

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCv2007/0590

BETWEEN:

REGINALD WALTER
As the Attorney for Leonie Walter

Claimant

And

ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendant

Appearances:

Mr. Ralph Francis and Ms. Denescia Thomas **for the Claimant**;
Miss. Bridget Nelson, Senior Crown Counsel, **for the Defendant**.

2010: February 15th, 16th;
2010: June, 9.

JUDGMENT

1. The Claimant Reginald Walter as Attorney for his wife, Leonie B. Walter, sues the Government of Antigua and Barbuda for compensation for damage committed to his property by the Ministry of works – Environmental Division - as a result of dredging his lands, all of which lay within a 'mangrove' known as McKinnon's Pond (**the 'pond'**). He alleges that the said works effectively removed 6' of soil from his property and caused his property to be submerged under water thereby causing his private development works to be suspended. The Claimant claims as an alternative remedy; an order for the restoration of his parcel; parcel 26.
2. The Defendant, represented by the Attorney General, denies the claim and states that the dredging works were commenced pursuant to the Environmental Protection (Runaway Bay) Order 2004 made by the Minister under S.57 of the Physical Planning Act, 2003. The McKinnons Pond was polluted and posed a health hazard and nuisance to residents of the surrounding Runaway Bay area. The said dredging works reduced the water level in the pond thereby exposing much of the Claimant's land which was previously either perpetually under water or most parts, seasonally under water. They claimed that the dredging has improved the land and had the Claimant not stopped the Governments ongoing works, the Defendant would have gratuitously back filled the lands of the Claimant even further, to the benefit of the claimant, as part of the general restorative works being carried out on the Pond.

THE EVIDENCE

3. The claimant gave evidence that he has been designated the Attorney for his wife Leonie B. Walter of Arizona USA for purposes of this action. He said that his wife purchased the subject

lands in 1980 and is the registered proprietor of the subject parcel 26. There is no dispute that the parcel 26 is located in the Mc Kinnons Pond area. He testified that in 1997 he and his wife "had plans drawn up for the erection of a facility on parcel 26", but "postponed construction, in favor of a considered, more profitable commercial facility elsewhere, with the expectation of imminently returning to build on the site in question"¹.

4. The claimant said that in about April-May 2007, he observed excavation works being carried out in several places in the pond including his wife's parcel 26. This he said, was without the approval of his wife, Leonie Walters. He tried several times to stop the excavation works without success. He said he took photographs of the activities. During the first year of excavation, he said he observed works being carried out unrelated to the excavation. He also observed material being trucked to the nearby Sandals Hotel construction site and followed the trucks to various other private homes and yards around Antigua and Barbuda. These works and the claimant's observations and stealth activities spanned some two years.
5. The claimant alleges that parcel 26 is a 2 ¾ acre parcel and is now a 'man-made lake', which requires 1664 truck-loads of fill material to restore it to its original condition. He submits that the cost of restoration is \$2,351,800.00. The defendant has not submitted an alternative costing based on the parameters used by the claimant.
6. The evidence of the Claimant, Reginald Walter, establishes him as an academic of some note. He has obtained the distinction of a PhD. in Agriculture and Food chemistry. Further, he possesses a Masters Degree in Soil chemistry. The claimant was at one time, a professor at Connell University. The claimant testified that during 1998 he worked in the Ministry of Planning of the Government of Antigua and Barbuda. The claimant testified that he has lived next door to the Mc Kinnons pond for 30-40 years and that he is aware that it is a wetlands area.
7. In cross examination he denied the suggestion that prior to the commencement of the subject works, he and Mrs. Black-lane, the Chief Environmental Officer at the material time, discussed the flooding and stench emanating from the pond. He denied experiencing flooding next door to the Mc Kinnons pond and that he had complained to Mrs. Black-lane about it. He further denied that she had told him about the Government project to dredge the pond and alleviate the flooding. He said that although he was in Antigua between 1999 and 2006, he is "emphatically" not aware of the public consultations Mrs. Black Lane alleges the government had on the problems of the swamp flooding, fish kills and stench during that period.
8. The claimant went on to deny the evidence and the suggestion by counsel, that he was made aware of the dredging project by way of a notice from the Environmental Division sent to his wife, Leonie Walter. Further still, Mr. Walter denied the evidence and the suggestion that after the project started; he was contacted by Mrs. Black-Lane and told that his parcel 26 would be reclaimed as a favor to Leonie Walter. He went on to deny that he accepted the offer and said then, that he was grateful for it.
9. When asked whether he had submitted his development plans for the said parcel 26 to the relevant authority for approval, he said he had not done so.

¹ See the witness statement of Reginald H Walter at pp 17 of the Core Trial Bundle.

10. At the crux of his evidence in cross examination, he stated that prior to the commencement of the dredging project in 2006; parcel 26 was certainly not submerged. Mr. Walter insisted that parcel 26, contrary to Mrs. Black-Lane's assertions, did not benefit from the dredging of the pond or any other Government works. He insisted further, that contrary to the rectified Land Title Register and the evidence of Surveyor, Ato Kentish; parcel 26 consists of 2 ³/₄ acres and not 1 ³/₄ acres².
11. In cross examination, the claimant said he did not recall a conversation in 2007 with Mr. Ato Kentish, the surveyor, where he told Mr. Kentish to continue putting down the survey markers on parcel 26. He acknowledged that he did see persons several times putting down markers on the road side along the pond and did speak to another person from the Department. Ato Kentish gave evidence of his surveying work at Mc Kinnon's Pond for the defendant, concerning the subject works and pertaining to the size of parcel 26. He testified as to a conversation with the claimant concerning the works at the pond. Ato Kentish testified further, that he surveyed parcel 26 and this survey involved going out into the pond in a boat to locate and/or place markers. Counsel for the defendant asks that the court consider this evidence as further proof of the claimant's awareness of the ongoing works in relation to the pond and to parcel 26 in particular.
12. Several photographs and aerial photos were submitted in the matter. The aerial shots show practically the entire parcel of the Claimants Parcel '26' as being within the "pond". It was suggested by the counsel for the Claimant and testified to by the Claimant, that the aerial shots show the Claimant's land, in 2004, being largely above water. This is contested by the defendant.
13. The Evidence from Mrs. Black-Lane is that the level of the water rises and falls with the dry season and wet season but that the whole of the Claimant's land was submerged prior to the works carried out by the Defendant. This seasonal ebb and flow of waters within the mangrove lands, I observe is not inconsistent with our Caribbean island experience from time immemorial. I accept Mrs. Black-lane's evidence along with the supporting evidence in this matter on this point as true.
14. Eric knight, owner and operator of a heavy equipment company, gave evidence for the claimant. He estimated the depth of the claimant's submerged lands to be 6'. He did this by adopting a highly speculative method of deduction in preference to an actual physical check. He did not testify to having himself physically gauge the depth of the water over the 2 ³/₄ acres that he was advised the claimant's lands extended. In cross examination, in response to Ms. Nelsons suggestion that "most of the time over the year parcel 26 is flooded with water"; he said that there are times when the swamp is "real real low, real dry." He said he wasn't aware if excavation was done specifically to parcel 26. I accept his evidence as to the fluctuations in the water levels in the pond. I also understand his evidence not to be concerned with the state of the claimants land immediately prior to the works, but limited to the terms of his engagement and general knowledge of the Mc kinnons Pond as a whole. I conclude from his evidence that he simply did not know what the state of the claimant's land was prior to the commencement of the subject works and that he did not know the

² See certified copy of land register at pp33 and 34 of the Exhibits Bundle.

actual depth of the pond throughout parcel 26. Further, he did not apply the calculations over the 1 $\frac{3}{4}$ acres constituting parcel 26 as reflected on the rectified register, but instead used the previous acreage of 2 $\frac{3}{4}$ acres.

15. Adelle Blair, the Chief Environment Officer (Ag) from October 2008, testified for the defendant, as to her familiarity with the pond area. She testified in chief, that apart from a narrow strip of land to the western side of the pond; *"the entire swamp would be submerged under water during the rainy season"* and in the dry season this narrow 12' strip would be above water but moist. Mr. Blair testified that with the consent of the claimant, following the commencement of this suit, the defendant, commissioned Environmental Solutions Antigua Ltd to provide estimates of the cost of placing fill material on parcel 26³. The maker of that estimate contained in an exhibited report did not testify in these proceedings, and I have not considered it as part of my deliberations.
16. Mrs. Blair in cross examination testified further, that the light colored strip depicted in the aerial photo at pp 29 of the exhibits bundle *'could be above water, but it could be below'*. She said that the lighter colored area appeared to be dry; *"sometimes it is dry sometimes it is not"*. The frontal suggestion by counsel for the claimant that the light colored area was always dry land was not accepted by the witness or in deed any other witness. The Court notes that in any event, the area referred to is a strip of land that does not extend the full length along the subject western side of the pond. It was to put to him by counsel for the claimant that the narrow strip of land that she claimed was above water in the dry season was not always moist as suggested and that the lands depicted in the foreground in the photos at pp 6-10 of the Exhibits Bundle were not moist as she suggested. Whilst her response did not appear confident, she did not resile from her position. I accept the limited evidence of this witness, that the pond is sometimes dry and sometimes not.
17. Ivor Jackson, is the head of Ivor Jackson & Associates (IJA), a consulting firm. Mr. Jackson testified for the defendant, that the firm undertakes environmental impact assessment studies for tourism projects in Antigua. He testified that McKinnons Pond is a wet land system that collects runoff from surrounding areas. He said that the water levels in the pond are at their highest in the rainy season and at such times low lying lands adjacent to the pond are subject to flooding. Mr. Jackson testified in cross examination that the original discharge point for the pond was to the north. He said a road was built in a previous time, connecting Runaway Bay with Dickenson Bay Road. The road he said, is to a certain extent a barrier to drainage at that point. The level of the water in the pond depends on the amount of rain and the extent of the blockage of the discharge point. I accept the evidence of Mr. Jackson that the water is highest in the rainy season and even floods adjacent Runaway Bay lands. The dominant inference to be drawn from this evidence is that the water level in the pond is low in the dry season. It is clear to me also that the water levels in the pond fluctuate with the seasons.
18. Mrs. Diane Black-Layne is the Chief Environmental Officer, Environmental Division, Government of Antigua and Barbuda, from 1998. Mrs. Black-Layne testified that on several occasions she had discussions with the claimant with respect to a project which included the dredging of the pond. She testified that prior to the commencement of the project only two

³ See pp 27 of Core Trial Bundle; see pp 12-16 of the Exhibits bundle for the report.

properties on the pond were not submerged under water. The properties she said, were that of Casino Riviera and that of the Hadeeds, both of which were built up by the owners.⁴ On the visit to the locus in quo, the elevated level of these two properties over all of the other lands on the western perimeter of the pond, including that of the claimant – parcel 26 - is patent. Mrs. Black-lane said that prior to the commencement of the project and since 1999 she had public consultations with the residents of Runaway Bay concerning the exact nature of the problems and its solutions. She swore further, that she conducted many programmes on the popular ZDK radio, published the details of the project in the two most widely read newspapers in Antigua and sent letters to all land owners including the registered owner, Leonie Walter - notifying them of the project. Reginald Walter, in cross examination, said he was *not made aware* of this notification from the Environmental Division that was sent to Leonie B Walter, but he did not expressly deny that it was sent.

19. Mrs. Black-Lane testified as to the toxicity of the material removed from the 'pond' by dredging it and that removing it was a benefit to the 'pond' and parcel owners including the claimant. She further testified that the defendant was stockpiling material close to the claimant's land for the purpose of further and gratuitously building up the claimant's land as part of the restorative works on the whole of the pond. She said that during that process, the claimant, through his parliamentary representative put a stop to the works. The claimant has not denied this fact either directly or by putting his case, in cross examination of Mrs. Black-lane. Mrs. Black-Lane testified that the road running along the western perimeter of the pond was raised as part of the project works thereby preventing the flooding of the Runaway Bay properties. The out-let however, does not appear to the court to have been elevated and as such would presumably maintain the same out-flow and pond level⁵.
20. The aerial photo apparently taken in "*March-April, 2004*" and exhibited and relied upon by the claimant in this matter is inconclusive as to whether at that instance in time the subject land was under or above water⁶. It is inconclusive also as to whether the state of the subject land in April 2004, as depicted in the photo, was the state of the lands at the time the Defendant carried out its works. The evidence of Mrs. Black-Lane is that at the commencement of the works, the claimant's lands were for the most part submerged. The claimant contests Mrs. Black-Lane's assertion by asserting as part of his case, that the lands were not submerged prior to the commencement of the works carried out by the defendants.
21. The Claimant testified and subsequently pointed out to the court during the visit to the locus in quo, that originally, some 50 years ago, his lands were similar to the existing mangrove fringed lands to the south of his. I observed the lands he there pointed out. At best, it appears on the evidence that 50yrs ago his lands were likewise, mangrove lands with water levels that ebbed and flowed with the seasons. However, the claimant is not in this action claiming against the defendant for the degradation of his mangrove lands over the 50 year period. That degradation, if that is what it was, appears to have taken place incrementally over the years for reasons not canvassed in this matter.

⁴ The evidence placed the Hadeed property to the south of the claimants and the Casino Riviera to the north of the claimants property

⁵ See evidence of the claimant and Mr. Jackson and inferences to be there drawn.

⁶ See pp 31 of the Exhibits bundle.

22. Certain photos exhibited at pp 6 – 10 of the Exhibit Bundle were referred to and identified by the claimant to show that while the defendant's work was going on in 2006-2007, the lands of the Claimant were not submerged as contended by the Defendant, but were extensively above water and solid surface land capable of carrying the weight of the heavy equipment shown in the photos. Counsel for the claimant identified certain features in the photos to the witnesses for the Defendant, taken from a point on the western side of the pond and using a line of sight in each of the photos and using as a base point, what appeared to be the same windmill tower in the background of each of the photos⁷. From this, he suggested that certain apparently dry and firm land depicted in the foreground would have to be that of the claimant – parcel 26. The said windmill was further identified on the visit to the locus. None of the defendant's witnesses could, in the end, affirmatively acknowledge the suggested location of the specific lands of the claimant or the stage of the excavation works from those photos, but did (except Carlton Lewis) acknowledge that the subject land would be in that direction.
23. No surveyor gave evidence for the claimant on the identity of the lands depicted in the foreground of the photos in an effort to assist the Court in establishing the location of parcel 26 in the said photos. Mrs. Black-Lane insisted that in any event what appears to be dry lands depicted in the foreground of the various photos is not solid ground and the track made by the heavy equipment seen in the photo had to be compacted before use. Further, she testified along with equipment operator, Carlton Lewis, that during the project several pieces of equipment were accidentally submerged and lost to the pond.
24. The claimant's method of determining that 6' of soil was removed from his land is not sufficiently articulated in the statement of case or the evidence and remains unclear. The defense has not directly challenged him on his methodology. However, Mrs. Black-Lane testified that whatever toxic soil was necessarily excavated from the claimant's land by the defendant, was replaced by "*sanding material*". I note however, that were parcel 26 to be backfilled as required by the claimant in his claim, it would approximate the appearance of that of the Casino Riviera and Hadeed properties, both of which were, on the evidence, indisputably man made backfills and not natural elevations.
25. To conclude, I am afraid that the photos shown were inconclusive. It was unclear which land was depicted in the foreground and at what time in relation to the dredging, backfilling and to a lesser extent, the annual seasons, the photos were taken. It is unclear whether at that time the pond had been dredged sufficiently so as to lower the water level in the pond thereby exposing the otherwise submerged lands such as depicted in the said photos. The photos carry dates on them ranging from 1994 through 1997 to 2007. The photos in 2006 and 2007 appear from the printed dates that seem to be inscribed by the camera itself, to have been taken mostly in January to March.
26. I accept as a fact, that at the commencement of the works, the lands were already substantially submerged and the water of the pond ebbed and flowed with the season. I find that with the onset of the dry season and notwithstanding the ebb of the water in the "pond", the Claimant's land remained substantially underwater, albeit with less depth. I accept that the commencement of the dredging of the pond by the defendant served to initially further reduce the water level in the pond until the rains filled it up to the level of the

⁷ It was suggested to the witnesses by counsel for the claimant, that the windmill was located in the 'Dry Hill' area.

outflow⁸. The evidence leads the court to conclude that the reduction in water level resulting from the ongoing excavation of the pond would have for some period expose the claimant's land in a manner hitherto not known to parcel 26 and therefore could substantially account for the expanse of lands above water as depicted in the foreground in the photos shown in pp 6-10 of the exhibit Bundle.

LAWFULLNESS OF THE WORKS.

27. There is no dispute by the claimant that the defendant acted under the lawful authority of the Physical Planning Act ('Act') and the 2004 Environmental Protection (Runaway Bay) Order.
28. Mrs. Black-Lane goes further in her evidence and points out that notwithstanding all the various forms of notice to the public and to the claimant of the details of the project, and the very public activity of the commencements and carrying out of the works, *"the claimant never raised any objections."*⁹
29. It is not part of the claimant's case that the defendant utilized any means or carried out any activity not contemplated by the Act and the 2004 Order. The claimant merely alleges that as a result of the defendants remedial works; he has been unlawfully injured and entitled to compensation or an order for restoration of his lands.
30. The defendant does not claim special protection by law against any liability for the effects of its works carried out under the said Act and Order.

THE FACTS – THE CONCLUSION

31. The central issues left in this matter are; **(i)** Whether the claimant's lands – parcel 26 – or a substantial portion of it, was permanently above the high-water level in the pond prior to the commencement of the works carried out by the defendant; and **(ii)** whether the said works carried out by the defendant at the McKinnons Pond caused damage to the parcel 26 by permanently submerging it under water and causing the postponement of his private project, as alleged by the claimant.
32. I accept the evidence of the witnesses for the claimant for the most part as truthful, more robust and inherently consistent with the logic of the circumstances.
33. As I have alluded to in several instances above and on the preponderance of the evidence in this matter; the claimant's land(or substantial part thereof) at parcel 26 was not permanently above water prior to the commencement of the works in 2006 or at any time prior to that¹⁰. I am satisfied that after the 2006 commencement, if the land did at anytime find itself above water, it was as a result of the works of the defendant, seasonal and was temporary in duration. I am further satisfied that the attempts by the defendant to excavate some of the toxic soil from parcel 26 would have been more than compensated for by the drop in the level of the water in the pond that resulted from the general excavation works of

⁸ See evidence of Ivor Jackson on the effect of the height and location of the out flow. The height does not seem to have been altered by the works.

⁹ See pp 24 of the Core Trial Bundle.

¹⁰ *ante* at paras. 25 and 26.

the defendant¹¹. But, more significantly and sufficient by itself, I accept the evidence in chief of Mrs. Black-Lane that the part of parcel 26 from which the toxic material was removed, was filled back with sanding material.¹² In any event, on the evidence in the matter as to the prior submergence of parcel 26, I see no discernable difference in the submergence of the claimants land now as compared with the evidence describing its state of submergence prior to the commencement of the works.

34. The issue of the size of parcel 26 arose in the evidence. The parcel was resurveyed for the Government of Antigua and Barbuda by Ato Kentish in 2007 and as a result the Land Register was rectified to reflect the reduction in the size from 2 $\frac{3}{4}$ acres to 1 $\frac{3}{4}$ acres. The evidence before the court is that of parcel 26 measuring 1 $\frac{3}{4}$ acres and not the 2 $\frac{3}{4}$ acres that forms the basis for the calculation of the land fill restoration costs by the claimant.¹³ The claimant disputed this finding by the surveyor and sought to testify as to the irregularity of the procedure adopted by the defendant in pursuit of Rectification under the Registered Land Act. (RLA)¹⁴ This issue is not pleaded and does not arise on the facts pleaded. The issue is one fit for another action. In any event there is insufficient evidence in this trial upon which the court could make a conclusive finding on this issue. Further, the Registrar of Lands was not served with the statement of case or made a party in this action or otherwise called upon to defend the allegation against the office of the Registrar of Lands. Further still, the RLA at S. 146 and S.147 provides for an appeal by an aggrieved land proprietor.

CONCLUSION

35. The claimant's case as pleaded is for compensation for comprehensive damage inflicted upon parcel 26 resulting from dredging the Mc Kinnons pond thereby causing the private developmental works to be suspended by the claimant.
36. The evidence led by the claimant concerning the movement of the material from the pond or other places around the pond is not of assistance to the court in determining the issues arising from the claimant's case as pleaded.
37. The suspension of the claimant's alleged private developmental works has not been established. There is insufficient evidence of a realistically realizable project in existence at the time. No development plan had been submitted to the relevant authority for approval¹⁵. In any event, there is no presumption that in these times of eco-enlightenment that any development plans would have been necessarily approved in the wetlands known as the Mc Kinnons Pond.
38. The claimant's pleaded case claims as an alternative to compensation for the backfill of parcel 26; the complete restoration of parcel 26 by the defendant. For the reasons earlier provided, I do not accept the figures claimed for the restoration as being an accurate representation of the extent and cost of the restoration of the parcel¹⁶. Mrs. Black-Lane

¹¹ Diane Black-Lane and Carlton Lewis testified to the excavation and initial lowering of the water line in the pond.

¹² See Witness statement at pp 25 of the Core Trial Bundle; This evidence is consistent with the uncontested assertion of Mrs. Black-Lane that part of the restorative works on the pond involved raising the level of the lands around the pond including that of parcel 26.

¹³ See the evidence and report of Eric Knight at pp 21-22 of the Core Trial Bundle and his cross examination; see also the 'Particulars of Restoration and Cost' in the claimant's Statement of Case at pp 3 of the Core Trial bundle..

¹⁴ The claimant is not without a ground for concern here.

¹⁵ For that matter, neither has one been exhibited in this case.

¹⁶ *ante* at paras 14, 33 and 34.

testified that the gratuitous backfilling of the perimeter of the pond including parcel 26, is not now likely to be realized due to Budgeting shortfalls and like considerations. The claimant in any event did not in his case acknowledge the backfilling to be an aspect of the defendant's works. The defendant is not bound to deliver the gratuitous works and neither is the claimant claiming it as such. The claimant is claiming Damages or restoration on an entirely different basis.

39. Further, envisaging the physical characteristics of the subject land, raised six feet and extending out to the perimeter of the parcel as pointed out by the claimant at the locus¹⁷, it would bear no resemblance to the original and what appears to be untouched and mangroved part of the pond to the south or indeed the adjoining parcels. In fact, it would likely elevate the land above the level of the original pre-2006 Runaway Bay road as described by several witness including the claimant. The physical characteristics of the "restored" parcel 26 would, I am afraid, be an absurdity and unsustainable on the evidence of the very claimant as to the original lay of the land.
40. On the evidence, I am convinced of the case for the Defendant on the civil standard of proof. I do not accept that the claimant's parcel was damaged as alleged or at all; and

For the reasons provided above, **IT IS HEREBY ORDERED AS FOLLOWS:**

ORDER

- i. That the case for the claimant is dismissed in its entirety;
- ii. Judgment for the Defendant;
- iii. That Costs to be paid to the Defendant according to the Prescribed Costs scale unless otherwise agreed between the parties.



DAVID C HARRIS
JUDGE, THE HIGH COURT
ANTIGUA AND BARBUDA

¹⁷ Or even the much closer rectified boundaries as pointed out by Ato Kentish.