IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

Claim No. ANUHCV 2004/0298

Between:

Rolston Michael

Claimant

-and-

Jo Hutchens

Defendant

Appearances:
Septimus Rhudd of Rhudd & Associates – Defendant
George Lake of Lake & Kentish - Claimant

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2009: January 29
2009: May 29
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DECISION

1. Harris J: This matter arose from the substantive claim by the Claimant Rolston Michael against Mr. Jo Hutchens, the Defendant, for, inter alia, damages for trespass and nuisances in relation to the Lands of the Claimant and the adjacent Public way respectively.

2. On the 22/May/2007 Madame Justice Blenman gave judgment for the Claimant Rolston Michael, in nuisance and trespass, with damages to be assessed.

3. It is an assessment of damages with which we are here concerned.

THE SUBSTANTIVE JUDGMENT

4. In so far as is of particular relevance to the ambit of the assessment of Damages, the judge made findings, on all the factual issues in contention in the assessment of damages matter, including a finding on; (i) the septic tank and its flow and (ii) the removal of top soil from the lands of the Claimant. On these two issues the judge put it thus:
"I am far from satisfied that either Mr. Michael or Mr. Hutchens have proved on a balance of probabilities that their allegations are made out. Equally I am far from satisfied that Mr. Hutchens septic tank has overflowed and cause damage to Mr. Michael's property" (para 64 of the judgment).

5. Earlier in the same paragraph of the judgment, having set out Mr. Rolston's claim in relation to soil being removed from his land and the Counter Claim by Mr. Hutchens that Mr. Rolston had parked cars on his land, the Judge went on to point out that having reviewed all the evidence, the court is not satisfied that either party had proved its allegation. Further, the Judge attributed the motivation for the bringing of these two claims, to the 'bad blood' that existed between the two parties.

6. The court did find that Mr. Michael is entitled to compensation by the Defendant for the trespass to his land for erecting and maintaining a fence for approximately 6mnths on the land of the Claimant (see para 74 & 75 of the Judgment).

7. Further the court did find that Mr. Michael is entitled to be compensated for the damage and loss he had suffered as a consequence of the nuisance brought about by the Defendant when he dug a ditch/trench across the adjacent public road [1]. The court noted

[1] See para 68 and 71 of the Judgment.

that the Claimant had taken steps to abate the nuisance – a Public nuisance – and has incurred costs in restoring the Public way so that he way have use of it.[1]

8. In my view, neither the claim for assessment for damages for the removal of the soil from the Claimant's land nor the trespass by the Defendant's Septic tank intermittently flowing on to the land of the Claimant are properly before this court at this time. The court had made findings on these issues adverse to the Claimant or, alternatively, made no finding on these issues in favour of the Claimant.

THE ASSESSMENT CLAIM

9. The Claimant claims the sum of $ 36,778.00 for the cost of restoring the road that the Defendant had destroyed by digging it up; $20, 00.00 for his loss of use and enjoyment of his land by virtue of the Defendant's trespass by way of the erection and maintenance of a fence on the Claimant's land for a period of 6mnths; Mesne Profits for such trespass at $1500/mnth to a total of $9000.00 and $10,000.00 for the removal of the top soil.

10. As I noted earlier, Justice Blenman did not find that top soil had been removed nor did she find that the Defendant had trespassed on the lands of the Claimant by the flow from the defendant's septic tank. In any event, insufficient evidence has been led to establish to the satisfaction of the court that soil was taken as alleged by the claimant and more importantly in my view, been led as to the value or means of calculating the value of that soil. The claim, on this assessment, for $10,000.00 – for the removal of the top soil cannot be sustained and is dismissed. The claim for trespass by way of; (i) the Defendants septic tank and (ii) erection of a fence, cannot now be maintained in its entirety. No adverse finding being made against the Defendant with respect to the trespass by his septic, the trespass claim is now reduced to a claim and damages flowing from the erection of the fence alone.

[1] Legal issues concerning the actionable nature of a Private nuisance and damages thereto are dealt with in the substantive judgment; see also para 70 and 71 of the said Judgment.

The Defendant's Submission

11. The Defendant submits that the trespass to the Claimant's lands by his fence was minimal and at best would attract a nominal award. He contends that he had given instructions to a contractor to erect the fence and as soon as the encroachment was brought to his attention he had it removed.

12. Counsel for the Defendant contended that no use other than farming could have attended the portion of the Claimant's land encroached upon. The Claimant himself in evidence acknowledged that the subject lands were best suited for farming.

13. The Defendant further submitted that the evidence of the Claimant and his witness, both oral and documentary, on the issue of the cost of restoration of the roadway was inconsistent and unreliable. He contended that the documents in support, reflected an element of double billing.

14. The Defendant contends that Mr. Michael should not be compensated for rehabilitating the road or loss of access to his property.

The Claimants Submission

15. The Claimant simply submits that he expended the sums claimed on restoring the public access way to his land and is entitled to the actual or presumed loss and damage flowing from the Claimants trespass to his lands. He disputed the allegation that the defendant removed his fence in a timely manner. He claimed that his capacity to close a sale of his land was affected by the Defendant's tortious conduct. He asserted the veracity of his claim and the quantum of damages claimed.

THE COURT'S FINDINDS

16. At the onset let me say that on the evidence the Claimant is entitled to damages for; (i) the restoration of the road and (ii) for the trespass to his land by way of the erection of the fence; neither being the subject of the *de minimis* principle.

THE LAW

17. Trespass is actionable per se.

18. The two bases for calculating a money remedy or Mesne Profits are (i) Compensatory (ii) Restitutionary[1]. The purpose of the damages award is to place the Claimant in the position he would have been in had the trespass not been committed.

19. The measure of Compensation would be the cost of any work reasonably required in order to restore the Claimants enjoyment of the land. If reinstatement of the land is not relevant measure of compensation, as in the instant case, then the relevant measure of compensation is the diminution in the value of the land[2]. It appears to me that a compensation award for the trespass as defined above is not entirely appropriate to the facts of this case.

20. Restitution on the other hand is described by ***Gray*** thus: "….*involves, not as compensation of the loss inflicted on the Claimant, but a calculation of the benefit deemed to have been received by the trespasser by reason of her unauthorized use of the land."* It focuses on the price which a reasonable person would have been prepared to pay for the user concerned had it been required to be purchased or the sum which the trespasser should

[1] Para 3.83 Elements of land law, 4th edit Gray.
[2] Ibid, para 3.84

reasonably have paid for its use and occupation (ordinary letting value of the land in the open market)[1].

21. Using this approach, no proof of loss by the victim is required, neither is it strictly relevant that the trespasser derive any actual benefit from his wrongful use of the land[2].

22. The basis for compensation for nuisance is set out adequately at para. 66 – 71 of the substantive Judgment of Blenman J.

DAMAGES

23. Nuisance: The evidence in support of compensation under this head is not of the best quality. The burden of proving that loss is on the Claimant who has asserted his loss/expenditure on the restoration of the subject road.

24. Cross examination of the Claimant and Mr. Roberts by counsel, made inroads into the sufficiency of the quantum claimed as expended on the road works.

25. That necessary road works were carried out is not in question in my view. That the works were carried out with the consent of the relevant authority, D.C.A is also, in my view, not in question. It is not contended by the Defendant that the road works were not carried out substantially in accordance with the rough diagram produced in court. I do glean from the evidence that the users of the road got back a road in better condition than what existed prior to the restoration works. There is no sufficient evidence before me that suggest that the road could properly have been restored by construction of a lesser design and cost. Also I am not satisfied that the Claimant constructed a road for his benefit as alleged and that it went over and beyond that which was required to put him in the position that he would have been had the tort – nuisance – not been committed. Any appreciation in the

[1] Supra, Gray, para 3.85; see also A.G. v Blake [2001] 1 AC 268 (278 F). Stoke on Trent cc v W.J wais [1988] 1 WLR 1406 (1413).
[2] Invenegie Investments v Hackett [1995] 1 WLR 713, (717 – 718); Swordheath v Tabet [1979] 1 WLR 285 (288c – f).

quality of the roadway by virtue of the restoration works was, it appears, unavoidable and would redound to the benefit of the claimant and in this case to all the users of the way. (See Judgment of Blenman J. on this point)

26. The cross examination of Mr. Roberts was instructive in determining the true extent of the Claimant expenditure and my award on this assessment of damages.

27. Doubtless, the Claimant expended monies on the road way[1]. However, following the cross examination of the Claimant and Mr. Roberts and the inconsistencies resulting from that, including the double billing; his admission as to what he received for transportation and labour - $5500.00 - , the involvement of the Claimant's wife in preparing invoices for Mr. Roberts and in all the circumstances, I discount the Claimant's claim for rehabilitating the road, by approximately 50%, for a total award for that item of, $18, 000.00.

28. Trespass: What benefit can the Defendant be deemed to have derived from the unlawful occupation of the Claimant's land for 6 months; what price would a reasonable person has been prepared to pay for use and occupation of this land? The authorities suggest an ordinary letting value of the land in the open market is the criteria to use in determining this value.

29. The Claimant has submitted a figure of $1500.00/mnth without providing the basis for arriving at that figure, as the *"ordinary letting value of the land in the open market"*. He did say that the land was good for farming and we do know that the land can accept housing; but, we are looking at a six month period only.

30. On the evidence, the fence encroached on a 3'strip of land; not much good for farming I would say. No evidence has been led as to whether this strip would have affected farming on the balance of the land or the extent to which it would have affected farming or the letting of the balance of the Lands for farming or for any other purpose for that matter. Further, on the evidence, I am not satisfied that any sale of the land was or in any event,

[1] See para 30 below.

would have been adversely affected by this occupation. The claimant was unconvincing on this point.

31. The Defendant has assailed the Claimants position on this point, but again, he does not provide an empirical basis for his contention as to the inadequacy of the Claimants figures or claim for a money award at all.

32. The principle applied here and set out above is that the Defendant is deemed to have derived a benefit from his occupation of the claimant's land. The question is, what benefit ? The answer is; the price a reasonable person would have paid for its use and occupation – *the ordinary letting value*. In the case of The Estate of Cyril Thomas Bufton v Lona Eileen Bufton C.A No. 22 of 2004 at para. 22 – 24, Barrow J.A. there said, that it is for the claimant to provide the basis for the court to make even a nominal award. The learned Justice of Appeal continued and held that in the absence of that evidence forthcoming from the claimant, that a court can, however, make a nominal award that is *justifiable on the scale of common experience.* [1]

33. I conclude that the land did have a discernable value beyond being *de minimis*. In the absence of a transparent formula for calculating same or other adequate evidence in support of the ordinary letting value, I make a nominal award of $500/mnth for 6 months to a total of $3000.00.

34. FOR THE REASONS PROVIDED ABOVE it is hereby ordered as follows:

ORDER

1. That Judgment on the Assessment of Damages, for the Claimant herein in the sum of;
   (a) $18,000.00 for the claim in nuisance
   (b) $3000.00 for the claim in trespass

[1] See also Carlton Greer v Alston's Engineering Sales and Service Ltd P.C. 61 of 2001 , Trinidad and Tobago 2003, on the point of awarding nominal damages in the absence of sufficient proof of value of loss and on the meaning of *"nominal"* damages.

2. That costs in the Claim ANUHCV 2004/0298 are the Claimants costs calculated on the prescribed cost scale unless otherwise agreed.

3. Interest under the Judgment Act from the date of Judgment until satisfaction.

David C. Harris
High Court Judge
Antigua and Barbuda