period of 21st November to 27th November. Harper seemed to have paid a visit to the site during this period but the Plaintiff did not see him.

The Plaintiff was quite naturally concerned over the possible danger that his land was now exposed to. It was still the rainy season, the Fifi rains had taken place in October, and some of the support for his land had been removed. He then wrote to Mr. Gabay, the City Engineer on 27th November 1974. In this letter, Exhibit 1, he stated inter alia that, "it was not until later in the morning I discovered to my horror that the traxcavator had been digging the hillside of my land to use as fill for the repairs to the road".

Dr. Barnett again in his final submissions stated that there was nothing in this letter which invited a reply as there was nothing in it which gave one the impression that the Kingston and Saint Andrew Corporation or any of its workmen were engaged in doing the wrongful acts complained of in the letter. With this I respectfully disagree for the simple reason that right opposite to the Plaintiff's premises there was a retaining wall being built by the Corporation. On site at times was a Clerk of Works attached to the Corporation. The letter contained very grave implications as far as the works being carried out in this area and called for an enquiry from the responsible officers of the Kingston and Saint Andrew Corporation of which two are mentioned in the letter, that the allegations as set out

in the letter were true or not. The response from the officers of the Corporation was one of silence.

The Plaintiff then stated that following this letter and in particular on 3rd December 1974 cracks started to appear in his driveway. He again telephoned Mr. Harper who promised to come back again and have a further look. Between 3rd December and 9th December the cracks widened and the driveway started to fall vertically. The startling effects of what took place is fully revealed in the photographs of the area taken on 15th January 1975. These all form part of Exhibits 3A - 3C. A meeting was finally arranged with Mr. Gabay, and Mr. Harper and this took place in front of the Plaintiff's premises on 13th December 1974. They inspected the damage and according to the Plaintiff they promised that they would restore his land to its former state. Both Gabay and Harper denied giving any such promise and Gabay further stated that the retaining wall which was eventually built to the western section of Plaintiff's land was done solely for the purpose of protecting the public roadway. Both Harper and Gabay also denied that the Plaintiff had complained that it was the traxcavator which had dug away his land to use as fill for the retaining wall which the Corporation was building to the southern section of the road. I find this denial on the part of these two gentlemen, although understandable, remarkable to say the least and very puzzling in the light of the fact that:-

(i) As far as Harper is concerned he admitted that he had been literally "plagued" with telephone calls from the Plaintiff from 21st November and continuing certainly up to the point at which Mr. Gabay returned to the Island around 3rd or 4th December.

(ii) He further stated that apart from telephoning him several times the Plaintiff asked him "what the Kingston and Saint Andrew Corporation intended to do about his driveway".

I honestly fail to see how the Plaintiff could in this statement to Harper in which he was holding the Kingston and Saint Andrew Corporation responsible for the damage to his premises, yet omit to mention to him what he was saying all along had caused it. Indeed Harper himself admitted that he met with the Plaintiff by the area where the slip had occured and although Harper cannot remember when this was, he made the comments "this is bigger than me. The City Engineer would have to decide what to do". It further would seen strange if Mr. Gabay in his position of City Engineer would not have been appraised by Harper as to the events that had occurred during his absence from the Island. Although Gabay gave the impression that he knew absolutely nothing about the Plaintiff's charges until sometime in 1976 when there was a default Judgment entered in the matter and he then called for and saw the file relative to the matter. According to Mr. Gabay, he only went to inspect the damage, he would have me believe because of the fact that a large area of the roadway had been covered by the earth which had slipped from the Plaintiff's land. Indeed his lack of concern having regard to what had taken place seemed strange to say the least. As it is inconceivable to believe that Harper did not brief Gabay on what the Plaintiff had constantly complained to him about from as early as 21st November, so it is equally difficult to believe that Gabay did not see the content of the Plaintiff's letter of 27th November 1974, after his return to the Island and before the meeting in front of the Plaintiff's residence on 13th December 1974.

Following the meeting between the Plaintiff, Mr. Gabay and Mr. Harper the Plaintiff vacated his premises along with his family as he feared further subsidence and his house and its occupants lives would be now endangered.

On 2nd January 1975 the Plaintiff returned to the premises and discovered that the slipping had ceased. He then contacted one Mr. Ivanhoe Henny, who is a chartered Civil and Structural Engineer of some 16 years experience. Mr. Henny came and inspected the Plaintiff's premises and observed the damage done. Based upon the information given to him by the Plaintiff and upon his own observations he made, he formed an opinion

that the damage which he saw to the land and the driveway including the retaining walls, was caused by the removal of the earth at the toe of the slope. It is worthy of note that both Mr. Henny and Mr. Gabay went to the Plaintiff's premises after the circular slippage and the resulting damage had already taken place. From the photograph Exhibit 3G one can see quite clearly that there was to use Mr. Gabay's words "a shearing away of the western embankment or slope to the Plaintiff's land . This earth was covering about half of the public roadway". Mr. Henny whose qualifications as an Engineer covers about the same period as Mr. Gabay, from around the early 1960's and whose qualifications are the same was asked many questions about other possible causes of the circular slip which had occurred and he frankly stated that these other factors could also have caused the circular slip I need not go into this in detail. He however, based his opinion upon the damage he saw and the information given to him by the Plaintiff. Assuming therefore, that the Plaintiff told Henny what he had been maintaining from 21st November, 1974 right throughout and up to the present date was the truth, then Henny's opinion had a sound basis in fact, Mr. Gabay's evidence is that Henny's opinion is not to be faulted having regard to the damage and the Plaintiff's evidence in Court. He also states that in his opinion the circular slip was the result of saturation of the soil in the area of the greatest over burden which would be the area to the western embankment of the Plaintiff's land. It was his opinion that "the saturation aggravated the situation and caused the shear failure which lead to the slip". It was the "Fifi" rains that caused the saturation but he did not say how long these rains lasted apart from the fact that they continued for sometime. If and when the soil became completely saturated there would be a submerged density and that moisture content would not have had any effect on the saturation. Of course all this evidence is very interesting but does it have any real basis in fact. There is no evidence as to the volume of rainfall which occurred during "Fifi" although one can take it there was a heavy rainfall during these rains, nor does Mr. Gabay say how long the rains lasted. There was according to the Plaintiff, and this

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aspect of his evidence was not challenged, that apart from the recent heavy rainfall in June 1979 when a small portion of his land to the eastern boundary slipped, there was no experience of slippage apart from that occurring between 3rd to 9th December 1974 following the removal of earth to the western slope of his land. Whatever slippage Mr. Gabay refers to in the area has been explained by the Plaintiff as being slippage caused by road works in the area to the northern section above his land when at times of heavy rainfall there have been land slides taking place and heavy water affected his premises. He gave his experience of this in the past. Mr. Gabay conceded, however, that having regard to the Plaintiff's evidence in Court he was of the opinion that the circular slip could have been caused by a combination of the saturation of the soil on the Plaintiff's land caused by the "Fifi" rains plus the removal of soil at the toe of the slope. He qualifies this by saying that it would depend upon the location of the cut. Gabay is in no better position than Henny as he did not visit the area prior to the circular slip nor did he as he told us, concern himself with anything taking place over Mr. ~~McNairs~~ Mc Nair's' land. According to Mr. Gabay the removal of soil at the toe of the slope in that critical area about 20 feet to western side of the Plaintiff's driveway, would accelerate the circular slip. It appears to me that this is all that the Plaintiff needed to establish to prove was that this act of removal of his land was one of the causes of the circular slip. Even if it was not the only cause, the mere fact that it assisted in bringing it about is sufficient. The mere fact that some other factor such as saturation or the other causes postulated by the defence, there is no evidence that without the removal of the soil from the toe of the slope of the Plaintiff's land, the circular slip would have taken place. Any opinion based upon such an assumption without any factual basis to support it would fall in the area of mere conjecture. What one is concerned with on this critical issue is not possibilities but actual events.

I turn at this stage therefore to the Defence which sought to explain away the strong probabilities raised on the Plaintiff's case. The defence have sought to shift the evidential burden by seeking to establish that:-

(i) The Plaintiff's evidence about the working of a traxcavator at night was highly improbable.

(ii) Having regard to the system used in carrying out contract work of the nature as that in the case of the building of the retaining wall and the degree of supervision which took place, it would not have been possible for earth to be removed from the Plaintiff's land.

(iii) An attempt to provide a factual basis for the opinion given by Mr. Gabay.

In considering this aspect of the case it is necessary to look very carefully at the evidence of Mr. Harper as well that of Mr. Smith. It is of note that while Smith's presence at the worksite daily from Monday to Saturday was understandable the presence of Harper there so frequently would have been totally unnecessary. There was a Clerk of Works on site also supervising what was done, which rendered regular visits by Mr. Harper totally unnecessary. He states, however, that he visited the site almost daily. Both Smith and Harper denied the presence of a traxcavator on Ridgeway during November 1974, although Harper later recanted and admitted that there was one in the area at the time clearing the road. The probabilities when looked at here, favour the fact that there was such a machine there at that period having regard to the usual blockage of this roadway following heavy rainfall and the fact that the roadway had been also damaged by the "Fifi" rains in late October 1974. Traxcavators are used for clearing roads as one of their functions. This leads me to the second denial that if a Traxcavator was being used on Ridgeway that it was brought in to use on 21st November 1974 in the manner as stated by the Plaintiff. The Defendants pleadings at paragraph 3 of the Defence mentioned without specifically denying it that a traxeavator was used, that "there was an entry on the Plaintiff's land on the date alleged for the purpose of removing the friable soil which formed part of the driveway". This pleading in the form in which it refers to the "removal of friable soil", bears a striking similarity to Mr. Harpers testimony in this regard. Throughout the entire case he was the only witness who averted

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to the use of this terminology in referring to the very area of the Plaintiff's land from which the circular slip occurred. He states during cross examination by Mr. DeLisser "I know the western section of Mr. McNairs' land. There was a lot of bush there. There was a slope leading up to Mr. NaNairs' land. This material was made of a very friable type of soil. This is the soil which easily crumbles or dissolves by water. There was none of this friable soil loose on the ground. I would not use that type of soil for backfilling the wall".

I pause here to observe that there is here a flat denial in the testimony of the Defendants through the mouth of Harper and Smith that any soil whatsoever was removed from the area of the Plaintiff's land and this is in direct contradiction to the admission about an entry by the Defendants, servants and or agents in paragraph 3 of the pleadings. Harper's evidence referred to above is further strange having regard to the fact that both Mr. Henny and Mr. Gabay have referred to the soil forming the western slope in the area of the slippage to be of a calcarious nature and to be cohesive - certainly far from the friable description given to it by Harper, but then this also is understandable as Harper is here seeking to postulate a reason for the slippage which took place. The theory being that if the soil was friable and was easily dissoluble by water, then rainfall of the nature that took place could have caused the slippage.

Having regard therefore to the material contradiction between the evidence of Harper and Smith as against the admission of entry in the pleadings it follows therefore that either Harper or Smith or both are not being frank when they say that they say that:-

(i) No soil was removed from the area of 8 Ridgeway on 21st November 1974.

(ii) When they deny that a traxcavator was in use on Ridgeway in November 1974.

Harper's later admission that there was a traxcavator in the area of 8 Ridgeway clearing the road, after having consistently denied this fact throughout his evidence leads one to ask two questions:-

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(i) Why despite the allegations as set out in paragraph 3 of the defence is it now being denied that soil was removed from a section of the Plaintiff's land?

(ii) Why despite the fact that it is not specifically denied in the pleadings was there a concerted attempt made to cover up the fact that a traxcavator was in use in the area of Ridgeway during November 1974?

When the whole of this evidence is looked at, the Plaintiff's contention as to what he said he saw on 21st November 1974 at 11 A.M. cannot be shaken. It gains support not only from the long chain events commencing in the early hours of that day, but more particularly what he later saw at 11 A.M. What he then saw and his reaction and subsequent conduct is consistent throughout with the veracity of his testimony, and in particular with the fact that he did see a traxcavator removing soil from his land.

The defence on the other hand when looked at as a whole apart from Gabay's evidence to a large extent, consists of a very determined attempt to cover up a very grave wrong which was done to the Plaintiff by the removal of soil which formed critical support for his land.

What the evidence clearly suggested took place is that despite the many complaints made by the Plaintiff as to what had happened, there was little or no concern shown for the Plaintiff's property and the damage done to it and his pleas in this regard went for the most part unheeded. There further appears to have been an attempt on the part of Harper in particular to attribute the slippage that took place to causes other than the removal of the earth from the Plaintiff's land and to provide Gabay with some factual basis for his opinion. For this one has to look at the evidence of Harper and Smith that they saw the seepage of water from the area of land where the slippage took place. Harper from the first time he went there and before the retaining wall to the southern section of the road, was started, and Smith for the entire period that he was there working on the retaining wall. As the evidence here is that this wall was started, in August 1974 it is most unlikely

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that both Smith and Harper would have seen any seepage of water from in August when the Summer season would be at its hottest period. Although there was some evidence of saturation when Mr. Gabay visited the area following the slippage, this was after a period of continuous and heavy rainfall, and his observations are understandable. The evidence of Harper and Smith I found in this regard to be highly exaggerated. I. find further that the account given by Smith, about the Plaintiff had been telling him of representations that he had been making to get a retaining wall built by the corporation, does not bear any semblance of truth. I say this because prior to going to Ridgeway in August 1974 both the Plaintiff and Smith were total strangers. Apart from the occasion when according to Smith he got permission to get water from the Plaintiff's premises for use in building the wall there seemed to have been no opportunity given for a meeting between these two persons. There was not that degree of familiarity which would have cause the Plaintiff to take Smith into his confidence to such an extent that he would be telling him of such a delicate matter of the kind as Smith would have us believe.

Conclusions

Having considered carefully and examined the whole of the evidence I accept the Plaintiff's account as to what took place on 21st November 1974. I found that he was not shaken in his testimony and that he spoke the truth.

I find that the witnesses Harper and Smith have not been frank in the manner in which they gave their evidence and in particular were not frank in their testimony that:-

(i) There was a traxcavator in the area of 8 Ridgeway on 21st November 1974.

(ii) That this traxcavator removed a portion of the Plaintiff's land to the western slope.

Having regard to the Plaintiff's evidence on the issue of causation there was clear evidence that the removal of the earth from the toe of the slope caused or contributed to the circular slip that took place between 3rd to 9th December 1974.

As there is no evidence that the Plaintiff by any act of his

contributed in any way to the removal of a portion of his land, the question of contributary negligence has not arisen. The test here surely is not causation but blameworthiness.

In passing one cannot help observing that despite the fact that the western slope is a steep one, prior to the removal of the earth in November 1974, and subsequently up to the present date the Plaintiff has experienced no further slippage in this area.

Finally on the question of damages although this was denied in paragraphs 10 and 11 of the defence there has been no challenge made to the evidence of the Plaintiff and Mr. Henny in this area.

In the light of my observations therefore it follows that there must be Judgment for the Plaintiff for the amount of the damage alleged and proved, $18,175.05 with costs to be agreed or taxed.

Miss Bennett asks for interest at the rate of 6% from 7th May 1975 to today. Order accordingly.

Stay of Execution granted for six weeks.

BINGHAM J. (Ag.)
23/7/79

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