THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NUMBER SLUHCV 1998/58

BETWEEN

J. B. JULIAN

Claimant

AND

BERNADETTE BOBB

Defendant

Appearances:

Mrs. Shirley Lewis for Claimant

Mr. Baden Allain for Defendant

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2005: February 24

March 4

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JUDGMENT

Introduction

1. Shanks J: The parties are neighbours in New Development, Soufriere. In 1995 the Defendant built a raised wooden apartment at the front of her property. The Claimant says that this apartment trespasses onto his land and causes a nuisance in that rain water overflows from the roof of the apartment onto his land and that it deprives his property of light, privacy, ventilation and a view. He seeks an order that it should be removed as well as damages. The Defendant denies that her building trespasses onto his land or that it constitutes a legal nuisance and says in any event that she has complied with various recommendations of the DCA issued in 1997 such that any problem has been alleviated.

2. This action was started in 1998 but unfortunately it has taken until 2005 for it to come to trial. It is also unfortunate that, although Saunders J ordered in May 2002 that the parties should agree on a surveyor/assessor to visit the site and report on the extent to which the Claimant's allegations were factual and on rectification measures, no such agreement was reached. In the event I heard evidence from the parties and from Tedburt Theobalds a valuation surveyor who made a report on behalf of the Claimant alone in October 2003. I also received some very helpful and fair written submissions from Mrs Lewis for the Claimant.

## Factual background

3. The Claimant has owned his property since 1985. He lives in London and the longest he has stayed at the property was for three months in 1995. He visits two or three times a year and rents the property to his sister.

4. The Defendant built her main house in 1993. According to the DCA (see letter 25 February 1997) the wooden apartment was added in August 1995 and measures 10 by 18 feet. It includes a staircase and veranda at the front. There are a number of photos attached to Mr. Theobald's report which show the structure and its relationship to the Claimant's property. Because it was less than one third the size of the existing building she did not require planning permission for it but, according to the DCA letter, it was built directly on the boundary line when it should have been set back at least 10 feet (they may mean 5 feet but the point remained unclear). The Defendant told me (and I accept) that she checked whether she required planning permission for the extension and was told that she did not and that she was unaware of any set back requirement.

5. The Claimant heard of the extension in June 1996 and wrote a letter "to whom it may concern" stating that the guttering of the new building was overhanging his land and that the building should be removed. The Defendant denied receipt of this letter and since it was not expressly addressed to her I accept her evidence about this. The Claimant wrote again in September 1996 and the Defendant replied promptly: she admitted that the guttering was overhanging but denied that any water fell on his land

or that any harm resulted. She stated that to remove the apartment would cost her dearly and she invited the Claimant to come to some other agreement.

6. The Claimant did not accept that invitation and instead pursued matters with the DCA. The DCA pointed out to him that the Defendant had not required planning permission and that because more than six months had passed since construction they could not take enforcement action anyway. However, having investigated matters they wrote to the Defendant on 9 May 1997 pointing out the violation of the set back requirement and asking her to take "mitigative measures", namely the removal of all openings on the façade of the building facing the Claimant's property and the removal of the overhanging guttering and its replacement with a flush eave. It is the Defendant's case that she complied with these requirements.

7. In a witness statement dated 21 November 2002 the Claimant says that since the hearing of his claim had been delayed he had gone ahead and concreted the area beside the overhang and built a small drain "so as to alleviate the dampness and mould" from the area. There was no evidence as to exactly when this step was taken. The statement goes on to say that there is still a problem with privacy and light and that he wishes the apartment to be removed from its present location "as it is unlawfully erected".

Trespass

8. As I have indicated, there is no doubt that the Defendant built her apartment right up to the boundary line and not 5 or 10 feet back from it. I have not been shown the legal basis for the "set back" requirement and in any event I am not aware that a breach of such a requirement would give rise to a claim for trespass (or nuisance for that matter). Nevertheless the Claimant says that the Defendant's building actually encroaches onto his land.

9. The Defendant's evidence was that the pillars and the side wall of the apartment do not trespass onto the Claimant's land but are standing directly above a separate wall belonging to her which she had built directly adjacent to the Claimant's own boundary wall. Although Mr. Theobalds only remembered one boundary wall, I am satisfied that

the Defendant's evidence about this is correct: I base this on my own reading of the photos (which are admittedly not the clearest) and, more importantly, on the Claimant's own admissions when I was questioning him and on the fact that the real complaint in his correspondence and statements relates to the overhanging gutter rather than an encroachment by the wall or pillars.

10. There is no doubt that at the outset the guttering was encroaching into the Claimant's land: the Defendant admitted as much in her letter to the Claimant dated 23 September 1996. The Claimant admitted that the guttering had been changed after the DCA became involved but he stated that it still overhangs the boundary line. Again based on my reading of the photos and on the fact that it is admitted that the wall of the apartment is right on the boundary line, I am satisfied that the guttering along the side of the apartment does still encroach onto the Claimant's land. This, however, is the extent of any trespass by the Defendant.

## Nuisance

*Water*

11. Mrs Lewis referred me to Art 485 of the Civil Code which provides that "roofs must be constructed in such a manner that the rain falls from them upon the land of the proprietor. He has no right to make it fall upon the land of his neighbour". I take it from this provision that if a roof is constructed in such a way that rain does fall on the neighbour's land that would constitute an actionable nuisance under the law of St Lucia.

12. The Claimant's evidence (para 8(2) of his 2004 witness statement) is that when it rains heavily the rain overflows the Defendant's gutter and falls onto the side of his property which causes damp and mould making the bedrooms on that side uninhabitable. I do not doubt that when it rains heavily more rain falls on the Claimant's property than would otherwise be the case but I am not persuaded that this makes more than a limited difference to the condition or enjoyment of his property. The matter was not really explored in evidence but I base this conclusion on the Claimant's witness statement dated 21 November 2002 to the effect that he had concreted the area of the overflow and built a drain into which the water flows so as to alleviate the damp and mould and on Mr. Theobalds' evidence in his report (para 3.2) that the building is "in a

good condition, structurally sound and well maintained". It is right to say that Mr. Theobalds gave evidence that the photos show moss and mildew on the wall resulting from water overflowing from the Defendant's roof but I am unable to see what he is referring to in the photos and I take the Defendant's point that rain no doubt also overflows from the Claimant's own roof when it rains heavily.

*Light*

13. It was not disputed that the Defendant's apartment reduces the light which formerly fell on the eastern side of the Claimant's property. However, it is well established in English law (which I take to apply in St Lucia in this case by virtue of Art 917A of the Civil Code) that there is no general right to light and that a claim of this nature can only arise by virtue of the establishment of an easement of some kind (see Halsbury's Laws Direct *Easements and Profits A Prendre* para 222). No evidence or submissions in relation to any such easement were addressed to the court and I therefore reject any claim for loss of light.

*Privacy*

14. The Claimant's evidence (para 8(5) and (6) of 2004 witness statement) is that there are two windows in the apartment which overlook his bedroom and that the stairway and veranda look directly over bedrooms, the backyard and the back door which leads to his kitchen. The Defendant gave evidence to the effect that she had blocked out the windows facing the Claimant's property with plywood (and indeed built a fixed cupboard behind one of the windows) in compliance with the DCA's recommendations. I accept that evidence. In spite of this, I do not doubt that the stairway and veranda still provide a view which disturbs the privacy of those using the Claimant's property.

15. Art 484 of the Civil Code provides that a proprietor of a wall which is on or within three feet of a boundary can only have openings for windows if no view can be obtained through them. In the light of my findings above this provision has not been breached since the DCA recommendations were adopted by the Defendant though I would be inclined to grant an injunction to make sure that the Defendant does not breach the Article in future. As to the stairway and veranda, an invasion of privacy is not an actionable nuisance in English law in itself (see Halsbury's Laws Direct *Nuisance* para

28): in the circumstances I reject any claim for loss of privacy based on the stairway and veranda.

*Ventilation*

16. There was little evidence about loss of ventilation but I have no reason to doubt that the Claimant's property has lost some. However, this again is not an actionable nuisance in English law (see: Halsbury's Laws Direct *Nuisance* para 26 note 3) and I therefore reject this claim.

*View*

17. Again there is little evidence about loss of view save that the Claimant says that he can no longer see the nearby trees. However, again, the loss of a view is not an actionable nuisance in English Law (see: Halsbury's Laws Direct *Nuisance* para 28).

## Conclusion on liability

18. My conclusion on liability is that the Defendant is liable in trespass in respect of the guttering which encroaches onto the Claimant's land and liable in nuisance in respect of the additional rain which falls onto the Claimant's property as a consequence of the position of her apartment and for the limited difference this makes to the condition and enjoyment of the Claimant's property but that she is not otherwise liable to the Claimant, except for the limited past contravention of Art 484 of the Civil Code.

## Remedy

*Injunction*

19. The Claimant seeks an injunction requiring the removal of the Defendant's apartment and I doubt whether it would be practicable to eliminate the encroachment or nuisance without taking this radical step. It was not disputed by Mrs Lewis that the court is not obliged to grant an injunction requiring the trespass and nuisance to cease but can award damages in lieu if appropriate. In this case I think it would be appropriate to grant damages in lieu of an injunction for the following reasons: (1) the building has now been in the same position for nearly 10 years (2) the extent of the trespass and nuisance and the damage caused by them are small compared to the cost of removing

the building (3) the Defendant took reasonable steps to comply with the recommendations of the DCA and indicated a willingness to negotiate with the Claimant from the outset and (4) I think damages in lieu would represent an adequate remedy.

*Damages*

20. It follows that I must assess both damages for loss already incurred and damages in lieu of an injunction.

21. As to the past, the primary head of loss may have been the cost of taking the measures to concrete and provide a drain in the area where the Defendant's roof leaks water onto the Claimant's property. However, no evidence was given as to the cost of this work and it was not clear that it was entirely the result of the nuisance caused by the Defendant. The Claimant also said that he had spent $16,000 on air fares visiting St Lucia solely to deal with this matter; I do not accept that his visits were solely to deal with this matter and in any event such costs should form part of the legal costs; the latter comment also goes for the fees of $1,500 paid to the appraiser. I accept that some additional damp may result from the water nuisance but I was not provided with any detail about this or any costs of rectification. There was no detailed evidence about the windows or the effect their existence had on the value or enjoyment of the Claimant's property. There was therefore no substantial evidence as to past loss although I am satisfied that some damage has been suffered and the trespass gives a right to damages in any event.

23. As to damages in lieu of an injunction (which are designed to compensate for the fact that in the absence of an injunction the limited trespass and nuisance will continue) prima facie these would be equivalent to the loss in value of the property as a consequence of the trespass and nuisance (not the existence of the neighbouring building *per se*) or the price the Defendant would have had to pay the Claimant for the right to commit these torts. Mr Theobalds' report says at para 3.3 that the erection of a building on a dividing wall can affect the market value of a property but he does not seek to ascribe any value to the effect in this case and in any event he does not recognise the distinction between the effect of the torts and the existence of the building itself.

24. I am therefore left with no hard material with which to assess damages either past or in lieu of an injunction. Some damage has been suffered however and it seems to me that I will have to do my best without giving the Claimant any advantage from his failure to bring proper evidence to court. The figure I assess to cover all damages is $5,000.

Result

25. I therefore refuse the claim for an injunction save that I will order that the Defendant must not open any window in the side wall of her apartment facing the Claimant's property. I award damages in the sum of $5,000 for past loss and in lieu of an injunction requiring the removal of the apartment. I will hear the parties on costs; at the moment I am inclined not to award the Claimant any costs because he has achieved a pretty Pyrrhic victory and he did not respond to the Defendant's invitation to reach agreement back in 1996.

Murray Shanks
High Court Judge (Acting)