

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION**

SAINT LUCIA

Case Number: SLUHCV2023/0313

BETWEEN:

WESTBAR HOLDINGS INC

Claimant

-and-

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Before the Honourable Mr. Justice Alvin Pariagsingh

Appearances: Mr. Eghan L.K. Modeste for the Claimant.
Ms. Rochelle John-Charles for the Defendant.

2024: July 23
November 11

JUDGMENT

THE CLAIMANT'S CASE

[1] **PARIAGSINGH, J** : - The Claimant is a limited liability company that is the owner of a parcel of land described as Parcel No. 1219B 63, situated at La Resource, Vieux Fort (the subject premises), which was acquired by a Deed of Sale dated 29 January 2021. The subject land lies to the left of Parcel 64, and both parcels share a common southern boundary, a roadway. The Claimant's case is that this roadway, which abuts the southern boundary of the subject land, is elevated by approximately 20 feet.

[2] The Claimant's case is that the Government of Saint Lucia was responsible for the implementation of proper drainage in the immediate surroundings of the subject land, which was to be managed through the Programme for the Regularisation of Unplanned

Development (the PROUD Programme). This programme was created by Cabinet Conclusion No. 1287 of 1999, dated 30 September 1999.

- [3] The Claimant's case is that the Government of Saint Lucia, through the PROUD Programme, ought to have constructed a drain along the southern boundary of the subject premises to collect rainwater, which was channeled between the subject premises and Lot 64, and thereafter connect this channeled water to another drain along the northern boundary of the properties.
- [4] The Claimant contends that the Government of Saint Lucia, through the PROUD Programme, failed to implement proper drainage in the immediate surroundings of the subject premises by May 2000, or at all.
- [5] The Claimant contends that immediately after the purchase (in January 2021), its Managing Director noticed that when it rained, the subject premises became flooded. He observed that the subject premises were receiving not only stormwater but also waste. It was also noted that a culvert constructed on Lot 64, terminating at the boundary between the subject premises and Lot 64, was bringing water and waste onto the subject premises. This, it is alleged, is a direct result of the Government's failure to implement proper drainage along the roadway.
- [6] In an effort to mitigate the loss, the Claimant caused a drain to be constructed along the northern boundary of the subject premises, but lacks the resources to do the same on the southern boundary. This drainage work is valued at \$55,997.66.
- [7] The Claimant also seeks to recover the sum of \$5,000.00 per month for loss of profits. It is claimed that the land was purchased with the intention of operating a commercial venture, a machine shop. This sum is claimed from February 2021 to the present.
- [8] Up to the date of the trial, the Claimant's quantified claim for losses amounts to \$260,997.66. This sum comprises \$5,000.00 for 41 months, together with the sum spent on the construction of a drain, \$55,997.66. The relief sought is an order requiring the

Defendant to implement proper and adequate drainage along the southern boundary of the subject premises.

THE DEFENCE

[9] The Defendant disputes the claim in its entirety. With respect to the unquantified portion of the claim, namely the relief ordering the Defendant to implement proper drainage, the Defendant raises a preliminary point, discussed below. In respect of the remainder of the claim, the Defendant admits that the Government is responsible for the implementation of the PROUD Programme to the extent provided by statute. However, the Defendant denies that the PROUD Programme was responsible for the implementation of proper drainage in the immediate surroundings of the subject premises. The Defendant avers that the Cabinet Conclusion approved a framework for the disposal of lands and the regularisation of unplanned settlements on public lands. It is specifically denied that the programme extended to private lands or interventions along the main carriageway, La Resource main road.

[10] The Defendant avers that the works executed under the PROUD Programme were carried out in accordance with a Hazard Assessment Report, which considered the topography and natural features of the area. The Report recommended, in a revised design, the construction of a single drain along the northern edge, with the road surface cambered towards the drain. The Defendant contends that the subject premises are located in a low-lying area in close proximity to a natural detention area where flooding is likely. Furthermore, the Defendant contends that the subject premises form part of a planned housing development by the Housing Development Corporation, which was sold to the Claimant's predecessor in title, Ms. Grey, in 1994, and subsequently sold to the Claimant in 2021. The Defendant avers that it is unaware of, and not responsible for, any changes that may have occurred to the land over the 27 years before it was sold to the Claimant, and the Claimant has failed to show that the lack of drainage caused or contributed to the flooding of the subject premises.

[11] The Defendant relies on Article 451 of the Civil Code of Saint Lucia in support of its contention that the Claimant had an obligation to investigate the matters it now

complains about when purchasing the land, and had a duty to mitigate its loss. The Defendant contends that there is no identified cause of action in contract or tort against it.

THE ISSUES:

[12] Both parties have filed their respective lists of issues for the determination of the Court, identifying the same issues. The Claimant raised an issue as to whether there exists an obligation on the Government to implement adequate drainage along major roadways. However, upon reviewing the Claimant's pleadings, I do not consider this issue to arise from the pleaded case.

[13] The following main issues for determination have been articulated based on the parties' lists:

- 1) Preliminary Issue (raised by the Defendant at trial): Whether the Claimant's pleadings provide a legal basis for the issuance of a mandatory order?
- 2) Government's Obligation Issue: Whether the Government of Saint Lucia is under an obligation to implement proper drainage in the immediate surroundings of the subject premises as part of the PROUD Programme?
- 3) Responsibility of the PROUD Programme: Whether the PROUD Programme is responsible for managing and implementing proper drainage in the immediate surroundings of the subject premises on behalf of the Government?
- 4) Claimant's Entitlement to Recover Losses: Whether the Claimant is entitled to recover the losses claimed, including costs of drainage works and loss of profits?

THE EVIDENCE

[14] At trial, the Claimant's Managing Director, Mr. Bernard Ian Duboulay, gave evidence on behalf of the Claimant. His evidence-in-chief was consistent with the pleaded case set out above. No evidential objections were raised by the Defendant to Mr. Duboulay's

testimony, although several paragraphs of his witness statement contained matters of his opinion and conclusions, which the Court must ultimately determine as fact. In assessing the weight to attach to his evidence, I have carefully examined his witness statement and distinguished between factual statements, opinions, and conclusions that the Court must decide upon. I formally express my disappointment at the lack of assistance provided by the Defendant in this regard. It is the Defendant's responsibility to assist the Court, including by raising evidential objections to any inadmissible portions of a witness statement.

[15] Mr. Duboulay conceded in cross-examination that the Claimant was not a squatter and acknowledged that the sale of the subject premises to the Claimant included reference to restrictive covenants. He also admitted that he was aware of the "buyer beware" principle and that he did not visit the subject premises during rainfall prior to its purchase. When referred to the Cabinet Conclusion and asked whether he agreed that "unplanned development" referred to squatting, he denied this. He also accepted that no one had instructed him to construct a drain on public land. Further, he acknowledged that he had destroyed an existing drain, though he qualified his answer by stating that he was unsure if it was indeed a drain, as it consisted of two block walls in the middle of the property. He admitted that he had carried out extensive work on the subject premises without seeking the necessary permissions. However, he did not accept that it was his or the Claimant's responsibility to build drainage for the subject premises.

[16] Overall, I found Mr. Duboulay to be a credible witness and accepted his evidence. I found him to be an honest witness who spoke the truth.

[17] Mr. Ovid Martyr, a former Civil Engineer and Project Manager for Civil Works within the PROUD Programme, gave evidence on behalf of the Defendant. His evidence was that, during his tenure with the Department of Physical Development/DCA, he was responsible not only for reviewing development plans for infrastructure projects and housing developments but also for monitoring the developments' compliance with approval conditions and best practices. He was the person responsible for final

inspections and the issuance of completion certificates, which were prerequisites for the adoption of road networks by the Ministry of Infrastructure.

[18] Mr. Martyr's evidence was that land developers are prohibited from discharging stormwater from a housing development onto adjacent private property unless it is channelled into an existing, well-defined natural watercourse. He stated that the PROUD developers did not discharge any stormwater onto the Claimant's property.

[19] Mr. Martyr also testified that he was personally aware of the Claimant's case, as the Claimant's counsel had written to him seeking compensation of \$60,000.00 for the reimbursement of the costs of constructing a perimeter drain along the boundary of the Claimant's property. This prompted Mr. Martyr to conduct an investigation, which led to the preparation of a report. In that report, Mr. Martyr noted that the subject premises, along with 50 other lots, had been surveyed in 1972. He explained that the drainage considerations for the development would have been determined by the engineer who designed the development. The initial design and approval for the development of the lands to the north of the subject premises were carried out by the Housing Development Corporation (HDC), and the subject premises were sold to Ms. Grey in 1993, seven years before the PROUD Programme was established.

[20] According to Mr. Martyr, the development to which the subject land forms part is a residential development. Based on his knowledge and experience with the Department of Physical Planning/DCA, he stated that a machine shop would be classified as industrial land use, which is incompatible with residential land use. He further testified that the remit of the PROUD Programme was limited to the regularisation of occupation and ownership of unplanned settlements on public land and did not extend to privately owned lands. He also clarified that the PROUD Programme did not extend to interventions along the La Resource main road. Mr. Martyr explained that the PROUD Programme was concerned only with the development of public land to the north of the subject premises and that, in this regard, Adrain Dolcy & Associates had been engaged to design a development plan, which included roads and drains. He confirmed that this

plan did not recommend the construction of any drain along the southern boundary of the Claimant's property, which adjoins the La Resource Highway.

[21] Additionally, Mr. Martyr referred to a regional consultant who conducted a hazard assessment of the area as part of the Settlement Upgrading Project Loan Agreement. This report confirmed that the development plans prepared by Mr. Dolcy adequately addressed drainage issues related to PROUD's development and did not recommend any drains along the southern boundary of the subject property.

[22] Mr. Martyr also testified that the hazard assessment report included a minor revision to Mr. Dolcy's original design. While Mr. Dolcy had proposed one drain on each side of the road running along the northern boundary of the subject premises, the revised design recommended a single drain along the northern edge of the road.

[23] Further, Mr. Martyr explained that, had the Claimant applied for permission to develop the subject premises, he would have been required to construct a perimeter drain. Essentially, Mr. Martyr's evidence was that the cause of the flooding on the Claimant's land was due to a drain/culvert on the neighbouring lot (Lot 62), which predated the intervention of PROUD, and that this pre-existing drain was the source of the flooding, not any action or omission by the PROUD Programme.

[24] Mr. Martyr remained unshaken in cross-examination, and his evidence remained consistent with the contents of his witness statement. Attempts to suggest that several businesses had begun operating in the vicinity of the subject land were firmly rejected, particularly the suggestion that a brewery was in close proximity to the subject premises. Mr. Martyr was careful to point out that the PROUD Programme only dealt with Crown lands in the area surrounding the subject premises, not private land, and he stated that he had no knowledge of the suggestion that lands sold by the HDC could be considered Crown lands.

[25] When shown three videos, Mr. Martyr clarified that the water shown in the first video came from the western boundary of the subject land, rather than from the area of the land shown to be flooded by the Claimant. He also rejected the suggestion that the

PROUD Programme had not complied with the advice of Mr. Dolcy. He explained that the decision to change the design from two drains to a single drain on the northern side was due to a revised plan to construct an 18-inch drain, which was more effective than the original two-drain design proposed by Mr. Dolcy.

[26] The Defendant's second witness, Mr. Shane Ellis, is a Building Officer with the Department of Physical Planning/Development Control Authority. His evidence was that the subject premises are privately owned, and the Department had not received any application for planning permission to construct any new development on the land, including the construction of a machine shop. He stated that, without the necessary planning permission, the Claimant was not authorised to carry out any development on the land. He further explained that the construction of a machine shop would fall under the classification of commercial or industrial development, which would require an environmental impact assessment.

[27] Mr. Ellis also testified that the proposed machine shop would be inconsistent with the classification of the land as residential. He referred to a restrictive covenant in the deed between the HDC and Ms. Grey, which prohibited the land from being used for any purpose other than as a private dwelling house.

[28] Mr. Ellis was also unshaken in cross-examination. Like Mr. Martyr, he rejected the suggestion that the land in the vicinity of the subject premises was commercial or mixed-use. He disagreed with the suggestion put to him that it would be reasonable to resolve the issue of soil stability before applying for planning permission.

ANALYSIS:

[29] Preliminary Issue (raised by the Defendant at trial) – **Whether a mandatory order is available to the Claimant based on its pleadings?**

[30] At the commencement of the trial, the Defendant raised a preliminary point: whether the Court has jurisdiction to grant the first relief claimed.

[31] The Court must first deprecate this practice. This is exactly the type of "trial by ambush" that the Civil Procedure Rules (CPR) regime seeks to avoid. The issue raised is neither novel nor complex and should have been clearly apparent to the Defendant when the claim was filed. There is no good reason why this point was not raised upon service of the claim, or at any stage during case management. The last order made in this case prior to the trial was on 25 April 2024, at the pre-trial review. As this point was raised at trial, when it could and should have been raised earlier, the Defendant must be penalised in costs for the delay.

[32] Notwithstanding the Defendant's conduct in raising the point belatedly, the issue is not frivolous. In essence, the Defendant contends that the first relief sought is in the nature of a mandatory order, and that the Court has no jurisdiction to grant such an order outside of a Part 56 CPR application.

[33] The Defendant's authorities, which I will not fully recite here in the interest of brevity, all deal with the principle that disputing the Court's jurisdiction at a late stage is not fatal. In my view, these authorities clearly demonstrate this, though there must be a balancing consideration of the fairness of raising the point at such a late stage, on the morning of the trial.

[34] There is a difference between asserting that the Court has no jurisdiction and suggesting that the Court should not exercise its jurisdiction. I am not convinced by the Defendant's argument that the Court lacks jurisdiction to hear the claim because the relief sought is a remedy under Part 56 CPR. In my view, there is more merit in the proposition that the Court should not exercise its jurisdiction, given the nature of the proceedings before it.

[35] The nature of the proceedings before the Court is a claim in private law. While there is some suggestion of a claim for breach of duty (as outlined in paragraph 12 of the statement of claim), the Defendant is correct in its submission that the claim's nature and cause of action are not immediately apparent from the statement of claim.

[36] The claim is not pleaded with any reference to contract or tort. Rather, it simply sets out a sequence of facts leading to the claim for loss, based on a failure of the Government

to implement proper drainage. There is no explicit identification of any statutory, common law, or other legal duty that imposes this obligation on the Government. The only reference to the genesis of the duty claimed by the Claimant is a Cabinet Conclusion pleaded at paragraph 7 of the statement of claim.

[37] The first relief sought is phrased as "An order that the Defendant is to implement proper and adequate drainage upon the southern boundary of Parcel Number 1219B 63." This, in my view, although not explicitly framed as an order mandating the Defendant to do something, is clearly a request for a mandatory order. The mandatory order sought is against the Government of Saint Lucia, according to the Claimant's pleaded case, and relates to the performance of a public duty or obligation. Matters requiring mandatory orders against public bodies or officials do not fall within the domain of private law; they are matters of administrative law.

[38] Administrative law matters are specifically provided for within Part 56 CPR. These matters are not governed by the same rules and practices that apply to private law claims. As such, any claim for a mandatory order against a public body or official by the Claimant should have been instituted as an administrative law challenge.

[39] The Claimant's response to this preliminary point is, in my view, entirely unmeritorious. All six authorities cited by the Claimant concern the approach the Court takes to unpleaded allegations in private law claims. The requirement to plead material facts does not extend to pleading legal arguments. Whether a portion of a claim available in an administrative law claim can be or ought to be granted in a private law claim is not, with respect, a pleading point.

[40] The ethos, rules, procedures, and philosophy of administrative law claims differ fundamentally from those in private litigation. Administrative law is a distinct category of litigation that does not adhere to the strict, granular approach to claims determination required under the CPR. One example of this difference is found in the application to amend procedures in administrative claims, and the inapplicability of the threshold hierarchical requirements of Part 20 CPR to such applications, as confirmed by the Board in **Ayres-Caesar v Judicial and Legal Service Commission (JCPC**

2019/0091). Lord Carnwarth's oral decision delivered on 13 November 2019 upheld the decision of Jamadar JA, who noted:

"Significantly, Rule 56.12(1) expressly provides that Parts 24 to 27 CPR 1998 apply, but is silent on whether Part 20, CPR 1998 (Amendments to Statements of Case) applies. In our opinion, the threshold and hierarchical requirements of Rule 20.1 have no formal applicability to applications under Part 56 CPR, particularly in relation to amendments to applications for judicial and constitutional review. Such applications are to be dealt with on general principles, bearing in mind the overriding objective, as well as the principles and processes in Parts 24 to 27 CPR, and through the lenses of relevant public law principles."

[41] Having failed to avail itself of the proper procedure to seek a mandatory order against the Government of Saint Lucia via an administrative law claim, the Defendant's preliminary point must succeed.

[42] Accordingly, the claim for a mandatory order is struck out.

[43] Given that this point was raised late and could and should have been addressed earlier, I exercise my discretion to make no order as to costs in favour of the Defendant on this issue.

Whether the Government is under an Obligation to Implement Proper Drainage in the Immediate Surroundings of the Subject Premises through the PROUD Program?

[44] The starting point for resolving this issue is whether the PROUD program applied to the Claimant's land at all. The answer to this is unequivocally in the negative. As clearly stated in the Cabinet Conclusion, the PROUD programme was specifically applicable to public lands. The subject premises were purchased by the Claimant's predecessor approximately seven years before the PROUD programme came into operation. Even if it were argued that the Housing Development Corporation's (HDC) land was Crown land — which I do not accept — the conveyance and sale of the subject premises to Ms. Grey in 1993 confirmed that the land was privately owned. This ownership was further affirmed when the land was sold to the Claimant in 2021.

[45] It is my view that the obligation to provide drainage, as mandated by the PROUD programme, did not, and could not, extend to privately owned lands such as the Claimant's. The suggestion that there was non-compliance with Mr. Dolcy's recommendations regarding drainage is immaterial to the subject premises. Mr. Dolcy's revised recommendations, having regard to the hazard assessment report, were not made arbitrarily. They were based on a revised design which involved a larger drain at one end of the development, which, in the expert opinion of Mr. Martyr, adequately addressed the drainage needs of the land developed under the PROUD programme.

[46] I also find the Defendant's reliance on Article 451 of the Civil Code of Saint Lucia to be well-founded. There is no obligation on the owners of higher lands to ensure that stormwater is drained in a particular manner or fashion that would be convenient for the owners of lower-lying lands. It is the responsibility of the owners of private lands to ensure that their property is adequately drained.

[47] I accept Mr. Martyr's unchallenged evidence that the flooding on the Claimant's land arose due to a failure to take proper account of the existing stormwater flows, including the culvert on Lot 63 and the water runoff from Lot 62 at the time the land was purchased. In short, the Claimant is the author of its own misfortune, particularly as the Claimant's own evidence confirms that no inspection of the land was conducted during rainfall prior to the purchase.

[48] I find no statutory, common law, or other legal obligation on the Government of Saint Lucia to ensure that private land is adequately drained. The measures put in place for drainage of lands developed under the PROUD programme were appropriate for the publicly owned lands involved and did not extend to the subject premises. Given this conclusion, the other issues raised in the claim fall away.

[49] Accordingly, the claim must fail in its entirety.

COSTS:

[50] On the issue of costs, the general rule is costs follow the event. There is no reason to depart from the general rule so the Defendant is entitled to its costs. I will however reduce the Defendant's costs by one third as out of the three substantive reliefs claimed by the Claimant, relief one could have and ought to have been determined before the trial.

[51] On the value of the claim to be used for prescribed costs, the Claimant's claim, excluding the mandatory order relief, up to the date of the trial was for the sum of \$260,997.66. Had the Claimant been successful it would have been entitled to costs on this sum. I see no reason why the Defendant ought not to be awarded costs based on the total sum claimed by the Claimant.

[52] The Claimant shall therefore pay the Defendant two thirds of its prescribed costs recoverable on a claim having a value of \$260,997.66 (total cost \$31, 099.77) calculated in the sum of \$20, 733.18.

ORDERS:

[53] For the reasons stated above, I make the following orders:

- 1) The Claimant's claim filed on 2 August 2023 is dismissed; and
- 2) The Claimant shall pay the Defendant's costs of this claim in the sum of \$20,733.18.



Alvin Pariagsingh
Judge

By the Court,

Registrar