

- b). The question of damages will be reserved and if necessary will be determined at the time of the assessment of damages between the Claimant and the Defendant/Ancillary Claimant.
2. This Order was made as Counsel assured the Court that both the claim and ancillary claim arose out of the same basic fact situation and contractual arrangements.
 3. In his opening to the court counsel for the Defendant/Ancillary Claimant (which I will hereafter refer to as Fiesta), stated that Fiesta had been a victim of the process because the standard of work was not Fiesta's. The Claim against Fiesta was for trespass on the works of the NWC and negligence. Counsel explained that in the course of construction of its hotel Fiesta needed to divert existing NWC piping. To this end they approached the NWC who recommended contractors to do the job. This contractor was the Ancillary Defendant (who I will hereafter refer to as Harding). Fiesta relied implicitly and explicitly on Harding's expertise. After the work was done the NWC claimed burst piping occurred with attendant consequences. Another contractor was retained, at great cost to correct these deficiencies. In this Ancillary Claim against Harding, Fiesta seeks an indemnity for the losses incurred by Fiesta and particularly any damages which NWC may obtain against them.
 4. Upon review of the pleadings and after all the evidence was taken it became apparent that the real picture was neither as clear or as straight forward as Counsel suggested in his opening.
 5. In the first place the claim by the NWC against Fiesta for Negligence and Trespass was filed on the 14th November, 2007. Among the particulars of negligence alleged were:
 - '(f) failing to anchor blocks in the vicinity of the pipelines where excavation work was done.
 - (g) Using wholly inadequate blocks which are nearest the diversion.

- (h) Failing to use “thrust” blocks to counter the forces that the water pressure creates to avoid lateral movement and damage to the pipe.
 - (i) Failing to provide protective walls or concrete casing to avoid damage to the pipe from accidents or from vandalism.”
- 6. On the 22nd November 2007 the Honourable Mr. Justice Roy Anderson made an order by and with the Consent of the NWC and Fiesta and to which Harding was not privy. That order provided that Fiesta establish an escrow account in the joint names of their attorneys to cover the cost of expenses and costs for doing repair and restorative work to the NWC’s pipeline.
- 7. Fiesta filed an Acknowledgment of Service of Claim Form on the 22nd November, 2007 and at Paragraph 8 they, in answer to the question, do you admit any part of the claim, answered “yes.” At paragraph 8(a) of the document written in handwriting appear the words, “pay for the required work.”
- 8. On the 28th December, 2007 a further consent Order was made by the Honourable Mr. Justice King for a further sum to be paid to the NWC. Leave was granted for Fiesta to serve a defence on or before January 30th 2008.
- 9. An ancillary claim appears at some stage to have been filed because on the 20th September, 2008 and 27th October 2008 respectively, there appears an acknowledgement of service of ancillary claim and a defence to ancillary claim. These were of course filed on behalf of Harding.
- 10. On the 15th January 2009 the Honourable Mr. Justice Donald McIntosh, having heard submissions from attorneys for NWC and Fiesta, made the following orders:
 - 1. The Defendants application filed 11 July 2008 is hereby struck out with costs to the Respondent/Claimant to be agreed or taxed.

2. The Claimants application filed on November 7th 2008 is granted in terms of paragraphs (1) and (2) as follows:
 - i) That judgment be entered for the Claimant/Applicant against the Defendant, Fiesta Jamaica Ltd. with damages to be assessed.
 - ii) Costs on the application to the Claimant to be agreed or taxed.
 3. Matter set for Assessment of Damages on the 24th day of April 2009.
 4. Defendant is hereby permitted to contest the question of damages.
 5. Claimant's attorney to prepare file and serve this formal order.
11. The Defendant's application to which Paragraph (1) of McIntosh J's Order referred was an application by Fiesta to be permitted an extension of time to file its Defence to the claim of the NWC.
 12. McIntosh J's decision was upheld by the Court of Appeal in a judgment filed as part of the Judges Bundle before me. That judgment is unreported and was delivered on the 28th February, 2010 in Supreme Court Civil Appeal No. 19 of 2009 between Fiesta Jamaica Limited - Appellant and National Water Commission - Respondent. The judgment of the Court was delivered by Justice of Appeal Harris.
 13. At paragraph 11 of her judgment Justice of Appeal Harris stated that Fiesta failed to file its defence notwithstanding time being extended by order of the 28th December 2007. Both the Defendant's application for an extension of time and the Claimants application for Summary judgment were heard at the same time by McIntosh J.
 14. In dismissing Fiesta's appeal the Court of Appeal noted the following:

- a). By consenting to meet the cost of repairs the inescapable inference was that Fiesta had accepted that it damaged the NWC's pipeline and admitted liability.
- b). The proposed defence put forward by Fiesta alleged that it commenced work on the pipeline with the permission of the Hanover Parish Council. However, as that body could not give permission for works on the property of the NWC, this did not amount to a defence to trespass.
- c). The proposed defence alleged that it retained the services of Harding but that did not amount to a defence either to negligence or trespass. The court stated,

[Para 23] "It is evident that the contractor's services were engaged by the appellant and any issue as to the work done by the contractor, at the appellant's bidding lies between the appellant and the contractor."

and at Para 24 of the judgment,

"No issue had been raised in the proposed defence to show that the contractor was not the appellant's servant or agent"

- d). At paragraph 35 when considering the award of Summary Judgment the court stated,

"The respondent's claim was pleaded with particularity averring an act of intrusion by the appellant on its pipeline causing damage to it. As previously indicated, there were no allegations raised by the appellant in its proposed defence which amount to an answer to that which has been pleaded in the claim. Consequently, it cannot be said that there are any issues on which the parties have been joined to have enabled the appellant to successfully pursue its defence even if leave had been granted to defend."

- 15. It is clear therefore that the decision of the Court of Appeal to uphold the Summary Judgment application against Fiesta was premised on the fact that the

defence proposed by Fiesta was unmeritorious and had not answered the claim raised by the NWC.

16. This is important because in these proceedings for Ancillary relief, Fiesta's counsel argued that the fact of a Summary Judgment against Fiesta was a starting point and could be a basis for the ancillary claim against Harding.
17. A review of the evidence and the Ancillary claim and the Ancillary Defence will demonstrate however that the decision of the Court of Appeal affects none of the issues for my determination. The Amended Ancillary Claim Form claims an indemnity against Harding for trespass on the works of the NWC, negligence and/or breach of contract. These are particularized in the Amended Particulars of Ancillary Claim filed on the 21st July, 2010.
18. In its Further Amended Defence to Ancillary Claim, filed on the 15th February, 2012 Harding alleged among other things that:
 - a). He was advised of a leak to the pipe one month after the work was completed during which month there were no problems.
 - b). The leak was not caused by negligence or breach of contract or breach of NWC specifications.
 - c). The leak was caused by the negligence of Fiesta's servants or agents who negligently placed excavated clay in close proximity to the pipe and continued work with heavy equipment in that area.
 - d). After the passage of Hurricane Noel in the area the water logged soil slipped under the weight causing downward movement of the anchor block and ultimately breakage of the pipeline.
 - e). It was also alleged that Fiesta did not allow Harding adequate opportunity to correct the leak.
 - (f) The pipeline broke because of the strain on the pipe diversion caused by the weight of the clay deposited by Fiestas servants or agents.
 - (g) Fiesta did not allow Harding to complete the work of fixing the broken pipeline.

(h) Harding denied specifically that he had trespassed on the works of the NWC.

19. That being the state of the pleadings as between Fiesta and Harding one would be pardoned for expecting that much technical and expert evidence would be presented. This was not to be. Fiesta, the ancillary claimant was content to rely on the evidence of Dimitris Kosvogiannis. He stated that he is the former General Manager and present Country Manager of Fiesta Jamaica Ltd. which trades under the name Grand Palladium Jamaica Resort and Spa, the ancillary claimant to the claim. He was associated with the case while he was General Manager and signed the amended ancillary claim on its behalf. He had full access to all the records archives minutes of internal meetings, accounts, file notes and reports which allow him to respond to the subject of the suit. He stated that on the 28th August 2007 Fiesta wrote to the NWC requesting their technical assistance in designing and implementing a plan for diversion of the NWC's 500 mm (20") pipeline. NWC required a lot of technical documentation to be submitted including a construction methodology. Fiesta did not have this expertise and asked NWC to carry out the works and allow Fiesta to pay for same. NWC by Mr. O'Neil Shand the Technical Services Manager stated that NWC would not do that but recommended instead that Harding a private contractor be utilized.
20. Mr. Kosvogiannis further stated that Fiesta, complied with the suggestion and Harding who represented himself as competent and capable and able to comply with NWC's requirements was retained. In or about September 2007 Harding prepared a single drawing and under cover of letter dated 13 September 2007 Fiesta submitted that drawing to the NWC. The NWC stated that it was insufficient to meet its specifications but granted provisional approval which was subject to a number of other more detailed documents being provided.
21. Fiesta's role said the witness, was that of a customer of Harding whose expertise in the carrying out of the project was relied on entirely by Fiesta. He liased with the NWC in the carrying out of the work.

22. The witness gave details of payments made to Harding. On or about the 14th November 2007 the NWC complained that the pipeline developed a leak and that Fiesta had trespassed on its property. NWC alleged that the work had been done negligently. The resultant leak became the subject of immense public outcry. All major radio stations broadcast the news that Fiesta was responsible for the rupture of the pipe.
23. The urgency of the situation coupled with the need to mitigate the loss suffered by the NWC compelled Fiesta to make another disbursement of funds to Harding to carry out immediate remedial works. He however failed to rectify the problems and the pipe ruptured again days after he completed repairs. The NWC on 14 November 2007 obtained an ex parte Order of this court compelling Fiesta to restore NWC's pipeline.
24. Fiesta's demands that Harding reimburse all payments from the diversion project resulting from their trespass and faulty work as well as consequential loss had not been acknowledged.
25. Counsel for Harding, Mr. Garth McBean applied to have paragraphs 23, 24 and 25 of Mr. Dimitris Kosvogiannis' witness statement struck out as being hearsay. After hearing submissions I allowed the application in relation to Paragraph 24 only. Paragraphs 23 and 25 were allowed to stand.
26. Mr. McBean cross examined the witness and was understandably brief in this endeavour. The witness admitted that he had never spoken to Nigel Harding nor did he know him personally. The only time the witness examined the pipeline was after it was fixed. He admitted he was unable to say what caused the leak. He acknowledged there had been rainfall in November 2007 "based on usual climate conditions at the time." He had no personal knowledge of the circumstances amounting to duress referred to in the witness statement. He could not recall any letter stating that Fiesta acted under duress. He admitted that the date in paragraph 12 of his witness statement should be 4th September 2007. He admitted that Mr. Shand of the NWC had admitted complete

satisfaction with the work done. He admitted he did not know what caused the leak and has no “technical knowledge.”

27. In reexamination the witness clarified that Fiesta acted under duress as there was an order of the court compelling them to make payments.
28. At this juncture both counsel indicated to the court that the documents to be contained in an agreed bundle had been agreed but the bundle was not yet put together. Fiesta closed its case save for the Agreed Bundle which was to be put in evidence.
29. The Ancillary Defendant called Mr. Nigel Harding. His witness statement dated 30th July 2012 stood as his evidence in Chief. Permission was granted to allow oral evidence in chief by way of amplification in order to have evidence in relation to photographs. The photos were put in as Exhibits 1 and 2 by Consent. The witness indicated to the court the pipe and the area where he said the leak occurred. The under block he said was below ground so the photo does not show it. He indicated what a pipe diversion was and why it was required. He described his theory as to why a leak occurred that is, when the soil got wet with a heavy lead above, it resulted in a “rotating movement” which caused the joint to break.
30. A sketch he did was admitted by consent as Exhibit 3, so too was an email dated 14th November, 2007 admitted by consent as Exhibit 4. The sketch (Ex. 3) the witness said had been sent with the email (Ex. 4).
31. Mr. Harding’s witness statement was by far more detailed. He describes himself as an Engineer and Contractor. Para 2 stated,

“In July 2007 I was employed to El Pihl & Sons who were the contractors on the segment 2A of the North Coast highway Improvement Project, in the capacity of Quality Control Engineer & Utility Co-coordinator with responsibility for design and relocation of all water main conflicts with the road works. As a result, and as always on projects of this nature, I worked closely with the National Water Commission. They were therefore aware of the diversion of the waterline work that I did at Half

Moon under pass (where a tunnel was constructed, refer to photographs) in approximately May, June 2007 which was successfully completed. This was done directly under my supervision from design to implementation including selection of materials. We invited Tankweld Special Projects to install it.”

32. The statement indicated that NWC had been impressed by the work done and hence he was contacted by them when a similar situation arose at Fiesta. He stated that Fiesta contacted him and he advised them the sketch they had was not sufficient for NWC’s purposes. Harding therefore generated a modified design which was supplied by letter dated 30th April 2007. The work was to be in four (4) stages.
33. By letter dated 13th September 2007 the design was submitted to the NWC. The work was done and according to Mr. Harding,

“The pipeline experienced no problems up to November 13th 2007. National Water Commission personnel went to the site and only recommended minor adjustments (such as, concrete support on top of the tunnel which was implemented forthwith).”

34. He was advised on November 14 2007 that the pipe broke at a particular location and when he checked he saw it was on the side where the large pile of clay had been deposited. He stated,

“This was after the heavy rain caused by the passing of Tropical Storm Noel and in my opinion, the water logged saturated soil slipped under the weight of the soil as explained below.”

There followed a detailed explanation as to how the break may have occurred.

35. The witness statement indicates that Harding made it clear to Fiesta that the damage was not his fault. He was however called to and did do repairs. Two days later he was called and advised that the pipe had broken again. He was however not allowed to fix it or to complete the job as NWC advised Fiesta to refrain from doing any further work.

36. The witness stated that he was never allowed to complete stages 3 and 4 of the 4 part project. Further that the leak was not caused by negligence breach of contract or breach of NWC specifications. The leak he says was caused by Fiesta's agents or servants who:
- a). Negligently placed excavated clay in close proximity to the pipe diversion.
 - b). Continued working with heavy equipment in that area.
 - c). When the land became water logged a downward movement under the weight of clay and heavy equipment resulted in fracture or breakage of the pipe.
37. The witness was extensively cross examined. He admitted that he was consulted for his expertise and that this was relied upon by Fiesta. He regarded the job as something he could do successfully. He stated he worked in accordance with NWC processes. He was asked whether he controlled the work site and answered in the negative. He stated he only dealt with the pipeline, there was other work being done. It was suggested that he ought not to have allowed the buildup of material and the witness indicated that the buildup of material did not affect the work he was doing. The witness denied it was his responsibility to ensure there was no pile up of material there.
38. He said the NWC representative was Mr. Byfield, a Project Manager. His boss was Mr. Franklyn Williams. Mr. Shand he said was the Manager Technical Services. The witness was asked and then related the steps necessary to do an NWC project. He stated that he had complied with all the steps. The witness stated that written approval from the NWC was not always required. He had been doing these jobs for more than 20 years and once the schedule of work was in 'everybody knows'. They would then turn off the water so the work could be done.
39. It was suggested that he had a duty to inform Fiesta of his observations if he felt there was a danger to the pipeline and he denied this. He was asked whether he

had informed Fiesta of the safe distance for heavy vehicles to pass pipeline and he said he had not.

40. The matter was adjourned to the 5th March 2012. On that day the court was advised that a bundle of documents had been agreed and I was eventually provided with it. Mr. Dunkley said the affidavit of Mr. Shand had not been agreed but he craved leave to make submissions as to its admissibility. He stated that the sole purpose of seeking to rely on the Shand affidavit was to allow the court to see what grounded the summary judgment application that led to the judgment of the Court of Appeal. It was not to prove the truth of the contents of the affidavit. Mr. Garth McBean made submissions opposing its admission. However, I allowed the Affidavit of O'Neil Shand dated 13th November 2007 as **Exhibit 5** on the basis that it was not for proof of the truth of its contents but the fact that it was filed and before the Court of Appeal. Mr. Dunkley stated he was not relying on a submission of *Res Judicata*. **The bundle of documents was marked Exhibit 6.**
41. The cross examination of Nigel Harding resumed. Mr. Dunkley attempted to suggest to the witness that he did not adhere to all NWC processes. Mr. Mcbean objected on the ground that there was no evidence to support such a suggestion. I upheld the objection.
42. Cross examination having been completed the court asked the witness whether he had seen the load being placed while his job was ongoing. He responded in the negative. In questions arising from the questions asked by the court, Mr. Dunkley asked the witness whether he had placed a cordon or perimeter around the area and he answered in the negative stating it was not his responsibility. He described in detail the other work being done which involved digging a trench. The result was to generate this material (clay) and to the closing of a gap where water would run through. These combined with heavy rains resulted in burst pipes due to heavy weight and water logged soil.

43. At the close of the Defendants case each party made oral submissions. Mr. Dunkley relied on the Public Utilities Protection Act and submitted that when regard was had to the judgment of the Court of Appeal the onus lay on Mr. Harding to prove he had NWC's consent. That Act submitted Mr. Dunkley required 'express' authority and oral authority would not suffice. Familiarity submitted Mr. Dunkley does not breed consent.
44. In response Mr. McBean submitted that it was clear Fiesta were now relying on trespass not negligence. The pleadings he submitted had not referred to the Public Utilities Protection Act. In any event that statute created a criminal offence. "Express" consent is in the context of the creation of a criminal offence. Consent simplicitor is relevant for a defence to common law trespass. In any event submitted Mr. McBean Section 3 when properly construed does not say "express" consent is required for a defence to trespass. The "or" he submitted is disjunctive. Further or in the alternative Mr. McBean submitted that there is evidence of consent as detailed drawings were submitted. The decision of the Court of Appeal does not assist as they made no findings in relation to Mr. Shand or his role. The Court had regard to the pleading by Fiesta that the Hanover Parish Council had given consent. Mr. McBean submitted that Mr. Harding's evidence as to causation is unchallenged. The Ancillary Claimant has both a legal and evidential burden and neither had been discharged. The Court of Appeal he submitted, made no finding on causation.
45. The Public Utilities Protection Act defines "public utility" to include any water system or undertaking. Section 3 (1) provides,

"Subject to the provisions of this section, any person who as respects any public utility

- a) *Trespasses upon the works or any part thereof; or*
- b) *Unless acting pursuant to the express authority of the licensee or owner of the public utility or pursuant to a licence duly issued to him in relation to such works under any law for the time being in force, meddles, interferes or tampers with the works or any part thereof,*

Commits an offence under this Act.'

46. The section refers to two offences (a) trespass and (b) meddling, interfering or tampering. The latter is the one to which reference to express authority is made. Furthermore this court does not agree that “express authority” means “written authority.” Certainly and on a literal construction of the statute, one may express consent orally. Express is to my mind to be juxtaposed to implied. The section is ruling out a defence of implied consent to the criminal charge. Had it been necessary for my decision I would have held in any event that this Act does not operate to change the law as it relates to the tort of trespass with which this court is concerned.

47. On the evidence lead in this matter between the Defendant Ancillary Claimant (Fiesta) and the Ancillary Defendant (Harding), this court will not be required to determine those issues. There has been no evidence lead to support allegations that the Ancillary Defendant was negligent. Nor indeed is there evidence that the Ancillary Defendant trespassed on the works of the National Water Commission. The Amended Particulars of Ancillary Claim filed on the 7th July 2011 alleges at paragraph 10(m) as a particular of Negligence, the failure to obtain consent before proceeding with the works. At paragraph 11 the allegation of trespass is pleaded as follows.

“On or about October 16, 2007 without the consent or authorization of the claimant and without regard to the due process for the execution of the repair work and in disregard of the Claimants specifications and without the claimant’s approval of the works to be performed, the Ancillary Defendant trespassed on the works of the claimant, causing the Ancillary Defendant to incur damage loss and expense as a result.”

The Ancillary Defendant as I indicated earlier denied these allegations in the Ancillary Defence.

48. On the state of the pleadings one might have expected evidence from the National Water Commission particularly as to the trespass to its works and the fact that no consent was given. One would also have expected some expert

evidence as to the cause of the burst pipes and the necessary processes and protocols involved in doing such work. The Ancillary Claimant had no such evidence. The Affidavit of Mr. O'Neil Shand (Exhibit 5) being tendered not for proof of the truth of its contents but to demonstrate the material the court of appeal had before it when giving its decision. For reasons earlier indicated in this judgment the Court of Appeal's decision does not assist in the resolution of the issues of trespass and/or negligence in these Ancillary proceedings.

49. The Ancillary Defendant has on the other hand lead evidence to the effect that the consent of the National Water Commission was obtained prior to commencement of the work. As Mr. Harding explained it they had received and approved his schedule of work. In his experience written consent was not always required. He stated further that a representative of the National Water Commission had attended and commented on the work done see paragraph 10 witness Statement of Nigel O. Harding dated 30th January 2012. See also copy letter dated 19th September 2007 N. O. Harding to the Chief Engineer National Water Commission (Bundle of Agreed Documents). That letter proposes a shutdown date of 12th October 2007. In his evidence Mr. Harding explained that water supply would have to be shut down for the works to be completed hence the shutdown date. In this regard, and in further support of the fact of consent, one could hardly envisage the National Water Commission shutting down water supply to facilitate work it had not consented to.
50. This court therefore, on the evidence presented, finds that trespass has not been proved. Further the evidence as to the cause of the break is such as to negate a breach of duty by the Ancillary Defendant. It appears to this court that on a balance of probabilities negligence has not been established. The cause of the break was not poor work or installation but rather a combination of circumstances which on Mr. Harding's unchallenged evidence were outside his control that is:
 - a) The placement of heavy clay above the works
 - b) The movement of heavy vehicles above and over the works
 - c) heavy rains

d) water logged soil

There is no evidence from which this court could find that all these were reasonably foreseeable or that Mr. Harding breached a duty to warn the Defendant/Ancillary Claimant that they might lead to burst pipes. Nor indeed was such a particular of negligence alleged in the Amended Particulars of Ancillary Claim. Mr. Harding stated that the placement of the heavy material occurred after he had completed the construction and left the site and that it was not within his purview to put a marker around the area.

51. Finally on both the issue of consent by the National Water Commission and negligence it is important to note that the Ancillary Claimant at paragraph 9 of the Particulars of Ancillary Claim pleaded,

“After completion of the project by the contractor on October 14 2007, the claimant’s representative, Mr. O’Neil Shand was invited to review the works done and save for his request for an additional anchor in the center of the pipeline which was immediately put in place expressed complete satisfaction with the work.”

Given such a plea it is difficult to imagine how, in the absence of expert evidence, this court could be expected to find the Ancillary Defendant liable in these Ancillary proceedings.

52. In the event therefore the Ancillary Claim is dismissed with costs to the Ancillary Defendant to be taxed if not agreed

David Batts QC
Puisne Judge

