

ANTIGUA AND BARBUDA
IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2006/0326

BETWEEN:

CLARABELL INVESTMENTS LIMITED

PAUL SUDOLSKI

DOREEN SUDOLSKI

Claimants

And

ANTIGUA ISLE COMPANY LIMITED

RUPERT STERLING

Defendants

Appearances:

Mr. Clement Bird for the Claimants
Mr. Hugh Marshall Jnr. for the Defendants

.....
2008: March 10
October 8
.....

JUDGMENT

- [1] **Blenman, J:** Clarabell Investment Ltd. (Clarabell) is a company in which Mr. Paul Sudolski and Mrs. Doreen Sudolski are directors and shareholders. The Antigua Isle Company Limited (Antigua Isle) is the owner of property described as: Mc Kinnons: Block: 45 1696B Parcel 18 (Parcel 18). Mr. Rupert Sterling is a licensee of Antigua Isle, and lives in a house situated on Parcel 18.

- [2] Clarabell owns property situated at Trade Winds, St John's Antigua, described as Registration Section: Mc Kinnons: Block: 45 1696B Parcel 301 (Parcel 301). Mr. and Mrs. Sudolski own property situated on Parcel 301. The two parcels of land are adjoining each other and Mr. Sterling has, at all material times, been in possession of Parcel 18.
- [3] Clarabell, Mr. and Mrs. Sudolski allege that around 2000, the defendants erected a garage and a fence on their land. They further complain that the defendants have trespassed on their land and they have filed these proceedings and seek damages for the alleged trespass. They also seek an injunction to restrain the defendants from trespassing on their property together with costs.
- [4] Both Antigua Isle and Mr. Sterling deny that they have trespassed on the claimants' property. They also dispute that the claimants are entitled to any relief whatsoever. Accordingly, they urge the Court to dismiss the claimants' case and award costs against the claimants.
- [5] The defendants contend that the structures, if any, on Parcel 301 have been there since 1940. Therefore, any claims that the claimants may have had against them are statute barred since the limitation period for bringing trespass action is 12 years.
- [6] The issues that arise for the Court's determination are as follows:
- (a) Whether either of the defendants has committed a trespass on the claimants' property.
 - (b) To what remedies, if any, are the claimants entitled.

[7] **Evidence**

Mr. Paul Sudolski filed an affidavit on behalf of the claimants and he was cross examined. Mr. Hugh Marshall Snr. And Mr. Rupert Sterling deposed to affidavits in support of the defendants and they were cross examined. The parties have also submitted agreed documents to which the Court has paid regard. While other persons have filed affidavits, they did not attend Court to be cross examined. The Court has therefore placed no weight on their evidence since their attendance was not dispensed with.

[8] **Mr. Hugh Marshall Jnr. submissions**

Mr. Marshall Jnr. stated that the claimants have not applied for, neither do they have a non-citizens land holding licence that they are therefore “devoid of the proprietary right” necessary to bring this claim for trespass, loss of use and enjoyment, Declaration, Order and Injunction. Counsel said that section 3 of the Non Citizens Land Holding Regulation Act (CAP 293) stipulates that:

“Subject to the provisions of this Act, neither land in Antigua and Barbuda nor a mortgage on land in Antigua and Barbuda shall, after the commencement of this Act, be held by an unlicenced non-citizen and any land or mortgage so held shall be forfeited to Her Majesty”.

[9] Section 14 of the Act which applies to “shares of any company incorporated in Antigua and Barbuda”, such as those held by the 2nd and 3rd claimants herein the 1st claimant, provides in subsection (2) that:

“With a view to preventing the evasion of the foregoing of this Act, no person shall without the licence of the Governor General, hold any property to which this section applies in trust for a non-citizen and any such property so held shall be forfeited to Her Majesty”.

[10] In relation to the limitation period, Mr. Marshall said, of extreme importance for establishing when time began to run for limitations purposes and for estimating any damages the Court may find payable to the claimants, the defendants submit that the wire fence, which established boundaries between the two properties had been in existence for decades. He referred the Court to paragraph 5 of Mr. Sterling’s affidavit, “I believe since the properties were owned by one entity and were sold in the 70s as a part of the liquidation of Cove Enterprises Limited. This has been more than twenty-five years ago”.

[11] Further, Mr. Marshall Jnr. said that even the claimants also misapprehended where the actual boundaries were. In fact, it was not until the report of the agreed expert witness, Mr. Leslie King L.S. dated March 12th 2007 that it was determined where the boundary lay between the two parcels, that the garage is on Parcel 301 and that the defendants have

encroached on that Parcel by approximately 3,015 sq ft. Counsel said that the claimants as well as the defendants simply did not know that there was any trespass, this is supported by the fact that the Sudolskis planted a hedge along the border of the fence to which Mr. Sterling refers.

- [12] Mr. Marshall Jnr. stated Antigua Isle maintains that it is not subject to any claims for damages because Mr. Sterling is not in a “principal/agent” relationship with Antigua Isle and “is not otherwise in a legal relationship” which would make Antigua Isle responsible for his torts; the two defendants have a licencor/licencee relationship in Parcel 18. No evidence has been adduced that Antigua Isle encouraged or performed any tort of trespass over Parcel 301. However, to the extent that the Court finds Antigua Isle to be in possession of the disputed 3,015 sq ft, the company admits the legal benefits and liabilities of such possession. It may seem contradictory for Antigua Isle to be claiming the benefits of possession but to not submit to possible liability in trespass. The company’s position is that it has taken no positive steps to commit any trespass but it has passively possessed the land in so far as the said land had been arbitrarily partitioned since the 1970’s.
- [13] Mr. Marshall Jnr. referred the Court to Halsbury’s Laws of England, as authority for the defendants’ position that the claimants do not have a right to bring the present action, under the caption; “WHO MAY SUE FOR TRESPASS TO LAND”. Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who was, or who is deemed to have been in possession at the time of the trespass. The owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of the trespass, since a mere right of property without possession is not sufficient to support the action”.
- [14] **Person with right to possession**
A person having the right to the possession of land acquired by entry on the land is in the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of entry wrongfully continues on the land.

- [15] Learned Counsel Mr. Marshall Jnr. said that the defendants were in actual possession of Parcel 18 and not the claimants. It has been established that the fence delineating the defendants' area of occupation of Parcel 18 and a portion of Parcel 301 existed since the 1970s. Not only do the claimants not have a right to pursue the claim for damages in trespass due to their lack of actual occupation, but they also are statute barred from asserting property rights and obtaining declaration, order, injunction or other relief as claimed because of the provisions of the Limitation Act (No. 8 of 1997 Laws of Antigua and Barbuda).
- [16] Mr. Marshall Jnr. said that on the issue of whether the presence of intention is relevant to trespass; it is the law that intention is relevant to the quantum of damages. Intentional invasions are actionable whether resulting in harm or not. Neither the intruder's motive is material, nor the fact that his entry actually benefitted the occupier. The requisite intent is present if the defendant desires to make an entry, although unaware that he is thereby interfering with another's rights. Thus, it makes no difference whether the intruder knows his entry to be unauthorized or honestly and reliably believes the land to be his. It may, however, affect the quantum of damages.
- [17] Counsel referred the Court to the case of **Joyce Ryan v Gloria Gonsalves and Another**, **Civil Suit No. 464 of 1993- St. Vincent and the Grenadines High Court of Justice**, in which the claimants claimed damages for trespass to land; an injunction to restrain the defendants for trespassing on the claimants land, and an order that the defendants demolish a building erected on the claimants land; the case raises issues of limitation and possession similar to those in the case at bar. The Court distinguished between adverse possession and trespass in relation to 12 year limitation period. The Court awarded damages along with the order of demolition of the building erected on the claimant's land and prohibitory injunction. The Court ordered the defendant to pay special damages the sum of \$200.00, for the loss of three coconut trees, eighteen peas trees and banana trees as claimed and general damages in the sum of \$5,000 were ordered to be paid by the defendants.

[18] **Mental Distress**

Mr. Marshall Jnr. said that the claimants' claim for damages for mental distress is unsubstantiated by the evidence. There was no assault by either of the defendants. Mr. Sudolski's affidavit evidence was that Mr. Sterling told him he would not share the cost of building a walled fence between the properties – That Mr. Sudolski should build the fence himself as he was a "white man". Mr. Sudolski said that Mr. Sterling, "He made explicit threats to my emotional and economic well-being by bringing into question my immigrant status in Antigua and Barbuda. He indicated that he knew I was engaged in business in Antigua and Barbuda and that he would not hesitate to bring the full force of his political connections down upon me and my business ventures. In particular, he inquired "if I knew who he was"; that "I was messing with the wrong man"; that "I bang water come here"; that "he was a well connected man"; and that "if I interfered with him I would suffer the consequences". He also said repeatedly that we "were trespassing on his land".

[19] Mr. Sterling denies that the alleged threats occurred. Mr. Sterling's evidence is consistent that his altercations with the Sudolskis involved their dogs. That was his testimony, both in his affidavit and cross examination. In the circumstances, it is Mr. Sudolski's word against Mr. Sterling's and with no corroborating evidence to support the claimants' allegations. Mr. Sudolski cannot be said to have proven this aspect of his case to the civil standard. Mr. Marshall Jnr. stated this aspect in any event does not directly affect the main claim, but would be merely an aggravating factor impacting the question of mental distress which is dependent upon the claim for loss of use and enjoyment of the claimants' property being established. It is Mr. Sterling's position that these types of comments though not kind and neighbourly, can be reasonably expected in a dispute of this gravity and fall far short of establishing a basis for a substantial award of damages for mental distress.

[20] In the case of **Owen Joseph and Others v Richard Frederick (2001) (St. Lucia High Court of Justice)**, the defendant committed trespass and fired shots from a revolver, one of which grazed one of the claimant's fingers and there was evidence that he had said that "somebody is going to die today", the aggravating factor of the mental distress from the assault attracted three separate awards of \$5,000 for aggravated damages. In comparison to

Joseph v Frederick case, the case at bar fades into relative insignificance in relation to the aggravating factors occasioning mental distress and therefore justifying an award of damages.

[21] Further, Mr. Marshall Jnr. further argued that the claimants' right to insist on their right to possession, is statute barred by virtue of the Limitation Act 1997 and that they do not have the necessary Non-Citizens Land Holding Licence. Therefore, there is no basis for the reliefs claimed and even if such a basis is found, the defendants have not made any commercial use of the property to justify restitutionary damages; any award would have to be compensatory. Further, in the interests of justice, those compensatory damages should be nominal given the mutual mistake the parties were proceeding under until the boundaries issue was clarified by Mr. Leslie King. The mental distress factor would be of little relevance to quantum of damages given that the situation was not serious. Also, the claimants have not established that they have possession or that they have brought their action within 12 years from the date that the cause of action accrued.

[22] **Mr. Clement Bird's submissions**

Learned Counsel Mr. Bird urged the Court to accept Mr. Sudolski's evidence in preference to Mr. Sterling's. He asked the Court to accept that between December 2000 and February 2001, the defendants constructed a fence within Parcel 301's boundary without the claimants consent or permission. Counsel further asked the Court to accept that on or about February 2001, Mr. and Mrs. Sudolski took up residence on Parcel 301 and that the construction of the garage on the claimants' property which had commenced in 2000, resumed without their consent or permission. This was in spite of the fact that Mr. Sudolski had advised Mr. Sterling about the latter's workmen trespassing on Parcel 301.

[23] Mr. Bird said that the Court should reject the evidence given by Mr. Sterling and Mr. Marshall Snr. as unreliable. Mr. Bird adverted the Court's attention to Mr. Sterling's original evidence that he had made no construction but that when pressed in cross examination, he said that he had placed a galvanize fence between the two properties. He was only forced to concede this in the face of the photographic exhibits. Mr. Bird said that the Court should not accept

Mr. Sterling's evidence that the garage was on the property long before 2001, neither should the Court accept Mr. Marshall Snr's. evidence that the structure was on the land since in the 1940s. Mr. Marshall Jnr. when pressed in cross examination about the structure to which he referred, he said that it was the house.

- [24] Learned Counsel, Mr. Bird said that in the absence of corroborating evidence, the Court is faced with the task of determining, on the balance of probabilities, which of the contrasting accounts is true. A lack of corroborating evidence is not fatal to a claim. There is clearly no middle ground; the testimony is diametrically opposed. Mr. Bird submitted that the corroborating evidence in support of the claimants may be found from the very testimony of the defendants, particularly as obtains from the cross examinations.
- [25] Mr. Bird stated that it is a question of fact for the Court to determine whether the garage was in fact erected in 2000 as claimed by the Sudolskis, or "in the 1940s" as seems to be suggested by the defendants. Under cross examination, it was suggested to Mr. Sterling that he had not denied undertaking the construction, but had merely stated that he had not built on their property, the obvious inference being that he had built something. The witness merely denied once more, any construction whatsoever.
- [26] Mr. Bird said that Mr. Marshall Snr's. evidence corroborates that of the claimants two-fold. First, when pressed in cross examination to explain what structures he referred to as having been in place since the 1940s, he clearly and unequivocally stated that it was the house Mr. Sterling occupies. Mr. Bird said that there could have been no doubt whatsoever in his mind as to the issues in connection, to wit, the construction of a garage, and placement of a fence in an encroaching position. Mr. Marshall Jnr. affidavit was in response to that issue. Mr. Bird said that notwithstanding this, he could not bring himself under oath to assert otherwise than he did; he could not assert that there had been a fence between the properties, or a garage thereat.
- [27] Mr. Bird said the claimants' case is to be determined on findings of fact. The claimants, through Mr. Sudolski, have clearly articulated a history of this matter, including a timeline of

2001 when it was appreciated and Mr. Sterling was advised that the defendants were encroaching on Parcel 301. The survey by Mr. Ato Kentish was commissioned to prove this to the defendants, as evidenced by their letter to Antigua Isle directors of January 2006. It should be noted that the subsequent Court commissioned survey of Mr. Leslie King, merely confirmed the earlier report, albeit in further detail with respect to the quantified encroachment. Further, and more importantly, the January 2006 letter clearly identified to Antigua Isle, some four months in advanced of the filed claim, that there was indeed an issue of trespass emanating from their property.

- [28] Learned Counsel Mr. Bird said that on the 26th January 2006, after considerable deliberation, Clarabell caused its solicitors to write a letter to Antigua Isle advising of the trespass, and seeking its assistance to have it rectified. The contents of the letter are clear and unambiguous, including its reference to its principals, and the interaction with Mr. Sterling. Under cross examination, Antigua Isle's representative admitted that the company had failed to respond to the said letter. It is the law that where a tenant has exclusive possession of premises, it is he generally, and not the landlord who may be sued for trespass. However, it is similarly law that a landlord may be sued where he expressly or impliedly authorises the trespass.
- [29] Mr. Bird said that Learned Counsel Mr. Marshall Jnr. sought at trial to introduce the issue of the Sudolskis capacity to bring this action, on the basis that they were not possessed of appropriate non-citizen's land holding licences, were accordingly devoid of a proprietary right to do so. The Court upheld the claimants Counsel's objection on the basis that the Sudolskis' ownership and the appropriateness thereof had never been a fact in issue in the matter. Further and more particularly, it is law that the question of ownership is irrelevant on actions for trespass; the action is founded on possession. It is uncontested evidence that the Sudolskis were in possession as at the time complained of. In any event, Mr. Bird said that the Sudolskis were duly and lawfully in possession of the requisite licences, and has provided evidence of the licence as required. Counsel forwarded copies of the relevant licence to the Court and the defendants.

- [30] Next, Mr. Bird submitted that on the basis of the Sudolskis' testimony, and on the corroboration supplied by the defendants themselves, it is open to the Court to make the factual finding that the defendants and/or Mr. Sterling simpliciter did take the actions complained of, and trespassed against the claimants property in or about 2001, in which event issues of limitation do not apply; and grant the relief sought and costs.
- [31] Mr. Bird stated that the claimants are entitled to the damages sought. In respect of damages for trespass and damages for loss of use and enjoyment and mental distress of the claimants, it is within the discretion of the Court as to the monetary award it deems appropriate. In **JnBaptiste v Richard et al Civil Suit No.1042/1998 SLU**, Baptiste J on a similar claim for an injunction restraining the defendants from entering or occupying property, remove structures and damages for occupation, awarded the injunction as claimed, and damages in the sum of \$500 together with costs of \$5000. In the earlier **Ryan** case, Bruce-Lyle J similarly awarded the injunction, removal of structure and general damages of \$5000. Similarly, in **Barbour v Compton Civil Suit No.606/1997 SVG** Mitchell J awarded \$5000 in general damages.
- [32] Mr. Bird referred the Court to **Horsford v Bird [206] UKPC 3**, in which the Privy Council concluded that,
- “It is well established that trespass to land accompanied by highhanded, insulting or oppressive conduct may warrant an award of aggravated damages. The award in such a case is to compensate the plaintiffs for the distress and injury to his feelings caused by the conduct in question”.
- Whereas the Privy Council found that such an award was unjustified on the peculiar facts of the case, particularly given the unanimous finding of fact by the Eastern Caribbean Court of Appeal that at the construction of the complained of wall, a “willful and deliberate encroachment on his boundary” had not been established; the same does not hold true here. Mr. Sterling was warned by Mr. Sudolski, persisted in construction, and abused him.
- [33] It is clear that in **Horsford v Bird ibid**, the question of demolition of the offending wall having been rejected at trial, the issue was not renewed on appeal, and accordingly was not

considered by the Privy Council. In the instant case, the claimants stand by their request for demolition and removal of the offending structures. Alternatively, the **Horsford v Bird** case ibid, outlines the methodology to be utilised in awarding compensatory damages in the event that the Court is minded only to award compensation, and not the mandatory injunction sought.

[34] **Court's findings of facts and analysis**

The following represents my finding of facts. I have given careful consideration to the evidence adduced by the witnesses, particularly that obtained in cross examination. Mr. Sudolski, in giving evidence, struck me as an honest, credible and reliable witness who simply told the Court exactly what had transpired. Unfortunately, I cannot say the same on Mr. Sterling. On several occasions during cross examination, he was found to be prevaricating. The Court is not of the view that he is either a credible or reliable witness. Where there are any conflicts between his evidence and Mr. Sudolski's evidence, I unhesitatingly accept Mr. Sudolski's. In my view, these are the two witnesses whose evidence would influence the Court's findings of fact. In my respectful view, Mr. Marshall Snr. evidence did not advance the defendants' case any further. To the contrary, this evidence, under cross examination, buttressed the claimants' case.

[35] Mr. and Mrs. Paul Sudolski are husband and wife, and they are the directors and shareholders of Clarabell; the latter which is the owner of Parcel 301. The Sudolskis reside in the home situated on Parcel 301. Antigua Isle is the owner of Parcel 18 which adjoins Parcel 301 on the south western boundary. For several years now, Mr. Sterling has been and is in possession of Parcel 18, as a licensee. Initially, the property on Parcel 301 was rented out.

[36] Around December 2000, Mr. Sterling caused loads of soil to be dumped along the south eastern part of the property. Sometime in late 2000, he caused a fence to be constructed on Parcel 301. All of this was done without the permission or consent of either of the Sudolskis. In 2000, he also caused a concrete block structure or garage to be commenced on Parcel 301, yet again without the permission of Clarabell or the Sudolskis. From 2001, the Sudolskis

took up residence on Parcel 301. In June 2001, Mr. Sterling caused the completion of the construction of the garage.

- [37] I also believe that initially and during the construction of the garage, Mr. Sudolski had spoken to Mr. Sterling about the encroachments and that Mr. Sterling was rude to Mr. Sudolski. Further, I believe Mr. Sudolski when he said that he and his wife were fearful for their respective well being since Mr. Sterling had threatened to bring the full force of his political connections down upon him. I have no doubt, also, that they felt trepidation over the entire situation. There is the uncontested evidence that Mr. Sterling was either then, or had been a Senator of the Parliament of Antigua and Barbuda. He was also a Minister of the Government that was formed by the Antigua Labour Party. Equally, I accept that in December 2005 when Mr. Sudolski was walking on his Parcel 301, together with a surveyor, in order to have the boundary line surveyed, Mr. Sterling told him that "he should look out for the time that he gets back into power" and what it could mean for Sudolski and his family.
- [38] In March 2004, the Antigua Labour Party lost the elections and is no longer in Government, the claimants thereafter felt confident to insist on their legal rights.
- [39] In order to get to Parcel 18 that Mr. Sterling occupies, he has to use a right of access over Parcel 301. Mr. Sudolski has not sought to impede Mr. Sterling's usage of the right of way. Mr. Sudolski struck me as a decent man, who has no acrimony or dislike for Mr. Sterling. He came across as a person who is very respectful and does not bode Mr. Sterling any ill will. I am afraid I cannot say that Mr. Sterling impressed the Court the same way.
- [40] In view of the totality of evidence, as stated earlier, I have no doubt that Mr. Sterling caused the fence to be erected on Parcel 301 between 2000 and 2001. He also caused the garage to be built, which encroaches on Parcel 301. In fact, Mr. Sterling was forced to admit under cross examination that he built the fence in order to prevent the Sudolskis dog from attacking his family even though he had earlier said that he had neither constructed or cause any construction to be erected. In his affidavit, Mr. Marshall Snr. said that there were structures on Parcel 18 since 1940s. I however state that Mr. Marshall Snr's. evidence is more

supportive of the claimants claim. Mr. Marshall Snr. said during cross examination that the structure he referred to that was on Parcel 18 was a house. He said that a house was on Parcel 18 since 1940. He did not at any stage mention the existence of any fence or garage on Parcel 18; this is very instructive. It is clear that had these structures been in existence on Parcel 18 over 40 years ago, Mr. Marshall Snr. would have said so. Further, the survey report ordered by the Court and presented by Mr. Leslie King clearly indicates that there are encroachments by the garage and the fence on Parcel 301. The encroachments are substantial. There is no dispute that, on the 26th January 2006, the claimants caused their solicitor to write Antigua Isle advising of the trespass and requesting corrective action, all to no avail.

[41] **Trespass**

It is the law that trespass to land consists of interference with possession. Based on Mr. Sudolski's evidence, both Mr. and Mrs. Sudolski are in possession of Parcel 301. It is not necessary that the two claimants should have some lawful estate or interest in the land in order to be able to sustain a claim.

[42] Also, it is clear that the owner of land even though not in physical possession of land, can have an action against a trespasser if there is damage to the owner's land. Therefore, Clarabell could, also, sustain action against Mr. Sterling if there is any damage to the property by the placing of the fence and the garage within the boundary of Parcel 301.

[43] Based on my findings above, Mr. Sterling has trespassed on Parcel 301 to the extent of encroaching 3,015 sq ft of Parcel 301 as stated in the Court ordered expert report provided by Mr. Leslie King.

[44] Trespass on a person's land gives rise to a continuing action (from day to day) for as long as the trespass lasts. Therefore, the claimants have a cause of action against Mr. Sterling for trespass for as long as it continues (and is not remedied). In the case at bar, the unlawful building of the fence which commenced in 2000 and was completed in 2001 is a trespass. This trespass continued, even to the date of the trial. The construction of the garage started

in 2000 and was completed in June 2001. This is also a trespass which continued up to the date of the trial.

[45] **Remedies**

This brings me to determine the remedies to which the claimants are entitled. A claimant in trespass is entitled to recover damages, even though he has sustained no actual loss. There is no need for the claimant to prove any actual damage in order to be able to sustain an action for trespass. See **Stoke-on-Trent Council VW&J Wass Ltd [1988] 1 WLR 1406**. It is not open to a defendant to assert that the plaintiff has no cause of action because the trespass was of a trifling nature. **Yelloly v Morley [1910] 27 T.L.R 20**. Trespass to land consists on any unjustifiable intrusion by one person upon land in the possession of another. The slightest crossing of the boundary is sufficient. It is a trespass to place anything on or in land in the possession of another.

[46] It is no defence that the trespass was due to a mistake of law or fact, provided the physical act of entry was voluntary. Where the act is voluntary, it is clear that an intention to enter renders the entrant a trespasser. In **Basely v Clarkson [1682] 3 Lev. 37** where the boundary between the plaintiff's and the defendant's land was ill defined, and the defendant in moving his own grass, by mistake mows some of the plaintiff's; this was held to be a trespass.

[47] Applying to the principles stated above to the case at bar, Mr. Sterling cannot rely on any lack of knowledge of the boundary line to Parcel 301 in his defence. He cannot be heard to say that he was not aware of the encroachments until he had received the Court ordered Surveyors Report. In any event, the Court has already indicated that it was of the view that Mr. Sterling was aware that he had encroached on the claimants' property since Mr. Sudolski had spoken to him.

[48] **Damages**

In determining the measure of damages to award to the claimant, the Court first considers the loss they have suffered. There is evidence Mr. Sterling persisted in constructing both the

fence and the garage despite the protestations of Mr. Sudolski; he acted with reckless disregard to the claimants' rights. Further, I am not of the view that Mr. Sterling's unlawful acts occasioned a small injury to the claimants. I am mindful of the fact that the encroachments have been in existence for in excess of seven years, and on a substantial part of their land. What is even more interesting is that Parcel 18 does not belong to Mr. Sterling, yet he boldly acted in such an unlawful manner. Taking into account all of the facts as I have found them, I am of the view that this is an appropriate case in which the Court should grant the claimant damages for the trespass. Further, I have paid regard to the very helpful authorities referred to by both counsel on the measure of damages the Court should award. I pause to state that the claimants have not pleaded any special damages, neither have they sought to lead evidence of such. It is the law that special damages must be pleaded and proven. While the claimants have stated that they have suffered loss of use and seek damages, they have not quantified this loss.

- [49] There is no evidence of the rental value of the part of Parcel 301 that is encroached on, neither is there any evidence before the Court of the cost or value of the land upon which Mr. Sterling trespassed. In view of the fact that the Court has decided that the trespass commenced from 2000 and continues to date, coupled with the extent of square footage of the land that Mr. Sterling has encroached, the Court is of the view that the damages that the Court awards to the claimants should indicate a sum that reflects the fact that they were kept out of the part of the parcel of land, as a result of the trespass. The damages must include an element for the use of that piece of Parcel 301 from 2000 to today's date.
- [50] Taking into account all of the circumstances, the Court is of the considered view that the sum of \$8,000 is appropriate to award the claimants as damages for the trespass. There is also no doubt that the claimants have a clear claim to damages for loss of use. In view of the totality of the circumstances, the Court is of the considered view that the sum of \$4,000 is a reasonable sum to award as damages for the loss of the use of the part of Parcel 301.

[51] **Damages for mental distress**

While the Court has no doubt that Mr. and Mrs. Sudolski were scared to take legal action against Mr. Sterling, due to the political office he held, there is no doubt that Mr. Sudolski did not act to assert his rights because of this. Nevertheless, the Court is of the view that the case at bar has reached the threshold required to trigger award of aggravated damages. The threats were made long after the encroachments commenced on the land; they were definitely made while the trespass continued. The words used by Mr. Sterling to Mr. Sudolski are not civil, polite nor respectful, and while they amount to empty boasts or threats, they injured Mr. Sudolski's pride and dignity. The words humiliated Mr. Sudolski. Had Mr. Sudolski instituted legal action earlier against Mr. Sterling, he would have realised that the threats were no more than empty boasts. This in no way negates the fact that Mr. Sterling acted in a high handed manner.

[52] Halsbury's Laws of England Vol 8 4th Edition, stated at paragraph 1114, the Court in determining whether to award aggravated damages, take into account the defendant's motives, conduct and manner of committing the tort, and where these have aggravated the plaintiff's damage by injuring his proper feeling of dignity and pride, aggravated damages may be awarded. The defendant may have acted with malevolence or spite or behaved in a highhanded, malicious and insulting or aggressive manner. The Court may consider the defendant's conduct up to the conclusion of the trial, including what he or his counsel may have said at the trial.

[53] In view of the Court's conclusion that while the trespass was continuing and Mr. Sterling acted in a high handed manner and deliberately encroached on Parcel 301's boundary, there are sufficient bases on which to award aggravated damages. In **Horsford v Bird** ibid, the Privy Council held that

"it is well established that trespass to land accompanied by high handed, insulting or oppressive conduct may warrant an award of aggravated damages".

It seems to the Court that based on the claimant's case however, that the award of aggravated damages should not be substantial. While, as stated earlier, the insulting comments were made during the continuance of the trespass, they did not have the same

sting or high handedness as if they were made in public or were accompanied by physical acts.

[54] The Court is of the view that an award of \$2,000 as aggravated damages is appropriate, in all of the circumstances of the case.

[55] **Injunctive relief**

Turning now to address whether the Court should compel Mr. Sterling to restrain from encroaching on Parcel 301, the Court finds it strange that even though Mr. Sterling is aware that part of the garage and the fence are located on the claimants' property (Parcel 301), he has not seen it fit to remedy his breaches. He could have sought to remove the encumbrances at latest on his receipt of the letter or the claim. The Court is satisfied that Mr. Sterling is intentionally refusing to remove the fence and garage and that unless the Court compels him to do so, the fence and garage would remain as encroachments on the claimants' property. The Court emphasises that he has encroached upon a not insignificant part of Parcel 301, namely approximately 3015 sq ft. Taking into account the totality of circumstances including the fact that Mr. Sterling is a licensee on Parcel 18, coupled with the fact that there is substantial encroachment, I have no doubt that this is an appropriate case in which the Court should order that Mr. Sterling remove the encroachments on Parcel 301. I am satisfied that unless the Court grants the injunctive relief prayed for Mr. Sterling would take no steps to remedy his unlawful acts.

[56] **Claims against Antigua Isle**

The evidence adduced in relation to Antigua Isle does not disclose that the company authorised, permitted or ratified Mr. Sterling's unlawful acts. Neither is there any evidence that Antigua Isle resisted any attempts, if there were any, by the claimants to correct the trespass. While there is no doubt that Mr. Sterling hoped to appropriate the piece of Parcel 301 for Antigua Isle, there is no evidence that the company is complicit in his acts. I am afraid that on the evidence, the claimants cannot properly saddle Antigua Isle with liability for the unlawful acts of Mr. Sterling. There is nothing to suggest that he acted either as agent or servant for the company, when he trespassed on Parcel 301.

[57] I am therefore not of the view that Antigua Isle is a proper party to this claim; they have been improperly joined as defendants. Accordingly, I dismiss the claim against Antigua Isle and award them prescribed costs, unless otherwise agreed.

[58] It is accepted that Parcel 18 has an easement or right of way over a section of Parcel 301. Accordingly, there is no dispute that Mr. Sterling as an occupier of Parcel 18 has the right to pass and re-pass along the right of way. Mr. Sudolski has acknowledged this throughout.

[59] **Conclusion**

In view of the foregoing, there will be judgment for the claimants against Mr. Rupert Sterling. The Court orders and declares as follows:

- (a) Clarabell Investments Limited, Mr. Paul Sudolski and Mrs. Doreen Sudolski are entitled to have exclusive possession of the part of land situate on Parcel 301 that is encroached on by Mr. Rupert Sterling, as indicated in the Survey or Map of Mr. Leslie King.
- (b) Mr. Rupert Sterling is ordered to remove the fence that unlawfully sits on Parcel 301 within 4 weeks of this order.
- (c) Mr. Rupert Sterling is further ordered to remove the part of the garage that unlawfully sits on Parcel 301 within 6 weeks of this order.
- (d) An Injunction is granted restraining Mr. Rupert Sterling, his agents or servants, or whosoever from entering or utilizing Parcel 301, save for the sole purpose of utilizing the right of way over Parcel 301.
- (e) Mr. Rupert Sterling shall pay to the claimants, damages in the sum of \$14,000 together with prescribed costs, unless otherwise agreed.

- [60] Clarabell Investments Limited, Mr. Paul Sudolski and Mrs. Doreen Sudolski's claim against Antigua Isle Company Limited is dismissed. Prescribed costs are awarded to Antigua Isle Company Limited, unless otherwise agreed.
- [61] The Court gratefully acknowledges the assistance of both learned Counsel.

Louise Esther Blenman
High Court Judge