

Minister for Water Supply, Sewerage & Drainage
and
Greenwood — Plaintiff vs. Defendant
4/8/22

The Chief Justice. In this case the plaintiff sought to recover damages in respect of a flooding of his land which he alleged to be due to the conditions brought about by the discharge from a drain constructed by the defendant.

The defendant denied that the damage which was admitted by him had been caused to the plaintiff's land by some cause or other, was due to his drain.

When the matter came on to be heard a mass of evidence was put forward on both sides consisting largely of theories to account for the presence of the water which had done the damage to the plaintiff's land, and on that evidence the learned Chief Justice, after hearing all the witnesses came to the conclusion which he has expressed. In view of the need of the plaintiff for his conclusion he said, in effect, this — "Whatever the cause may be (that is the cause of the rising in the water level) it seems to me to be clear that the underground drain was called upon to carry away more water than it was capable of taking and the result was the damming back of water and the flood, etc. in the pool at Jolimont which got above the surface in 1908."

That is dealing with the condition independent of the construction of the drain by the defendant.

"Then came the discharge from the drain of a vast amount of water which largely increased the ~~low~~ water which the Channel (that is the underground channel) was expected to carry away and it seems to me to be immaterial whether the water reached the subterranean water level from the ditch or (over)

from the dump because the result would be the same in either case. The effect was to further dam back the water which was coming down from Jolimon and to cause land including I think the plaintiffs' which would not otherwise have been reached to be flooded. Probably also it increased the amount of water in Shenton Park but that would depend of course on the exact position of the obstruction. But although in my opinion the main cause of the rise of water of Jolimon was the damming back which was effected in the way I have indicated I think that some water found its way directly from the drain to Jolimon itself although that water alone would not have been sufficient to cause the damage which has been done ^{to the} plaintiffs."

So it is quite clear the learned Chief Justice found that water actually proceeding by percolation from the drain to Jolimon contributed to the damage sustained by the plaintiffs. Now on that point Dallas James has very fairly — and I don't think he could have avoided it — says he must admit and has admitted that if that finding is justified by the evidence that water going directly by percolation from defendants' drain to the plaintiffs' land did contribute to the damage he cannot claim judgment. So the final question is if there was evidence to support that ~~finding~~ conclusion.

Briefly put the evidence for the plaintiffs might be summarised in this way. There were two sources north of the plaintiffs' land from which this water might have come. The plaintiffs' witnesses excluded both these. They gave evidence which if believed and acted upon showed that the water could not have come from these. No suggestion was made that the water might have come because of the alteration in the surface catchment area; they negatived that also by their evidence. Then they said, having negatived those three, in fact the only place it could have come from — the place for it to come from is this open drain at a considerably higher level than Jolimon, and they have indulged in a certain kind of theory or speculation by assuming the water got

(3)

from that drain to Jolimon. That was not by a theory or speculation on the other side showing that it did not. The main contention put forward being that if the water did get from the drain to Jolimon it must have appeared in some of the wells between the drain and Jolimon and it is said the evidence called by the defendant negated that possibility. But as I have pointed out there was evidence which apparently the learned Chief Justice accepted . . .

. . . that the water flowing by percolation from the drain to the inundation at Jolimon and it is obviously open also to the learned Chief Justice sitting as a jury and considering the case as a jury to give some weight to the fact that there was no water at this place before the drain was made but that it came there after the drain was made and that this inundation coincided with the institution and increase to their drain.

Taking all these circumstances into consideration and taking into consideration also the views put forward on the other side to account for this were theoretical - nobody could see whether the water flowed there or not. - I think there was evidence upon which the Chief Justice was justified in arriving at the conclusion he did and that the appeal ought to be dismissed.

I ought to have mentioned that the amount of damages has been fixed on the basis that the land was rendered valueless ^{and} by arrangement between the parties the plaintiff was to transfer the land to the Crown and Sir Walter James has stated that he does not take any exception to the amount of damages the liability of the defendant to damages also is established.

For these reasons I am of opinion that the judgment of the learned Chief Justice which was affirmed by a majority of the Full Court was correct and that the appeal ought to be dismissed.

Higgins J.: I concur with the Chief Justice in his judgment and his reasons and agree that the appeal should be dismissed - I want to add that no objection has been taken to the form of the judgment given - The judgment that plaintiff recover £340 and transfer the land to the defendant. There is no record found of ^{that occurred} ~~that occurred~~ ^{was to be} ~~was to be~~ ^{compromise} between counsel that if the defendant ~~was to~~ ^{was to} ~~compromise~~ for the injury done he was to take the land from the plaintiff - Prima facie there was no jurisdiction to make such an order if one looks at the pleadings.

The only question is whether there was any evidence that the defendant was to blame for the injury or not - I agree that there was evidence.

Gavan Duffy J.: I also agree that the appeal should be dismissed and I think it should be expressly stated that in dismissing the appeal we do not decide any point of law.

C. J. Appeal dismissed with costs.

Keenan: Reserve costs?

C. J.: Are matters costs of the appeal

Gavan Duffy J. Doesn't that satisfy you