THE HIGH COURT ON CIRCUIT

Record Number: 998/03

SOUTH EASTERN CIRCUIT COUNTY OF WATERFORD

BETWEEN

OLIVER DEMPSEY AND ELIZABETH DEMPSEY

PLAINTIFFS/RESPONDENTS

AND
WATERFORD CORPORATION

DEFENDANT/APPELLANT

Judgment of Mr Justice Michael Peart delivered on the 29th day of February 2008

1. The plaintiffs are the owners of an old 17th century building at 1, Dyehouse Lane in the City of Waterford, which they purchased in about 1984 and which in more recent years they have renovated and restored and now use as their home. The first named plaintiff is an architect by profession.

2. The plaintiffs' living room has a parquet floor which was not laid until they were absolutely certain that there was no moisture in the surface on which that was to be laid since moisture can cause the floor timbers to swell and buckle.

3. On the 3rd March 2000, the plaintiffs' discovered without any warning that the entire parquet floor had buckled. The room had also a noxious smell. Investigations by the first named plaintiff showed him that there had been an inflow of water beneath the floor, and that it was sewage water which had somehow entered his premises underneath this floor area. He carried out his own investigations as did the defendant local authority after the problem was brought to their attention. Mr Chris O'Sullivan, an engineer in the employment of the defendant has stated that when the complaint was received the manholes on Dyehouse Street outside the plaintiffs' house were inspected, and no problem was identified there. Following that inspection a test referred to as a dye test was carried out. That test involved running water containing a dye through the pipe in that street in order to see whether in due course any of the dyed water could be found to have entered the plaintiffs' living room area. None was found to have done so.

4. The plaintiffs' arranged to excavate their own floor in order to see if there was anything beneath which could have caused the ingress of water since the examination of the defendant's drain pipes on the street has revealed no problem which could be linked to the problem within the house. That excavation revealed that there was a very old 17th century drain or culvert beneath the room and which ran out in the direction of the street outside. That culvert or drain has been referred to in the evidence as a French drain. It is not a pipe as such but rather is made of old bricks. The defendant on being informed of the existence of this culvert beneath the plaintiffs' house carried out some excavations outside the house and discovered that this structure continued out of the house and into an equally old culvert under the pavement and which in turn ran down Dyehouse Street in the direction of Grattan Quay and the river. Further investigations revealed that this old culvert was completely blocked such that a very powerful jet used by the defendant in an attempt to clear it failed completely to do so.

5. Everybody is agreed that the water penetration beneath the plaintiffs' living room floor resulted from water entering the premises via this old culvert. The plaintiffs have lived in this house since 1984 and have never had such an incident before, although in evidence it was stated that there had been a previous similar complaint but it is quite clear that that complaint related to an entirely problem in a different area of the house and there is no suggestion that the two incidents are in any way linked.

6. Of central importance is the fact that around the time of this incident the defendant was carrying out or had recently carried out major sewage renewal works on Grattan Quay. It appears that due to population increase a programme of sewage drain upgrading was undertaken and this involved the re-laying of the main sewer along Grattan Quay, and the reconnection into that new main sewer of all branch pipes or tributaries which connect into that main sewer on Grattan Quay. One of those branch sewers was on Dyehouse Street. That branch sewer on Dyehouse Street was the drain in which the dye-test had been carried out and which revealed no seepage to the plaintiffs' house. It was clear that there was no defect in that pipework which could have caused the problem in the plaintiffs' house.

7. Mr O'Sullivan has stated that the defendant was never aware of the existence of this old French drain beneath the pavement and which in the past must have serviced the plaintiffs' house. It does not appear on any map or any of the defendant's records. He is of the view that there are probably a very large number of these old drains beneath the surface of the city which they are completely unaware of. However, since the investigations carried out showed that the water had entered the plaintiffs' house by way of this old culvert the defendant decided that in order to assist the plaintiffs it would simply divert it into the new sewer pipe which they had laid on Dyehouse Street, and the problem disappeared completely thereafter.

8. The defendant however does not accept that what happened to the plaintiffs was due to any negligence or fault on the defendant's part since it was completely unaware of the existence of this old pipework and could not have foreseen that it was there. The plaintiff on the other hand submits that it was incumbent on the defendant when reconnecting all the branch sewers and drains into the new main sewer on Grattan Quay to ensure that all branches were reconnected, including that which caused the problem to the plaintiffs. Mr Bernard Harte, an engineer called on the plaintiffs' behalf has given it as his opinion also that it was the duty of the defendant to ensure that all such branch drains were properly reconnected into the new main sewer.

9. Nobody is quite sure why following the work carried out to the main sewer on Grattan Quay, this old pipe, for the first time since the plaintiffs came to live in this house in 1984, filled up so that water backed up the 70/90 metres up Dyehouse Street and escaped into their house. But it seems to be clear that water must have backed up in the old culvert, whereas previously whatever water was within the culvert flowed down Dyehouse Street and either entered the old sewer drain or entered the river adjacent to Grattan Quay successfully. No further investigations have been carried out to see why the old culvert no longer empties as previously, but the plaintiffs ask the Court to infer that whatever works were carried out on the main sewer failed to identify this drain and that it was not connected into the main sewer when it ought to have been, or else whatever works were done caused its exit to the river to be interrupted causing whatever water was in it to back up to the point where the old culvert entered the plaintiffs' house, and then to enter the house as happened for the first time on the 3rd March 2000. There is no hard evidence. There is speculation in this regard, but the plaintiffs emphasise the coincidence in time between the defendant's sewage works on Dyehouse Street and below on Grattan Quay, and the ingress of water on the 3rd March 2000, and the fact that it had never happened before. They ask the Court to conclude as a matter of probability that these works, for whatever reason as yet undiscovered, caused the problem.

10. As I have said the defendant denies liability for the moisture which entered the plaintiffs' house, and say furthermore that when the plaintiffs carried out their renovation works to their house they ought to have complied with building regulations by putting in a

vertical damp proof course (DPC) along the wall which abuts the pavement in Dyehouse Street since the pavement which has a significant gradient is higher that the floor of the living room area described. This vertical DPC would then have joined with a horizontal DPC preventing any dampness or other moisture permeating the wall of the house abutting the pavement. The plaintiffs say that those Regulations apply to the building of new houses and in any event there had been no problems since 1984.

Conclusions
11. I am satisfied that the plaintiffs are not to blame for the damage to their living room floor. I think the reference to the Building Regulations is a 'red herring' really. I have certainly not been satisfied by any evidence that these regulations apply to the renovation works carried out by the plaintiffs, and neither have the regulations themselves been opened to the Court.

12. Similarly I am not satisfied by the evidence which I have heard that the application of a vertical damp proof course to the exterior of the plaintiffs' wall abutting the pavement on Dyehouse Street would have successfully prevented the seepage of water via the old culvert into the plaintiffs' living room. There is no firm evidence that this would have blocked the culvert which ran from the plaintiffs' house into the old drain under the pavement. I do not have any evidence to assure me about that as a matter of probability.

13. It is trite law to state, as I should nevertheless, that the Court must make conclusions of fact based on a balance of probabilities. In my view the timing of the inflow of water on 3rd March 2000 in such close proximity to the carrying out of major sewage replacement works on Grattan Quay, and the reconnection of all branches into that main sewer line is, in some as yet undiscovered way, the probable cause of water backing up in the old culvert and entering the plaintiffs' house. It can only be speculation, but in my view it reasonable to infer that whatever works were carried out downstream from the plaintiffs' house were done in such a way as to impede the exit of such water as continued to flow in the old culvert into the river or the drain. It is possible that the old culvert drained into the old sewer on Grattan Street and was not reconnected into the new sewer. Alternatively, and in my view more probably, the old culvert drained directly into the river, and that for some reason, since the culvert was not known to exist, that exit to the river became obstructed or damaged during the carrying out of the works, and this caused whatever water was accustomed to flow in it down Dyehouse Street to simply back up as far as the branch into the plaintiffs' house. It is significant that as soon as this culvert was diverted into the branch sewer on Dyehouse Street the plaintiffs' problem disappeared as quickly as it had happened.

14. As a matter of probability the cause of the damage to the plaintiffs' house was the failure to connect this old culvert into the new mains or the blocking or damaging of the old culvert during those works. The Court has no evidence from which to conclude which is the precise cause since those investigations have never been carried out, and understandably so, since the problem has been simply solved by the diversion carried out into the branch sewer on Dyehouse Street.

15. However, the finding that the defendant's works is the probable cause is not the end of the matter as far as fixing the defendant with the liability to the plaintiffs for the damage thereby caused.

16. The plaintiff' case is pleaded in negligence, breach of duty, including statutory duty, trespass, nuisance, and on the basis of the principles in *Rylands v. Fletcher*.

17. I am not satisfied that the defendants are in breach of duty, including statutory duty, nor in trespass. The issues to be considered are whether the defendant has been negligent in the legal sense, and/or whether they are liable in nuisance, including by reference to the related *Rylands v. Fletcher* principles. In opening the case, Mr Maher stated that while the case was brought under a number of headings, negligence was the main issue, but nuisance is also relied upon.

18. Having heard this case while on circuit in Waterford, I reserved my judgment and indicated that I would give my decision in due course in Dublin. While considering my judgment, and having prepared it in part in relation to conclusions already set forth above, I listed the case for mention and invited submissions in relation to matters not addressed in argument before me, principally the impact of the judgment of Keane CJ in *Glencar Exploration Ltd and anor v. Mayo County Council* [2002] 1 ILRM. 481 in relation to the issue of negligence. Those submissions were in due course made to me, and the Court was provided also with helpful written submissions by both parties.

Negligence
19. Prior to Glencar, the law was that in order to recover damages in negligence, a plaintiff was required to first of all establish that a duty of care was owed to the plaintiff; secondly that there was a breach of that duty of care; thirdly that the injury caused either to the person or property resulted from such breach. If the plaintiff succeeded in establishing these matters, then, unless there was some countervailing public policy consideration of sufficient strength, an award of damages would follow – see *Ward v. McMaster* [1988] IR 337. The question of whether there existed a duty of care involved the issue of the proximity of the parties. The second question regarding a breach of that duty involved the issue of foreseeability of the damage which occurred to the plaintiff. *In other words was it reasonably foressseable by the defendant that if they did not take reasonable care in the manner in which it carried out the works on Grattan Quay, that water could back up in this old culvert/French drain and cause damage to the plaintiff's house?*

20. Only after those matters were established did the question arise as to whether there was any sufficient public policy consideration which ought to exempt the defendant from liability.

21. In his judgment in *Glencar*, a case against a local authority, though admittedly a case involving a claim for recovery of pure economic loss, Keane CJ took the opportunity of reformulating the law of negligence in this respect in line with English authority. Having extensively considered the development of that line of authority, he stated:

> *"There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of 'proximity' or 'neighbourhood' can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff, as held by Costello J at first instance in Ward v. McMaster, by Brennan J in Sutherland Shire Council v. Heyman and by the House of Lords in Caparo Industries plc. v. Dickman. As Brennan J pointed out, there is a significant risk that any other approach will result in what he called a 'massive extension of a prima facie duty of care restrained only by undefinable considerations..."*

22. Thus an additional test must be applied, even where a duty of care and a breach of it has been established by reference to proximity and foreseeability, namely "*whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff*".

23. Mr Maher for the plaintiff has submitted that since Glencar was a case involving pure economic loss, this passage of the learned Chief Justice's judgment should be regarded as obiter, and should not be extended to cases where a claim arises from personal injury or injury to property. My view in relation to that submission is that while Mr Maher is correct in identifying that distinction between that case and the present one, it is nevertheless a strong restatement of the law in relation to the duty of care in the context of a claim against a local authority, and I see no reason why it should not equally apply to a case such as the present one. Indeed, I have followed it myself in *Gaffey*, a *minor v. Dundalk Town Council*, unreported, High Court, 5th December 2006, a personal injury case.

24. In his written submissions, Mr Maher has stated that by the time the Court requested submissions to be made, the Court had reached a conclusion, *inter alia*, that the "*Court was satisfied that the question of proximity and foreseeability of damage had been established*". I do not believe that this is correct in so far as foreseeability is concerned. What I have concluded thus far is that "*as a matter of probability the cause of the damage to the plaintiffs' house was the failure to connect this old culvert into the new mains or the blocking or damaging of the old culvert during those works*". I have also concluded that the plaintiffs are not guilty of any contributory negligence. But the issue of foreseeability needs to be examined further, since until this damage to the plaintiffs' property was in the legal sense foreseeable, the other steps to be taken under Glencar do not come into play at all.

25. Nevertheless, Mr Maher has submitted that even if he is required to go further than establishing proximity and foreseeability, and establish that it is just and reasonable in all the circumstances that a duty of such scope should be imposed upon the defendant local authority, the Court should be so satisfied, particularly since, he submits, the defendant did not either in cross-examination or in its evidence, put in issue the question of negligence or breach of duty. He submits that the defendant defended the case on four bases, namely that the damage was not caused by an ingress of water but rather by 'damp'; that the drain in question had become blocked over a number of years; that the ingress of water into the plaintiff's premises was not due to any activity on the part of the defendant; and that the ingress of water was the plaintiff's own fault for failing to damp-proof his own premises.

26. He submits also that the plaintiff's engineer was not challenged in relation to his evidence that ingress of water was caused by the absence of reasonable care on the part of the local authority in failing to ensure that pipes were not blocked during the course of carrying out the drainage renewal works on Grattan Quay.

27. In my view it is not correct to say that the defendant conceded in this manner suggested that it was negligent. Mr O'Sullivan of the defendant Council was quite clear that this culvert was something which they never knew existed on Dyehouse Street, that it is not marked on any maps in its possession, and was probably over laid down over three hundred years ago in the 17th century. He also stated that there are probably a great many of these lying under the city of Waterford from those days that nobody knows about. Negligence is denied in the Defence, and it cannot be inferred from the matters referred to by Mr Maher that because the plaintiff's engineer has given it as his opinion that the damage was caused by the defendant's negligence, that the Court's function in determining that issue has been ousted by a failure to challenge that assertion, even if that occurred. My notes do not confirm the situation one way or the other, but my clear impression is that negligence is denied, including on the basis that the Council did not know, and could not reasonably have known, of the existence of this old underground culvert.

Duty of care

28. There is no question but that the defendant Council owed a duty to the plaintiffs to take reasonable care not to damage their property. The question of proximity is thus easily determined.

29. That duty of care is to take all *reasonable care* in order to ensure that the plaintiffs' property is not damaged. The question of what amounts to "reasonable care" in the circumstances of this case must be considered, because unless the meaning of that term is in some way confined, this case would stand to be determined on the basis of strict liability, once proximity and loss have been established.

30. It is too general simply to conclude the matter by saying that the defendant must be taken to be aware that if they did not take reasonable care to ensure that unless they connected all the pipes and drains on Dyehouse Street into the new main sewer drain under construction, that damage to the plaintiffs' property could ensue. Everybody accepts that all pipes and drains which the defendant was aware of on Dyehouse Street were properly connected into the new drain on Grattan Quay. In my view, the fundamental question to be determined in relation to the extent of the duty of care in this case is:

> *"Did the duty of care owed by the defendant to the plaintiffs extend to considering that there could be pipes/drains on Dyehouse Street of which it was unaware, and which might require to be connected into the new system or otherwise dealt with, and if necessary, carrying out such investigative works as may be necessary to establish that there were none?"*

31. If it did reasonably extend that far, then there is no doubt that this was not done. Unless it is found to extend that far, the Court does not have to consider whether they were in breach thereof, and neither is it necessary to consider whether it was reasonably foreseeable that a breach of such a duty would result in damage to the plaintiffs' premises. It is sometimes easy to confuse foreseeability of damage with the consideration of proximity and the existence of a duty of care. But it must be remembered that foreseeability of damage resulting from a breach comes into play only where there has been found to be a particular duty of care and a breach of it. The question of whether it is just and reasonable that a duty of care of a given scope be imposed on the defendant comes into play only if a duty of care, a breach of same, and resultant foreseeable damage have been found.

32. Mr O'Sullivan, the defendant's senior drain engineer, has stated that the 17th century culvert located on Dyehouse Street does not appear on any of the maps of Waterford City, and that the Council was not aware of it, or of any other such culverts that may be underground in other locations in the city. While I cannot recall him specifically saying so in his evidence, it is a safe and reasonable inference that the only way in which this culvert could have been discovered was if Dyehouse Street had been dug up in its entirety prior to the completion of the reconnection of pipes and drains into the new system on Grattan Quay, and that this excavation be done on the off-chance that a culvert would be discovered. It must be borne in mind also that there has been no evidence that on any previous occasion the defendant was aware that such culverts existed. In my view in such circumstances, it is not reasonable that the Council's duty of care extended to an exploratory digging of Dyehouse Street in order to confirm the existence or non-existence of such a culvert that they had no basis for suspecting might exist.

33. Since I have so concluded, there can be have been no breach of a duty of care, and the further question of the foreseeability of damage to the plaintiffs' premises does not arise, much less the question of whether it is fair and reasonable that a duty of such a scope be imposed upon the defendant council.

34. I am grateful to all parties for the helpful submissions which I requested in relation to the judgment in Glencar. But in the end, it is unnecessary to determine the issue of negligence by reference to that decision, and I refrain from discussions its possible implications

in this case.

Nuisance
35. There remains the claim based on nuisance/*Rylands v. Fletcher* principles.

36. Mr Maher has submitted that nuisance should be understood as defined by Shanley J. in *Royal Dublin Society v. Yates*, unreported, High Court, 31st July 1997, namely:

> *"Private nuisance consists of any interference without lawful justification with a person's use and employment of his property."*

37. He has referred also to MacMahon & Binchy, *Law of Torts* (Butterworths) at p. 675 where the authors state that such interference must be an "*unreasonable interference with another person in the exercise of his or her rights generally associated with the occupation of property*".

38. In so far as the defendant may have submitted that when this ingress of water into the plaintiffs' premises occurred, the council was performing a statutory function and that therefore it should not be found to have committed a nuisance, Mr Maher submits that it cannot be said that in this case the ingress of water was an inevitable consequence of works done pursuant to its statutory function, and that the defendant cannot escape liability on that account.

39. Mark Flynn BL for the defendant submits that the issue of foreseeability has relevance also in relation to whether the claim based on nuisance should succeed in this case, and has submitted that since there was no negligence on the part of the Council it cannot be found guilty of creating a nuisance.

40. In my view, in this case, the finding that the Council was not negligent because it could not be expected to have foreseen or anticipated that this culvert might exist without digging up the entire street in question – an unreasonable expectation in my view – leads to the inevitable conclusion also that the Council is not liable in nuisance either. I can usefully refer to a passage in *Clerk and Lindsell on Torts*, Sweet and Maxwell, Eighteenth Edition, para 19-66 where it is stated:

> *"As the general rule is that no one is liable for nuisance unless he either created it or continued it after knowledge or means of knowledge, it follows that it is a defence to prove ignorance of the facts constituting the nuisance, unless that ignorance is due to the omission to use reasonable care to discover the facts."*

41. That statement is supported by authorities referred to in that same paragraph, to which it is unnecessary to refer in detail. The clear evidence in this case is that the Council was unaware that this culvert existed, and that it does not appear marked on any maps in the possession of the Council. In my view it had no knowledge of this culvert, and neither had it the reasonable means of being aware of it, since speculative excavation of the entire street on a 'just in case' basis is an unreasonable burden to impose on a local authority.

42. Neither can this claim succeed under the related basis of *Rylands v. Fletcher*. Even if this ingress of water resulted from an unnatural use of the lands, i.e. from a culvert placed thereunder, and even if the water in question fulfils the requirement that it was likely to do mischief if it escaped, and I refrain from deciding those questions finally, the absence of any knowledge on the part of the Council of the existence of this potential mischief removes the claim from the principles derived from *Rylands v. Fletcher*, particularly in the circumstances of this case where it cannot with any reality be stated, in the light of that ignorance, that the Council brought the substance onto its lands.

43. I therefore vacate the order of the learned Circuit court judge and dismiss the plaintiffs' claim.