JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 79/06

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.

BETWEEN	**KARLENE HENRY**	**1ST APPELLANT**
AND	**BARBARA GAYLE**	**2ND APPELLANT**
AND	**BURNS GAYLE**	**1ST RESPONDENT**
AND	**NAVIENEY McBEAN-GAYLE**	**2ND RESPONDENT**

Miss Jacqueline Cummings & Aon Stewart instructed by Archer Cummings & Co., for appellants

Huntley V. Watson instructed by Watson & Watson for respondents

18th, 19th, 20th December 2006 & 27th April 2007

HARRISON, P.

This is an appeal from the decision of Miss Justice Mangatal on 15th September 2006 refusing an interlocutory injunction to restrain the respondents from preventing the flow of storm water from the appellants' lot 57 onto the respondents' lot 28 both at Cave Hill Estate, St. Catherine.

The relevant facts are that the appellants are the registered proprietors of the property at 57 West Cave Hill Drive registered at Volume 1299 Folio 409 of the Register Book of Titles ("Lot 57"), which they purchased in about November

1998. They began to occupy the property in 2001 and then noticed that the owners of the adjoining property at 28 Cave Hill Boulevard had built boundary walls separating the properties. The property at 28 Cave Hill Boulevard registered at Volume 1299 Folio 380 ("Lot 28") was then owned and occupied by one Charles Beaver who had built the dividing wall at the rear of each.

After discussions between the appellants and Mr. Beaver, he agreed and created an opening in the dividing wall which allowed the flow of storm water from the appellants' property lot 57 onto his property, lot 28, and thereafter onto the roadway and into the drain along Cave Hill Boulevard.

The respondents subsequently bought lot 28 by auction, the mortgagee's power of sale having been exercised against Beaver, and went into possession in 2004. The respondents, on noticing the hole in the rear wall, blocked it. After some heavy rains, the appellants discovered that water had built up in their backyard and noticed the blocked area in the wall between lots 57 and 28. They requested the respondents to remove it. The respondents refused.

In September 2004, the heavy rains accompanying hurricane Ivan caused the appellants' backyard to be flooded due to the blocked opening in the said rear wall.

In July 2005, the appellants filed a claim form claiming damages for a breach of covenant, a declaration that the respondents were in breach of the restrictive covenants, which bound the lands, preventing the respondent from restricting the flow of storm water from lot 57 to lot 28, and for an injunction restraining the respondents from preventing such flow of storm water.

On 14th May 2005, Daye, J., granted an interim injunction, which was successively extended.

On 15th September 2006 Miss Justice Mangatal J., at a hearing, inter partes, refused the injunction sought, until trial. This appeal resulted.

The parties were registered propriertors of adjacent premises in a development scheme created and developed by the Urban Development Corporation, a statutory corporation, in an area named Cave Hill, Hellshire in the parish of St. Catherine. The said developers, aware of the problems of flooding caused by heavy rainfall, had from time to time sought to carry out "... technical assessment ... to arrive at a solution."

Each of the lots in the scheme was subject to several covenants. Two covenants nos. 2 and 6 were of particular relevance to this case. They read:

> "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 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 subdivision or any lot forming part thereof shall not in any manner 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." (Emphasis added)

The appellants argued that the learned trial judge erred when she found that it was a case of uncompensatable disadvantages, that damages were inadequate in each case, the case of the parties would not differ widely and that the respondents were not obliged to receive the storm water from the appellants' premises. She also erred in holding that only covenant no. 6 permitted an owner to block storm water from the roads, that the covenants did not change the common law, and that the relative strength of the respondents' case as opposed to the appellants' tipped the scales thereby causing the balance of convenience to favour the refusal of the injunction.

Counsel for the respondents argued that the oral contract between the appellants and Beaver was the granting of a personal right between them which did not create a binding right over Beaver's successor in title. The first appellant said in paragraph 8 of her affidavit dated 14th July 2005:

> "That after discussions with Mr. Beaver, it was agreed between him and I that he would create an hole or passage in the dividing boundary wall to allow the flow of storm water from our property to his property at Lot 28 and thereafter unto the roadway and into the drain along Cave Hill Boulevard."

The common law approach in respect of the discharge of the storm water was not dealt with in any of the covenants 1 or 6 and therefore conferred no rights over the land of the respondent, who had a right to protect their land from storm water. The learned judge properly found that damages would not adequately compensate either party, both of whose properties were subject to flooding. The

learned judge was correct to apply the principles of the ***American Cynamid*** case, consider the balance of convenience and refuse the interlocutory injunction in the circumstances. He relied on ***King v David Allen ansd Sons, Billposting Ltd*** [1916] 2 AC 54, and Gale on Easements, 16th Edition at pages 255-256.

In our view an application for an injunction is made at a time when the evidence before the learned judge, contained in affidavits, is incomplete, not subject to cross-examination, and the issues are not all joined. This requires a degree of caution in the issuance of an injunction order to restrain a party on behalf of another who complains that his right is restricted.

Lord Diplock in the ***American Cyanamid v Ethicon*** [1975] 1 All ER 504, consistently followed in Jamaica, laid down the guidelines, along which a learned trial judge should proceed. He maintained that "the court ... must be satisfied that the claim is not frivolous nor vexatious, in other words, that there is a serious question to be tried." The restraint that he placed on a judge, were contained in his words, at page 510. He said:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

The learned trial judge in the instant case held that there was a serious question to be tried and that damages were inadequate to compensate the appellants if he ultimately succeeded at the trial. At page 141 of the record she said:

> "... 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."

In our view there was material before the learned trial judge to cause her to conclude that this was a case of uncompensatable disadvantages and therefore damages would not be adequate. She was therefore correct to consider the balance of convenience.

On the evidence adduced before the learned trial judge both properties, lots 57 and 28, because of the undulating terrain, would be subject to flooding in the event of a heavy downpour of rain. In respect of the respondents' lot 28, their expert witness, David Abrikian, at page 25 of the record said:

> "The main cause of the drainage problem lies in the fact that the terrain is such that the land at the rear of the lot has an adverse slope, which gives rise to ponding in the area, as rainwater run-off becomes trapped in the region. This is evidenced by numerous residual indications of water that have collected there in the past.
>
> This situation is of crucial importance to residents of the premises, because the floor level of the building is only marginally above the land in this location, and the slightest amount of ponding immediately threatens the residents with the possibility of flooding."

and at page 26:

> "When the house had originally been constructed, the developers had installed a concrete slab on the ground at the rear of the structure, apparently to assist with the run-off from the premises. This slab had however been sloped adversely, and had contributed to, rather than diminished the amount of ponding taking place. The poorly sloped concrete had not only prompted the flow of water in the wrong direction, but had also hindered the collected water from being absorbed by the ground. ...
>
> There is, without any doubt, a drainage problem at No. 28 Cave Hill Boulevard.
>
> This is caused by an unfinished and improperly graded land surface in the lot, and is further complicated by the finished floor level of the house, which being only marginally above the affected sections of land, poses a real threat of flooding whenever there is any significant rainfall.
>
> An essential requirement of any scheme of this kind, that contains finished dwellings, is the adequacy and functionality of both the individual and public drainage arrangements within the scheme. It cannot be denied that there is an obligation on the part of all developers to ensure that these, among the other aspects of construction, are satisfactorily established prior to the houses being made available to the public."

In respect of lot 57, Major Hall, at page 73 said:

> "4. Lot 57 slopes drastically towards its back in the following manner: from West Cave Hill Drive to boundary wall adjoining Lot 28 Cave Hill Boulevard – five feet (5-0"); from the floor level of Lot 57 West Cave Drive to back of property -three feet (3'.0). ...
>
> 6. The soil type is a mixture of marl and dirt topsoil. The general area shows hardened Limestone rocks much like the entire Hellshire. This does not allow percolation except where natural sinkholes occur in

> the rock. This is caused by openings between pieces of rocks."

He was of the opinion that:

> "5. If storm water is allowed to flow through lot 28, it would not cause flooding on the said property, if properly channeled into an open drain. ...
> An opening in the wall between lots 28 and 57 [should] be permanently created to alleviate the possibility of flooding in lot 57."

The evidence indicates the degree of danger of flooding that is capable of being suffered by both parties in respect of their respective lots 57 and 28.

The learned trial judge sought guidance from Lord Diplock in ***American Cyanamid*** (supra) in seeking to find where the balance of convenience lay. Lord Diplock said at p. 511:

> "Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and 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 where 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. The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case."

Mangatal, J may have been correct, having examined the covenants, to find that the appellant's claim to an easement over the land of the respondent was unlikely to succeed.

Covenant 2 addressed itself to the restraint required in the disposal of bath and domestic water; storm water was excepted from the restriction. Consequently, the learned trial judge was correct to address her mind thereafter to the common law position. In ***Home Brewery Co. Ltd v William Davies & Co. (Leicester) Ltd*** [1987] 1 QB 339 (Piers Ashworth, Q.C., sitting as deputy High Court Judge) said at page 349:

> "...the ... rule is that the lower occupier has no ground of complaint and no cause of action against the higher occupier for permitting the natural, unconcentrated flow of water, whether on or under the surface, to pass from the higher to the lower land, but that at the same time the lower occupier is under no obligation to receive it. He may put up barriers, or otherwise pen it back, even though this may cause damage to a higher occupier."

In the instant case, the learned trial judge was correct to hold that on a view of the affidavit evidence, the respondents, by their action on their land were not shown to be clearly unreasonable.

The appellants, in their pleadings rely on a breach of the covenants and the agreement with the respondents' predecessor in title, Mr. Beaver, to support their application for an injunction until trial. This oral agreement was not supported by writing, was in personam and therefore cannot bind the respondents. In ***Hill v Tupper*** (1863) 159 ER 51, Pollock, C.B. with whom Martin, B. agreed said, at page 53:

> "A grantor may bind himself by covenant to allow any right he pleases over his property, but he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for an infringement of ... a limited right..."

The covenants 2 and 6 do not appear to avail the appellants' contention of a right to run the storm water from their land onto that of the respondents. Neither may the oral agreement between the appellants and Mr. Beaver to which the respondents were not parties, bind the land of the respondents.

The strength of the respondents' case therefore seems to out-weigh that of the appellants, as the learned trial judge so found.

There is a serious question to be tried. Both the interpretation of covenants 2 and 6, as they relate to the proprietors of land in a development scheme in respect of the discharge of storm water, requires further mature considerations of law. The common law rights existing between adjacent landowners in such a development scheme, in addition, needs such consideration.

The balance of convenience, in our view, due to the circumstances of this case, favours the refusal of the injunction at this preliminary stage. These matters are best resolved at trial when the respective rights of the parties may there be ascertained.

The appeal is accordingly dismissed the order of Mangatal, J., is affirmed with costs to the respondents.

SMITH, J.A.

I agree.

COOKE, J.A.

I agree.

HARRISON, P.

ORDER

Appeal dismissed. Order of Justice Mangatal affirmed. Costs to the respondents to be agreed or taxed.