

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT: NO 328 OF 1992

BETWEEN:

CHARLES SERIEUX

Plaintiff

and

FITZ MARK

Defendant

Appearances:

Miss V. Georgis Taylor for Plaintiff
Mr. Nicholas John for Defendant

1997: April 24, 30
1999: June 28
November 23

JUDGMENT

- [1] **d'Auvergne, J.:** By an Amended Writ of Summons endorsed with a Statement of Claim filed on the 20th day of November 1995 the Plaintiff claimed special damages in the sum of \$127,490.00 general damages, further or other relief and costs. There was a previous statement of claim filed in July 1992 seeking special damages in the sum of \$109,492.83 and the other relief noted above.

FACTS

- [2] The Plaintiff purchased two parcels of land viz 1252B parcels 483 and 484 (hereinafter referred to as the land) from the Defendant for the price of \$72,308.00. The said parcels of land were duly registered at the Land Registry on the 12th day of June 1990.
- [3] The Plaintiff alleged that he told the Defendant that the parcels of land were bought to construct a house.
- [4] He exhibited the deed of sale which shows that the Defendant covenanted with the Plaintiff to “at his own expense and in a workmanlike manner commence and within six months.....complete the installation of water and electricity” to the said parcels of land and “will construct a motorable access road to the subdivision hereby sold.”
- [5] The Plaintiff alleged in his Statement of Claim that it was only after the filing of the Writ in July 1992 that the Defendant constructed a road to the said parcels of land and in so doing has cut the land bounded to the Plaintiff’s land in such a way as to create a precipice but that he has not supplied water as was covenanted. He said that as a result of the aforementioned he has suffered the following damages.
- (i) Increased cost of building due to the delay in providing the aforesaid infrastructure from 1991 when the Plaintiff’s house plans were completed to 1994 when the Defendant provided a road only motorable to a four wheel drive vehicle, which allowed the building to commence construction \$60,690.00
 - (ii) Cost of building a retaining wall along the South Western

	boundary of the said parcels	\$30,000.00
(iii)	Cost of excavating a drive way from the access road onto the Plaintiff's said parcels	\$ 1,800.00
(iv)	Cost of providing a temporary water supply	\$20,000.00
(v)	Depreciation to the said parcels of land as a result of having to cut a drive way across the said parcels, rendering the lands South of the excavation drive way useless	\$15,000.00

[6] The Defendant on the other hand admitted the stipulation of six months but stated that time was not of the essence and was just an approximation and that he still intended up to the time of filing the amended defence in December 1995 to complete the servicing of the said two parcels of land with water, electricity and a motorable road within a reasonable period.

[7] He averred that he had placed pipes and other apparatus to enable the water and Sewage Authority to supply the Plaintiff with pipe borne water and that he was not aware that the Plaintiff was not receiving water. He denied that the Plaintiff had suffered the damage noted above.

[8] At the trial Plaintiff told the Court that the two covenants namely the providing of the amenities and the construction of the motorable road were of particular importance to him since he had plans to construct his home within a certain period of time, that he had secured the services of a company who agreed to construct a house for him, (plans having been drawn in September 1991) at not more than \$200,000.00 two hundred thousand dollars.

- [9] He further said that though there was no access road prior to purchase in 1991 a path was "bulldozed" to the land.
- [10] He exhibited two maps showing the intended access road prior to the purchase and from which he cut a driveway to the land and another showing the road in existence which he said cut away his driveway and left a sheer rock face all along the frontage to the land averaging 8 to 12 feet steep.
- [11] He said that it cost him \$600.00 to cut that original driveway and after the new access road was cut by the Defendant he had to cut a new motorable driveway which cost him \$1,900.00. He said the land is forever slipping and that he was in the process of building a retaining wall, that though there were pipe lines placed by the Defendant he never received any water from Water & Sewage Authority, that he had to build a reservoir which cost him \$20,000.00 and is very expensive to maintain.
- [12] Under cross examination he admitted to choosing the land at the top of the hill and of his telling the Defendant "just build a road for me to get to my house" for at that time there was no motorable road. He said that Defendant told him that the road was too steep therefore Development Control was changing the road. He told the Court that he almost lost his life on the former road which was not motorable, since the surface was not good and the cars could not grip.
- [13] He admitted that the original drawings for the land needed retaining walls which he had not built though his house was completed in May 1995 but said that because of the cutting of the new road it now needed further retaining walls.

- [14] He told the Court that he had no receipts for the work done.
- [15] He admitted that there is a main pipe going to his property but that there was no water and that it was the Defendant's duty to ensure that he received water. He further admitted that the houses below his house about 130 feet below received pipe borne water from Water & Sewage Authority. He concluded by informing the Court that the land was not affected in size by the new road.
- [16] Cornelius Dolcy, a quantity Surveyor, gave evidence on behalf of the Plaintiff. He exhibited two reports he prepared concerning the land. One which was prepared in 1994 and another in 1996. He estimated the price for the construction of the house from drawings given. He said that in 1994 the house would cost \$380,110.00 to build and in 1991 \$319,420.00. He said that the estimated price for the retaining wall in 1994 was \$76,800.00.
- [17] In his second report, he told the Court that he measured the length of pipes from the water tank from the bottom to the top and estimated it at \$18,900.00. He also stated that the cost of the proposed retaining wall was \$38,700.00, that there was about 1,890 square feet of land which was unusable and that he also saw soil erosion where the original driveway should have been. He concluded his cross examination by admitting that up to the preparing of the second report in 1996 there were no retaining walls anywhere on the land and that it was advisable that everyone who builds a house should construct a water tank.
- [18] Desmond Fostin, a Civil Engineer, gave evidence on behalf of the Defendant. He told the Court that he visited the land in 1997 and that the land was of the hard rock tiff better known as volcanic tiff and that it was stable. He said that the driveway he saw would cost in the region of

\$5,000.00 to \$6,000.00 to construct and that from the drawings and examination of the house he placed a value of \$243,000 to construct (\$100,000.00 for labour and \$143,000.00 towards material); that the difference in the cost of building houses in 1991 and 1994 was negligible since the cost of building materials did not increase significantly as compared with the cost of labour in 1989 which would cost more than it would cost to build in 1997.

- [19] This witness told the Court that he was a developer and that the responsibility of a developer was “to bring the main Water & Sewage Authority line to the property boundary and the owner of the lot would then approach the Water Authority and do the needful.
- [20] He agreed that the driveway is situated to the South eastern portion of the land but disagreed that the triangular piece of land between the driveway and the main road was useless for he observed that there was a garden of either bananas or plantains. He said that he measured the distance between the house and the road and that was only fifty-two (52) feet.
- [21] With regard to the water tanks he said that he saw them from a distance but estimated them to be 600 gallon tanks at \$600.00 each and a pump which would cost about \$1,000.00. This witness concluded with the same advice to all home builders to the North of the island, namely, that they should construct water tanks.
- [22] The Defendant gave a history of the selling of the land to the Plaintiff. He told the Court that he had an agreement to sell one of the two lots which formed the land to another person but the Plaintiff was insistent and offered fifty Eastern Caribbean cents extra. The land was sold at \$4.00 per square foot.

- [23] He conceded that upon the Plaintiff's purchase of the land there was no pipe borne water or electricity but that the road had been cut.
- [24] The Defendant said that while constructing the road in accordance with the approved plan it became apparent that the gradient was too steep about 400 yards away from the Plaintiff's land; that upon further complaint by the Plaintiff he made many trips to the chief surveyor Mr Martyr who eventually sent a Surveyor and crew to the development and the direction of the said 400 yards of road leading to the Plaintiff's property was altered and that altered plan was approved nine months later. He said that because of heavy rains it took him two years, not including the previously mentioned nine months to complete the new road, that because of that delay he was unable to install the pipe and electricity lines.
- [25] The Defendant insisted that he knew the law with regards to the development of property for he has been a developer for the past twenty five years (25), that he was late in the placing of the amenities because of the delay with regard to the construction of the 400 yards of road leading to the Plaintiff's property. He admitted that he could not read or write but that he had six sons and daughters who assisted him with his various developments.

ARGUMENTS

- [26] Learned Counsel for the Defendant commenced his arguments by stating that the Plaintiff had changed the nature of his claim by his amended statement of claim which the Defendant denied for he did not cut lands which was bounded to the Plaintiff's lands so as to create a precipice, and that he had placed all the requirements for the supply of pipe borne water and electricity to the Plaintiff's property.

- [27] Learned Counsel argued that the Plaintiff was seeking damages for increased cost for the building of his house in 1994 yet he had not produced one document to substantiate his case. His own expert witness Dolcy said that the increased costs would be \$46,198.00.
- [28] Desmond Fostin an engineer who is personally involved in development stated that there was no substantial increase in building between the years 1991 and 1994.
- [29] He urged the Court to accept the evidence of Desmond Fostin.
- [30] He said that the Court should note that the Plaintiff's house was completed in 1994; yet up to the date of trial April 1997 no retaining wall had been built. His expert witness said that "a wall may be necessary." Fostin on the other hand said the cutting of the road only exposed volcanic tuff which was sufficiently solid.
- [31] Counsel contended that the Defendant did not breach his covenant. The Plaintiff bought prior to the cutting of the road and after the road was cut and completed it left a taller soil face than the Plaintiff had anticipated and that the driveway was designed before the access road was completed. That the Plaintiff has built an elaborate water supply and wishes the Defendant to pay the costs. That the Plaintiff also admitted that the Water Authority attempted to provide him with water.
- [32] Learned Counsel argued that for the Plaintiff to succeed with his claim he must show that the Defendant breached his contract and that he actually suffered loss. Learned Counsel contended that there was no breach but a delay in the providing of the amenities and completed road; that the new circumstances caused inconvenience to the Plaintiff not done by the Defendant.

- [33] He emphasised that for Plaintiff to succeed with his claim he must show that the Defendant interfered with his property for example trespassed or encroached.
- [34] Learned Counsel for the Plaintiff argued that Defendant breached two major contractual terms contained in the Deed of Sale. Firstly that he did not complete the installation of pipe borne water and secondly did not construct a motorable access road to the said land. She said that the Plaintiff paid the Defendant an addition sum of money per square foot in order to facilitate and enable the Defendant to keep within his contractual agreement.
- [35] She said that the Defendant deceived the Plaintiff in that he had not obtained the planning permission for the construction of the development and consequently the sale of the land and therefore was in breach of **Section 7(1) of Land Development (interim Control) Act 1971.**
- [36] She urged the court to accept the valuations given by expert witness Dolcy and to accept that the Plaintiff suffered the loss as per his particulars in the Statement of Claim.

CONCLUSION

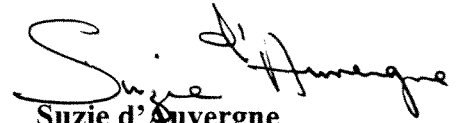
- [37] It is trite law that a breach of contract occurs where a party fails to perform, or evinces an intention not to perform one or more of the obligations laid upon him by the contract. The Defendant covenanted “at his own expense and in a workmanlike manner to commence and within six (6) moths of execution of the deed of sale to complete the installation of water and or electricity up to the land.”

- [38] The evidence discloses that to date the Plaintiff does not receive pipe borne water through the usual water supply of the island but from water tanks provided by himself, that the Defendant did cut a new motorable road which caused the Plaintiff to cut a new driveway to his house south of the said driveway, and that there were no retaining walls.
- [39] There is no doubt in my mind that the Defendant has breached the contract since he did not adhere to the terms stated in his deed of sale but I must also conclude that the amount requested by the Plaintiff for damages flowing from that breach is colossal.
- [40] I accept the evidence of Mr Fostin that the difference in the cost of building between 1991 and 1994 was negligible, but I am of the opinion that there was an increase and I should award the Plaintiff under this head the sum of \$30,000.00.
- [41] With regard to the cost of building a retaining wall, it is my view that the Plaintiff should not succeed since he particularly choose the land at the top of the development and therefore it is his obligation to pay the cost of any retaining wall. I pause here to note that he has been able to live at his residence on the land from 1994 to 1997 without any retaining wall and also that he always intended to build a retaining wall hence its inclusion in his original plan of 1991.
- [42] While I agree with both experts that all persons who intend to build in the North of the island should construct a water^{bank} system due to the frequent shortage or closure of the Water and Sewage system the Plaintiff was forced to provide one for his household for since the six month period after execution of the deed of sale to date of hearing there is no water flowing to the land through the pipe lines placed by the Defendant; for this I will award him \$6,000.00.

[43] I award \$600.00 for the new driveway which has to be less than fifty two (52) feet in length. I do not believe that there has been any depreciation to the said land and therefore the Plaintiff should not succeed with this claim.

[44] My order is therefore as follows:
That the Defendant do pay to the Plaintiff the sum of \$36,600.00 special damage.

[45] General damages in the sum of \$10,000.00.
Costs to the Plaintiff to be agreed or otherwise taxed.


Suzie d'Auvergne
High Court Judge