

GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2003/0366

BETWEEN:

ALBERT BERNADINE

Claimant

AND

1. STEPHEN DE COTEAU
2. IRMA DE COTEAU

Defendants

Appearance:

Mr. Arley Gill for the Claimant
Dr .F. Alexis for the Defendants

2006: July 27 & 28

JUDGMENT

- [1] **BENJAMIN, J:** The parties are neighbouring proprietors of properties at Gouyave, St. John's. The Claimant owns and occupies a lot of land with a building thereon situate at Lower Depradine Street at Gouyave. The Defendants are the owners of the adjoining lot of land with a building thereon. The two lots are separated by a stone boundary wall, the property of the Defendants. The said wall delimits the said lots.
- [2] The Defendants are desirous of constructing a commercial building on their lot of land. To this end they applied for and obtained approval on June 12, 2003 from the Land Development Control Authority ("the Authority") to renovate an existing structure to a two-storeyed building.
- [3] By a Claim Form filed by the Claimant on September 2, 2003, the following relief was sought against the Defendants:

1. An injunction restraining the Defendants or any of them whether by themselves, their servants and/or agents from constructing a commercial building using the boundary wall as the outer wall of the said building on property situate at Lower Depradine Street in the town of Gouyave in the parish of Saint John in the State of Grenada.
2. Damages.
3. Costs
4. Further or other relief."

In the Statement of Claim filed simultaneously with the Claim Form, it was averred that in August 2003, the Defendants commenced construction of a commercial building using the said boundary wall as the outer wall of the said building. The contentions of the Claimant are two fold. Firstly, it was pleaded that the Defendants' use of the boundary wall as the outer wall of the proposed building was in breach of section 8 of the Land Development Control Act, Chapter 160. Secondly, the Claimant complained that the construction of the building would adversely affect the light to his home.

- [4] The Defendants challenged the title deed dated March 16, 1985 relied upon by the Claimant as evidence of his ownership of the property he occupies at Upper Depradine Street as being not valid and not effective to convey the said property to the Claimants. However, it was acknowledged that an earlier deed of October 19, 1978 was effective in conveying the parcel of land to the Claimant. The former deed conveyed a parcel of land measuring 80 ft by 25 ft (2000 square feet) by estimation, whereas the later deed purported to convey a parcel containing by estimation 720 square feet. This observation, though prima facie correct, does nothing to assist the Court in resolving the areas of contention in the present suit. Suffice it to say that the Defendants do not seek to impugn the Claimant's occupation of the adjoining lot of land.
- [5] In their Defence, the Defendants asserted ownership of the stone perimeter wall. In this regard, reference was made to a default judgment entered in their favour on September

25, 2003, in Claim No. GDAHCV2001/0544. Consequently the Claimant did not, and indeed cannot, challenge the Defendants' entitlement to claim ownership of the said wall.

[6] The Defendants' further averred that the said wall has been in use since 1926 by their predecessors-in-title as the outer wall of commercial building. However, inherent in the remainder of para 3.1 of the Defence is a partial recanting of that general position by it being stated that three-quarters of the northern boundary of the existing building has been covered.

[7] The Defendants revealed the extent of the proposed structure by averring that they seek to carry out construction to: (a) cover the uncovered one-quarter of the northern boundary using the said boundary wall; and (b) add another floor on top of the existing building. It was projected that the second floor would be no higher than 4 feet above the Claimant's building along the northern boundary. They insisted that the building would not be extended in any way and would be delineated by the stone perimeter wall to the north.

[8] The Defendants disputed that the proposed use of the perimeter stone wall was in violation of section 8 of the Act. In this regard, it was specifically pleaded that such use had been authorised by a proper grant of permission by the Authority to the Defendants to undertake the construction as proposed by the Claimant.

[9] It was further averred that the construction would not adversely affect the light to the Claimant's house substantially or at all.

[10] The issues to be resolved by the Court are as follows:

(a) Was the permission granted by the Authority to the Defendant validly granted?

(b) Can the Claimant maintain a successful claim to a right to light against the Defendants?

[11] At the hearing, the Claimant gave testimony on the basis of his witness statement and was cross-examined on behalf of the Defendants. The first-named Defendant adopted the witness statement filed on his authority by Mr. Dwight Horsford and was cross-examined by learned Counsel for the Claimants.

PLANNING PERMISSION

- [12] There was exhibited on behalf of the Claimant a letter dated August 18, 2003 addressed to the Director of the Physical Planning Unit protesting that the construction of a commercial building by the Defendants was in violation of section 8 of the Act," in that the boundary wall is being used as the outer wall of the said building contrary to the 10 feet distance provided for in the said Act." That letter would have been dispatched after the Authority had granted planning permission on June 12, 2003. However, at trial, the Claimant admitted that he sent a hand-written letter in early 2001 to the Authority objecting to the construction than being undertaken by the Defendants without the permission of the Authority. The construction site was then visited and inspected by the Authority who than issued an order for the work to cease. No doubt to rectify the omission, the Defendants then applied for planning permission.
- [13] The Claimant said that the Defendants' proposed use of the northern stone perimeter wall as the outer wall of the building violates the said section 8. In paragraph 4 of his witness statement, he stated:

"That boundary wall is one feet away from my house. I had the opportunity to consult with my Attorney, and I had the privilege to read for myself, section 8 of the Land Development Control Act Cap 160 which provides that a commercial building should not be constructed within ten (10) feet of any site or near boundary of the plot on which it is situated. The construction of the said commercial building is in direct contravention of this regulation and adversely affect the light in my house especially the living and dining rooms and my kitchen which is on the side facing the Defendants."

The Claimant further said that a temporary roof was erected to cover a disco and party place at the back of the building by the previous owners of the building during the 1970's with his permission. He further stated in his witness statement the following:

" Even in the area where there was a roof there was no upstairs in the old building. The commercial building by the Defendants would fundamentally change the

character of the building, in that there will be an upper floor in the area closest to me where there was none at anytime before.”

[14] The relevant section of the Act reads:

“8. No part of a building used as a dwelling house shall be erected within 6 feet (1.8) and for all other types of development within 10 feet (30 m) from any side or rear boundary of the plot on which it is situated. The Authority may, on application being made to the Authority, permit buildings to be erected up to the boundary or within distances so specified providing that any building or any part of any building is not constructed with wood or other combustible materials. Any application made to the Authority should include a statement signed by the owner of any adjacent plot affected by the proposed encroachment on the boundary, signifying the agreement or objection to the proposal.”

[15] There is no demur that the Defendants sought and were granted permission by the Land Development Control Authority to construct a commercial building comprised of two storeys and utilizing the northern perimeter wall as the outer wall of the said building. The Authority must apply section 8 of the Act.

[16] The provisions of section 8 must be carefully scrutinized to ascertain their purport. The first sentence introduces a general rule as to the distance of a dwelling-house or other types of development from the side or rear boundaries of the plot of the land on which the relevant building stands. The distance applicable to a commercial building is therefore 10 feet from the side or rear boundary. However the second sentence of the section goes on, by the use of the subjunctive word ‘may’, to confer on the Authority a discretion, upon the basis of an application being made, to ‘permit buildings to be erected up to boundary or within distances so specified.’ This discretion is circumscribed in that where the same is exercised, the building must not be constructed with wood or other combustible materials.

[17] The third or final sentence of section 8 prescribes that an application to the Authority ‘should’ include a statement of agreement or objection signed by the owner of the adjacent lot affected by the proposed encroachment within the distance specified in the starting rule

in the first sentence of the section. The Claimant asserted that no such statement was appended to the Defendant's application. This was somewhat altered when he admitted in cross-examination to having penned a letter of objection before permission was applied for and granted. The said letter had been acted upon and it is fair to say that the Authority would have been well aware of the Claimant's objection to the construction work, the extent of which he was personally apprised by the first-named Defendant.

[18] The initialization of the word 'should' conveys probability or expectation and does not impart compulsion. The statement is therefore not a mandatory requirement. In any event, though the application may be accompanied by such a statement, whether of agreement or of objection, the Authority in its deliberate judgment can grant or refuse permission. Since nothing turns on the material of which the outer wall is to be constructed, it is plain, in my view, that the Authority has the full jurisdiction and power to grant the permission to the Defendants to undertake the proposed construction. It follows, then, that the permission was validly granted by a competent Authority.

[19] The Claimant also complained as stated in paragraph 9 of his witness statement (set out in paragraph 13 supra) that the character of the existing building would be altered by the addition of an upper floor where there was none previously. Although this matter was not dealt with in the statement of claim, I nevertheless feel compelled to deal with it. The short answer is to be found in section 10 of the Act which reads:

"10. The height of all buildings shall not exceed two storeys or the height of the original building. The Authority may, on application being made to the Authority permit buildings in excess of two storeys."

The Defendants did so apply to the Authority and the Authority was empowered to grant permission for a building comprised of two storeys as it did in the case of the Defendants.

RIGHT TO LIGHT

[20] In the Statement of Claim, it was pleaded that the proposed construction adversely affects light to the Claimants house. The Defendants' said that the said light would not be adversely affected substantially, if at all. However, the Claimant offered no evidence in his witness statement in support of this contention. In the skeleton argument, Counsel for the

Claimant referred to a passage in Kelvin Gray, Elements of Land Law at p. 663 which reads:

“In the absence of any natural right of access to light, the preservation of access to sunlight must be sought by way of either a duly acquired easement of light or a restrictive covenant which precludes adverse building development. Rights of light are commonly acquired as a prescriptive easement and are often termed ‘ancient lights.’ In English law at any rate, an easement of light can arise only in respect of light which comes through a defined aperture (such as a window) and easements of light are therefore restricted to buildings. The obstruction of part of light reaching a building on the dominant tenement can constitute an actionable nuisance.’

[21] In the absence of any evidence, far less cogent evidence, there is no substratum of fact to which the relevant principles of law as to the creation of an easement can be applied. This contention therefore fails.

[22] In the premises, it is ordered that the Claim be dismissed. It is further ordered that the injunction order made on September 2, 2003 be discharged. The Claimant shall pay the costs of the Defendants in the sum of \$5,000 as agreed at Case Management Conference.

Kenneth A. Benjamin
High Court Judge