THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NUMBER SLUHCV 1995/0031

BETWEEN:

THERESA PLUMMER

Claimant

AND

RENEE EDWARD

Defendant

Appearances:

Mr. Dexter Theodore for Defendant
Mr. Oswald Larcher for Claimant

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2005: MARCH: 1, 4, 10

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JUDGMENT

## Introduction

1. The Defendant is the owner of 0.6 hectares of land at Moulin-a-Vent registered as parcel 1254B 329. The land is bounded to the south by the Monchy high road with a frontage of about 100m. He purchased it in 1970 and it remains undeveloped and wild. The Second Claimant is the owner of parcel 1254B 847 which lies to the east of the Defendant and also has a frontage to the high road. To the north of the Second Claimant's land lie parcels 1254B 524, 525, and 526, which are owned by the Fourth, Third and First Claimants respectively. The western boundary of each of those lots also forms part of the eastern boundary of the Defendant's land.

2. Parcels 524, 525 and 526 are effectively "land-locked" and it is common ground that there is a 5 foot wide right of way which runs through the Second Claimant's land and parcels 524 and 525 giving access to parcel 526 along the Defendant's eastern

boundary. This case is about a "motorable" road which (roughly speaking) follows the right of way. The Claimants say that the Defendant agreed to this road being cut in 1991 and widened and repaired in 1994. The Defendant denies that he ever agreed to a road along the existing alignment which he says passes through his land.

3. The case arises because in 1994 the Defendant took steps to prevent the road being used by the First Claimant. She obtained an injunction from Matthew J in December 1994 which had the effect of preventing the Defendant interfering further with her use of the road. (Strictly speaking this was in separate proceedings (case 947/1994) but in effect it was an interlocutory injunction in these proceedings, albeit it has been in force for the scandalously long period of over ten years).

4. The First Claimant seeks the continuation of that injunction and claims damages in respect of damage which the Defendant did to a bridge carrying the road across a small ravine running through his land and for delay she suffered in building works she was carrying out on her land in 1994 as a consequence of the access road being impassable. She also seeks a contribution she says the Defendant agreed to make to survey costs in relation to the road in 1994. It is not entirely clear what claim the other Claimants make though the Second Claimant told me in evidence that she was concerned about the position of her boundary with the Defendant and I suppose the Fourth and Third Claimants would have an interest in whether the existing road can continue to be used though I am not sure they are still owners. The Defendant counterclaims for an injunction to stop the First Claimant trespassing on his land by using the road and for damages.

5. Rufinus Baptiste was appointed by the court to report in relation to the boundary between the Defendant's land and that of the Claimants and he produced an extremely helpful report in June 2004. He concludes very clearly that the access road does not follow the exact alignment of the right of way. At the point where it meets the Monchy high road it lies entirely on the Defendant's land; half the bridge lies on his land; and the road is not off his land until it reaches the First Claimant's parcel. In all the road encroaches some 119 square metres onto the Defendant's land. There was a faint suggestion from Mr. Larcher for the Claimants that Mr. Baptiste's conclusions were wrong but I can see no basis for so concluding and in any event no attempt was made

to ask Mr. Baptiste any questions or to call him to be cross-examined so that his conclusions could be challenged (see CPR 32.8(1), 32.7(1) and 32.10). In the circumstances I have no hesitation in accepting Mr. Baptiste's report in its entirety and in particular that the boundary between the Defendant's and the Claimants' land is shown by the blue line 1A-2-6A on his plan RB10 (as I understand his report this is the alignment shown on the Girard plan prepared in 1972).

6. Since the First Claimant's claim arises out of interference by the Defendant with the road which I have concluded ran over his own land and Mr. Larcher was not able to suggest any basis of liability unless I found for the Claimants in relation to the alleged 1991 and 1994 agreements it must be right that the result of the case will depend entirely on my findings of fact about those agreements.

7. I heard evidence from the First and Second Claimants and Earl Cenac for the Claimants and from the Defendant and his friend Victor Girard. Before dealing with the facts in detail I note that although a witness statement was filed for the Third Claimant he did not appear to give evidence and that the First Claimant's statement conspicuously failed to comply with CPR 29.5 (1) (f): not only was it patently not in her own words, it was in the third person and it followed very closely the wording of the statement of claim.

1991 Agreement

8. The First Claimant's witness statement says that she and the Second and Third Claimants orally agreed with the Defendant in January 1991 to build a 10 foot wide motorable road over the right of way to her parcel 526 which would include 5 feet to be contributed by the Defendant. The Third Claimant then constructed the road and built a bridge over the ravine. In her evidence she stated that only she and the Third Claimant (and not the Second) were present when the agreement was made and she suggested for the first time that there was already in existence a dirt road which the parties were agreeing to extend up to her parcel. She accepted that the Third Claimant was away and that nothing happened in relation to his building works or the road from 1991 to 1994.

9. The Defendant's evidence was that the road in question was cut by the Third Claimant in the second half of 1990 without any notice to him and at a time when he was not even aware that the Third Claimant was a neighbour of his. When the Defendant confronted the Third Claimant about the road he had cut across his (the Defendant's) land the Third Claimant told him that he was about to build a house on his land and that he had been under the impression that there was some land in the area provided for a road.

10. The Defendant says that he then reported the matter to the Survey Department who arranged for Tennyson Gajadhar (who was also carrying out some survey work for the First Claimant) to establish his eastern boundary. This was done in January 1991 in the presence of both the Third and First Claimants and it was demonstrated that the road did indeed run through the Defendant's land. At this point the Third Claimant apologized and said that he would abandon his project and he did so. The Defendant was very clear in his evidence that this apology was witnessed by the First Claimant.

11. I have no hesitation in preferring the Defendant's evidence about what happened in 1991 for the following reasons. (1) There is no written record of the agreement the First Claimant contends for, as one would expect if the Defendant had agreed to part with a five foot strip and/or allow a road to be built through his land. (2) The road actually built does not comply with the agreement alleged by the First Claimant in her witness statement since it is clear it did not follow the right of way. (3) The inconsistencies I have mentioned in the evidence about the agreement undermine her evidence substantially. (4) The abandonment of the building works and the road by the Third Claimant in 1991 is consistent with the Defendant's account. (5) I found the Defendant a more reliable witness in the box and his evidence much more cogent and convincing.

12. Accordingly I accept the Defendant's evidence outlined in paragraphs 9 and 10 above in full. It follows that the First Claimant was aware from 1991 that the road cut by the Third Claimant ran across the Defendant's land and that he objected to its use.

1994 Agreement

13. The First Claimant's statement says that she wished to build a house on her land in March 1994 and that since the road had deteriorated since 1991 she repaired it and continued it to her parcel. While this work was being carried out she and the other three Claimants agreed with the Defendant that the road would be widened to 15 feet which involved each of the Claimants giving five feet in addition to the Defendant's five feet. To this effect, she says, the parties agreed to employ Mr. Cenac to survey the road at a cost of $2,000 and that they would each contribute $400 to the cost of the survey. On 6 June 1994 the Defendant destroyed the bridge. She rebuilt it on 8/9 August and on 29 August 1994 the Defendant destroyed it again. He again interfered with it after tropical storm Debbie and placed iron poles at the entrance to the road. This led to the application for an injunction in December 1994.

14. The cross-examination revealed considerable confusion in the First Claimant's story. She accepted that the Defendant had complained that the access road she had improved was on his land where it joined the main road. She said that she had thought that it was a public road since it was the only way to her property but she also said that she had sought the Third Claimant's permission to use the road since he had built it. Later on she said she had initially sought the permission of all the other Claimants to extend and widen the road. After that had happened there was a meeting on site with Mr. Cenac on 24 July 1994 (which resulted from the Defendant breaking the bridge) at which she thought the Defendant agreed to give five feet towards the road. She accepted that the boundary had already been established by pegs and that no part of the right of way was on the Defendant's land. She denied employing Mr. Cenac personally and said that he was engaged at this meeting by the Claimants and the Defendant jointly. She denied the agreement was as alleged by the Defendant (see paragraph 19 below) or that he had expressly refused her permission to use the road pending the carrying out of that agreement.

15. The Second Claimant's statement says that there was an agreement to widen an existing 10 feet road to 15 feet. She confirms that the parties employed Mr. Cenac at a cost of $2,000. She states that the small bridge over the ravine was built by the Third Claimant after the agreement had been made and that after he had completed it and the First Claimant had started building her house the bridge was destroyed.

16. In cross-examination she stated that the agreement about the Defendant giving five feet to the road was made at Mr. Cenac's office. She accepted that she did not agree to pay Mr. Cenac $400 towards the cost of the survey and that she did not hear the Defendant agreeing to pay anything.

17. Mr. Cenac's statement says that in June 1994 he was jointly instructed by the Claimants and the Defendant to carry out a survey to widen an existing five feet road by adding five feet from the Claimants' land and five feet from the Defendant. He says he carried out the work and produced a plan dated 31 August 1994 and informed the parties that the cost of the survey was $2,000.

18. In cross-examination he agreed that if he had been jointly instructed by the Defendant he would not have served a notice of intention to survey on him; Mr Theodore then showed him such a notice dated 11 July 1994 addressed to the Defendant stating that he had been employed by the First Claimant: he was not able to explain this. He also said that he was still owed money for the job; Mr. Theodore showed him a receipt for $2,000 signed by the First Defendant which showed this to be wrong. He produced his plan (dated 31 August 1994) which showed a five feet right of way with five feet contributed by the Defendant and the Claimants respectively but he accepted that the plan did not show the position of the actual road as opposed to the right of way.

19. The Defendant's account was quite different to that put forward by the Claimants' witnesses. He first learnt that the First Claimant had re-established the road on his land in March 1994. He objected and a meeting was arranged at Tennyson Gajadhar's office but she was two hours late and the meeting was not held. The Defendant decided that the First Claimant was not taking him seriously and planted some coconut palms to block the road but they were uprooted by her contractors. There was then another incident and the Defendant decided the only way to stop the First Claimant trespassing on his land was to remove the culvert which in effect formed the bridge over the ravine running through his land.

20. This led to the First Claimant calling in Mr. Cenac and the notice dated 11 July 1994. There was a meeting on site on 19 July at which it was acknowledged that the entrance to the access road was entirely on the Defendant's land. This led to a further

meeting on site on 24 July designed to reach a settlement. The outcome was that the Defendant agreed with all the Claimants that if the position of the five foot right of way was established on the ground he would contribute five feet to its west and the Claimants would contribute five feet to its east and a road would be built. At the end of the meeting the First Claimant asked him whether pending the carrying out of this agreement she could continue to use the existing road and he refused her request. He never agreed to instruct Mr. Cenac or to pay him. Mr. Cenac came onto site again on 2 August to complete his survey without informing him.

21. Notwithstanding that agreement, the First Claimant went ahead and re-established the bridge. The Defendant learnt of this on 23 August and wrote to Mr. Cenac with copies to the Claimants objecting on 25 August 1994. He then removed the culvert again and blocked the entrance to the road: this ultimately led to the First Claimant seeking the injunction granted by Matthew J.

22. Again, I have no hesitation in preferring the Defendant's account of events for the following reasons: (1) Although I am sure Mr. Cenac did not intend to mislead the court he was clearly mistaken about a number of points and I do not think his recollection was of events was very good. (2) The letter written by the Defendant dated 25 August 1994 confirms his account. (3) The First and Second Claimants' evidence about exactly what was agreed and when was hopelessly confused. (4) Again, the Defendant's evidence, confirmed by Mr Girard to an extent, was far more cogent and convincing.

## Result

23. It follows from my findings of fact in relation to the alleged 1991 and 1994 agreements that the Defendant never agreed to the establishment or use of the road over his land and that the First Claimant's claim based on his interference with it must fail: the consequence of that is that the injunction granted by Matthew J on 30 December 1994 must be discharged. It also follows that the First Claimant was herself trespassing when she re-established the road and started using it in 1994.

24. Clearly the Defendant is entitled to damages for the trespass committed over the last 11 years. Since the First Claimant ought never to have obtained the injunction granted by Matthew J she is also in principle liable on her undertaking in damages (see paragraph 20 of the affidavit sworn in support of the injunction). However, I do not see what damage the Defendant can be said to have suffered that will not be compensated by an award of damages for trespass and I do not propose therefore to order a separate enquiry under the undertaking.

25. As to the future, Mr Theodore accepted that it is open to me to make an award of damages in lieu of an injunction to prevent the continued use of the road by the First Claimant. I have considered anxiously whether an injunction or damages would be the more appropriate remedy. On the one hand, the area of encroachment is fairly small and it is hard to see how it actually harms the Defendant in any substantial way, the road has been in use for 11 years now and a financial payment ought to be an adequate remedy. On the other hand, I have found that the First Claimant re-established the road knowing that she had no right to do so, she obtained the injunction on a false basis and the Defendant has remained staunch in his position at all times that he does not want this road to cross his land.

26. On balance I think the right course is not to insist that a new road is constructed on a slightly different alignment just so the Defendant can vindicate his rights when a money payment ought to be good enough. I will therefore order that the Defendant pay him a sum by way of damages in lieu of an injunction; if this sum is not paid within a reasonable period of being assessed an injunction will be granted instead. The sum to be assessed should be the market value of the 119 square metre encroachment.

27. I will therefore order as follows:

    (1) the First Claimant is to pay the Defendant damages to be assessed for her trespass on the Defendant's land since 1994;

    (2) the First Claimant is to pay the Defendant damages to be assessed in lieu of an injunction, such damages to represent the current market value of the land encroached upon;

(3) if the damages assessed under (2) are not paid within 28 days of the assessment a perpetual injunction is to be granted to prevent the First Claimant committing any further trespass on the Defendant's land;

(4) the claims against the Defendant are dismissed;

(5) the injunction granted by Matthew J on 30 December 1994 is discharged;

(6) costs shall be dealt with at the conclusion of the assessments.

Murray Shanks
HIGH COURT JUDGE (ACTING)