[2013] JMSC Civ. 204

IN THE SUPREME COURT OF JUDICTURE OF JAMAICA

CLAIM NO.2011 HCV 00683

BETWEEN	GARFIELD SEGREE	CLAIMANT
AND	JAMAICA WELLS AND SERVICES LIMITED	FIRST DEFENDANT
AND	NATIONAL IRRIGATION COMMISSION	SECOND DEFENDANT

Marcelle Donaldson, instructed by Shelards, for the claimant

Douglas Thompson, of counsel, for the first defendant

Cheryl Bolton, instructed by the Director of State Proceedings for the second defendant

Heard: October 14, 15, and 18, 2013

CLAIM FOR DAMAGES FOR NEGLIGENCE – CLAIM FOR DAMAGES FOR BREACH OF STATUTORY DUTY UNDER THE IRRIGATION ACT – LOSS OF OPPORTUNITY- LOSS OF EARNINGS- LOSS OF PROFIT- SPECIAL DAMAGES

ANDERSON, K., J.

RE: SUMMARY OF EACH PARTY'S STATEMENT OF CASE
Claimant's Statement of Case

[1] The claimant, Garfield Segree, is a farmer of New Forest District in the parish of Manchester. The claimant instituted a claim on February 9, 2011, seeking damages for negligence and breach of statutory duty and/or wrongful acts against Jamaica Wells and

Services Limited (first defendant) and the National Irrigation Commission (second defendant). The claimant contended that the first defendant was the agent and/ or servant and/or employee of the second defendant. The claimant contended that he had entered into a contractual agreement with Couples Resort in which it was agreed that the claimant would supply Couples Resort with a variety of high quality fresh local produce. This contractual agreement was to commence in the week of January 5, 2010 and end in December 2010, in which it was agreed as a term of the contract that the claimant would be paid $300,000.00 per month which would be a total of $3,600,000.00 from January 5, 2010 to December, 2010. However, the claimant contended that in or around November 2009, the second defendant conducted a well test in the vicinity of the claimant's farm which resulted in significant damage to the claimant's seedlings and produce caused by water from the well test, which resulted in the claimant being unable to fulfill his contractual obligation to Couples Resort.

[2] The claimant also contended that in or around November 2009, the Rural Agricultural Development Authority 'hereafter referred to by the acronym – 'R.A.D.A') which is a representative of the second defendant, had conducted a valuation of the damage that was done to the crops on the claimant's farm as a result of the well test executed by the first defendant and the second defendant and that it was agreed between the parties that the claimant would be compensated for the loss he would have suffered by being awarded the sum of $ 271, 932.00. The claimant contended that the said sum of $271,932.00 was arrived at by R.A.D.A and that sum had been accepted by the claimant at that time. However, the claimant said that the said sum of $271,932.00 was never paid to him and that only a fraction of the true cost of the damage to his crops on his farm were reflected in the valuation report prepared by R.A.D.A.

[3] The claimant claims that the defendants were negligent and were in breach of their statutory duty by:

i. Failing to carry out any adequate site investigations to determine the proximity of the claimant's farm in relation to the well test area and the likely damages to be caused to the claimant's farm from the testing.

ii. Failing to acquire any adequate geological data concerning the claimant's farm and its proximity to the well testing area.

iii. Failing to give sufficient notice or accurate advice to the claimant about the likely risks to his farm of the well test being conducted in the vicinity of the farm.

iv. Failing to give the claimant an opportunity to reap his farm produce before conducting the well testing so as to eliminate the losses suffered by the claimant.

v. Failing to exercise reasonable skill and care and diligence in the discharge of their duties as public bodies.

[4] The claimant in his claim is seeking to recover the following in damages:

1. The sum of $3,600,000.00 which is the loss of earnings from January 5, 2010 to December 2010 under the contract between the claimant and Couples Resort; and

2. Loss of opportunity; and

3. Loss of profits; and

4. Interests; and

5. Costs; and

6. Special damages in the sum of:

   $743,182.00 and continuing for damage to crops, money paid to workers, money paid for delivery of produce, loss incurred to purchase and for selling below the market value, legal fees, stamping costs, mediation costs, parking charges and loss of income per day as a result of travelling to Kingston in relation to this specific matter.

The first defendant's statement of case

[5] The first defendant is a limited liability company incorporated under the laws of Jamaica with its registered office situated at 3 Ballater Avenue, Kingston 10 and is involved in carrying on the business of drilling wells for water and is a company which specializes in well drilling. The first defendant, in its defence to the claimant's claim,

contended that insofar as they were the agents and or servants of the second defendant, it denies any negligence and breach of statutory duty in its conduct towards the claimant. The first defendant also contended that it conducted a well test in the vicinity of the claimant's farm but accepts no responsibility for any major damage done to the seedlings and produce that were on the claimant's farm. The first defendant contended that it took due care in relation to the well test that was done and that the claimant and other land owners were notified about the nature and extent of the well test, and that the claimant in particular was given sufficient notice of the well test operation, full and accurate information as to the details of the well test and as to the operations of the first defendant and details of any risk that were likely to be caused to the claimant's farm thereby providing the claimant with ample opportunity to safeguard anything that might have been susceptible to damage. The first defendant alleged that the claimant after being informed of the nature and impact of the well test to be performed by the first defendant had agreed that the first defendant could carry out the works without objection.

[6] The first defendant contended that it did not enter into any arrangement with the claimant to compensate him for any loss he may have suffered to the crops on his farm or make any award of any sum of money to the claimant and specifically not the sum of $287,000.00.

[7] The first defendant also contended that it is under no duty to indemnify the second defendant and/or the claimant against any loss of damage to property in connection with the contract which was due to or the responsibility of the second defendant under Clause 11.1 of the contract for works between the first defendant and the second defendant dated 8th day of December 2008. The first defendant contended that it will be relying upon the said contract dated December 8, 2008 for its full force and effect.

The second defendant's statement of case

[8] The second defendant is a limited liability company incorporated under the laws of Jamaica and is duly registered as the Irrigation Authority under the Irrigation Act and has its registered office at 191 Old Hope Road, Kingston 6 and is involved in carrying on business as farm irrigators. The second defendant, in its defence to the claimant's claim, contended that the first defendant was acting as an independent contractor contracted by the second defendant for the purposes of constructing, developing and testing of three production wells at Plumwood, Lane and New Forrest in the parish of Manchester. The second defendant also contended that representatives met with the farmers including the claimant to indicate the works that were to be carried out in relation to the well test. The second defendant further contended that it carried out the relevant investigations including acquiring adequate geological data in relation to the sites and the proximity of the farmers including the claimant. The second defendant has alleged that when it had contracted the first defendant to carry out the well test, the second defendant ensured that the first defendant was a registered and qualified contractor and was listed with the National Contracts Commission and that if there was any damage suffered by the claimant, it was while work was being undertaken by the first defendant. The second defendant denies the particulars of negligence and particulars of loss and damage of the claimant and has contended that it was in no breach of any statutory duty and was not negligent, as it had fulfilled all of its responsibilities, whether statutory or otherwise in relation to the claimant and providing the sites for the first defendant to undertake its duty under the contract. The second defendant alleged that the claimant along with other farmers, had given permission for drains to be established through their property for the disposal of the water from the well test.

[9] Additionally, the second defendant admitted that it provided a hydro-geologist to aid R.A.D.A in the determination of the value of any loss suffered and as a consequence, a value of $271,932.00 was arrived at by the hydro-geologist. The second defendant alleged that a letter was sent to the second defendant on April 1,

2010 from the claimant, claiming the sum of $271,932.00 as representing the total amount for the damages and the loss of income he had suffered, but no such sum was paid over to the claimant by the second defendant.

[10] The second defendant also contended that the first defendant would be under a duty to indemnify the second defendant against any loss or damage caused to the claimant's property and that such damage would fall under the contractor's risk as a result of the contract between the first defendant and the second defendant.

Evidence summary-claimant:

[11] The claimant during cross-examination by the second defendant said that he was a taxi operator and farmer before October 20, 2009 and that he was contracted by Couples Resort to produce crops costing Couples Resort, approximately three million dollars. He also said that prior to October 2009 the main crop that was being harvested on his farm was escallion but that he did not recall the cost for clearing the escallion. However, he also said that during January 2010, he had melon, pumpkin, and escallion intercropped with thyme on is farm. The claimant also said, during cross examination, that he had incurred irrigation expenses and expenses to keep pests out of the farm and to load the crops into trucks to be taken to Couples Resort, but that he is unsure of the costs of those expenses.

[12] The claimant in giving evidence in support of his allegations said that representations were made to him by representatives from the second defendant, namely; Sydney Beckford (Engineer), Wesley Blake (Senior Procurement Specialist) and Milton Henry (Project Director of the National Irrigation Developmental Program), that he would be compensated for damages done to his farm as a result of the wells test which was conducted near the farm. He also alleged that it was Wesley Blake who got the representative from R.A.D.A to assess the damage done to his farm. He also said that he told them that this would affect his contract with Couples Resort Limited. The claimant said that the assessment was done by Mr. Townsend, a representative of R.A.D.A., but that the assessment was not a true representation of the damage that was

done to his farm. He also said that he however agreed with the assessment in good faith, despite the fact that it was not a true reflection of the damage caused.

[13] The claimant also said that he was not notified of the wells test by the representatives of the first defendant and second defendant prior to the conduct of the wells test. The claimant said that he understood a wells test to mean pumping water into the field and to the best of his recollection it has three phases: it went for eight hours at first, twenty four-hours and then a longer period. The claimant also said that the trench that was made on his farm was not done with his permission and that he did not give any permission to a Mr. Windward Lawrence (Operations Manager of second defendant during the well testing) and Sydney Beckford to put any trench through his property. The trenches were made to run off the water and he had made a complaint about the trench to Mr. Beckford after observing the trench during the operations of the wells test and also after observing that the trench was going through his farm without his permission and that the water that was going through the trench was damaging the farm. He also said that he observed the trenches at the early phase of the wells test operations and when he notified Mr. Beckford about it, Mr. Beckford said that he, the claimant, would be compensated.

[14] The claimant said that he was unable to see what the representatives did each day on the site or in the vicinity to his farm and that he cannot accurately state that they failed to carry out any adequate investigations and geological data concerning his farm and the proximity to the well testing area. The claimant in his evidence also said that after the wells test was performed he was unable thereafter to plant new crops and has ceased from doing farming.

Evidence summary – first defendant:

[15] The only witness who testified for the first defendant is Mr. Windward Lawrence. Windward Lawrence is currently the General Manager of the first defendant but he was the operations manager at the time when the lane well was being constructed. In his evidence he said that there was a contract signed between the first

and second defendants on December 8, 2008 to conduct a well test on the lane well. The lane well test was done by the second defendant and the first defendant's duties were to supervise the day to day engineering aspects of the company and the first defendant was not responsible for the design of the work or any of the well test phases as it was the second defendant's responsibility to carry out the well tests in its entirety base on terms of the contract. The first defendant only did the drilling and development and provided the equipment so that the second defendant could do the pump testing. The pump testing was done by the second defendant. The trench was however prepared by the first defendant but it was the engineer, Sydney Beckford of the second defendant, who designed the pathway for the trench. A well test is one where water basically comes from beneath the earth's surface to the earth's surface by way of a pump and that is done in two phases: one is a step test which entails pumping the well at increasingly high temperature and the other is pumping the well consistently for 72 hours. Those two steps were carried out in the lane well which was within the vicinity of claimant's farm. When the first defendant was preparing the trench they were instructed by the engineer to prepare the trench in lands adjacent to the well at which time the first defendant was assured by the engineer that he had obtained full permission from the adjacent land owners to do so. The trench ran through the claimant's land. The first defendant only come to know of the claimant's objection to the trench in July of 2010. The two well tests phases were conducted by the second defendant but the first defendant however contracted a sub-contractor to prepare the earthen drain/trench. It was not the November, 2009 testing, that caused the excess water to come into the lane area.

[16] Evidence was also given that the first defendant was working alongside the second defendant and that it was the first defendant that carried out the construction of the well and the pumping of the water from the lane well. Pipes were laid on the lane well to facilitate the flowing of water from the well and only one trench was dug and in order to construct the well there had to be drilling. It was Mr. Windward Lawrence's evidence, that he did not speak with the claimant at the time of the construction of lane well. Mr. Windward Lawrence said that he knew that the there was property near the

well site during construction but that he did not know that it was a farm but instead that it was an open land. He also testified said that it was not necessary for prior tests to be carried out before there is a construction of a well and that adjacent lands will not necessarily be at risk. He also said there are precautions that the first defendant would have to take where water escapes from the well during a well test and that those precautions are not necessarily aimed at instances where the water may escape to adjacent lands. Mr. Lawrence testified that he had not found out who had owned adjacent lands where the well test was being done and that it was not necessary for him to find out that the open land belonged to the claimant. He said that the claimant's land was not the only adjacent land next to the lane well site as there were other farm lands close to the well site. He also said that no one from the first defendant went to find out who owned the adjacent lands.

[17] Mr. Lawrence said that during the 72 hours of the wells phase when water is pumped during the wells operation there is a possibility that a lot of water would be discharged from the lane well. He also said that excess water was directed to the trench that was located on the claimant's land but that he cannot say that the claimant had a farm there at the time. He also said that he is not aware that any representative from the first defendant had obtained the permission of the claimant to dig a trench through his land and that he did not know whether any representative form the first defendant had obtain permission from the claimant to dig any trench through the claimant's land. He alleged that the trench that was dug was inadequate to contain the water that was discharged and that he was made aware that the water from the trench flowed into the claimant's land but that he had no knowledge that crops were destroyed.

[18] In his evidence, he also said that he spoke with farmers who owned adjacent land but the conversation was not in respect of the construction of the lane well and that no other representative of the first defendant spoke with those farmers or had meetings with them regarding the impact the wells test would have on their farm. He also said that claims were made by other farmers to the first defendant as a result of the excess water flowing on their land and those farmers were compensated because those claims were

made in small sums. However, the claimant's claim was forwarded by the second defendant to the first defendant but no compensation was given to the claimant because a report was made by Mr. Beckford that the first defendant was not negligent.

Evidence summary – second defendant:

[19] There were two witnesses called upon to testify at the trial, on the second defendant's behalf, namely: Milton Henry and Sydney Beckford. Milton Henry was the Project Director of the National Irrigation Developmental Program at the time the alleged acts took place. He said that it was the first defendant's responsibility to conduct the wells test at the lane well in November, 2009 and the second defendant did not at any time conduct any of the phases of the wells test. He also said that he cannot recall whether it was the second defendant who designed the pathway for the trench and that the engineer dealt with the rate at which the water flow and does the supervision and the first defendant deals with the discharge of the flow of water. Under the contract, the first defendant was supposed to deal with the testing and the disposal of discharge and the second defendant has the responsibility for the specification of the well, the drilling, design and drawings. There was evidence of an invoice sent by the first defendant in relation to the well test done and that the wells tests began in or around June, 2009.

[20] Mr. Henry also said that he did not know that the claimant owned an adjacent farm near the wells site and he only became aware of the claimant's farm in January 2010 when he received a report from Sydney Beckford about the damage done to the farm. He also said that he was unaware that the claimant did not give any permission for the trench to be on his farm and in order to do so permission is required. He said that he cannot confirm as to whether a trench was dug on the claimant's farm. He said that the farm was assessed by a representative from R.A.D.A. and the report was prepared by Mr. Townsend and was forwarded to the second defendant. He also said that he saw the report but no representation was made to the claimant on behalf of the second defendant for the payment of $271,932.00.

[21] In the evidence given by Sydney Beckford – hydro-geologist/engineer, it was alleged that the water from the well test was directed by way of an earthen drain/trench in a southerly direction from the wells location. The wells test was done by the first defendant and monitored by him. It was his duty to ensure that the discharge was not going back into the well and the impact of the pumpage of the test on the aquifer. He said that he spoke with the claimant before the construction of the trench in November 2009. He said that the trench ended in the claimant's farm but actually the trench ended on the depression in the road and that the overflow from the depression took the water to the claimant's land. He also said that when the trench was built, he knew that the overflow would have gone onto the claimant's land but that he was unsure whether it was damaged by the overflow. He said that he got Mr. Robert Townsend from R.A.D.A to do the assessment and that he was present when the assessment took place. He also said that after the assessment, Mr. Townsend did not speak to him about any compensation because it was not necessary. He also said that the claimant did not indicate to him that he wanted compensation and that nothing was omitted from the R.A.D.A assessment.

[22] He also gave evidence that no notice was given to the claimant by the witness that the second defendant was going to conduct any lane well test as that was the responsibility of the contractor-first defendant. However, he said that the trench that was dug was not inadequate and that permission was obtained from the claimant to carry out the wells test on his farm.

[23] He also said that the second defendant designed the wells and approved the drilling methods. He denied invoices and variation order shown to him as proof of the fact that he allowed the first defendant to construct a trench through properties in order to prevent flooding. The contractor had the responsibility for the disposal of the discharge of water from the well testing. The contract provides for the first defendant to provide the equipment and everything done by the contractor was directed by him. Upon examination of the property just at the end of the test, there were no crops in production. The property was in tall grass and shrubs and only had a couple of

pumpkins and crop nurseries that had stopped producing before the wells test was conducted.

Analysis:

[24] Both the claimant and the first defendant alleged that it is the second defendant that conducted the well test and the court accepts their evidence in that respect. Mr. Blake from National Irrigation Commission was informed of the claimant's contract with Couples Resort only after the well test had been conducted and after the relevant damage to the claimant's farm had already been caused. It was at that time that Mr. Blake told the claimant that he would be compensated. After R.A.D.A conducted an assessment of the extent of damage and loss suffered by the claimant with respect to the crops allegedly on his farm, as a consequence of the well test, R.A.D.A. estimated the loss at $271,000.00. Not all crops planted were ready for reaping or had even begun growing, when the well test was conducted. This means that it is uncertain that those crops that had been planted but had not yet begun to bear produce, as and when the well test was conducted, would have in fact resulted in the production of such produce much less, that such produce would have yielded such amounts and quality that same not only could, but would, have been sold to Couples Resort pursuant to the contractual agreement that existed between the claimant and that hotel. The hotel, it should be noted, under that contract, had reserved the right to reject produce that was not considered by them, solely as a matter of its own discretion, as being of suitable quality. The claimant did not know and lead no evidence as to what the costs of rearing the produce on his farm would have been. He instead said that the costs vary depending on the weather. The only crop the claimant had harvested prior to October, 2009, was escallion. He did not know how much he would have earned if he had been able to sell the escallion. Thus, it is clear that the claimant had no real farming history with respect to the farm which was the subject of this claim. This is what in turn assists the court in reaching the conclusion that the claimant's claim for loss of profit and earning is too speculative. The claimant also failed to recall the amount of irrigation expenses he had incurred. The claimant has failed to prove any of the particulars of negligence laid out in

his statement of case. He also failed to establish whether the second defendant carried out any adequate site investigations. He was also unable to lead any evidence that the second defendant failed to acquire any adequate geological data concerning his farm.

[25] This court does not accept the claimant's evidence that he did not give permission for the trench to be dug on his farm. The claimant gave evidence that he visited his farm quite regularly. Surely then, he would have seen the trench when it was being dug on his property and he would have queried the doing of same. It is certain that he authorized the building of such trench on his property. This though does not mean that he had at the same time, consented to the overflow of water from the trench onto his farmland. Nonetheless, it was for the claimant to prove the particulars of negligence which he has averred. Having failed to do so, the overflow of water from the trench onto the claimant's farmland, cannot avail the claimant in respect of his claim for damages for negligence.

[26] The claimant was a taxi operator prior to October, 2009 and later gave evidence that he was also a farmer before October, 2009. Even if the claimant was farming prior to October 2009, he was either not selling what he was then farming, or alternatively, what he was selling was not then providing him with enough funds to meet a suitable living. If it were otherwise, he would not also, in this court's considered view, then have been operating a taxi service.

Loss of Earnings and Loss of Profit:

[27] The claimant claims against the defendants for loss of earnings in the sum of $3,600,000.00 from January 5, 2010 to December 2010 pursuant to a contract between the claimant and Couples Resort. Unfortunately, the claimant would not be able to recover for loss of earnings because no evidence was lead by the claimant to show that he was actually earning from the farm. It was uncertain whether the crops on the farm, as alleged by the claimant, were anywhere near growth and or quality so as to yield any form of earning. In a claim for damages for negligence, loss must be proven by the claimant, as having arisen from the alleged negligent actions of the defendant; in order

for that claim to be properly considered by a court as having been proven. See: **Winfield and Jolowicz on Tort**, 13th ed. [1989], at p. 130.

[28] In any event, the question to be decided is whether the defendants could have foreseen that their actions would have resulted in loss of earnings of $3,600,000.00 which was an alleged contractual sum agreed between the claimant and Couples Resort. Before establishing that, the court would have to first decide whether a duty of care was owed to the claimant by the defendants. Clearly, base on the principle in **Donoghue v Stevenson** [1932] AC 562, there was indeed a duty owed by the defendants to the claimant. Lord Atkin in **Donoghue v Stevenson** *(op. cit)* at page 580 laid down the principle as follows:

> *'The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? Receive a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'*

[29] The test for remoteness is whether the loss was reasonable foreseeable by the defendants. This test is laid down in the locus classicus case of **Overseas Tankship (UK) Ltd v Morts Docks & Engineering Company Limited, The Wagon Mound** [1961] AC 388. In that case, the defendants carelessly discharged oil from their ship into the harbor. Molten metal from the claimant's welding operation set fire to the oil on the water. The claimant's wharf was severely damaged. The Privy Council held that the defendants were not negligent because while they could have reasonably foreseen damage to the wharf by fouling, they could not have reasonably foreseen that the wharf would be damaged by fire when they carelessly discharged the oil. In the present case, while the defendants could have reasonably foreseen that the claimant's land could be damaged as a result of the overflow or discharge of excess water from the well test,

they could not have reasonably foreseen that the claimant would have lost $3,600,000.00 under a contractual arrangement with Couples Resort. The second defendant was only informed of the claimant's contract with Couples Resort, after the well test has been conducted and thus, after the relevant damage to the claimant's farm had already been caused. It was at that time that the claimant was told that he would be compensated. Therefore, the defendants could not have reasonably foreseen that damage to the claimant's land would have resulted in the loss of $3,600, 000.00.

[30] The claimant also claims against the defendants for loss of profit. This claim cannot succeed due to the inability of the claimant at trial to lead evidence to secure such a claim. Also, the claimant was not earning anything from the farm so as to afford him the opportunity to claim for los of profit. However, In order for the claim for loss of profit to succeed it would have to be proved that the claimant would have made a profit in the future. The claimant has not lead any evidence in this regard and he did not give any evidence as to his having, in the past, made profits from farming. The claimant was a small farmer and taxi operator and it was uncertain whether the claimant would have profited from the farm or whether he would have sustained losses. Not all crops planted were ready for reaping or had even begun growing when the well test was conducted. This means that it is uncertain that those crops that had been planted but had not yet begun to bear produce, as and when the wells test was conducted, would have in fact borne such produce, much less, that such produce would have yielded such amounts and quality, that some not only could, but would, have been sold to Couples Resort pursuant to the contractual agreement that existed between the claimant and that hotel. The hotel under the contract had reserved the right to reject produce that was not considered by them to be solely as a matter of its own discretion, as being of suitable quality.

[31] Additionally, the claimant was specifically asked during cross- examination by counsel for the second defendant what the costs for rearing the produce on his farm would have been and the claimant did not even know the costs. The claimant in answering the question said that it varies depending on the weather. Therefore, the

claimant's evidence of loss of profits was unclear and the court cannot grant the claimant judgment base on either sympathy or speculation. The claimant's claim for loss of profit is speculative because the evidence given by the claimant during cross-examination was that the only crop that he had harvested prior to October, 2009, was escallion. Thus, it is clear that the claimant had no real farming history with respect to his particular farm that was the subject of this claim.

Loss of Opportunity:

[32] The claimant is claiming for loss of opportunity to earn from farming, in the future, arising from the damage to his alleged farmland, due to excess water having been deposited on same, due to the negligence of one or the other, or both of the defendants. The claimant in his submissions said that he was unable to provide fresh produce to Couples Resort as it led to financial losses since he was buying produce at a higher cost than he was re-selling to Couples resort, thus not making a profit. The claimant in his submissions also said that he had lost the opportunity to use the sum of $271,932.00, which was assessed by R.A.D.A, to replant other seedlings and still honour his obligations under the contract in a timely manner and has now been completely deprived of the benefits under the contract in which he had entered into with Couples Resort in which he could have earned $3,600.00.00. This claim cannot succeed because it is too speculative in nature. Below that, damages for loss of chance can sometime be awarded in proportion to the chance of that loss if the loss cannot be proved with reasonable certainty. No damages is recoverable where the chance of the loss is speculative. The law as to loss of chance was summarized in the case of **Mallet v McMonagle** [1970] AC 166 at page 176 by Lord Diplock as follows:

> *'In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect*

those chances, whether they are more or less than even, in the amount of damages which it awards.'

[33] This is an accurate summary of the law as it relates to past facts and future events. But the approach to hypothetical events is much more complex. Lord Diplock's formulation of the law makes a general distinction between uncertainty about hypothetical events, where damages are assessed according to the chances and uncertainty as to past facts, where a balance of probabilities test applies. The case that establishes that a case of loss of chance can succeed in appropriate circumstances is **Chaplin v Hicks** [1911] 2 KB 786. In this case, the defendant ran a newspaper beauty competition in which he offered theatrical engagements to 12 contestants whom he should chose after interview from 50 contestants who secured a greatest number of votes from the newspaper's readers. Sixty thousand women entered the contest and the claimant succeeded in being voted as one of the 5 women to be interviewed. However, because of the defendant's breach of contract, the claimant was not informed of the interview in time and the 12 winner were chosen in her absence from the remaining 49. The uncertainty in this case was as to the hypothetical actions of the interviewing panel. The issue was whether the claimant would have been chosen at the interview. The Court of Appeal held that while the claimant could not recover for the loss of a theatrical agreement, since she could not establish to the required degree of proof that she would have been one of the 12 persons chosen, nevertheless, she should be given contractual damages for the loss of the chance for being one of the 12.

[34] The leading case on the more complex approach which involves different types of hypothetical approach, is the case of **Allied Maples Group Ltd. v Simmons & Simmons** [1995] 1 WLR 1602. The facts, which were taken from the head note of the case, were that the claimant, a retailing company, instructed the defendant solicitors, who had extensive experience in company takeovers and mergers, to act for them in the takeover of assets of the vendor, among which were four department stores leased by a subsidiary. Those leases were subject to conditions against alienation or planning consents which were personal to the subsidiary. In order to acquire the leases, the claimant agreed with the vendor to purchase the subsidiary's issued share capital, while

all its other assets and liabilities would be sold to another company in the vendor's group. The defendants drafted an agreement which included a warranty by the vendor that the subsidiary had no existing or contingent liabilities in respect of, inter alia, any properties leased by it. In the course of negotiations, however, that warranty was replaced by a clause which provided that, in the event of it being subsequently discovered that there was at the date to which the completion accounts were made up any liability of the subsidiary which if known at the time should have been provided for in the completed balance sheet, the vendor would compensate the claimant. Completion took place on 15 May 1989. A year later, the claimant became aware of substantial contingent claims by the lessors of property assigned by the subsidiary. Since contingent claims were, as a matter of accountancy practice, not such as should have been provided for in the completed balance sheet, the claimant brought an action against the defendants claiming damages in respect of their negligent advice. At the trial of a preliminary issue on the question of liability the judge found, inter alia, that on a balance of probabilities there was a real and not a mere speculative chance that the claimant would have successfully renegotiated with the vendor to obtain proper protection and he held that the defendants were in breach of duty in having failed to give thought to the effect of substituting the new clause for the warranty in the original draft. On appeal by the defendants, it was held that (1) that the establishment of a causal link between the defendant's negligence and the claimant's loss where the negligence consisted of some positive act was a question of historical fact to be determined on the balance of probability; that, once established, that fact was taken as true and the claimant was entitled to recover his damage in full; but that where the quantification of the claimant's loss depended upon future uncertain events it was decided on the court's assessment of the risk materialising; that, where the defendant's negligence consisted of an omission, causation depended on the answer to the hypothetical question of what the claimant would have done if the defendant had not been guilty of the omission, which was a matter of inference to be determined from all the circumstances and that where the claimant's loss depended on the hypothetical action of a third party he was entitled to succeed if he could show that there was a real

or substantial, rather than a merely speculative chance that the third party would have acted so as to confer the benefit or avoid the risk to the claimant.

[35] In the essence therefore, what the **Chaplin and Allied Maples** cases have decided, is that if the loss cannot be proved with reasonable certainty, then damages are awarded in proportion to the chance of loss. This court cannot take the claimant's claim in the present case, for loss of a chance, any further, because this claim does not fall into any of the circumstances of the decided cases. This is so because no evidence was led by the claimant to show how he was prevented from continuing to farm his farmland and whether the land remains in good condition to continue the farming. The claimant as was said earlier was a small farmer and also a taxi operator and no evidence was led by him to show that he was earning from the farm and thus the claimant is not deprived of any opportunity to earn from his farmland in the future. Also, it was too speculative as to whether the claimant would have earned the $3,600,000.00 from his produce as he alleged as a result of his contract between himself and Couples Resort. As was said earlier, the only crop that was near reaping was escallion and the claimant in giving evidence said that he was unsure as to the value of such produce. It is also uncertain to this court whether the claimant was involved in any real farming on the land as he was also a taxi operator before the well test was conducted near his farm. This is no doubt why there was evidence from Mr. Windward Lawrence that the land which Mr. Segree had, after the wells test had been conducted, claimed as being his farmland, was merely 'open land' at the time when the wells test was conducted. This court has accepted that evidence as being truthful.

Claim for Special damages:

[36] The claimant also claim for an award in special damages in the amount of $743,182.00 and continuing for damage to crops, money paid to workers, money paid for delivery of produce, loss incurred to purchase and for selling below the market value, legal fees, stamping costs, mediation costs, parking charges and loss of income per day as a result of travelling to Kingston in relation to this specific matter. For such a claim, the claimant has not lead any evidence to show that he is in fact entitled to such an

award. A claim for special damages must, at least as a general rule, be specifically pleaded and specially proven. See: **Bonham-Carter v Hyde Part Hotel Ltd** [1948] 64 T.L.R. 177, esp. at p.178, per Ld. Goddard, C.J. and **Hepburn Harris v Carlton Walker** – SCCA 40/90. The claimant ought to have specially proven the alleged losses which he has claimed as special damages. He has utterly failed to do so. The general rule of special proof of the alleged particularly ascertainable losses, or in other words, 'special damages', ought, in this court's considered opinion, to have been abided by the claimant in this case. Regrettably for him, he did not so abide.

Breach of Statutory Duty:

[37] The claimants also claimed that there was a breach of statutory duty by the defendants two of the questions to be decided on by this court though, in respect of the claimant's claim for damages for breach of statutory duty, are whether any statutory duty was owed to the claimant by the defendants and what was the statutory duty that was breached. The claimant submits that the defendants have breached their statutory duty which was owed to the claimant. The claimant claimed that **section 23 of the Irrigation Act** was breached and that once the statute has been breached by a statutory agency then any person aggrieved by that breach can claim for damages. The claimant also submits that the claim can be made for losses suffered as a result of the breach and that if notice had been given, the claimant would have had the opportunity to have protected himself from the loss which he had suffered. The claimant also claimed that **section 6(3)(a) of the Irrigation Act** was also breached. The claimant's counsel has submitted that there was foreseeability of damage and that there was sufficient relationship of proximity, so that the defendants owed the claimant a duty of care.

[38] **Section 23 of the Irrigation Act provides**:

> *23.-(1) 'At any time after any irrigation scheme becomes a confirmed scheme the Authority may subject to the provisions of this section enter by their servants or agents upon any land within an irrigation area and there do at the expense of the Authority any work authorized to be done*

under such confirmed scheme or necessary to be done for implementing such scheme.

(2) The power of entry conferred by this section shall not be exercised except-

(a) with the prior consent of the occupier of such land; or
(b) after seven days' notice in writing to such occupier of intention to exercise such right.'

Section 6(3)(a) of the irrigation Act provides:

'Whenever it appears to the Authority that it is necessary to enter upon land which lies outside an irrigation area for any purpose set out in subsection (1) the Authority shall (after giving notice in writing accordingly to the occupier of such land) with the approval of the Minister cause a notification to that effect to be published in the Gazette; and thereupon the Authority may enter by their servants or agents upon such land and there do such acts as may be necessary for the purpose aforesaid :

Provided that it shall not be necessary before entering to cause such notification to be published in the Gazette in any case where the occupier of such land gives written permission to the Authority to enter, or in the case of an emergency.'

[39] In order for a claim of breach of duty to succeed, the following must be established:

1. The duty must be owed to the claimant: **Sparrow v Fairway Aviation Co. Ltd** [1964] AC 1019; and

2. The injury must be of a kind which the statute is intended to prevent: **Close v Steel Co. of Wales Ltd** [1962] AC 367; and

3. The defendants must be guilty of a breach of their statutory obligation: **Chipchase v British Titan Products Co.** [1956] 1 QB 345; and

4. The breach of duty must have caused the claimant's loss/damage: **Mcghee v National Commercial Bank** [1973] 1 WLR 1

[40] There has been no evidence provided by the claimant to this court so as to properly enable the court to conclude there has been a breach of **sections 23 and 6(3)(a) of the Irrigation Act**. Also there exists no evidence that even if there has or had been a breach of the Irrigation Act, that such breach either caused or contributed to the losses allegedly suffered by the claimant. The claimant's claim for breach of statutory duty as against the defendants must fail.

Conclusion:

[41] The claimant has failed to lead sufficient evidence to make out his claim against the defendants, or, for that matter, against either defendant. He has failed to lead evidence to show that he had suffered loss of profits and loss of earnings. He has also failed to prove the items specifically pleaded in his statement of case. He has failed to show that there was a breach of statutory duty by either or both defendants. The claimant has failed to make out his case and judgment must be awarded in favour of the defendants. These are the reasons, as promised, for my oral judgment in respect of this claim, which was pronounced by this court, in October 18, 2013.

Order:

[42] 1. Judgment on this claim is awarded in favour of the defendants.

2. Costs of claim is awarded to the defendants with such costs to be taxed if not sooner agreed.

3. The second defendant shall file and serve this order.