IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 1971 of 2005

BETWEEN	**KARLENE HENRY**	**CLAIMANT**
AND	**BARBARA GAYLE**	**CLAIMANT**
AND	**BURNS GAYLE**	**1ST DEFENDANT**
AND	**NAVIENEY McBEAN-GAYLE**	**2ND DEFENDANT**

Heard: 15, 16 August and 15 September 2006.

Miss Jacqueline Cummings instructed by Archer Cummings & Co. for the Claimants.

Mr. Huntley Watson instructed by Watson & Watson for the defendants.

MANGATAL J.:

1. The application before me is made on behalf of the Claimants seeking an injunction until the hearing/trial of this action, restraining the Defendants whether by themselves their servants and/ or agents from preventing the flow of storm water from Lot # 57 West Cave Drive, Cave Hill Estate in the Parish of Saint Catherine, to Lot # 28 Cave Hill Boulevard, Cave Hill Estate in the Parish of Saint Catherine. The Claimants are the owners of Lot #57 and the Defendants are the owners of Lot # 28.
2. In their Amended Particulars of Claim, the Claimants state that their property Lot # 57 is situate at 57 West Cave Drive and is the land registered at Volume 1299 Folio 409 of the Register Book of Titles. The Defendants' Lot # 28 is situate at 28 Cave Hill Boulevard and registered at Volume 1299 Folio 380 of the Register

Book of Titles (the Amended Particulars in error say folio 409). The Claimants purchased their property from the Urban Development Corporation "the U.D.C." in or about 1998 and initially rented it to tenants until 2001. In 2001 the First Claimant returned to Jamaica and began to occupy Lot # 57. Upon residing at the property, the First Claimant noticed that all the adjoining occupiers in Cave Hill Estates had built boundary walls separating the properties.

3. It is common ground that the rear of the Claimants' Lot is separated from the rear of the Defendants' Lot by a dividing fence constructed from concrete blocks reinforced with steel straighteners. It is also not in issue that the Claimants' Lot is on higher ground than the Defendants' Lot, with the land sloping downwards from the Claimants' to the Defendants' land, and further sloping downwards to the road upon which the Defendants' property abuts, i.e. Cave Hill Boulevard. There is a Drain Swale situate on Cave Hill Boulevard, having been constructed there by the developers U.D.C. According to a letter dated July 21 2005 from the Cave Hill Estate Citizens Association, exhibit B.G.2, attached to the First Defendants' Affidavit sworn to on the 27th July 2005, the higher lots(of which Lot 57 would be one), are lower than the roads/streets to which they are addressed. This would suggest that Lot 57 is lower than West Cave Drive.

4. At the time when the First Claimant first began to occupy Lot 57, the owners of Lot 28 were joint tenants Charles Beaver, Orville Boothe, and Dorothy Samuels. These persons purchased Lot 28 from the U.D.C. in or about 1997.

5. The Claimants say that after discussions with Mr. Beaver, it was agreed that Mr. Beaver would create a hole or passage(elsewhere referred to as weep-holes) in the dividing boundary wall to allow the flow of storm water from the Claimants' property to Lot 28 and

thereafter unto the roadway and into the drain along Cave Hill Boulevard.

6. The Defendants became the owners of Lot 28 by purchasing the Lot from the National Housing Trust when the Trust exercised powers of sale in respect of a mortgage which it had granted to Mr. Beaver, Mr. Boothe and Miss Samuels. The Defendants became the occupiers of Lot 28 sometime in 2004.

7. After an episode of heavy rains the Claimants noticed that the water began to build up and that their yard became flooded. They then carried out an inspection of the rear wall and discovered that the Defendants had blocked the flow of storm water from Lot 57 to Lot 28. The Claimants have repeatedly requested the Defendants to remove the blockage but the Defendants have failed and/or neglected so to do. In her Affidavit sworn to on the 14 July 2005, the First Claimant states that the Defendants have also built another wall behind the boundary wall creating a further blockage of the opening first created by Mr. Beaver.

8. The Claimants state that during the passage of Hurricane Ivan which affected Jamaica in September 2004, their property was flooded and theirs was the only property in Cave Hill Estate which became so flooded that water came into their house as a result of the Defendants' actions in blocking the flow of water.

9. It is the Claimants' contention that the agreement between themselves and Mr. Beaver was in accordance with the terms and provisions of the Dividing Fences Act and that the Defendants have now become a party to that agreement by virtue of their purchase of Lot 28. They claim that the Defendants are obliged to uphold and honour the agreement in relation to apertures in the dividing wall. The Claimants aver that the Defendants are in breach of the Dividing Fences Act and the original agreement

with Mr. Beaver, which the Defendants have inherited as successor.

10. The Claimants also allege that the Defendants are in breach of Restrictive Covenants #2 and #6 which appear in identical form on the registered titles to both Lots. The terms of these restrictive covenants are important and are set out along with other aspects of the registered titles later in this decision.

11. The Claimants claim relief including a permanent injunction, declarations in relation to breach of the restrictive covenants and damages.

12. The Defendants in response say that in storm conditions the Claimants' Lot is flooded by rainwater and so too is the Defendants' Lot. The Defendants acknowledge that the Claimants allege that by agreement between the Defendants' predecessor in title they had been permitted to open an aperture in the dividing wall to facilitate storm water which collected on the Claimants' land being discharged onto the Defendants' property. The Defendants also concede that when they inspected the property in 2003 they observed that there was a dividing wall erected by their predecessor which had two holes in it. However, the Defendants say that if there was such an agreement it was a private agreement, they were not party to it, and according to the Affidavit sworn to by the Defendants on the 17th November 2005, the mortgagees from whom they purchased the property advised them that Mr. Beaver did not seek their permission to encumber or depreciate the property value in any way.

13. The Defendants claim that when water is discharged from the Claimants' property onto their property it creates a nuisance and a health hazard on their property. They state that they have not agreed to subject their property to the additional volume of water being discharged from the Claimants' property as this

unnecessarily and unfairly exacerbates their own flooding problem without any right to do so or compensation from the Claimants. Further, the discharge of water from the Claimants' property over the Defendants' property will simply transfer the Claimants' woes to the Defendants. The Defendants who already have a difficulty in removing water which has settled on their property will suffer an unreasonably exacerbated (i) risk of damage to their property (ii) risk of hazard to the health of occupants (iii) risk of diminution in property value and (iv) diminution in standard of living, lifestyle and aesthetic value of their living environment.

14. The Defendants go on to say, that even if, which they deny, the restrictive covenants give the Claimants a right to discharge storm water from their Lot to the Defendants' Lot, then it must be accompanied by an implied duty to undertake to see to an aesthetic and efficient means of disposing of the danger and hazard which they are seeking to introduce to the Defendants' property and to compensate the Defendants for any loss that they suffer thereby.

15. The Defendants counterclaim for a declaration regarding the true meaning of the restrictive covenants, damage for damage to the dividing fence, trespass to property and injunctive relief.

16. There were a number of Affidavits filed on behalf of the parties. In her Affidavit of July 14 2005, the First Claimant says that the First Defendant admitted that he had blocked the opening in the wall as he did not want his yard to flood. The First Claimant says that she told the First Defendant that Lot 28 had never had a problem with flooding and if he would permit, she could put some pipes to run underground through his Lot 28 to allow the water to flow through his land under the surface into the drain on his roadway.

17. In his Affidavit sworn to on the 26 July 2005, Mr. Charles Beaver confirms that he was one of the former owners of Lot 28 and he

also confirms the agreement referred to by the Claimants with regard to creating holes in the dividing wall. He also indicated that at no time at all while he resided at Lot 28 was his premises ever flooded or threatened to be flooded due to any heavy rains, storm or hurricane.

18. In his Affidavit sworn to on the 27 July 2005, the First Defendant confirmed that in his discussions with the Claimants about the holes he advised them that he would not be able to permit the continued use of the holes as they presented a flood hazard.

19. The First Defendant also states that although Lot 57 is generally on higher ground than Lot 28, the natural slope of the land channels the water directly towards his house. The Defendants' house he states has been flooded, even without the additional water from Lot 57.

20. The First Defendant indicates that the problems experienced by Lots 57 and 28 also exist between Lots 58 and 27 and Lots 56 and 29 and the problems relating to the flow of water in the sub-division principally concern the issue of inadequate drains.

21. In their Affidavit sworn to on the 18th of November 2005, the Defendants indicate that both of the Lots 57 and 28 are in the same sub-division of land and so the Claimants benefit from the covenants. However they deny that they are in breach of the covenants.

22. The Defendants say that the natural course of water from the Claimants' property is not through their property but rather through an adjacent property and they say that the water has been artificially diverted from the neighbour's land to their property. They say that the Claimants can through proper engineering easily and readily contrive an appropriate method of ridding their land of any excess water without affecting the Defendants' property.

23. The Defendants claim that damages cannot adequately compensate them for the health hazard and other risks to their house and irreplaceable contents therein.

24. In her Affidavit sworn to on 23rd November 2005, the Second Defendant alleges that the First Claimant has always taken a very uncooperative approach to resolving the problem of flooding in the sub-division and she states that flooding is an issue which affects several Lots.

25. In her Affidavit sworn to on the 23rd November 2005, Sonia Campbell states that she resides at 56 West Cave Drive and her premises are a part of the sub-division development the subject of this matter. She states that on the 24th of May 2003 there were heavy rains which resulted in the flooding of her Lot and the adjacent Lot 57 belonging to the Claimants as well as in several other Lots in the sub-division. She states that although the First Claimant had solved her flooding problems by boring a hole in the dividing wall with Lot 28, the First Claimant refused to permit Mrs. Campbell the similar courtesy of boring a hole in the wall dividing their properties so that water would flow from Mrs. Campbell's Lot and onto the First Claimant's Lot and out through Lot 28 which now belongs to the Defendants. Mrs. Campbell also states that the First Claimant flatly refused to have implemented one of the suggestions by the developers U.D.C. to alleviate flooding by laying pipes and trenching to the main drainage outlet. The First Claimant refused this suggestion on the basis that she did not want any pipe running through her yard.

26. What the Claimants seek in this application is an injunction until the substantive hearing or trial of this matter. The principles to be applied in this area of the law have been set out in the well-known case of **American Cynamid Co. v. Ethicon Ltd.** [1975]1 All. E.R.504. In that case Lord Diplock at page 510 indicated that the

court must be satisfied that the claim is not frivolous or vexatious and that there is a serious issue to be tried. Further Lord Diplock stated:

> *So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the Claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*
>
> *As to that [i.e. the balance of convenience], the governing principle is that the court should first consider whether if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction.*
>
> *If damages..... would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.*
>
> *If, on the other hand, damages would not be an adequate remedy, the court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the plaintiff's undertaking as to damages.*
>
> *If damages in the measure recoverable under such an undertaking would be an adequate remedy, and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.*
>
> *It is where there is doubt as to the adequacy of the respective remedies in damages...that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to*

suggest the relative weight, to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at trial is always a significant factor in assessing where the balance of convenience lies.

...if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only when it is apparent on the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.

....in addition to [the factors] to which I have referred, there may be other special factors to be taken into consideration in the particular circumstances of individual cases.

27. In **Fellowes v. Fisher** [1975] 2 All. E.R. 829, a decision of the English Court of Appeal which took place shortly after the **American Cyanamid** decision, the court discusses, explains, and critiques, the House of Lord's decision at length. It was held(per Lord Denning M.R.) that the case before the court (which had to do with a restraint of trade clause), was one of those individual cases where, because of the need for immediate decision, conflicting affidavits and the consideration of difficult questions of law, the court had to make an estimate of the relative strength of each party's case. Alternatively, it was a case of uncompensatable disadvantages, where damages on either

side would not be an adequate remedy, and where, accordingly, the proper course was to have regard to the relative strength of each party's case.

28. At page 843 g to 844 b, Sir John Pennycuick referred to certain difficulties which in the view of the English Court of Appeal the principles(they have been called guidelines in later cases) laid down by Lord Diplock presented. He stated:

> *By far the most serious difficulty, to my mind, lies in the requirement that the prospects of success in the action have apparently to be disregarded except as a last resort when the balance of convenience is otherwise even. In many classes of case, in particular those depending in whole or in great part on the construction of a written instrument, the prospect of success is a matter within the competence of the judge who hears the interlocutory application and represents a factor which can hardly be disregarded in determining whether or not it is just to give interlocutory relief. Indeed many cases of this kind never get beyond the interlocutory stage, the parties being content to accept the judge's decision as a sufficient indication of the probable upshot of the action. I venture to think that the House of Lords may not have had this class of case in mind in the patent action before them. There is also a class of case where immediate judicial interference is essential, for example to take two examples at random, trespass or the internal affairs of a company, and in which the court could not do justice without to some extent considering the probable upshot of the action if it ever came to be fought out, or in other words, the merits.*

29. The learned author Spry, on **The Principles of Equitable Remedies**, 5th Edition, 1997, pages 466-467 in the chapter dealing with interlocutory injunctions, states:

.....where there is, not a conflict in the evidence as to matters of fact, but rather a dispute as to questions of law, the preparedness of the court to determine those questions depends on their difficulty and on the balance of convenience, regard being had both to the consequences of granting or refusing relief and also to the relevant circumstances. Even where in a particular case the court is not disposed to decide a difficult question of law on an interlocutory application, it is often found that the risk of injury to the plaintiff is such that interlocutory relief should be granted. But usually the court does not regard any matters of law in dispute as so difficult that it should decline to consider them if this may affect its decision, and hence it may be prepared to adopt a view, which is to be treated as merely provisional; and both that conclusion and the degree of confidence with which it has been reached may be duly taken into account in determining whether the balance of justice favours the grant of interlocutory relief. Indeed, in the case of disputes of law there is not so great a reluctance as in the case of disputes of fact for preliminary determinations to be made, since disputes on questions of law do not depend on events which are unknown to the court and which must be duly established on the abduction of appropriate evidence. Hence although in exceptional circumstances it may be found that a question of law is of such difficulty that , in all the circumstances the court does not see fit to determine it although the consequent legal uncertainty is important, the court does not ordinarily refuse to consider a question of law if substantial hardship to one of the parties may result from that refusal.

30. In my judgment, there are clearly serious issues to be tried in the instant case. The main issue will be the meaning of the restrictive

covenants #2 and #6 and whether the Defendants are in breach of those covenants in blocking off the weep-holes/ passage between Lot 57 and Lot 28. Another issue to be tried is whether the Defendants are in breach of the Dividing Fences Act.

31. Moving on to the next aspect of the relevant queries enunciated by Lord Diplock, i.e. the question of the adequacy of damages, in my view both the Claimants and the Defendants stand to experience irreparable damage to their property and risks to their health, comfort and quiet enjoyment, in light of the nature of the problems at issue. This is a case of uncompensatable disadvantages, where damages would not be an adequate remedy for either party and the extent of the uncompensatable disadvantage to either party would not in my judgment differ widely.

32. In terms of the balance of convenience generally and the status quo, the status quo would be in favour of granting the injunctive relief. The relevance and weight of this factor will depend on whether other factors appear to be evenly balanced.

33. In this case, the Claimants argue that the Defendants are in breach of the Dividing Fences Act. Miss Cummings in her submissions on behalf of the Claimants relies upon sections 5 and 6 of the Dividing Fences Act. She submitted that although nothing in the Act speaks to alteration of the dividing fence between two properties, whenever any alteration is done it is to be done by agreement between the parties. She contends that whatever agreement there is between the parties must bind successors, otherwise other persons who become owners/occupiers could simply come along and tear down or alter the fence agreed upon or alteration agreed upon. Miss Cummings submits that the Defendants are bound by the agreement entered into between the Claimants and the Defendants' predecessor Charles Beaver.

34. Section 3 of the Dividing Fences Act provides as follows:

3. In this Act-

"dividing fence" means any fence which separates any holding from any other, and shall be deemed synonymous with the term "line fence";

"fence" includes wall, bank, and hedge;

"occupier" includes the owner of any land whether in possession by himself or by any other person for him.

35. Sections 4, 5 and sub-sections (1) and (2) of section 6 provide as follows:

4. Every occupier of land shall, as between himself and the occupier of the adjoining land, be liable to bear one half of the expense of erecting and maintaining a sufficient dividing fence to separate their respective holdings.

5. A fence shall be deemed "sufficient" for the purpose of this Act when it is high enough, strong enough and close enough, to prevent ordinary animals, other than pigs and goats, of the kind kept on the one holding from trespassing on to the other.

6 (1). Whenever there shall be no dividing fence between two holdings, or the existing fence is from want of repair or other cause insufficient, it shall be lawful for the occupier of either holding, by notice in writing, to call on the occupier of the other to come to an agreement in writing with him as to the kind of fence to be erected, or the kind of repairs or work to be done to make such fence sufficient, and as to the mode in which the work is to be carried out.

(2) If the parties come to such an agreement, and either party shall nevertheless fail to do anything which by the said agreement he has agreed to do, the other party having done what he had agreed to do, or so much thereof as he has not been prevented from doing by the default of the other party, may do for the other party what such party has failed to do,

and on the completion of the work shall be entitled to recover from such party a sum equivalent to what he has spent on the work in excess of one half of the cost of the whole work.

36. In his response, Mr. Huntley Watson on behalf of the Defendants submitted that the Dividing Fences Act makes no restriction on what the occupiers can erect on the property. It permits and makes provision for the erection of a dividing fence on boundaries. He submits that it goes further to provide a mechanism for requiring contribution to the cost of erecting such a structure and it provides a mechanism for identifying cases of excessive expenditure later on. Accordingly, it is clearly not restrictive in effect.

37. Separate and apart from her reliance on the Dividing Fences Act, Miss Cummings argues that the agreement entered into between Mr. Beaver and the Claimants binds successors, including the Defendants, as the new owners of Lot 57.

38. Mr. Watson submits that any contractual arrangement between Mr. Beaver and the Claimants could, at the very most, be construed as a contract in personam and enforceable only between Mr. Beaver and the Claimants. The Defendants were not privy to this contract and there is no such allegation. He further submits that as to whether this contract could in fact be passed to an unsuspecting and innocent purchaser for value, there would have to be instruments in writing or it would have to have been done in the context of a development scheme so that such covenant would run with the land. He submits that that is not the case here.

39. In my view, this is the kind of legal issue which principally involves dispute as to law and in respect of which, in light of the potential serious consequences for either party, the court ought not to shy away from expressing its provisional views as suggested in **Fellowes v. Fisher** and in the work by Spry. It is not clear to me whether there was any consideration for the agreement between

the Claimants and Mr. Beaver. The agreement is not in writing and my provisional view is that it will be difficult for the Claimants to prove that this agreement, which affects property rights, and to which the Defendants are not a party, is binding upon the Defendants.

40. As to the issue of the parties' rights and the meaning of the restrictive covenants and their effect on the rights of the Claimants and the Defendants, I am of the view that this is a case depending to a large extent on the construction of written instruments and on points of law and like Sir John Pennycuick in **Fellowes v. Fisher**, it would seem to me that the prospect of success is within my competence as the judge hearing the interlocutory application, and represents a factor which can hardly be disregarded in determining whether or not it is just to grant interlocutory relief. Alternatively, since it is a case of uncompensatable disadvantages of like degree, it is permissible and proper for the court to have regard to the relative strength of each party's case.

41. Mr. Watson referred to the authority of **Gale on Easements**, 16th edition by Jonathan Grant Q.C. and Paul Morgan Q.C. , paragraphs 6-22 and 6-23, pages 255-256, with headings and sub-headings "Surface water: no defined channel-right to discharge". Here the common law position is discussed as follows:

> *6-22. The occupier of land has no right (a) to discharge onto his neighbour's land water which he has artificially brought onto his land or water that has come naturally on to his land but which he has artificially, even if unintentionally accumulated there or (b) by artificial erection on his land to cause water to flow on to his neighbour's land in a manner in which it would not, but for such erections, have done. He is, however, under no obligation to prevent water that has come onto his land (and has not been*

artificially concentrated retained or diverted) from passing naturally onto his neighbour's land.

6-23. An occupier of land is entitled to protect his land against flood water from the sea or from an overflowing river even if this causes the flood water to flow onto his neighbour's land in greater quantities with greater violence than it otherwise would have done. The neighbour's remedy is to erect his own embankment. Similarly, the owner of lower land is not obliged to receive water running off higher land, he may put up barriers or otherwise pen it back even though this may cause damage to the occupier of the higher land, provided he does no more than is reasonably necessary to protect his enjoyment of his own land, does not act for the purpose of injury to his neighbour and uses reasonable care and skill. If, however, it is established that the lower occupier's use of his land in taking such preventative steps went beyond what was reasonable and that the resultant damage to his neighbour's land was reasonably foreseeable or if the lower occupier propels water naturally on his land on to his neighbour's land, he will be liable in nuisance and/or trespass (my emphasis).

The case cited for most of these propositions is **Home Brewery Co. Ltd. v. William Davis and Co. (Leicester) Ltd.**[1987] 1 Q.B. 339. The extract from **Gale on Easements** in my view accurately summarises the principles discussed in detail by Piers Ashworth Q.C., sitting as a Deputy High Court Judge in **Home Brewery.** In that case Piers Ashworth Q.C. discussed the law relating to water flowing through defined channels above ground and underground, and the law relating to water not flowing through defined channels, surface water. The judge expressed his surprise(page 345 A), and I certainly echo that reaction, at the fact that the questions of whether the owner or

occupier of higher land has a right to discharge water percolating through his land onto lower land, or conversely whether the owner or occupier of the lower land is obliged to accept that water or is he entitled to prevent it entering his land, fell to be decided for the first time in England in 1986. Said the learned judge:

I should have expected it to have been established in the last century, if not earlier, when many decisions on rights and duties in respect of water are to be found.

42. The judge accepted and followed the decision of the High Court of Australia in **Gartner v. Kidman** (1962) 108 C.L.R. 12.That case reviewed many authorities throughout the commonwealth and the United States and also expressed surprise (Windeyer J. at page 38) at the lack of definitive well-settled authority in relation to the law governing the natural flow of water from higher land to lower land. At pages 46-47 of the judgment, Windeyer J. summarises aspects of the High Court's decision as follows:

....the law is, I think, that (the lower owner may block the natural flow of surface water) by any works on his own land, so far as they are reasonably necessary to protect his land for his reasonable use and enjoyment; but that in doing so he must not act recklessly of his neighbour so as to cause wanton damage to him.....

The view expressed above is the same in substance as that which prevails in parts of the United States, and which is there referred to as the "modified common law" or "reasonable user" view, in contrast with the civil law and the extreme form of the "common enemy" doctrines. But it is not really a modification of the common law. The idea of reasonableness that is basic to so much of the common law, is firmly embedded in the law of nuisance today. Pronouncements

concerning the scope of nuisance as a tort avoid stating rights and duties as absolute. In respect of both what a man may do and what his neighbour must put up with, its criteria are related to the reasonable user of the lands in question.

43. Cases discussing the common law of England as to riparian rights in relation to water have been accepted and applied in our local courts and the rights of riparian owners in relation to water flowing in defined channels and water which oozes and does not flow in defined channels, are thoroughly discussed in the Jamaican Court of Appeal decision in Supreme Court Civil Appeal No. 3/95**Charles Stuart v. National Water Commission**, delivered July 31 1996.

44. I accept the judgment of Piers Ashworth Q.C.in the **Home Brewery** case and the judgment of the High Court of Australia in **Gartner v. Kidman** as reflecting the common law of Jamaica. However, what is the effect of the fact that there are restrictive covenants endorsed on the respective titles and what is their true purport?

45. It appears to be common ground that the restrictive covenants on the Title to Lot 28 are for the benefit of the owners of Lot 57 and vice-versa as the lots are part of the same sub-division development. Indeed, the Titles expressly speak to this benefit. For a discussion of restrictive covenants and building schemes and the Torrens Title system it is useful to refer to Voumard on **The Sale of Land in Victoria**, fourth edition, pages 524-531. Also, in Francis' work **The Law and Practice Relating to Torrens Title in Australasia**, Volume 1, pages 542-543, there is a discussion which suggests that the term "the land therein described" in certain statutes in Australia, includes those rights which have been recognized by the common law, being those rights of a landowner which are in the nature of, but differ from, true easements, such as the right of support of his land by adjacent land, and the rights

of riparian owners to take and use water, to the flow of water without obstruction and such similar rights.

46. It is imperative that the two covenants #2 and # 6 be examined closely along with other relevant parts of the Title(for present purposes both Titles are worded in the same way save for the Lot numbers):

Urban Development Corporation a Statutory Corporation existing under and by virtue of the provisions of.....is now the proprietor of an estate in fee simple subject to the incumbrances notified hereunder in all that parcel of land part of The Great Salt Pond called Hellshire now called Hellshire Heights in the Parish of Saint Catherine being the Lot numbered.....on the Plan of part of the Great Salt Pond called Hellshire now called Hellshire Heights aforesaid deposited in the Office of Titles on the ....of the shape and dimensions and butting as appears by the said Plan and being part of the land comprised in Certificate of Title registered Volume 384 Folio 67.

Incumbrances above referred to:

.....

.....

The restrictive covenants set out hereunder shall run with the land above-described(hereinafter called "the said land") and shall bind as well the registered proprietor its successors assignees and transferees as the registered proprietor and shall enure to the benefit of and be enforceable by the registered proprietor for the time being of the land or any portion thereof comprised in Certificate of Title registered at Volume 384 Folio 67....

2. No bath water or water for domestic purposes in respect of the said land or any part thereof or any water except storm water shall be permitted or allowed to flow from the said land or any

part thereof to any portion of the land comprised in the said subdivision or any part thereof to any portion of the land comprised in the said subdivision or any road, street or land adjacent to the said land but all such water as aforesaid shall be disposed of by being run into the sewerage system provided by the registered proprietor or by evaporation or percolation on the said land.

6. The registered proprietor or proprietors of the land comprised in the sub-division or any lot forming part thereof shall not restrict or interfere with the discharge of storm water flowing off the roads onto his land. The Road Authority shall not under any circumstances be liable to the registered proprietor or occupier of the land for any damage occasioned by storm water flowing off the roads. (My emphasis).

47. My reading of these restrictive covenants is that they do not appear to change the common law position. When one examines these covenants and the Titles the following points emerge:

(a) Covenant #2(which is also on the Claimants' Title) says that the landowner is permitted or allowed to have storm water flow from his land to any other portion of the land comprised in the subdivision. This means that the Claimants are permitted to have storm water flow from their land onto the Defendants' Land.

(b) There is nothing in the covenant #2 which states expressly or otherwise that the landowner onto whose land storm water flows from another Lot is obliged to receive it. The case law suggests that there is a conceptual divide between finding that a landowner is allowed or permitted to have storm water flow naturally off his premises onto another owner's lot, and therefore not being liable to his neighbour

for that flow, and finding that the landowner of the recipient Lot is obliged to receive that water.

(c) It is only in the case of covenant #6 in relation to storm water flowing off of roads, as opposed to any other Lot, that a landowner is enjoined from restricting or interfering with the flow of the water onto his Lot.

48. In my view, the Defendants have a better chance than the Claimants of succeeding at trial and have the relatively stronger case. My provisional view is that the covenants and the case law support a position that while the Defendants would have no cause of action against the Claimants for permitting storm water to flow from the Claimants' higher land onto the Defendants' lower land, the Defendants are not obliged to receive that storm water running off the Claimants' higher land. They are entitled to pen it off in reasonable protection of the enjoyment of their property. In the instant case there is no pleading by the Claimants that the Defendants have acted with intent to injure them or that the actions of the Defendants are negligent or unreasonable, separate and apart from their deliberate blocking of the holes or flow of water, which the Defendants say is in exercise of their rights.

49. In addition, it may well be that at trial a certain aspect of the water coming from the Claimants' land to the Defendants' land may be found to be an artificial accumulation of water via the Claimants' roof and channeling towards the Defendants' property. There is no right to have such an artificial accumulation flow onto another person's property. The Engineering Report by Major Renrick Hall submitted on behalf of the Claimants would appear to support that position, particularly paragraphs 7 and 12 of the findings, and paragraph 3 of the recommendations.

50. In all the circumstances, the Claimants have in this case satisfied the first requirement laid down by the House of Lords in **American**

Cyanamid that their claim is not frivolous or vexatious and that there is a serious issue to be tried. The remedy of damages is inadequate for both parties, and the degree of the inadequacy is in my view of the same serious order in each side's case. I have gone on to consider the balance of convenience generally, and it seems to me that the Defendants' case appears more likely to succeed at trial. The factors are not therefore evenly poised, and given the extent of hardship that may flow, I do not think it would be appropriate to take steps to preserve the status quo. The relative strength of the Defendants' case in my judgment tips the scales in their favour and, in the circumstances, the balance of convenience is in favour of refusing the injunction sought until trial.

Accordingly, the application for an injunction until the hearing or trial is refused. The appropriate order as to costs is, I believe, costs in the claim.