SCJB

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P 102 OF 2002

BETWEEN	**CREGTON**	**POLLOCK**	**FIRST CLAIMANT**
AND	**MAUREEN**	**POLLOCK**	**SECOND CLAIMANT**
AND	**BEE HOMES**	**LIMITED**	**DEFENDANT**

Miss Carol Davis for both claimants

Mr. Lawrence Haynes instructed by Clough, Long and Company for the defendant

September 29, 30, October 15, November 19 and 26, December 17 and December 24, 2004

Sykes J (Ag)

NEGLIGENCE: FLOOD DAMAGE AND BREACH OF BUILDING CONTRACT

1. Appendix one is at the end of this judgment. It is a map, not drawn to scale, of the relevant area. It is the scene of this action in tort and contract. It assists in understanding the issues.

2. Mr. and Mrs. Pollock, the claimants, have had a nightmarish existence in their home at lot 59 South Sea Park, Whitehouse, Westmoreland. What should have been a house by the sea, with all the imagery involved in that, became a house inundated by mud, muck and flood waters from a

drain located on lot 58, the adjoining lot. The flooding commenced in 1998 and reached its zenith during the May/June floods of 2002. The claimant's house was not just flooded, it became an internal lake with water of up to five feet in depth. Needless to say, furniture and other household items were either destroyed or badly damaged.

3. The claimants have sued Bee Homes Ltd, the defendant, alleging breach of contract and negligence. Bee Homes was and is the developer of South Sea Park. They deny liability in either contract or tort. The claimants say that the defendant built them a house that was unsuitable and inadequate for the surroundings. This was the claim in contract. The claim for negligence arises from damage caused by the negligent manner in which the defendant constructed a drain in 1998. I will call this drain Moe's drain because by Mr. Moe, a director of the company, built it.

4. The defendant rebuffs the claim by alleging that it built a proper house and the flooding in May/June 2002 was the result of an unprecedented, concentrated level of rain fall, in South Sea Park, in a comparatively short time period. This type of rain fall, the defendant submits, would have overwhelmed any drainage system. Who is correct?

5. The first task is to determine liability and then the quantum of damages depending on the outcome on the issue of liability.

South Sea Park

6. It is appropriate at this point to refer to appendix one to have a proper mental picture of the flood scene and the flooding that occurred.

7. South Sea Park is located in eastern Westmoreland near to the border with St. Elizabeth. The South Coast Main Road runs from St. Elizabeth in

the east, to Savanna – la – mar in the west, past South Sea Park. South Sea Park is to the left of this main road as one drives from St. Elizabeth to Savanna – la – mar. The Pollocks bought a lot and a house from the defendant in 1986.

8. The Public Works Department (now known as the National Works Agency (NWA)) built culvert no. 1. This culvert carried water into the original drain. The water would collect in an area near to the Pollock's lot and then make its way down to the "sink hole". This collection of water is known, technically, as ponding. This was the drainage system between 1986 and 1998 in the vicinity of Pollock's residence. During this time, there was no reported instance of flooding of the Pollock's property.

9. The NWA built culvert no. 2 some time after it constructed culvert no. 1. There was no reported instance of flooding of the Pollock's property after culvert no. 2 was completed. It is not clear whether the manhole was constructed as part of culvert no. 2, but I will assume that the manhole was put in by the NWA. The date of construction of culvert no. 2 was not established but it was agreed that it was before 1998.

10. In 1998, Mr. Moe built the drain, shown on the map as Moe's drain. This was in response to complaints from the owners of lots 51, 52 and 53 about flooding of their property. The defendants say that this flooding was caused by water coming onto these lots from culvert no. 2. When Moe's drain was completed, there was a raised metal grating at the entrance to South Sea Park. The water flowed away from the metal grating. Towards the east, the drain sloped towards a manhole. Towards the west, the drain sloped towards the original drain.

11. Mrs. Pollock testified that when she saw Mr. Moe making the drain she had words with him about the possibility of flooding of her property because the drain would be sending more water to the original drain. She says that Mr. Moe responded by suggesting that she was just an ignorant woman who had little, if any, knowledge of engineering matters. As it has turned out the obvious common sense of Mrs. Pollock now has the solid support of experience. Mr. Michael Pennycooke, the claimants' engineering expert, provided the technical explanation for the flooding. More will be said of him later.

12. Moe's drain when joined to the manhole had a functional defect. According to Mr. Pennycooke, when he visited the area in August of 2002 there was no outlet hole in the manhole from which water flowing along Moe's drain into the manhole could exit. In other words, the water that flowed to the manhole had no where to go because there was no exit point. The result of this, Mr. Pennycooke testified, was that at some point during heavy rains, there would be what is called a reverse flow. This meant that whenever rail fell the water would flow towards the manhole but there would a stage, if the water rose high enough, when the water would flow in the direction from which it originally came. This was the result of the lack of an exit point for the water that flowed into the manhole. Based upon the map, this would mean that water would flow from the manhole, back along Moe's drain and into the original drain. Mr. Harrison's report does not contradict this explanation and neither did his oral testimony. Mr. Harrison is the defendant's expert on this point.

13. The evidence is that Moe's drain would not just have water from culvert no 2 but also water from lots 51, 52 and 53 as well as water from

the South Coast Main Road. Moe's drain runs parallel to the main road. There was, therefore, the potential for significant amounts of water to enter the original drain that had not done so before Moe's drain was built. Even at this point in the narrative, it is not difficult to see that the defendant might have the Herculean task of deflecting liability in negligence.

Prerequisites of a proper drainage system

14. Let me say at this point that Mr. Pennycooke was quite a competent person who displayed great professionalism. He explained in a satisfactory manner, when questioned, the bases of his conclusions. I accept him as reliable and competent in the area of drainage construction.

15. Mr. Pennycooke is a qualified engineer who received his degree from Concordia University, Canada, in 1979. His experience in engineering is enormous. To reproduce his experience here would consume much ink and space. In August of 2002 he visited the area after receiving instructions from the Pollocks. He produced his first report dated August 12, 2002. His report is adorned with photographs showing parts of the drainage system that is the subject of this case including Moe's drain.

16. Mr. Pennycooke and Mr. Harrison, the defendant's engineer, both agreed that a properly designed and functional drainage system must have the following features:

a) collection;

b) transmission; and

c) disposal.

17. By this, both men meant that the drainage system must collect the water, transmit it to the disposal point and the disposal point must be adequate to deal with the volume of water taken there. Feature (c) is vital - if the disposal point cannot accommodate the water then it overflows. In some instances, there is the risk of flooding.

The South Sea Park sink hole

18. As shown on the map, there is an area near to the front of the Pollock's lot, on lot 58, where an alleged sink hole is located. Mr. Pennycooke said that when he went there he did not see a "defined disposal point". A defined disposal point is one where the capacity and destination of the water are known. He says that one must know the capacity of the disposal point. One must know what happens to the water when it reaches the disposal point. In other words, one must know how and how much water is accommodated at the disposal point. He did not know the sink hole's capacity. He also said that an adequate drainage system is supposed to accommodate heavy rainfall.

19. Mr. Harrison was not able to shed any light on the sink hole's capacity.

20. Mr. Ricardo Powell, managing director of Bee Homes, testified that he did not know of any geological or engineering examination done to determine the capacity of this alleged sink hole. Neither did Mr. Powell know what became of the water after it went to the sink hole. The net result of all this was that no one knew then or knows now whether it is in fact a sink hole; if it is, what is its capacity and where does the water eventually go.

21. What this meant, was that when Moe's drain was constructed with the obvious potential of adding increased volume of water, from the sources already mentioned, to the original drain no one checked to see if the alleged sink hole would be able to accommodate the added volume of water without the risk of flooding the Pollock's property.

The blocked sink hole

22. Mrs. Pollock said that when the construction of Moe's drain began in 1998 the defendant went on lot 58 to work on the original drain, but they were prevented from completing their work because the lot owner would not give them permission to do so. She said that when the rains came in the summer of 1998, the debris from Moe's drain was washed into the original drain.

23. It will be recalled that before the construction of Moe's drain the water would collect near the Pollock's land and then meander its way to the sink hole. In other words the flow of water, from where the water ponded near the Pollock's land, was not free flowing. When the debris from Moe's drain was added to this, given the functional defects, the added volume of water from the already stated sources and the potential for reverse flow, it was not surprising that the Pollock's first complaint of flooding occurred in 1998.

The flooding

24. The claimants' say that before 1998, which was before the construction of Moe's drain, their property was never ever subject to flooding. They bought the property in 1986 and lived there in quiet bliss even with heavy rains pounding outside. As early as July 1998, within weeks of the

construction of Moe's drain, the claimants' property was flooded. Mr. Pollock wrote to Mr. Moe in a letter dated July 20, 1998 complaining about the damage to his furniture and fittings to say nothing of the inconvenience. By October 1998 Mr. Pollock was writing to the Managing Director of Bee Homes complaining of the flooding of October 6, 1998. It is important to quote from this second letter.

> *But, heavy rain on 6th October 1998 cause (sic) water from the same culvert to come over the wall and* ***flood by home yet again.*** (my emphasis)
>
> I quote again from the same letter
>
> *How many more times is my home to be flooded before BEE HOMES do (sic) something to rectify this problem that they have caused? So far,* ***after all the times I have been flooded out****, causing damage to my furniture and fittings, not one of your representatives have come to see me, telephone me or compensated me for the damage caused by this and previous floodings. A further addition to the damage from the flood as mentioned in my attorney's letter dated 9 Oct 1998, is my Kitchen Cupboards (sic), the costs of which is as yet to be determined.* (my emphasis)

25. The language of the letter could hardly be clearer. The Pollocks are complaining of persistent and continuous flooding since the construction of Moe's drain.

26. Mrs. Bell, a director Bee Homes, wrote a most telling reply dated November 25, 1998. If I were to describe her letter as an admission I would be guilty of an understatement. It reads in the material part:

> ***We know that the flooding of your house was caused by non-maintenance of the storm-water drains.*** *I have blocked off the drain with boulders and marl at the entrance – way to the scheme and cleaned the drains.* ***It will not flood again.*** (my emphasis)

27. Mrs. Bell even proposed to replace the damaged kitchen cupboards and restore "*whatever we can or replace what cannot be restored of the settees*". Mrs. Bell turned out to be a false prophet as far as the flooding was concerned. In May/June 2002, the flooding was even worse. Mr. Pollock was marooned on the top floor of his house because he had a five foot deep lake in his house.

28. I should say at this point that the flooding was such that the tenant who had occupied the ground floor up to 1998 fled the premises and since then, the Pollocks have not found a brave soul who may wish to gamble on the possibility of the flat not being flooded.

29. Mr. Pollock testified that when he arrived in June 2002 he did not see any signs of flooding. He was at the house in June when it flooded and had five feet of water in it. He said that after the "lake" subsided, the house was flooded two or three times more in June 2002.

30. Mrs. Pollock said that the rains of June 2002 were the heaviest she experienced since 1986.

31. Both Mr. Pennycooke and Mr. Harrison are agreed that the ground floor of the house was built in what could be described as a low point in the topography. Mr. Pennycooke stated that the floor level was more than 7 feet below the main road and over 6 feet below the scheme road entrance. Mr. Harrison said that the ground floor of the house was too low for it to be a proper design for the location.

32. The effect of this evidence was to emphasise the need for particular care during the construction of Moe's drain. Moe's drain would be adding a greater volume of water to the original drain that was not free-flowing in an area that was lower than the surrounding lands.

Mr. Mahlung the meteorologist

33. Bee Homes sought to rely on the testimony of Mr. Clifford Mahlung, a meteorologist. Mr. Mahlung is the person on whom the defendant relies to take it to the promised land of exoneration. Through him, the defendant sought to say that the May/June 2002 flood rains were extraordinary and would have overwhelmed any drainage system. This meant that even if Bee Homes were negligent in the construction of Moe's drain that negligence did not cause the flooding because of the extraordinary rain that fell at that time.

34. I take into account that Mr. Mahlung's evidence was not tested by cross examination since he was overseas at the time of the trial and not expected to return before December 2004. His statement was admitted under rule 29.8(1)(b) that allows the court to order that the statement be admitted in the circumstances set out by the rule.

35. It is common ground that South Sea Park is in eastern Westmoreland right next to the St. Elizabeth/Westmoreland border. Mr. Mahlung describes its location as south eastern Westmoreland.

36. Mr. Mahlung's report chronicles the extensive rains that fell in Jamaica in May/June 2002. His report is entitled **Report of the Severe Weather Event of May/June 2002.** The report has a section entitled *Rainfall Summary For the Flood Events of May 22,31 2002.* In this section Mr. Mahlung proceeds to give more detail about the rainfall pattern for the period May 22 – 31, 2002. There is a third section entitled *Expert Report on the Flood Events of May 22 – 31, 2002 and June 2 – 12, 2002.*

37. In this third section, he said the rainfall for Westmoreland for May was above normal (127%). For June it was below normal (71%). For St. Elizabeth for both months the rainfall was above normal – May (184%) and June (116%). There follows a chart summarizing this conclusion. He then has a section that focuses on what he describes as the area of interest. Mr. Mahlung selects eleven rain fall stations – five in Westmoreland and six in St. Elizabeth - for his data. The names of the rain fall stations and the parish they are in as well as the distance and general direction from Whitehouse or Cove. Presumably, these were the relevant rainfall stations that assisted him to determining the amount of rain that fell in the South Sea Park area during May/June 2002.

38. The meteorologist sets out in table three what he says are the actual rainfall for the periods May 22 – 31, 2002 and June 2 – 12, 2002. The text accompanying the table actually says 2004 while the actual table refers to 2002. This is clearly an error. The case has been conducted on the basis that he is referring to 2002.

39. Mr. Mahlung gives a break down of the thirty year mean for St. Elizabeth and Westmoreland and for each of the eleven rain stations used to prepare his report.

40. His table indicates that for Westmoreland the thirty year mean for the month of May was 302mm and the actual rainfall for May 2002 was 383mm. The thirty year mean for June was 262mm and the rainfall for June 2002 was 186mm. These are figures for Westmoreland as a whole.

41. The data shows the following:

a) the total rainfall in St. Elizabeth at each rain station for the period May 22 – 31, 2002 was far in excess of the mean for the particular station;

b) the total rainfall in St. Elizabeth at each rainfall station for the month of May 2002 was far in excess of the mean for the parish;

c) the total rainfall in Westmoreland for each rainfall station for the period May 22 -31, 2002 was below the mean at four of the five rainfall stations;

d) the total rainfall in Westmoreland at each rainfall station for the month of May 2002 exceeded the mean for each station.

42. In table 4, Mr. Mahlung indicates the percentages of normal for May 2002 for all eleven weather stations. The percentages range from a low of 105% to a high of 396%. He also provides similar percentages for June for ten of the eleven stations. No data were available for the month of June in respect of one rain station. Only four rain stations were above normal, while six were below normal. However, in respect of the ten rain stations for which data for June 2002 are reported most of the rain that fell in June 2002 fell in the period June 2 – 12, 2002.

43. What this means is for the month of May 2002 **above normal rain fell in the areas where the rain stations were in both parishes.** Most of the rain fall for the month of May 2002 occurred in the period May 22 – 31, 2002. It also means that for the month of June 2002 most of the rain, even for the rain stations that had below the mean, fell in the period June 2 – 12, 2002.

44. In the report, Mr. Mahlung stated that the rain fall in or about May and/or June 20, 2002 in the area of Southsea Park, Cove and/or Whitehouse in the parish of Westmoreland was not normal for the period May 22 – 31, 2002. He then says that the rainfall in or about May and/or June 20, 2002 in and/or around the Southsea Park, Cove and Whitehouse was above normal.

45. What the report establishes is that on a balance of probability much rain fell in May/June 2002.

46. Mr. Haynes submitted that the report of Mr. Mahlung established that, in respect of Westmoreland, if one looks closely at the data it will be seen that for the month of June 2002 most of the rain that fell during the month of June fell in the period June 2 – 12, 2002. He added that for three of the rain stations for which data are available at least 60% of the total rain for June fell between June 2 – 12, 2002. In the other station for which data is available the rainfall exceeded the thirty year mean. Mr. Haynes submitted that this established that in Westmoreland for the period June 2 – 12, 2002 there was a heavy concentration of rain and that this concentration of rain overwhelmed the drainage systems in South Sea Park.

47. Mr. Haynes rested heavily on data from the Black River rain station that is in St. Elizabeth. He says that in Black River for both May and June 2002

not only was the thirty year mean exceeded but all the rain that fell in Black River in June 2002 fell between June 2 – 12, 2002. The June thirty year mean for this rain station was 128. Also 547mm of rain fell in Black River in May and of this total 450mm fell May 22 – 31, 2002. The May thirty year mean for this station was 138mm. This Mr. Haynes' said must have spread to South Sea Park which is near to Black River. From all this Mr. Haynes concluded that it was not the bad construction of the drain that caused the flooding but the overwhelming rains. Mr. Haynes also relied on Mrs. Pollock's testimony concerning her experience with rainfall since 1986. He drafted in the evidence of Mr. Powell who testified for the defendant. Mr. Powell spoke of much rain and flood damage in May/June 2002.

48. This is the flaw in Mr. Haynes submissions. It overlooks the other evidence in the case. The uncontradicted evidence of the claimants is that before 1998 they had no problems with flooding. Once Moe's drain came into being they were flooded in April of 1998, July of 1998, twice in October of 1998. The letter from Mrs. Bell accepted that the blocked drain caused the flooding. All that happened in 2002 was that it was worse than before. This evidence of flooding before the floods of June 2002 shows that it was not necessary to have rain of an extraordinary nature for the flooding of the claimants' property to occur. In addition Mr. Pennycooke said that "even normal heavy rain will continue to cause flooding". Mr. Harrison said in his report that the second drain, which he felt was properly constructed, contributed to the flooding of the claimants' property. This conclusion is not necessarily incompatible with functional defects identified by Mr. Pennycooke. The two positions can be harmonised in this way: if the manhole was built by the NWA and the drain joined it and no provision was

made for an outlet, then the addition of the drain without provision for an outlet would be a design defect in the drainage system. It is therefore entirely possible for the drain itself to be properly made but when placed in the context of a manhole that had no exit point then it would not properly function.

49. In addition Mr. Haynes overlooked the principle that in the tort of negligence the claimant only need prove, in addition to the duty owed to him, that "such default caused or materially contributed to his injury" (see Lord Reid in ***Bonnington Castings Ltd v Wardlaw*** [1956] A.C. 613, 619 – 620, ***Wilsher v Essex Area Health Authority*** [1988] A.C. 1074). It is not necessary to prove that the default was the sole cause of the damage suffered by the claimant.

Findings of fact

50. There are several findings of fact that can be stated at this point, some of which are incontrovertible. I will begin with the facts that are incontrovertible:

1. the claimants purchased the house from the defendant on or about 1986;
2. the claimants lived in the house without any problems of flooding until 1998;
3. Moe's drain was built in 1998;
4. Moe's drain added a greater volume of water to that which would have accumulated in the original drain;

5. since Moe's drain was built the claimants' property has been flooded. The property was flooded in July of 1998, October 1998, May/June 2002;
6. the second culvert at one end of Moe's drain had no outlet such that if sufficient rain fell the water would flow back along the drain into the original drain;
7. the original drain before 1998 was not a free flowing drain;
8. the original drain was obstructed from debris from the construction of Moe's drain;
9. between 1998 and 2002 there is no evidence that the Moe's drain was altered in any way to prevent flooding of the claimants' property if there was heavy rain;
10. there is no evidence of flooding of the claimants' property in 1999 – 2001. There was no evidence of the volume of rain that fell in the South Sea Park area for these years;
11. the defendant accepted, through Mrs. Bell, that Moe's drain was responsible for the flooding in 1998;
12. no steps were taken by the defendant to ensure that the alleged sink hole could accommodate the extra volume of water that Moe's drain would now add to the original drain;
13. a properly constructed drainage system has to have proper collection, transmission and disposal of water;
14. a proper drainage system should accommodate normal heavy rains;
15. there is no evidence that the rains in 1998 were abnormal;

51. I will now deal with facts that depend upon the acceptance of particular witnesses. Mr. Pennycooke presented evidence that suggested that the property was flooded again in 2003. He says that he visited the property in September 2003. He based his opinion on the presence of a substantial pool of mud under the staircase of ground floor. He described it as an internal fish pond. He is very clear that this was not there on his first visit in 2002. He said that the drive way had significantly more damage from heaving. I accept Mr. Pennycooke as a credible and competent expert witness. He did not seek to embellish his testimony in any way whatsoever. There is no evidence to suggest that the basis of Mr. Pennycooke's conclusion is faulty. I therefore accept that he saw what he said he saw, and I also accept the further inference, and I find as a fact, that there was flooding of the claimants' property after the May/June 2002 floods. There is no evidence of when this took place but it would be between August 2002 when Mr. Pennycooke first visited and September 2003 on his second visit.

52. Mr. Harrison's report and testimony before this court, in my view, did not provide a credible alternate explanation for the flooding. He never debunked the reverse flow thesis advanced by Mr. Pennycooke. Mr. Harrison disagreed with Mr. Pennycooke's conclusion that Moe's drain may have added up to four times the volume of water to the original drain. Significantly, Mr. Harrison did agree that Moe's drain contributed to the damage to the Pollock's property since it introduced some amount of water in the area of this alleged sink hole. Thus at the end of the day the real difference, if any, between Mr. Pennycooke and Mr. Harris was about the volume of water.

Further evidence

53. It is convenient at this point to address an application made by Mr. Haynes during this trial. He sought permission to adduce oral evidence from Mr. Harrison, the defence expert, about the completed drainage works and their effect. According to Mr. Haynes this was important because of the possibility that the defendant may be found liable and the effect the absence of this evidence might have on the assessment of damages. I refused this application for these reasons. First, it is new evidence that was not supplied to the claimants. Second, it is in the nature of expert evidence which at the time of the application was not in a written report. This meant that the claimants' expert had not yet heard of it to say nothing of seeing it. He could not comment on it one way or the other. Third, the claimants' would be at a severe disadvantage because it might be that they would have had to have changed the way they planned and presented their case. The new rules are designed to prevent this kind of thing from happening. What the defendant ought properly to have done was to have applied either at the case management conference, the pretrial review or even apply for a hearing after the pretrial review where they would be seeking permission to adduce further expert evidence. They might have been penalized in costs but they might have had their evidence before the court.

54. Mr. Haynes next applied for a visit to the locus. This was really an attempt to the get to the same destination by a different route since in the absence of further expert evidence I could not see how a view of the area could assist. I therefore refused this application.

Liability in contract

55. I do not find that there was a breach of contract. The terms of the contract were never put before the court. I do not know what the written terms were. The claimants say that there was an implied term to build a house that would be habitable for a reasonable length of time. Even if this was so there is no evidence that the house was not fit for the purpose for which it was built.

56. It is true that both experts say that the ground floor was not properly constructed having regard to the terrain. They said it was too low. There is no evidence of flooding before 1998. This would suggest that it was not too low in an absolute sense. The low level of the floor only came into focus after the construction of Moe's drain. I accept that the ground floor was low, but it was Moe's drain that was the effective cause of the flooding.

57. In any event, the claimants did not pursue the claim in contract.

Liability in tort

58. As is well known if the claimants are to succeed they must prove that the defendant

a) owed them a duty of care;

b) breached that duty; and

c) the damage suffered flowed from that breach.

59. Bee Homes were under a duty to construct Moe's drain in such a manner that it did not cause flooding to the claimants' property. This duty was sharply accentuated in this case because the ground floor of the Pollock's residence was at risk of flooding because both experts accepted

that the ground floor was too low for the location (see page 12 of Pennycooke's report and page 11 of Harrison's report).

60. That duty was breached when they constructed the drain without adequate preparation for disposal of the water. The defendant was negligent when it added Moe's drain to a manhole that had no outlet which meant that the water would flow back after it got to a certain height. The proof of this is found in the flooding in 1998. Having regard to the evidence of flooding prior to 2002 I find that the flooding in 2002 was substantially caused by the negligent construction of Moe's drain. The heavy rains in 2002 only exacerbated what was already occurring. Further, there is evidence of flooding after the May/June 2002 floods. It follows from this that I do not accept the defendant's argument that the property would have been flooded in any event even if it was negligent.

Assessment

House-hold items and appliances

61. I will deal with the items that were damaged before dealing with the assessment for the property damage. Two valuators presented reports and gave evidence. They were Major Victor Beek and Michael Robinson. It is nothing short of remarkable that of the 52 items that were on Major Beek's list his values coincided with the values given to them by Mrs. Pollock. There was not even a pence or a pound difference between the Major's and Mrs. Pollock's. The list had 55 items and the only three the Major did not value were those he regarded as priceless.

62. This does not suggest that the Major did any independent assessment. He says that he did research but it is absolutely astounding that his

research on prices in 2002 coincided with Mrs. Pollock's values even in respect of items purchased some time before the flood! He even priced the individual items in pounds as did Mrs. Pollock. This seems more a case of the Major abdicating his responsibility and succumbing to the influence of the claimants. I therefore reject the Major's assessment of the items.

63. I accept Mr. Robinson's assessment of the items. The basis of my assessment is that he clearly did a thorough job. He photographed some of the items. He did independent research. In cross examination it became apparent that when an item might be repaired but was badly damaged he assessed in favour of replacement. I therefore use his values. He valued all the losses of furniture, fittings and fixture at JA$1,187,300.

The loss of rental income

64. Miss Davis has conceded that the claim for $804,000 was not properly proved. The evidence was simply of the claimants' say so but there were no documents in support. No rent book, no receipts were presented.

The cost of travel to Jamaica

65. The claimants say that they spent £3,840 travelling to Jamaica. Mr. Pollock says that he and his wife traveled to Jamaica from England twice to deal with flooding at the property. Each trip cost £1,740. This would make it £3, 480 and not the sum pleaded. It seems like a typographical error. This was expenditure caused by negligence of the defendant. The claimants would have been seeking to mitigate their losses.

The house

66. The claimants seek the replacement cost of the house. They say the property is subject to repeated flooding since 1998. They say it was flooded twice in 1998, thrice in 2002, and at least once more since the May/June 2002 rains. This makes the house uninhabitable.

67. The defendant says that the house can be made habitable with repairs. There is no evidence that the property is now secure from flooding. As indicated earlier I had refused the defendant's application to adduce this evidence because of the reasons stated at paragraphs 52 and 53. In fact, Mr. Pennycooke had made recommendations in his report indicating how the situation could be addressed.

68. That the claimants might have claimed the replacement value of the house should not have surprised the defendant since the second report of Mr. Pennycooke that was served on the defendant observed that although a drain under construction should take off some of the water from the surrounding areas, "*the Pollock's residence, being the low point of that part of the development, will continue to attract water from the surrounding terrain*" (see page 2 of second report dated October 4, 2003). This is consistent with his first report dated August 12, 2002 where he stated that "*the developers of the property did not take sufficient care in sufficient care in establishing the house floor level as the lot is obviously the natural basin for the surrounding areas*" and that "*the house floor level is too low in relation to both the main and scheme roads adjacent*" (see page 12 of report).

69. The defendant's expert Mr. R. L. Harris wrote in his report that "*the ground floor level of the house is too low for a proper design at that*

location" (see page 11). As I have already pointed out even Mr. Harrison admitted under cross examination that Moe's drain contributed to the damage to the premises because it introduced "*some amount of water into the area of the sink hole*". He concluded his cross examination by these telling words, "***What I am saying is that the sink hole was inadequate to deal with the water.***"

70. Mr. Robinson agreed that if the place was subject to repeated flooding it would not make sense to repair the ground floor. There is no point in repairing a flood prone house. There was flooding in 1998 – repairs to appliances and such like were undertaken. There was severe flooding in 2002. There is evidence of flooding since then.

71. What is the law relating to damage to land? It has been said that the usual measure of damages is the difference between the value before the damage and the value after the damage. As the authorities show the usual measure is just that - the usual measure. They do not say that no other measure can be used in appropriate cases (see ***Ward v Cannock Chase District Council*** [1986] 1 Ch. 546; ***Dodd Properties (Kent) Ltd. v Canterbury City Council*** [1980] 1 All ER 929; ***Dominion Mosaics and Tile Co. Ltd. v Trafalgar Trucking*** [1990] 2 All ER 246). Whatever the rule of thumb is, it cannot override the guiding light which shines supreme in this area: the fundamental rule is that damages are compensatory and as such they should put the innocent party as far as is possible in the same position as if no wrong had been committed.

72. In this case, before Moe's drain was built which added water to a slow moving disposal point, the Pollock's had a home that was free from flooding. There is no evidence that the flooding is likely not to recur. I

cannot therefore accept Mr. Haynes' argument that I should award the cost of repair. Given the repeated history of flooding since 1998 and the severe flooding in May/June 2002 in my view it is unreasonable to expect the claimants to repair the ground floor and continue living in the house. The evidence is that because of the repeated flooding the claimants have not lived there since 2002. No one has lived there since because of the fear of flooding. The only remaining question is, what is the replacement value?

73. Miss Davis puts forward the assessment of Mr. Beek. I have reservations about Mr. Beek's methods. In the area where he was challenged he was exposed as one who did not exercise any independent judgment. He simply accepted the values given to him by Mrs. Pollock. What confidence can I have that he was not so influenced when he assessed the replacement value of the house? I do not accept his evidence at all.

74. The best evidence of this comes from Mr. Maxwell. He was asked by the defendant to value the property. He was not given the flood history of the property when he was asked to make his assessment in December 2003. He seems to be a competent valuator and had the defendant given him proper instructions I have no doubt that he would have done a good job. He lives in Mandeville and is quite familiar with the housing market in the areas of Manchester and St. Elizabeth. He gives a market value of JA$12,500,000. It is not clear whether this value included the swimming pool. He makes no clear reference to it. I will take the swimming pool into account. He added that the highest price that he knows anyone has secured for a house in Southsea Park is JA$15,000,000.

Conclusion

75. The defendant is liable in tort and not in contract. It built Moe's drain badly. The drain added to the water in the original drain. The flooding began in 1998. The defendant admitted that its drain caused the flooding to the claimants' property. The May/June floods of 2002 only made worse what was already happening. The property would have been flooded, based upon Mr. Pennycooke's report, once there were heavy rains. Extraordinary heavy rains were not necessary to overwhelm Moe's drain.

76. I therefore make the following award:

1. expert report and travel expense for Mr. Pennycooke - $60,000;
2. expert report of Major Beek - $30,000;
3. cost cleaning at $15,000;
4. damage to furniture and other household items $1,187,300;
5. replacement value of house $15,000,000.
6. the cost of air travel £3,480 @ JA$100
7. Interest on the total sum at 1 – 6 at the rate of 6% from the date of service of the writ of summons.

The total award is $16,640,300 at 6% interest from date of the service of the writ to November 26, 2004. Costs to the claimants to be agreed or taxed.

77. When I delivered my judgment on November 26, 2004, Mr. Haynes asked for time to produce some authority that he claimed provided guidance on what should be done to the damaged property. It was decided that a formal order of the judgment would not be drawn up until the additional submissions were made. The matter was then set for December

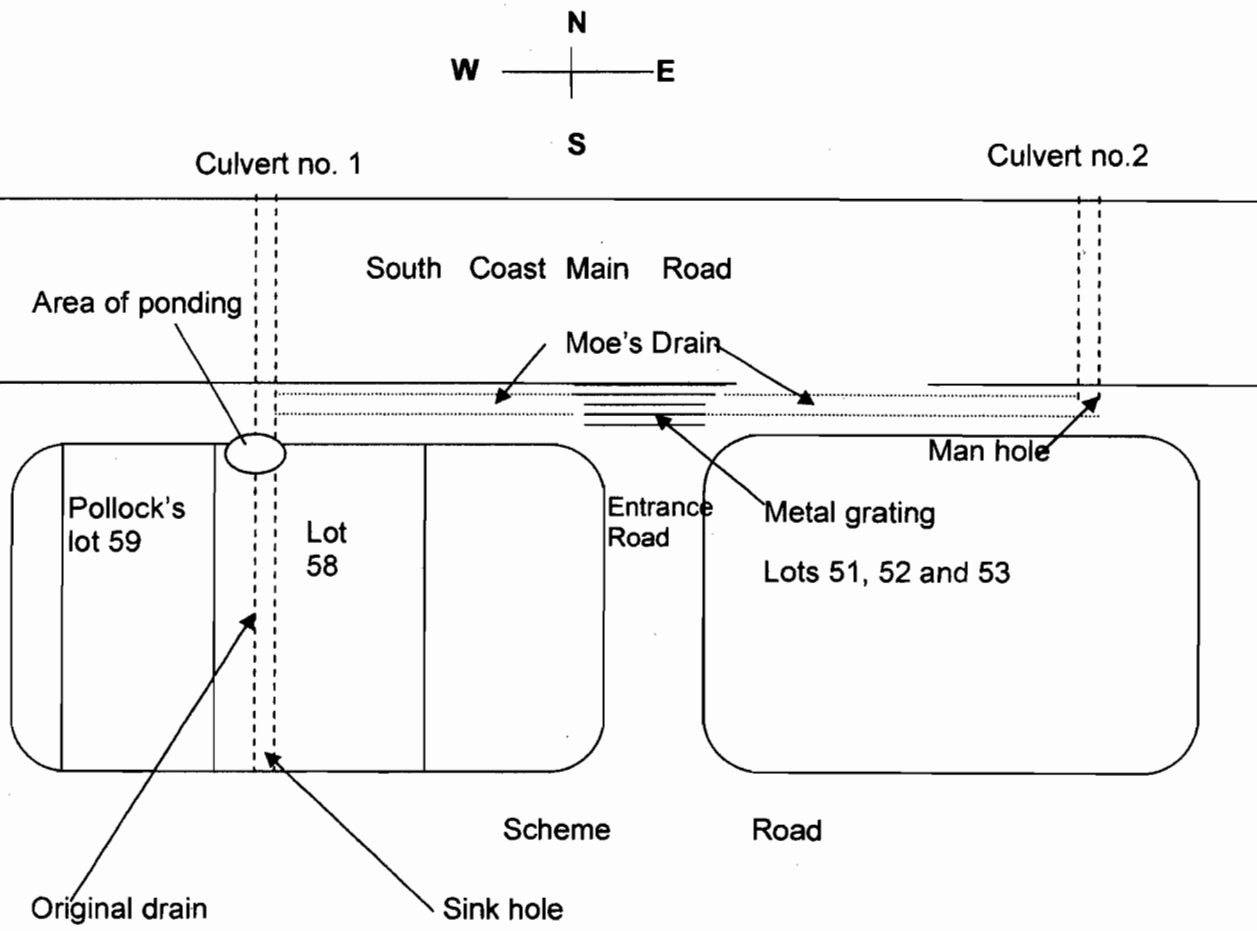
17, 2004 but it was not heard. It was then set for December 24, 2004. This accounts for the delivery of the written judgment on December 24, 2004.

78. I have received written submissions from Ms. Davis and Mr. Haynes. I do not agree with Mr. Haynes's further submissions. It is not necessary for me to hear oral arguments on the issue. The closest that Mr. Haynes' submissions came to addressing the issue was when he wrote that the cost of replacement should only be considered where there is no market for the property. He then went to refer to evidence of Mr. Beek and Mr. Maxwell that the property had some market value.

79. To say that something has market value is not the same thing as saying that there is a market. The market value, where no offer has been made, may be based upon the seller's view of what he would like for the property. The word "market" here means a willing seller and a willing buyer who are prepared to engage in a transaction for the purchase of what is being offered for sale. If there is only a willing seller there is no market. There is no evidence before me that there is a market for a property that is prone to flooding and has a history of flooding.

80. In the event that I have been misunderstood let me repeat for clarity. The decision to award the replacement value in this case was based upon the fact that the evidence showed not only that the property has a history of flooding but also that there was no evidence that the flooding was unlikely to occur in the future. I do not see how it could be reasonable to ask the claimants to attempt to repair damage to property when, based upon the evidence, there is no proof of effective flood control. Mr. Haynes referred to works being done since 2002. This further work was not communicated to the claimants or their experts so that they could visit the

site, do their examination, analyses and calculations. Based upon the evidence any one staying in the property may well be at risk of drowning. It will be recalled that in May/June 2002 the house had in five feet of water. My conclusion and award remain the same.



APPENDIX ONE (Not to scale)