

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

CLAIM NO: ANUHCV 2010/0686

BETWEEN:

BLONDELLE RICHARDSON
WORRELL RICHARDSON

Claimants

and

CLEVELAND SEAFORTH
JOYCELYN SEAFORTH

Defendants

Appearances:

Ms. Denise Jonas-Parillon for the Claimants

Mr. Arthur Thomas (Mr. Loy Weste, Ms. Lisa Weste and Mr. Olusegun Sheppard with him) for the Defendants

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2012: March 13
July 11
.....

JUDGMENT

[1] **MICHEL, J:** The Claimants and the Defendants are neighbours. The Claimants, Worrell and Blondelle Richardson, are husband and wife living in a house constructed by them on a portion of

land jointly owned by them at Fitches Creek in the parish of St. George, while the Defendants, Cleveland and Joycelyn Seaforth, are husband and wife living in a house constructed by them on a portion of land jointly owned by them at Fitches Creek and sharing a common boundary with the Claimants' land. In fact, it is a dispute as to the precise location of their common boundary which led to the institution of these proceedings.

- [2] The Claimants' case, as per their claim form and statement of claim filed on 5th November 2010, is that in or about May 1999, whilst they were in occupation of their land (Parcel 54), the Defendants began occupation of their land (Parcel 51). Shortly afterwards, the First Defendant brought a surveyor to the property, who moved the boundary markers along the common boundary of the Claimants and the Defendants and installed new boundary markers which enclosed some of the Claimants' land. On or about 31st May 1999, the Defendants wrongfully entered the Claimant's land and wrongfully took possession of a portion of the Claimants' land comprising approximately 0.03 acres by erecting a fence along the boundary established by their surveyor and fencing in and occupying the 0.03 acres. Between 2006 and 2008 the Claimants were placed on enquiry and they sought to confirm the boundaries of their Parcel 54, so they engaged Mr Ato Kentish (a licensed land surveyor) whose report, dated 13th November 2008, confirmed an encroachment on their land by the Defendants. By letters from their attorneys to the Defendants dated 3rd June and 1st December, 2008, they informed the Defendants of the encroachment and asked them to remove their fence and other items which they had placed on the Claimants' land, but the Defendants failed and or refused to do so. On 30th January 2009, the Claimants filed an application in the Land Registry for the determination of the boundaries of Parcels 51 and 54. By order dated 29th April 2010, the Registrar of Lands ordered that the boundaries of Parcels 51 and 54 were as defined in the survey plan submitted by Mr Ato Kentish. By letter dated 14th July 2010

addressed to the Defendants, the Claimants' attorney sent a copy of the Registrar's Order to the Defendants and demanded that they remove their fence and other items from the Claimants' property and advising them that the Claimants intend to seek damages from them. The Defendants, through their attorneys, indicated an unwillingness to end their trespass on the Claimants' property, even in the face of the Registrar's Order.

[3] In their suit brought against the Defendants, the Claimants claimed an order for possession of the portion of Parcel 54 trespassed on and unlawfully occupied by the Defendants since in or about August 1999; a declaration that the Defendants are not entitled to enter or use the portion or any part of Parcel 54 by planting or growing crops or other plants or erecting a fence or other structure there; general damages or mesne profits at the rate of \$250 per month from 31st August 1999 until possession is delivered up; exemplary damages; interest; and costs.

[4] In their defence filed on 3rd December 2010, the Defendants denied that any surveyor engaged by them altered the location or point of any boundary markers found on the land and averred that they did engage a licensed land surveyor, Mr Oliver Joseph, for the purpose of establishing their boundaries so that they could erect a fence and boundary walls and avoid any encroachment on Parcel 54. They alleged that during the survey by Mr Joseph, and in his presence, the Claimants and the Defendants agreed on the boundary makers shared by them. The Defendants deny any encroachment whatsoever on the Claimants' land and assert their reliance on the findings in a report by Mr Sean Peters (licensed land surveyor) dated 30th June 2008. The Defendants deny that the Registrar's Order made any allegation of an encroachment by them; they admit that they have not removed their fence; and they allege that they are entitled to retain it.

[5] At the trial on 13th March 2012, only the First Claimant gave evidence for the Claimants, while both Defendants gave evidence and called both their surveyor, Mr Sean Peters, and their contractor, Mr Isaiah Knight, as witnesses.

[6] In her witness statement, the First Claimant repeated much of what was in the statement of claim. She also stated that in April 2008, in preparation for construction work on her property, she employed a surveyor, Mr Vernon Bird, to survey Parcel 54 to confirm that further development of her property would not encroach on the neighbouring lots. The survey revealed that the fence erected by the Defendants was encroaching on her property. She immediately brought this to the attention of the First Defendant and asked him to rectify the boundaries. The First Defendant employed another surveyor, Mr Oliver Joseph, who confirmed the encroachment by the Defendants. The First Defendant employed yet another surveyor, Mr Sean Peters, whose survey conflicted with Mr Bird's and Mr Joseph's. She then engaged the services of another surveyor, Mr Ato Kentish, who confirmed that the Defendants had encroached on Parcel 54. The Claimants caused a valuation to be done of the disputed portion of Parcel 54 and it was valued at \$13,000; and its annual rental value was assessed at \$845. She also stated that the Defendants had notice of the encroachment on Parcel 54 since in or about June 2006 and have wilfully and unreasonably persisted in their trespass on the Claimants' property and are accordingly liable to the Claimants in general and exemplary damages for trespass, mesne profits and reimbursement of expenses incurred by the Claimants in pursuing their claim for possession.

[7] Under cross-examination, the First Claimant testified that it was in 2003 and not in 1999 that the Defendants erected the fence and wall around their house. She testified that the statement in her statement of claim that the Defendants erected a fence along the boundary in 1999 is a lie - it was

in 2003 that it was erected. Then, when it was put to her under further cross-examination that the Defendants' fence and wall had been erected for about thirteen years, she responded that it was approximately twelve years since they were erected, which would be some three years before 2003.

[8] When the First Claimant was asked under cross-examination about the discrepancy between her statement in her witness statement that it was in April 2008 that she engaged Mr Vernon Bird, who discovered that the Defendants had encroached on her property, whereupon she immediately brought this to the attention of the First Defendant, and her later statement that it was since in or about June 2006 that the Defendants had notice of the encroachment, she testified that this is not a discrepancy. Her explanation for the contradictory statements was to the effect that, although she got Mr Bird's official report in 2008, she knows that Mr Bird notified the First Defendant of what he (Mr Bird) was doing and about the encroachment.

[9] It is to be noted though that the First Claimant had stated in her witness statement that it was only in April 2008 that she engaged Mr Bird. It is also to be noted that in the Claimants' closing submissions it is stated on page 2 that prior to 2008 "the Claimants were unaware of the Defendants' encroachment" and (on page 3) that when the Claimants became aware of it "the Defendants were immediately notified of their encroachment onto the Claimants' land".

[10] Of note too is the fact that although the First Claimant had alleged in her witness statement that Mr Oliver Joseph confirmed the encroachment by the Defendants, she testified under cross-examination that she never met or spoke to Mr Joseph. There was also no report from Mr Joseph from which the First Claimant could have arrived at the position that Mr Joseph had confirmed any

encroachment by the Defendants and the evidence of the Defendants and their witness, Mr Isaiah Knight, was that Mr Joseph confirmed the correctness of the boundaries, within which boundaries the Defendants' fence and dwelling house were constructed.

- [11] The evidence of the First Defendant, as per his witness statement, was that he entered into occupation of Parcel 51 in or around May 1996. The First Claimant resides on Parcel 54 and had been residing there before the Defendants commenced construction on Parcel 51 in 1997. They (the Defendants) had employed a contractor, Mr Isaiah Knight, to construct their house and, in order to ensure that they built their house within their boundaries, they obtained a professional opinion from a licensed land surveyor, Mr Oliver Joseph, regarding the demarcation and position of their boundaries. Contrary to the assertions of the Claimants, Mr Joseph did not alter any boundaries, but confirmed that the boundaries which were demarcated by existing government stakes were in the correct position. The confirmation of the correct position of the boundaries was done in the presence of the First Claimant, with whom the Defendants shared a very good and neighbourly relationship at the time. Immediately thereafter, they constructed their fence pursuant to the initial boundary markers set down by the government's surveyors and confirmed by Mr Joseph. The fence was constructed in or about August 1999. Before the Defendants had commenced construction of their boundary fence, the First Claimant had demarcated her boundary marks abutting the Defendants' land by erecting a "concrete post cube" containing her electric meter at the front western side of Parcel 54 immediately adjacent to Parcel 51. The First Defendant was aware that the Claimants always thought that the concrete post cube demarcated their boundary's edge because in 1999, after he had commenced construction of the fence, the First Claimant approached him and asked him why he did not "jam" his wall against the concrete post cube to eradicate the small space between the boundaries, to which he responded that he

placed his wall where the surveyor told him his boundary ended. He alleged that the Claimants did not dispute the positioning of the boundary or embarked on any investigations for almost ten years; that they therefore acquiesced in any alleged encroachment; and that the Defendants relied on the expert advice of Mr Oliver Joseph who, in the presence of the Claimants, confirmed the existing boundaries. The First Defendant denied any encroachment and stated his intention to rely on the report of Mr Sean Peters (licensed land surveyor) dated 30th June 2008.

[12] The First Defendant alleged that there was a warm and friendly relationship with the Claimants for nearly ten years until in or around 2008 when it suddenly deteriorated after he approached the First Claimant and informed her about lewd and inappropriate demonstrations and behaviour towards his (the First Defendant's) wife, his two teenage daughters and his maid. He informed the First Claimant that he refrained from making a report to the police because of the relationship then existing between the Claimants and the Defendants, but asked her to ensure that her son discontinued his inappropriate behaviour. The First Claimant thanked him for speaking to her and for choosing not to go to the police and she assured him that her son would discontinue his inappropriate acts. Thereafter, the First Claimant stopped speaking to him and his family. Soon after that, on 3rd June 2008, the Claimants (through their attorneys) requested the Defendants to remove their fence due to an alleged encroachment. The Claimants relied on a survey report of Mr Vernon Bird, dated 8th April 2008, which indicated that the Defendants had encroached on the Claimants' land to the extent of 0.01 acres or 457 square feet.

[13] The First Defendant alleged that, in the light of the letter of 3rd June 2008, they (the Defendants) engaged the services of Mr Oliver Joseph, who had initially confirmed the boundaries, but Mr Joseph started to vacillate as to his findings and so they sought the services of Mr Ato Kentish

who, however, indicated that he had a conflict of interest and referred them to Mr Sean Peters. The report by Mr Peters dated 30th June 2008 showed that there was no encroachment as alleged by the Claimants. Mr Kentish subsequently provided a report to the Claimants dated 13th November 2008 which stated that the Defendants had encroached some 1,185.70 square feet or 0.03 acres on the Claimants' land.

[14] Under cross-examination, the First Defendant reiterated much of what is contained in his defence and in his witness statement, maintaining his assertion that there was no encroachment on the Claimants' land and that he and the Second Defendant acted at all material times on the professional advice they received from the surveyors and lawyers engaged by them.

[15] The evidence of the Second Defendant, as per a witness summary filed by her Attorney - the contents of which she accepted as being true and correct - was materially identical to the evidence of the First Defendant contained in his witness statement.

[16] Under cross-examination, the Second Defendant reiterated much of what was in the witness summary and in the defence, but on some issues she conceded that there were factual assertions made in the witness summary which she could only confirm as having been told to her by her husband, as opposed to her having personal knowledge of same.

[17] The third witness for the defence was Mr Sean Peters. In his witness statement, he stated that he is a licensed land surveyor and that in or around June 2008 he was requested by the Defendants to do all the necessary research to verify the existing boundaries for Parcels 51 and 54 and to report on any encroachment that may exist. He stated that he visited the property, made certain

observations and took measurements. He then detailed his observations and measurements and concluded that there was no encroachment situation or any irregularities along the boundaries of Parcels 51 and 54 and that the existing fence along the perimeter of Parcel 51 does not breach the registered boundary for Parcel 54 on the ground. He further stated that the fence corresponds with the cadastral survey of Parcel 51, which can be obtained from the survey department, and that the proposed development layout of CHAPA (the Central Housing and Planning Authority) conflicted with the authenticated development plan from the survey department and does not accurately reflect the true position of the boundaries and acreage for Parcels 51 and 54.

[18] Under cross-examination, Mr Peters testified that he has been a licensed land surveyor since 2004; that as far as he is aware Mr Oliver Joseph is a licensed land surveyor, and he believes that Mr Joseph has been a surveyor before 2004; that he knows Mr Ato Kentish and is aware that he is a licensed land surveyor employed at the survey department; that he also knows that Mr Vernon Bird gave a report concerning the boundaries of Parcels 51 and 54; and that he knows that Mr Oliver Joseph was consulted concerning these boundaries. He testified that, as far as he can remember, he is the only one out of those mentioned who insists that there is no encroachment. He testified that he was in court to prove that his survey was the correct one.

[19] It is to be noted that Mr Peters' evidence and his report were never really tested in cross-examination so as to cast doubts on the correctness of his conclusions, other than by eliciting from him that his conclusions on the absence of any encroachment by the Defendants differed from the opinions of other named surveyors who were not called to give evidence in the case.

[20] The fourth and final witness for the defence was Mr Isaiah Knight. A witness summary was filed by the Defendants' attorney containing the evidence intended to be given by Mr Knight, some of the contents of which he accepted to be correct and some he disavowed, in particular, he disavowed all statements relating to his building of the fence along the common boundary of Parcels 51 and 54. He testified that he built the Defendants' house on Parcel 51, but he did not build the fence and was not able to speak to its construction and its cost.

[21] The remainder of Mr Knight's evidence, as per the witness summary, was that he is a contractor; that in or around 1999 he was employed by the Defendants to construct their house; that in order to ensure that he built the house within the proper boundaries, he asked the Defendants to have a surveyor to confirm the boundary markers; and that Mr Oliver Joseph visited the site, showed him where the boundary markers were and confirmed that the markers that were on the ground were in the correct position.

[22] The evidence of Mr Knight under cross-examination was (as the doctors are fond of saying) unremarkable.

[23] The evidence in the case having been concluded, the Court made a visit to the locus, where the parties pointed out the location of the disputed boundaries and the fence and other property of the Defendants located on the area of alleged encroachment.

[24] On the return to the Court, the parties were ordered to file written closing submissions within one week, which order was complied with by both parties.

[25] Even without delving into any detailed analysis of the judicial, statutory and textbook authorities referred to by the parties, certain things are clearly apparent. The first is that, although there were two claimants, both of whom were present in court, only the First Claimant gave evidence. Secondly, although the Claimants appeared to have been relying on the reports of two licensed land surveyors and the alleged indications and/or conclusions of another, none of these three surveyors were called as witnesses, while the surveyor upon whose report the Defendants relied was called as a witness for the Defendants. Thirdly, there were discrepancies in the evidence of the First Claimant, whose evidence contained material inconsistencies on material issues in the case, such as the time when the Defendants were notified of the alleged encroachment - whether it was in 2006 or 2008 - and the time when the Defendants built the allegedly encroaching fence - whether it was in 1999 or 2003. There was too the fact that, having alleged that Mr Oliver Joseph had confirmed the encroachment by the Defendants, she then testified that she had never met or spoke to Mr Joseph. There was divergence as well in the two surveyor's reports disclosed by the Claimants, with the report of Mr Bird stating that there was a 0.01 acre or 457 square foot encroachment on the Claimants' land by the Defendants' fence, while the report of Mr Kentish seems to be stating that there was a 0.03 acre or 1,185.70 square foot encroachment on the Claimants' land by the Defendants' fence. Finally, there was evidence given by the First Claimant which was not reflected in or foreshadowed by the statement of claim.

[26] On the flip side of the coin, it is apparent that both of the Defendants gave evidence in support of their case; that the surveyor on whose report they indicated they would rely was called as a witness and presented his findings to the Court, which findings were tested under cross-examination and from which they emerged unblemished; that they also called as a witness their builder, who had initiated the ascertainment of boundaries exercise in 1999. It is apparent too that

there were no material inconsistencies in the evidence of the Defendants, their witnesses and their filed defence.

[27] The Claimants appear to have placed very heavy reliance on the so-called Order of the Registrar of Lands and on the fact of the Defendants not having appealed the Order, which they evidently regarded as making untenable “the Defendants’ persistent denial of their encroachment onto the Claimants’ property”¹. But section 18 of the **Registered Land Act**², pursuant to which the Claimants applied to the Registrar of Lands¹, requires the Registrar to do four things before she can “define accurately the boundaries of the parcel”. Section 18 of the Act is reproduced here in full because of its centrality to the principal issue for determination by the Court:

“18. (1) If the Registrar in his discretion considers it desirable to indicate on a filed plan, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if any interested person makes application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing by the register to be affected an opportunity of being heard, cause to be defined by survey the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.”

¹ See para. 16 on page 7 of the Claimants’ submissions

² Cap. 374 of the Laws of Antigua and Barbuda

[28] Section 18 requires the Registrar to - (1) give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries; (2) cause to be defined by survey the precise position of the boundaries in question; (3) file a plan containing the necessary particulars; and (4) make a note in the register that the boundaries have been fixed. There is no evidence, however, that any of the four prerequisites to the definition by the Registrar of the boundaries of Parcels 51 and 54 had been complied with. It may be possible to infer that since both the Claimants and the Defendants seem to have appeared or were represented before the Registrar and since they may have been the only two land owners affected, then the first requirement might have been satisfied. There is no basis however on which one can infer that the Registrar caused the precise position of the boundaries of Parcels 51 and 54 to be defined by survey, so as to satisfy the second requirement. There is also no basis to infer and indeed sufficient basis not to infer that a plan containing the necessary particulars had been filed by the Registrar and note made by her in the register that the boundaries had been fixed. Surely, if these two latter requirements had been satisfied, then the Court would have expected to have the plan and the noted register disclosed and/or tendered in evidence.

[29] The statement contained in paragraph 18 of the closing submissions of the Claimant to the effect that the precise position of the boundaries of Parcel 51 and 54 was fixed by the Registrar "as defined on the survey plan submitted by Ato Kentish, Licensed Land Surveyor", is but confirmation that the second requirement of section 18 was not satisfied, because not only does the section not provide for the Registrar to simply accept the plan of one of the disputing parties as defining the boundaries, as opposed to him causing a survey to be done, but moreover, the plan submitted by Mr Ato Kentish, which was referred to in the closing submissions, is not in fact a survey plan but is

a sketch plan prepared by Mr Kentish, and it does not itself define the precise position of any boundaries.

[30] Application could also have been made to the Registrar of Lands under section 17 of **the Registered Land Act**² to determine and indicate the position of an uncertain or disputed boundary, but it would be fatal to the Claimants' claim to treat the order by the Registrar of Lands as having been made pursuant to section 17. The reason for this is that there are specific procedures to be followed by the Registrar in order to effectuate the determination of an application under section 17, which procedures were evidently not followed and the following of which is critical to the pursuit of court action on a boundary dispute.

[31] No reliance can accordingly be placed on the so-called Order of the Registrar of Lands in establishing that there was any encroachment by the Defendants on the Claimants' land.

[32] Considering that the onus is on the Claimants to prove their case and, having regard to the Court's findings in paragraphs 23 and 24 above and to the Claimants misplaced reliance on the Order of the Registrar of Lands to establish the fact of encroachment and trespass by the Defendants, this Court cannot but conclude that the Claimants have failed to prove that the Defendants have encroached upon their land. There is no basis therefore for the Court to make any order for the Defendants to give possession to the Claimants of any land on which they have trespassed, nor can the Court make any consequential declarations or orders for reimbursement, damages, mesne profits, interest or costs.

[33] Issues of acquiescence and laches and general and exemplary damages canvassed by Counsel for the parties and on which several authorities were cited and provided to the Court, are not necessary to be addressed and determined by the Court and I decline so to do.

[34] The Claimants' case is dismissed, with costs to the Defendants in the sum of \$5,000.

Mario Michel
High Court Judge