



[2012] JMSC Civ. 48

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 05720 HCV 2008

BETWEEN SELECTIVE HOMES DEVELOPMENTS CLAIMANT
LIMITED

AND HOUSING AGENCY OF JAMAICA FIRST DEFENDANT
LIMITED

AND THE MINISTER OF HOUSING, SECOND DEFENDANT
ENVIRONMENT AND WATER

AND THE ATTORNEY GENERAL THIRD DEFENDANT

AND NATIONAL WATER COMMISSION FOURTH DEFENDANT

IN CHAMBERS

Dr Lloyd Barnett and Weiden Daly instructed by Hart Muirhead Fatta for the claimant

Kevin Williams and Sorayya Williams for National Water Commission

March 26, 30 and May 2, 2012

APPLICATION TO STRIKE OUT CLAIM – ALLEGATIONS RELIED ON OCCURRED MORE THAN SIX YEARS BEFORE DEFENDANT ADDED - STATUTE BARRED – DUTY OF CARE – WHETHER PLEADED CASE ESTABLISHES DUTY OF CARE

SYKES J

- [1]** This is an application by the National Water Commission (NWC) to strike out Selective Homes Developments Limited's (Selective) claim, in negligence, made against it.
- [2]** NWC's point is direct and simple. NWC says, firstly, on any interpretation of Selective's claim it is statute barred because the facts constituting the cause of action occurred at least six years before NWC was joined as a defendant and secondly, the facts pleaded do not establish the three –fold requirements of the tort of negligence which are (a) duty owed; (b) breach of duty and (c) damage flowing from the breach of duty.

Background

- [3]** Very briefly stated, Selective was the developer of a housing development known as Long Mountain Country Club (LMCC). It consisted of 526 units. The question of how the sewage from LMCC should be disposed needed to be addressed. For

the purposes of this application the only relevant allegation is this: according to Selective NWC directed it to connect its sewage pipes to a particular manhole.

The pleadings

[4] The relevant pleadings of Selective will be set out below. Not every single paragraph will be reproduced but sufficient numbers will be reproduced in order to show that the pleaded case is in fact statute barred and consequently there is no real prospect of success. It will also be shown that the case pleaded does not show that NWC had any duty of care to Selective in the circumstances of this case. The particulars of claim alleged the following:

16. *It was the 4th Defendant's obligation to provide a **"suitable manhole to accommodate the sewage from the [LMCC] development"** aforesaid.*

17. *On 5th July 2001 Natural Resources Conservation Authority ("NRCA") granted approval for LMCC by way of Permit Number 047P00 ("**the Permit**"), the second paragraph numbered "5)" of which provided that:*

"The sewage disposal facilities (Sewer System) shall be connected to the National Water Commission central sewers via Karachi Lands Housing Development, Bamboo Avenue to the proposed extension to the Hope Road Collection sewers and shall be implemented based on the recommendations of the National Water Commission dated October 12, 2000."

18. *The original approval for LMCC was for the construction of 462 two bedroom townhouses, 60 studios and 45 three-bedroom individual family homes (a total of 567 residential units). The actual number of*

units constructed was 474 two-bedroom townhouses, 36 studios and 16 individual family homes (at total of 526 residential units).

- 19. Omni Services Company Limited (“Omni”) was the Claimant’s mechanical and electrical consulting engineers for LMCC. In a letter to Omni dated 12th October 2000, the NWC granted approval, in principle, for the connection of the sewer system of LMCC to the NWC central sewers, via Karachi Lands Housing Development, Bamboo Avenue, to the proposed extension to the Hope Road collection sewers.*
- 20. Omni made a design for sewage based on a density allowance of 300 litres per person per day, with 5 persons in each unit and 2.5 persons in each studio. The sewage was pumped in an 8-inch ductile iron pipe from the collecting station at Lot 13 in LMCC to the 10,000 gallon energy dissipating tank constructed in Lot 253 of Pines of Karachi. The sewage was then gravity-fed into the manhole adjacent to Lot 253 into a manhole with an existing 10-inch pipeline in Pines of Karachi designated by NWC. Sewage flowed periodically, that is, only when the sewage holding tank at Lot 13 was full, the flight submersible sump pumps would empty the holding tank, pump to the energy dissipating tank at Lot 253 where the sewage would be gravity-fed into the NWC designated manhole in Pines of Karachi.*
- 21. Neither a potable water system nor a sewage system existed in Pines of Karachi at the commencement of the LMCC development, save and except the sewage pipelines laid in the subdivision for and on behalf of the 1st Defendant in about 1995 by KSA Engineering Limited. Without those systems no titles for Lots in Pines of Karachi subdivision could have been issued.*

22. *The pumping station required for Pines of Karachi was never built by the 1st Defendant or its contractors. It was redesigned by the Claimant in conjunction with the NWC and constructed by the Claimant. The sewage system drawings which the 1st Defendant submitted to the NWC in or around 1994 confirmed and represented that the size of the connecting sewage disposal line from manhole 43 to the sewage pumping station Lot, would be 12 inches in diameter.*
23. *Contrary to the said original drawings, the 1st Defendant constructed or caused to be constructed sewer pipes of 8 and 10 inch diameter, rather than of 12 inch diameter. Subsequent to the commencement of this action the Claimant has discovered that two (2) sewer pipelines leading into manhole 43 (adjacent to townhouse Lots 222, 223 and 224 of Pine of Karachi), one being 8-inches (200mm) in diameter and the other 10-inches (250mm) in diameter, with one inadequately sized outgoing conduit from manhole 43 of 8-inches (200mm) diameter pipe. The size of the said outgoing 8-inch (200mm) conduit from manhole 43 was substantially smaller than the 12-inch (300 mm) diameter conduit that was required, approved and set forth in the 1st Defendant's original design of the sewage disposal system at Pines of Karachi.*
24. *If the said sewage pipes were inadequate in size to carry efficiently sewage from LMCC thereby causing overflows of sewage at manhole 43 and any damage or loss (which is not admitted), the 1st Defendant is by its negligence the author of its own misfortune.*

PARTICULARS OF NEGLIGENCE

- (1) *Failing to construct the sewage pipes in accordance with its original drawings and design aforesaid.*

(2) Failing to inform the NWC and other regulatory agencies which granted approval for connection of the LMCC sewage system to the Pines of Karachi system that the 1st Defendant had failed to construct the sewage pipes in accordance with its original drawings and design aforesaid.

(3) Failing to inform the Claimant that it had failed to construct the sewage pipes in accordance with its original drawings and design aforesaid.

(4) Failing to warn the Claimant and the Claimant's engineers that the said pipe actually constructed were inadequate aforesaid.

25. Further, or in the alternative, the 2nd Defendant, the 4th Defendant and the said regulatory agencies which granted approval for connection of the LMCC sewage system to the Pines of Karachi system were negligent in granting approval for the LMCC development with the mandatory condition that the LMCC sewage system must enter to the Pines of Karachi sewage mains.

***PARTICULARS OF NEGLIGENCE OF THE 2ND & 4TH
DEFENDANTS***

(1) In respect of the 2nd Defendant, the 4th Defendants and the said regulatory agencies:

a) Failing to ensure that the sewage pipes constructed in Pines of Karachi were in accordance with the original sewage drawings and design the 1st Defendant submitted aforesaid.

b) *Failing to verify that the sewage pipes constructed in Pines of Karachi were in accordance with the original sewage drawings and design the 1st Defendant submitted aforesaid before granting approval for the mandatory connection of the LMCC sewage system to the Pines of Karachi sewage mains.*

c) *Failing to first ascertain and verify whether the sewage pipes actually constructed in Pines of Karachi were adequate or inadequate in size to carry efficiently sewage from LMCC.*

d) *Instructing and requiring the Claimant to connect the LMCC sewage system to the Pines of Karachi sewage system.*

e) *Failing to warn the Claimant and the Claimant's engineers that the said sewer pipes actually constructed in Pines of Karachi were inadequate aforesaid if they were inadequate.*

(2) *In respect of the 4th Defendant, identifying, instructing and requiring the Claimant to connect to the Pines of Karachi sewage pipes at the manhole at which the LMCC sewage system was duly so connected.*

26. *In consequence of the foregoing, the Claimant is entitled to a full indemnity or contribution from the 2nd, 3rd and 4th Defendants in respect of any liability for which the Claimant may be found hereinto to have to the 1st Defendant (which is denied) as a result of the Claimant's connecting the LMCC sewage system to the Pines of Karachi sewage pipes or system.*

27. *In or about March 2001 at a meeting with the Claimant, 1st Defendant, the 4th Defendant National Water Commission (“NWC”) and others, NWC on the instructions of the then Minister of Water and Housing amended an approved design for potable water for LMCC. The amendment required the Claimant to carry out additional infrastructural works and provision of equipment to accommodate balancing of the supply of potable water system to include all communities neighbouring LMCC, namely the said Pines of Karachi and Wellington Heights Phase One, and Beverly Hills, Shenstone and Mona Great House.*

28. *The Claimant’s obligation under condition “m” of the subdivision approval the Claimant obtained from the Kingston and St. Andrew Corporation in respect of the LMCC required only that:*

“the [Claimant] should make all necessary arrangement to connect the sewage system immediately after the NWC provide suitable manhole accommodation from the development.”

29. *The Claimant says that it was the 1st Defendant’s obligation to construct the said manhole as well as a fully functional sewage system into which the said connection by LMCC was to be made. However, after some five (5) years after commencing development of Pines of Karachi the 1st Defendant was unable to complete anything more than a concrete facility to house a generator and a concrete undersized hole (known as a sump) for the sewage pump lift station.*

30. *Subsequent to the above-mentioned meeting NWC requested, and the then Minister of Water and Housing instructed, the Claimant to redesign the Pines of Karachi sewage facilities/network to accommodate not only the LMCC but also Pines of Karachi and Mona Great House sewage. NWC made this request because the 1st Defendant had been unable to complete the sewage system for Pines of Karachi, as stated above, and the said redesign would facilitate a more efficient method of collection of sewage of the neighbouring communities.*
31. *The 1st Defendant is about to subdivide and sell 54 residential service lots at Mona Estate Section One located between Pines of Karachi and LMCC, the sewage from which will flow into the dissipating manhole located at the said Lot 253 of Pines of Karachi. The 1st Defendant projects that each of the said lots will have an average of 3 bedrooms.*
32. *The Claimant had no obligation to provide the said additional infrastructure, equipment, works and facilities for the Pines of Karachi which the 1st Defendant was developing. The obligation for so doing was the 1st Defendant's.*
33. *The Claimant at its sole expense provided the required equipment, materials, labour, management, supervision and itself paid all costs associated with implementing, and did implement, the said potable water and sewage facilities. The facilities became operational and were commissioned in late December 2002. The cost of implementing the facilities exceeded Forty-Five Million Dollars (\$45,000,000.00). The Claimant handed over the said facilities to NWC on or about 26th April 2005.*

34. *It was agreed and well understood by the parties concerned, including the 1st Defendant, or further or alternatively it was an implied term of said agreement, that the 1st Defendant would be liable for a fair and reasonable portion of the cost of those additional infrastructural works and facilities. It was also agreed and well understood by the parties concerned, including the 1st Defendant, or further or alternatively it was an implied term of said agreement, that the said fair and reasonable portion would be determined at a later date and within a reasonable time after the works had been carried out and the full actual cost for so doing became known. It was an implied term of the said agreement of the parties' (including the 1st Defendant) that the 1st Defendant would pay to the Claimant the fair and reasonable sum so determined within a reasonable time after the said determination.*
35. *Further, or in the alternative, the Minister of Housing negligently represented to the Claimant that the 1st Defendant (and others concerned) would be responsible for and pay for a fair and reasonable portion of the cost of those additional infrastructural works and facilities.*

PARTICULARS OF NEGLIGENCE

- (1) Failing to take proper care to ascertain that the 1st Defendant would honour the said responsibility.*

(2) Failing to ascertain whether the 1st Defendant was financially capable to honoring the said responsibility.

(3) Failing to ensure that the 1st Defendant honoured the said responsibility.

(4) Failing to arrange for the 1st Defendant to honour the said responsibility.

36. *At a subsequent meeting in 2003 (called and chaired by the Minister of Water and Housing), with the Claimant, the 1st Defendant, NWC, members of the Ministry of Water and Housing Joint Venture Committee and others, the successor Minister of Water and Housing instructed the Chief Engineer of the NWC, who was present, to determine the fair and reasonable apportionment of the cost and expense amounts the Claimant in creating and implementing the facilities. It was agreed by all the parties present, including the 1st Defendant, that the said determination would legally bind all relevant parties, including the 1st Defendant.*

37. *By a letter dated 20th September 2005 to the then Minister of Water and Housing, NWC's Chief Engineer submitted to the Claimant, the 1st Defendant, among others, his apportionment of the liability the 1st Defendant and others had to the Claimant as their fair and reasonable share of the cost of the said additional infrastructural works and facilities. The 1st Defendant's liability was determined to be Ten Million Five Hundred and Seventy-One Thousand Nine Hundred and Eleven Dollars Jamaican Dollars (J\$10,571,911.00) in*

the aggregate. The Claimant says that the 1st Defendant has agreed to, accepted, acquiesced in and submitted to the said determination of its said liability in as much as the 1st Defendant has never opposed or objected to the said determination and the 1st Defendant, by its then General Manager has orally acknowledged and accepted the said debt.

38. In arriving at the apportionment aforesaid, the said letter dated 20th September 2005 relied in part upon percentages previously established by NWC and agreed upon by the Claimant, NWC and the 1st Defendant in a document called "Division Of Costs For Construction of Sewage Pumping Station at Karachi Housing Development (NHDC) And Serving The Mona Great House0 Private Owners), Long Mountain (Private Owners) and Karachi Lands Housing Developments" enclosed with a letter to Omni from NWC, dated 26th April 2002. In arriving at the percentage of 11.34% payable by the 1st Defendant, the 1st Defendant was duly credited at the Claimant's expense with a sum for the Claimant's use of the Pines of Karachi sewage mains and the area used for the sewage pumping station. The Claimant will at trial rely upon the said document and letter dated 20th September 2005.

39. In the circumstances, the 2nd Defendant and/or 4th Defendant and the said agencies by their words and/or conduct negligently misrepresented to the Claimant that the sewer mains in Pines of Karachi for the use of which the Claimant has paid were adequate in size to convey the sewage from LMCC efficiently.

PARTICULARS OF NEGLIGENCE

- (a) Instructing and requiring the Claimant to connect the LMCC sewage system to the Pines of Karachi sewage system.*
- (b) The Claimant knew or ought reasonably to have known that it was likely that the Claimant would have assumed and acted on the basis that those instructions and requirement would only have been given and stipulated on the basis that the sewage pipes and sewage system constructed in Pines of Karachi were adequate to carry efficiently sewage from LMCC.*
- (c) Failing to inform or warn the Claimant that the sewage pipes and sewage system constructed in Pines of Karachi were or might have been inadequate to carry efficiently sewage from LMCC.*
- (d) Failing to verify, ascertain or ensure that the sewage pipes constructed in Pines of Karachi were in accordance with the original sewage drawings and design the 1st Defendant submitted aforesaid or otherwise adequate to carry efficiently sewage from LMCC, before issuing the said instructions and requirement.*
- (e) Failing to verify that the sewage pipes constructed in Pines of Karachi were in accordance with the original sewage drawings and design the 1st Defendant submitted aforesaid*

before granting approval for and stipulating the mandatory connection of the LMCC sewage system to the Pines of Karachi sewage mains.

- [5] There are a number of things to note about these pleadings. First, NWC did not construct the manhole. Indeed, paragraph 16 of the pleadings makes the allegation that NWC had a duty to provide a suitable manhole to accommodate the sewage from LMCC. I am not sure of the source of this duty.
- [6] Consistent with this assertion, Selective pleads the second point of significance to this application. At paragraph 19, Selective states that in a letter dated October 12, 2000, NWC 'granted approval, in principle, for the connection of the sewer system of LMCC to the NWC central sewers.' This pleading does not make the assertion that NWC directed them to a particular manhole and neither is it clear to me how this approval in principle can translate into a duty of care to satisfy the tort of negligence.
- [7] Third, it was Omni, Selective's engineers, which 'made a design for sewage.' This is stated in paragraph 20.
- [8] Fourth, the pleadings also make clear that Omni, in conjunction with NWC designed a pumping station, and also submitted the 'sewage drawings' to NWC in 1994. These drawings 'represented that the size of the connecting sewage disposal line from manhole 43 to the sewage pumping station Lot, would be 12 inches in diameter (sic).' This is stated in paragraph 22. Paragraph 23 makes the allegation that 'the 1st defendant constructed or caused to be constructed sewer pipes of 8 or 10 inch diameter (sic), rather than of 12 inch diameter (sic).' What is being said here is that NWC in 1994 along with NWC apparently agreed to the use on 12 inch diameter pipes. These drawings were submitted to the first defendant who either laid or caused the inadequate pipes to be laid. None of this, according to the pleaded case, was done by the NWC. In fact, what is being alleged is that NWC agreed what was considered to be an appropriate size for the pipes but the size was not in fact laid. It is important that no negligence is being alleged against NWC up to this point. NWC had no responsibility for laying

the pipes and neither did it supervise the laying of the pipes or gave any directions or advice to the pipe layers. If this is so, it is difficult to see the basis of NWC's liability to Selective.

[9] Fifth, paragraph 24 and the particulars listed there clearly concede that whoever laid the inadequate pipes did so without the knowledge or consent of NWC.

[10] Sixth, paragraph 25 alleges that NWC was negligent because it did not ensure that sewage pipes were of the correct size. NWC did not have any duty to make sure that the pipes laid were the correct size. Even if NWC had such a duty it is not clear to me that such a duty would be owed to Selective. However, it will be recalled that paragraph 19 alleges that NWC approved the connection in principle by letter dated October 12, 2000. From this any approval NWC gave would have been based on the drawings submitted to it in 1994. There is no pleading that NWC undertook to supervise the construction of the sewage system or was actively involved in the execution of the sewage works. Paragraph 25 does not allege that NWC directed or compelled Selective to connect to any specific manhole. There is insufficient proximity between NWC and Selective for a duty of care to be owed by NWC to Selective.

[11] Mr Williams, counsel for NWC, stressed that in respect of paragraph 25 no date is given for the alleged act of negligence on the part of NWC. However, he submitted, this does not matter because Selective had pleaded that the entire system was handed over in April 2005 to the NWC. Inferentially, he continued, all these alleged acts of negligence would have taken place either before or in April 2005. The import of this is that the facts giving rise to the cause of action occurred by the latest April 2005 and would now be statute barred since the NWC was joined in July 2011.

[12] Seventh, when one reads paragraph 26 to 33, they outline a series of events which were as follows:

- a. the approval for a potable water supply;

- b. the Housing Agency of Jamaica being unable 'construct the said manhole as well as a fully functional sewage system into which the said connection by LMCC was to be made' (paragraph 29);
- c. NWC requested Selective to redesign the Pines of Karachi sewage facilities to accommodate LMCC, Pines of Karachi and Mona Great House sewage;
- d. Selective 'at its sole expense provided the required equipment, materials, labour, management, supervision and itself paid all costs associated with implementing, and did implement, the said potable water and sewage facilities' (paragraph 33);
- e. the facilities became operational and commissioned in late December 2002 at a cost of JA\$45m;
- f. the facilities were handed over to the NWC on or about April 26, 2005.

[13] Mr Williams, forcefully submitted, that properly understood, these paragraphs can only mean that the sewage facilities were constructed by Selective. Not only that, the facilities were constructed and were operational by December 2002.

[14] Learned counsel submitted that, on the pleadings, no construction regarding sewage or potable water systems took place after April 2005. This must mean, the argument went, that the inadequate sewage pipes, the potable water system and sewage system were all completed and operational not later than April 2005. If these things or some of them were done at Selective's expense and the expenditures incurred then it must necessarily mean that any negligence attributable to NWC would have become actionable at the time the expenditures were incurred.

[15] Mr Williams is on good ground. It seems to this court that the pleadings are making the unambiguous assertion that all acts or omission by NWC that would have led to the expenditure of sums of money by Selective occurred by the latest April 2005, if not by December 2002.

- [16] If there are any lingering doubts about the meaning and effect of the pleadings set out, paragraph 46 removes all doubt. It reads:

The Claimant operated and maintained the potable water and the sewage facilities until April 2005, a period of some three (3) years. The Claimant had to do this over that long period because the NWC refused to take over the potable water and sewage facilities immediately after they were commissioned as a result of the improper installation of both the sewage and potable water pipelines laid in Pines of Karachi many years earlier by KSA Engineering Limited for and on behalf of the 1st Defendant. Neither the potable water nor the sewage pipelines were laid in accordance with proper engineering practices. Further, both sewage and water laterals were uncapped (resulting in debris entering the sewer pipes resulting in blockages), and in respect of sewage no interconnecting manholes were constructed in many instances, and for most of Pines of Karachi the sewage pipelines were laid under the sidewalk which made access by the NWC difficult. (my emphasis)

- [17] This paragraph is saying that the sewage system was maintained at Selective's expense for three years until April 2005. The sewage system referred to could only be that which was being spoken about in the pleadings which must be the one with the inadequate pipes which was repaired at Selective's expense. This in turn must mean that by April 2005, according to paragraph 46, Selective had been operating the sewage system for three years after it had expended the money.
- [18] This court also takes the view that the pleadings do not disclose that NWC owed any duty of care to Selective. NWC did not do the construction with the inadequate sewer pipes and neither did it supervise the construction of the sewer pipes. This court does not see how approving a connection or even directing the claimant to connect to a particular manhole translates into a duty of care owed to Selective by NWC. NWC had no duty to Selective to ensure that the pipes

actually in the ground were the correct size. This position remains the same even if NWC directed Selective to a particular manhole.

Conclusion

- [19] The pleaded case, in my view, shows that NWC did not owe Selective any duty of care regarding the provision of correct size pipes to which Selective could connect in order to dispose of sewage from LMCC. The facts alleged against NWC are also statute barred.

Disposition

- [20] Selective's claim in negligence against NWC is struck out on the basis that it has no reasonable prospect of success.
- [21] Costs to be agreed or taxed. If not agreed, taxation is to take place within 45 days of this order and costs to be paid within 30 days of taxation.
- [22] Leave to appeal refused.