DAMAGE TO NEIGHBOURING BUILDING BY REMOVAL OF UNDERGROUND WATER

Singapore Finance Ltd. v. *Lim Kah Ngam (S'pore) Pte. Ltd. & Others*[1]

Introduction

THE present case illustrates some of the difficulties encountered in a case where three branches of the law namely negligence, nuisance and real property coincide. The purpose of this note is to reveal the shortcomings of the law in such situation and to inquire whether the judge in the instant case ought to have been more innovative in developing the common law here in Singapore.

Facts

The facts of the case are as follows. In mid-January 1974 the defendants (developers) were excavating on their site enclosed within a cofferdam for three basement floors. This was for the purpose of erecting a 13-storey-building. As this was going on, the owners of buildings in the neighbourhood complained of cracks appearing in their buildings. The plaintiffs who were one of the owners of these buildings instituted proceedings claiming damages for loss of support, nuisance, as well as, negligence against the defendants. The plaintiffs alleged that by reason of the defendants' excavation, the bottom of the hole formed heaved upwards and the ground upon the sides of the cofferdam moved downwards and laterally towards the excavation hole, having passed underneath the sheet piles surrounding the defendants' land, with the consequence that the surface ground in the immediate vicinity subsided and the buildings standing on them suffered cracks. The defence raised was two-fold: First, that the damage caused to the plaintiff's building was attributed to differential consolidation settlement brought about by dewatering of their soil; second, that this settlement was accentuated by the mixed foundation of the plaintiffs' buildings and the abnormal "King Tide" occurring on February 9, 1974. The defendants admitted that the de-watering had been caused by their excavation. However they (the defendants) claimed that the de-watering was due to the flow of water from the plaintiffs' soil into the excavation hole and was via indeterminate or undefined channels and this was due to the forces of nature and the forces of gravity. Neither was such de-watering avoidable given the state of engineering at the time nor was the de-watering due to any "positive" acts done by the defendants. Hence the damage to the plantiffs' building, was alleged by the defendants to be *"damnum sine injuria"* or damage without legal injury.

1. *The Decision: Effect Given to English Common Law*

The judge Lai Kew Chai J. noted: firstly the practical importance of stating the Common Law on the liability of a landowner for the flow of the subterranean water from his neighbour's land through undefined channels into his land due to excavations; and secondly the irony that there has been no judgment in Singapore that deals with this branch of the law.

The English Position

The two cases considered were *Acton* v. *Blundell*[3] and *Langbrook*

1 [1984] 2 M.L.J. 202.
2 *Ibid.,* at p. 204.
3 (1843) 152 E.R. 1223.

Properties, Ltd. v. *Surrey County Council & Others*.[4] The former case concerned the removal of water from the plaintiff's well. This was caused by the defendant opening a colliery nearby, sinking two coal pits and underground water in the plaintiff's land seeped through undefined channels causing the plaintiff's well to run dry. In the Exchequer Chamber, Tindal C.J. stated that:

> (this case) falls within (the) principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below his property; whether it is solid rock, or porous grounds or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that there is found to his own purposes at his free will and pleasure; and that, if in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria,* which cannot become the ground of an action.[5]

Primarily this statement reflects the common law maxim *"cujus est solum, ejus est usque ad coelum et ad inferos"* (whose is the soil, his is also that which is above it): a property law concept which enables a freeholder to do whatever he likes with his property.[6] This seemingly, absolute freedom of a landowner is however circumscribed by various other rights such as easements (rights of way), rights of lessees, and mortgagees. Needless to say the landowner's right is also subject to his neighbouring owners' similar rights.

The above statement by Tindal CJ. also reflects the common law's views on what can exist as '*ex jure naturae'*. Natural rights are rights that exist automatically and is an incidence of the ownership of an estate in land. Thus they are unlike easements and restrictive covenants relating to land because these have to be acquired. As Megarry V.C. puts it "... it is... simply a right protected by the law of tort, *i.e.,* the right to damages or an injunction for nuisance."[7]

In holding that there is no liability on the defendant by his action of withdrawing water from underground spring under the plaintiff's land, Tindal C.J. was clearly of the view that the plaintiff had no natural right to the water underneath his land, *i.e.,* he has no property right to the water. This is unlike the rule that applies to riparian owners of land having surface streams flowing in a defined channel where, although the water is not the subject of absolute ownership, the riparian owner is, as Lord MacNaghten stated:

> ... entitled to have the water of the stream on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstance.[8]

The rationale for having two different rules applying for streams that flow in a defined channel and undefined underground streams

4 [1969] 3 A.E.R. 1424.
5 *Supra,* n. 3 at p. 1235.
6 See generally, Megarry & Wade, *The Law of Real Property* (5th ed. 1985) at pp. 61-67.
7 *Op.cit*., at p. 842.
8 *John Young & Co.* v. *Bankier Distillery Co.* (1893) A.C. 691 at p. 698 following the principle enunciated in *Mason* v. *Hill* 110 E.R. 692.

appears to be that the former is patent and rights are easily ascertainable. Moreover as Tindal C.J. stated:

> (it) assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages or... (it is) an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law.[9]

The difficulty one encounters with subterranean water is that they are invisible on the surface and to allow a plaintiff landowner to have a natural right to it would have, as Lai J. in the present case pointed out,[10]

> ... unfairly prevented neighbouring owners from draining their land for cultivation, from running their lands ... and from carrying out excavations for the construction of underground buildings and structures which is increasingly becoming necessary.

From the above, it is abundantly obvious that there are strong reasons for refusing to allow the plaintiff a cause of action in such situations as the present case.

In the more recent case of *Langbrook*,[11] which is more factually akin to the present case, the defendants had made excavations on some ground near the plaintiff's land. To keep these excavations dry, water including those percolating beneath the plaintiffs' land was pumped out. As a result there was a settlement of the plaintiffs' buildings. Plowman J., in dealing with the preliminary issue as to whether the plaintiff had any cause of action in such circumstances held that there was none. The strict property view enunciated earlier was held supreme over the maxim *"sic utere tuo ut alienum non laedas,* that is, use your own property so as not to injure that of another — (a tort law concept). This was because he held there was no room for nuisance or negligence. In answer to the negligence plea he cited the House of Lords' decision in *Chasemore* v. *Richards*[12] where "the water authority concerned was found to have had reasonable means of knowing the natural and probable consequences of their excavations but there was no suggestion in the House of Lords that this was a relevant matter."[13]

Plowman J. had also considered the motive of the defendant an irrelevant factor by referring to *Bradford* v. *Pickles*[14] and he felt that:

> since it is not actionable to cause damage by the abstraction of underground water, even where this is done maliciously, it would seem illogical that it should be actionable if it were done carelessly. Where there is no duty not to injure for the sake of inflicting injury, there cannot... be a duty to take care not to inflict the same injury.[15]

9 See *supra,* n. 3 at p. 349; for a more detailed account of Natural Rights in Water see *Gale on Easements* (4th ed. 1972), Chap. 6.
10 See *supra,* n. 1 at p. 204.
11 See *supra,* n. 4.
12 [1859] 7 H.L. Cas. 349.
13 See n. 4 at p. 1440.
14 [1895] A.C. 587.
15 See n. 4 at p. 1440.

As to nuisance, he stated that "it involves an *unlawful* interference with a man's use or enjoyment of land (and)... here the interference was not unlawful."[16]

At this juncture, one does have some comments to make with regards to Plowman J.'s treatment of negligence and nuisance which Lai J. in the present case had wholeheartedly accepted. First, the fact that in *Chasemore* v. *Richards*[17] the House of Lords did not explicitly suggest the reasonableness of the defendants' action as a relevant matter ought not prevent a later court from deciding otherwise in a future case. It may be that the defendant in that case did use all reasonable care according to the state of affairs at that time.

Secondly, Plowman J. appears to have ignored the fact that that case was decided on notions of negligence which are quite different from those in the *post-Donoghue* v. *Stevenson*[18] era.

Thirdly, the defendant in *Chasemore* v. *Richards* was doing something of benefit to the public, namely, for the purpose of supplying water to the inhabitants of a district and it would be absurd to impose liability on the defendant in such circumstances.

Fourthly, perhaps undue significance was given to the case of *Bradford* v. *Pickles*,[19] in denying that the defendant owed a duty of care to the plaintiff. Whilst the decision is one given by the House of Lords, that case is one concerning nuisance and not negligence; and whilst it is conceded that there are many similarities between the two causes of action and often the same facts give rise to both, yet they are essentially different. In certain situations an action in one may lie only.

For example: If the air above *A's* land is polluted by *B, A* has no proprietary right at all because the right to access of air (as distinct from airspace) is incapable of being either *ex jure* nature, or being granted as an easement.[20] Yet no one can deny that *A* has a cause of action in nuisance even though *B* has taken the utmost care.[21]

Fifthly, it is suggested by this writer that the motive of the defendant ought to be a relevant factor in nuisance. In *Bradford's* case Lord Halsbury said;[22]

> If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question... seem to me to be absolutely irrelevant.

16 *Ibid.*
17 See n. 12.
18 [1932] A.C. 562; see also *infra,* n. 29.
19 See *supra,* n. 14.
20 See *supra,* n. 9, *Gale on Easements* at pp. 256-259; assuming that the air does not flow in a defined channel.
21 See statement of distinction between nuisance and negligence by Lord Reid at *Wagon Mound (No. 2), The Overseas Tankship (U.K.) Ltd.* v. *Miller Steamship Co. Pty., Ltd.* [1967] A.C. 617 at p. 639; see also *St. Helen's Smelting Co.* v. *Tipping* [1865] 11 H.L.C. 642.
22 See n. 14 at p. 594.

The basis for so stating this is that as the plaintiff had no right to underground percolating water, the defendant by abstracting it *(i.e.* appropriating it) is not doing an "unlawful" act. But surely, this is confusing proprietary rights and rights that are capable of being conferred on the plaintiff by the law of torts. Whilst it may be conceded that the right to air may be *'ex jure naturae'* and thus can be distinguished from percolating water it is submitted that this will be unfortunate because in both situations the plaintiff's enjoyment of his property has been impaired by the defendant's acts. It seems peculiar that if subjacent support had been removed by the abstraction of substances like silt or brine, the plaintiff who suffered damage from such subsidence would have a cause of action,[23] but if it was merely percolating water abstracted it would be *"damnum sine injuria"*. Lai J. in the instant case felt constrained by the English authorities considered above.

2. *Departure from the English Rule*

Counsel for the defendants raised a string of authorities from Australia, Canada and the United States which show that the English view was departed from. For the purposes of this note, we shall confine our attention to the Canadian treatment of this area of the law because this was the only jurisdiction considered briefly by Lai J.

It is necessary to consider the Ontario Court of Appeal decision in *Pugliese et al* v. *National Capital Commission*.[24] The material facts as reported in the present case are as follows. The defendants were engaged in the construction of a collection sewer which involved the control of groundwater condition by pumping subterranean water from deep drainage wells. The pumping lowered the ground water in the vicinity which caused ground consolidation and caused differential settlement over the base of the plaintiffs' homes. The homes suffered cracks and faults. In its detailed judgment, the Ontario Court of Appeal made an extensive and exhaustive survey on the law dealing with percolating water and came to the conclusion that the plaintiff did have a cause of action in negligence and nuisance. The judgment delivered by Howland J.A. proceeded in the following manner: whilst he agreed with the English property law rule that "an owner of land does not have the *absolute right* to the support of subterranean water which is not flowing in a defined channel so that the damage caused by the abstraction of such water automatically gives rise to a cause of action. His neighbour... has a right to abstract such water for his own use which may... (remove) the support of the water under adjoining land; but, similarly, the neighbour's right is *not* an *absolute right*."[25] It is pertinent to note that he qualified the word "right" with the adjective "absolute". On the one hand he did not go so far as to say that the plaintiffs were entitled to the water flowing underground. Yet on the other hand he was not prepared to give the defendant an "absolute right" to remove that water to the plaintiff's detriment. The use of the qualification "absolute" would also get around the difficulty of not being able to determine when an act is "unlawful" which under

23 See *Jordesan* v. *Sutton, Southcoates and Drypool Gas Co.* [1899] 2 Ch. 217, (C.A.); *Trinidad Avsphalt Co.* v. *Ambard* [1899] A.C. 594, (P.C.); *Lotus Ltd.* v. *British Soda Co. Ltd.* [1972] Ch. 123.

24 79 D.L.R. (3d), 592.

25 *Ibid*., at p. 615.

the English view seems to be confined to acts which interfere with some proprietary interest of an adjoining landowner.[26]

This decision by the Ontario Court of Appeal does not go so far as to prevent a defendant, adjoining landowner, from developing his plot of land. It is that he should take reasonable care in his actions and if he has done so, then there should be no liability even if the plaintiff suffers damage through subsidence. Howland J.A. cites[27] Lord Wilberforce's enunciation of the nature of a duty of care in *Anns* v. *Merton Borough Council*[28] and concludes that on the facts there was such physical proximity between the plaintiffs' lands and the defendants' operations that gave rise to a forseeable risk of harm from the negligence alleged. Hence there was little difficulty in establishing that there was a duty of care. The English Courts have been reluctant to circumvent well-established rules of property law, but should this bar the development of negligence here in Singapore? One writer[29] has observed that the old rule in *Acton* v. *Blundell*[30] is one that "... harks back to the pre-*Donoghue* days when *B* (the defendant) could escape liability in tort because there was no contract between himself and *A* (the plaintiff)." Furthermore he adds that in such a situation there is an obvious contradiction because, "if *A* had a property right or a contractual right he would base his action on it and tortious liability would be totally superfluous."[31] The same difficulties which lawyers and judges have with the tort-contract relationship, is resurrected in the tort-property dispute. A logical and, perhaps, necessary conclusion will be as follows: If one accepts that the absence of a contractual relationship should be no bar to a negligence action, then similarly the same considerations should, in theory and fairness apply, in a case where there may be an absence of a property right in the plaintiff.

In the *Pugliese* decision itself, Howland J.A. after circumscribing the rights of the defendants as not "absolute", then poses the question whether the plaintiffs have a right which the law deems "worthy of protection."[32] In other words, as the same writer pointed out, the "replacement of the protectable interest" for the contract or the property right is the keystone of the whole argument.[33]

Expanding the scope of the duty of care to cover such situations as the present case may cause some to fear that there may be open-ended liability and multiplicity of claims. But as pointed out in *Anns et al* v. *Merton Borough Council*[34] even if *prima facie* a duty of care arises because of the sufficient relationship of proximity,

> ... it is necessary to consider whether there are considerations which ought to negative, or, to reduce or limit the scope of the duty, or the class of person to whom it is owed, or the damages to which a breach of it may give me; [see *Dorset Yacht* Case].[35]

26 See *supra,* p. 194.
27 See n. 24 at p. 616.
28 [1977] 2 W.L.R. 1024 at p. 1032.
29 Phillip Girard, "An Expedition to the Frontiers of Nuisance" [19801 25 McGill L.J. 565 at p. 572.
30 See *supra,* n. 3.
31 See n. 29 at pp. 572-3.
32 See n. 24 at p. 615.
33 See n. 29 at p. 573.
34 See n. 28.
35 [1970] A.C. 1004 *per* Lord Reid at p. 1027.

The issue of nuisance was also considered by the Ontario Court of Appeal. The Court had no qualms over finding that the defendants could be liable in nuisance. It said that "it is not sufficient to ask whether an occupier has made a reasonable use of his own property. One must ask whether his conduct is reasonable considering the fact that he has a neighbour."[36] Thus in the *Pugliese* case, it is not disputed that the National Capital Commission's excavation was a reasonable use of their own land, however what is objectionable and thus unreasonable is the effect that would have on neighbouring landowners' houses.

It has been commented that the reluctance to allow the nuisance action in such situations was due to the proprietary basis of nuisance and that hence, the courts have interpreted the "reasonableness" criteria solely from the point of view of the defendant and have failed to give adequate attention to the plaintiffs' interests that are affected.[37] Such a statement is perhaps too sweeping, as the courts do take into account all the circumstances of the case. As Winfield puts it:

> Whether an act constitutes a nuisance cannot be determined merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case; the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it is done maliciously or in the reasonable exercise of rights; and the effects of its commission, that is, whether it is transitory or permanent... it is a question of fact whether or not a nuisance has been committed.[38]

It is important to take note that the notion of 'reasonableness' in nuisance differs from that in negligence and that a situation may arise where although the defendant has taken all reasonable care in his action, yet he can be liable, for it may be unreasonable "according to the ordinary usages of mankind living in a particular society."[39]

Conclusion

In modern Singapore, given the present needs for urban development for both commerce and residential occupation, the problems encountered in the present case would not be a rare feature. The decision itself may be correct because the trial judge found no evidence of negligence on the defendants' part and did attribute the subsidence of the plaintiffs' building as being caused by the effect of the mixed foundation of the plaintiffs' building and the abnormal "King Tide". However, it is submitted that given an appropriate case, negligence in the abstracting of percolating water causing damage to a neighbouring landowner ought to be actionable despite the absence of a property right in the plaintiff. Similarly the same considerations ought to be applied with regard to the issue of a possible action in nuisance.

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36 See n. 24 at p. 617 *per* Howland J.A.
37 See n. 29.
38 *Winfield & Jolowicz on Tort* (11th ed. 1979) at p. 364.
39 *Sedleigh-Denfield* v. *O'Callaghan* (1940) A.G. 880, 903 *per* Lord Wright.