ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.AXAHCV 2006/0083

BETWEEN:

PATRICIA ANN HURST-WILLARD
JOHN WILLARD

Claimants

And

PARAGON HOLDINGS LTD.

JOHN M ERATO

MICHAEL SOONS

TURTLE'S NEST BEACH RESORT

Defendants

Appearances:

Mr. Gerhard Wallbank for the Claimants
Mrs. Tara Ruan and Ms. Kristy Richardson for the Defendants

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2012: July 20

August 27

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JUDGMENT

BACKGROUND

[1] **BLENMAN, J:** On 21st June 2012, after a full trial, Mrs. Patricia Ann Hurst Willard and her husband Mr. John Willard, (Mr. and Mrs. Willard), obtained judgment against Paragon Holdings Ltd., Mr. John M.Erato, Mr. Michel Soons and Turtle's Nest Beach Resort, (the defendants). In that trial, the main order that Mr. and Mrs. Willard had sought was a demolition order.

[2] In the court's written judgment, the court found that the defendants had trespassed on Mr. and Mrs. Willard's property and created a nuisance by constructing Building 2 in close proximity to Mr. and Mrs. Willard's Unit, 3BE, which is housed in Building 1.

[3] In its judgment, and in the court's considered view, based on the totality of circumstances, the court held that the demolition order was not an appropriate order but felt that damages should be awarded instead. In the written judgment the court was forced to invite both sides to make further submissions on the amount of damages that should be awarded.

[4] It is noteworthy that during the trial and at the conclusion of the evidence, the court had invited both sides to address alternative remedies to the demolition order in their written closing submissions. Neither side adequately complied with the court's directions. The court, in its written decision of 21st June 2012, granted Mr. and Mrs. Willard a number of declarations. The court was therefore left with no alternative in its judgment but to specifically request the parties to address the amount of damages that should be awarded costs.

[5] The parties have provided the court with further submissions.

[6] This is a judgment on the quantum of damages that the court should award to Mr. and Mrs. Willard due to the trespass and nuisance that have been created by the defendants.

[7] It bears repeating that in the case that was deployed by Mr. and Mrs. Willard they sought relief in the form of a demolition order of Building 2 which is the source of the trespass and the nuisance. At the conclusion of the evidence, the court invited both sides, in their closing written submissions, to address the alternative remedies that are available to that of ordering that Building 2 be demolished. All learned counsel in their closing submissions were not as helpful to the court as they could have been on this issue. The court had hoped that the parties would have utilized the opportunity to address as an alternative to the demolition order the quantum of damages that should have been awarded if Mr. and Mrs. Willard were to succeed on their claim.

[8] Accordingly, the court in rendering this further decision bears in mind that there was a full ventilation of the issues that were joined and the court had quite generously granted both sides a very lengthy period to provide their closing submissions; this was based on the request that was made by counsel.

[9] I now turn to the claimants' additional submissions.

Claimants' additional submissions

[10] Learned counsel Mr. Gerhard Wallbank submitted that the law recognizes two primary heads of damages: pecuniary damages and non-pecuniary damages. The former comprises all financial and material losses that are capable of being arithmetically calculated, even though the calculation may be a rough one where there are difficulties of proof. The latter comprises all losses that do not represent an inroad upon a person's financial or material assets.

[11] Mr. Wallbank said that Mr. and Mrs. Willard have suffered past and future permanent losses for which they should be compensated. Mr. Wallbank stated that Mr. and Mrs. Willard's potential pecuniary losses consist of any diminution in value of Unit 3BE caused by the impact of Building 2's location, including the physical usurpation of the property upon which Building 2 encroaches, its impact on the condominium's aesthetic character, the property wide nuisance posed by the close proximity of the two buildings, and any resulting loss to the condominium's income stream.

[12] Learned counsel Mr. Wallbank also stated Mr. and Mrs. Willard's pecuniary losses are comprised of the past and future interference with their personal use and enjoyment of Unit 3BE and its amenities. Mr. Wallbank sought to expand his original closing arguments by asserting, in his further written submissions, that the improper location of Building 2 impacted 25% of the strata lots. He stated that all of the condominium units in the south east corner of Building 1 and all of the condominium units in the north western corner of Building 2 are impacted. Mr. Wallbank said that the result is that whole area now carries an obvious sense of overcrowding. Learned counsel Mr. Wallbank said that there also is ample reason to believe that the overall value of the property and its income stream would suffer negative effects.

[13] Mr. Wallbank submitted that the acts of the defendants have caused the diminution in the value of the property. He posited that appraisal of Unit 3BE's value will require expert evidence. He also stated that the income that is derived from the rental pool would have been affected and there is need for forensic analysis of the property's rental history and potentially a comparative analysis of other resorts. Based on those suggestions, Mr. Wallbank asked the court to embark on an elaborate and unknown procedure of instructing the defendants to produce the records of the condominium development and allow Mr. and Mrs. Willard 60 days after to do a preliminary review of them, among other things. Mr. Wallbank said that assuming the Willards deem it advisable to seek damages then they would file their witnesses or request further instruction concerning the selection of an approved international appraiser. Mr. Wallbank also opined that Mr. and Mrs. Willard are entitled to compensation for their percentage share in the value of the common property upon which Building 2 encroaches. Mr. Wallbank said that Mr. and Mrs. Willard request further instructions concerning the engagement of an expert appraiser in order to assess the costs to the defendants of obtaining a right of way for Building 2.

[14] The cumulative effect of the requests that Mr. Wallbank, made in his closing further submissions on the amount of damages, is to invite the court to give directions for further evidence to be provided. This is quite a novel approach particularly since the court had invited the parties to provide submissions on the amount of damages that should be awarded. The usual posture that counsel who is so invited by the court adopts is to refer to the findings of the trial court and the conclusions on the breaches by the defendants and thereafter to provide the court with authorities on the quantum of damages that should be awarded, based on the findings of facts and the applicable principles of law.

[15] Also, it is not open to Mr. and Mrs. Willard in their further closing arguments to indirectly address matters which the court has determined in a manner adverse to them.

[16] The approach that learned counsel Mr. Wallbank has adopted, with respect, is not helpful. It must be remembered that the judgment was rendered after there was an extensive trial of the issues in circumstances where there was the provision of a vast amount of documentary and oral evidence. The written closing submissions were very extensive.

[17] I am of the considered opinion that it would be unlawful and unjust for the court at this stage to even contemplate embarking on this very interesting approach that Mr. Wallbank has requested. I therefore decline to accede to learned counsel's request.

[18] Turning to the issue of non-pecuniary losses, Mr. Wallbank, in addressing the issue of nuisance, said that even if Mr. and Mrs. Willard's pecuniary losses ultimately should prove nominal, they are nonetheless entitled to compensation of the loss of their use and enjoyment of Unit 3BE amenities, in particular the permanent loss of privacy among other things.

[19] Mr. Wallbank said there was sufficient trial evidence for the court to draw the necessary inferences and assess damages for Mr. and Mrs. Willard's permanent loss of their personal privacy and the nuisance they have and will endure as a result of Building 2's change in location. However, Mr. and Mrs. Willard are prepared to submit supplemental witness statements on the question of damage and give such evidence as the court deem necessary.

[20] Mr. Wallbank requested that the court gives direction for the provision of an expert report or for leave to be given to Mr. and Mrs. Willard (after judgment has been rendered) to file supplemental witness statements. The request, in my view, is quite extraordinary. It bears repeating that the court had specifically at paragraph 123 of the judgment requested the parties to file and exchange brief submissions together with authorities on the amount of damages the court should award.

[21] It is the law that where the court has, as in the case at bar, found that trespass and nuisance have been committed, damages can be awarded in lieu of an injunction. As indicated in the judgment of the court that was delivered on 21st June 2012, this is not an appropriate case in which a demolition order should be granted but rather damages will be an appropriate remedy.

[22] Perhaps it may be the case that Mr. and Mrs. Willard are faced with the situation in which they chose to deploy their case in such a way so as not to adduce evidence which could properly assist the court in its determining the quantum of damages that should be awarded. There was very little effort on the part of Mr. and Mrs. Willard to lead evidence upon which the court can properly

determine the quantum of damages that should be awarded. This may well explain the approach that is taken by them in their further submissions to request, quite belatedly, that the court give directions for them to adduce additional evidence. This was after the full three days of trial of the matter in which detailed witness statements were provided by the parties which was followed by very extensive cross-examination on both sides.

[23] I am not of the view that there is any proper basis upon which I could accede to Mr. and Mrs. Willard's request to allow them to either file supplemental witness statements or to have them produce expert evidence at this stage. The case has been concluded and judgment has been rendered. I have no doubt that quite apart from the fact that it would be improper for the court to do so it would also be unlawful and unjust to accede to the requests that are made by learned counsel Mr. Wallbank. The Civil Procedure Rules 2000 (CPR 2000) clearly speak to the procedures that should be adopted in civil trials and should the court even contemplate acceding to the requests that were made it would lead to injustice to the defendants. In addition, it would severely undermine the overriding objective of the rules. What, in effect, learned counsel Mr. Wallbank is requesting is that the court allows him to lead evidence, after the judgment has been rendered, which ought to have been adduced during the trial. I therefore decline to accede to learned counsel's request.

[24] In relation to the quantum of non-pecuniary damages, learned counsel Mr. Wallbank said that the pre-construction price of Unit 3BE was US$130,000. He said that a comparable unit in Building 2 was valued at US$284,006.25 even though it contains slightly more area than Unit 3BE. Mr. Wallbank therefore posited that it would not be excessive for the court to award non-pecuniary damages in excess of Mr. and Mrs. Willard's purchase price of US$130,000 plus interest. The justification for this assertion remains unclear to me despite learned counsel's suggestions.

[25] Finally, Mr. Wallbank urged the court to award Mr. and Mrs. Willard costs even though he stopped short of specifically suggesting a mathematical figure.

Defendant's further submissions

[26] Learned counsel Mrs. Tara Ruan said it is settled law that an easement of light and air are acquired in augmentation of the ordinary rights incidental to the ownership and enjoyment of the land. It is a right which prevents the occupier of an adjoining piece of land from building or placing upon his land anything which has the effect of obstructing the light, air or privacy coming to the building of the beneficiary of the easement. Such an easement may be acquired impliedly by virtue of purchasing a portion of property from another where the other person owns the adjoining property. Mrs. Ruan posited that McGregor on Damages at Paragraph 34-001 states that the two main torts with respect to land are trespass and nuisance. A nuisance or trespass may be caused by interference with a proprietor's enjoyment and use of his property or with whether his easement of light and air or his view and or privacy. Interference with an easement may amount to an action in nuisance and or trespass. Mrs. Ruan posited that the mere fact of interference of the easement is not of itself sufficient to constitute a nuisance. The disturbance must be a substantial interference with one's comfortable use and enjoyment of one's house according to the usages of ordinary persons in the locality. Kodilyne in Commonwealth Caribbean Tort Law states that there are two main requirements in order to establish an action in nuisance. Firstly, the claimant must prove sensible material damage to the land or substantial interference with his enjoyment and secondly, he must also demonstrate that the actions of the defendant were unreasonable in the circumstances.

[27] As it relates to an easement of light, Mrs. Ruan said that Halsbury's Laws of England indicates that the test as to whether the interference complained of amounts to a nuisance is not whether the diminution is enough to materially lessen the amount of light previously enjoyed nor does it relate to what light remains. The deciding factor is whether the difference between the light before and the light after the obstruction is great enough to really make the building to a sensible degree less fit than it was before for the purposes of business or occupation according to the requirements of mankind. Easements of air are likened to easements of light and as such the same principles apply with respect to interference. Halsbury's provides that a trespass of land may arise if a person erects on his own land anything which invades the airspace of another. If no loss or damage is caused, nominal damages are awarded. However, if damages are awarded, the

claimant is typically entitled to the diminution in the value of the land which may be the cost of repair and reinstatement. Mrs. Ruan opined that in the case at bar the court found that Building 2 was not substantially located in accordance with the filed Declaration and as such had encroached on the common property. Mr. and Mrs. Willard's light, air, and privacy had been reduced (though not to a great extent). These constituted a trespass and nuisance although there is no evidence that the property value had been diminished.

[28] With respect to damages in nuisance, Learned Counsel Mrs. Ruan said that Kodilyne indicates that a claimant must prove damages, that is, the claimant must show sensible material injury to his property or substantial interference with his enjoyment of the land. In relation to a person seeking damages, McGregor at paragraph 8-001 states that:

> "*to justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court of neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages."*

[29] Mrs. Ruan postulated that there is an award of damages also referred to as small damages which is not nominal damages. Small damages is where the loss is small but quantifiable. McGregor at paragraph 10-006 states that small damages are not frequently utilized as the law tends not to recognize any distinction between no appreciable damage and no damage at all.

[30] Mrs. Ruan said that in McGregor at paragraph 32-003 it is stated that the normal measure of damage with respect to a tort is the amount by which the value of the goods has been diminished. In the case at bar, the court found that the extent by which the light, air, view and privacy had been reduced did not, on the evidence, diminish the value of the property.

[31] Also, Mrs. Ruan referred the court to ***Elizabeth Cordice Mapp v Cammie Mathewes,*** Claim No. 560 of 2002. In that case the court held on the defendant's counterclaim that the Claimants

were liable for trespass on the former's property. However, since no evidence was led by the defendant in relation to the loss which she had suffered she was awarded nominal damages in the sum of EC$2,000.00.

[32] Mrs. Ruan stated that, in the case at bar, the court indicated that from the evidence presented the court was unable to tell the extent of the encroachment caused by Building 2. Mrs. Ruan opined that the inability of the evidence to reveal the distance between where Building 2 was identified to be located in Diagram 1 and its actual location provides uncertainty as to the loss, if any, suffered by Mr. and Mrs. Willard because of the encroachment by Building 2 on their Unit and the resulting light, air view and privacy infringement. Furthermore, from the evidence presented the court determined that Mr. and Mrs. Willard's light, view and air had not been seriously compromised (though their privacy had been affected to some extent). The court further stated that the infractions complained of by Mr. and Mrs. Willard were not serious. In the circumstances, Mrs. Ruan submitted that the case at bar is one which is amenable to an award of nominal damages or in the alternative small damages. In terms of the amount of nominal damage, learned counsel Mrs. Ruan submitted that this court should be guided by the ruling in the ***Elizabeth Cordice Mapp v Cammie Mathewes*** matter and likewise award the claimants in the case at Bar, the sum of EC$2,000 as nominal damages.

[33] Next, learned counsel Mrs. Ruan addressed mitigation of damages. She referred the court to McGregor on Damages at paragraph 7-003 which states that the principal meaning of mitigation comprises three rules. The first being that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for loss which he could have avoided by taking such reasonable steps. The second rule, a corollary to the first, asserts that the claimant cannot recover losses avoided but can only recover losses incurred in taking reasonable steps to avoid loss. The third rule is that where the claimant takes reasonable steps to avoid loss and such loss is avoided, the defendant is entitled to the benefit of the loss accruing and is only liable for the loss as lessened but not for the avoided loss. Mrs. Ruan said that the three rules of mitigation were examined in ***Oswald France v the Attorney General et al***, where the court stated that:

> "*In several cases the conduct of the plaintiff and the circumstances of the case can affect the measure of damages which he is able to recover. It is the law that a person who has suffered a wrong is obliged to take reasonable steps to avoid loss which could be prevented; failure to do so would result in him being unable to claim for the part of the damage which occurred during the plaintiff's neglect.*"

[34] Learned counsel Mrs. Ruan submitted that Mr. and Mrs. Willard did not take all the necessary and available steps in order to mitigate their losses, in these circumstances. They could have reduced the loss suffered and in fact avoid any loss by seeking injunctive relief which would have prevented the further construction of Building 2 until the determination of the dispute. As highlighted in the judgment of the court, Mr. and Mrs. Willard failed to do so.

[35] Mrs. Ruan said that on the issue of costs *Part 64 of the CPR* 2000 states that the general rule with respect to costs is that the unsuccessful party must pay the costs of the successful party. However, the court has the discretion with respect to adherence to the general rule. The court may order a successful party to pay the unsuccessful party's costs, make no order as to costs or make one party pay a specific portion of another party's costs of the proceedings after consideration of among other things the conduct of the parties (before and during the case), the manner in which the party has pursued a particular allegation, particular issue or the case and whether a party has succeeded on particular issues even if the party has not been successful in the whole of the proceedings. This was confirmed in ***Rochamel Construction Limited v National Insurance Corporation,*** Civil Appeal No. 1 of 2003. The general rule is where fixed costs do not apply, then prescribed costs applies.

[36] Mrs. Ruan said according to Part 65.5 (2) (b) (iii) of the CPR, the value of a claim that is not for a monetary sum shall be in the amount of EC$50,000.00 unless the court has made an order at the case management conference determining the value of the case. This claim at bar was not for a monetary sum and no such order with respect to the value of this claim had been made by this court.

[37] Mrs. Ruan said that Mr. and Mrs. Willard were not wholly successful in their claim. The court had identified seven (7) issues to be determined in this matter. Firstly, it was to be determined whether the Original Declaration was lawfully amended and secondly, if it was not whether it was a nullity. It was held that it was amended lawfully and consequently it was not a nullity. The court also found that the Original Declaration did not memorialize the development plan for the project. Though the court found that Building 2 was not located substantially in accordance with the Original Declaration and that the privacy, light, air and view of Mr. and Mrs. Willard had been reduced, the court did not accept that it was reduced to the degree in which they claimed and in fact found that the value of the Condominium had not been diminished. Consequently, the court did not grant the mandatory injunction sought by Mr. and Mrs. Willard. The defendants therefore succeeded on four or five of the identified issues. In the circumstances, Mrs. Ruan posited that there is cause for the court to derogate from the general rule in Part 64. Mrs. Ruan submitted that an award of EC$7,000.00 costs to Mr. and Mrs. Willard is suitable in the circumstances.

[38] Learned Counsel Mr. Wallbank has not suggested a mathematical figure that the court should award as damages.

[39] Before I determine what is an appropriate award of damages, I must state that it is incredible that after several invitations by the court for the parties to provide the court with assistance in relation to the award in damages, the court is in no better position. In a word, the court has bent over backwards in the interest of justice to no avail.

[40] Of some concern to the court is the fact that Mr. and Mrs. Willard have sought to raise in their additional submissions issues upon which the court has already ruled in the judgment of 21st June 2012. This can hardly be acceptable. If they are dissatisfied with those rulings it is always open to them to challenge them by an appropriate means.

[41] For the record, I state that given the evidence the court is unable to determine the diminution, if any, in the value of the property. It bears stating that this is the sort of evidence that should have been provided during the trial. Mr. and Mrs. Willard have failed to do so. In fact, during the cross-examination of Mr. Cleveland Richards, one of the defendants' witnesses, learned counsel Mr.

Wallbank unsuccessfully tried to elicit this evidence. It is clear to me that Mr. and Mrs. Willard ought to have provided this evidence through their witnesses. They have failed to do so. The court cannot properly at this stage give directions to assist them in remedying the defect, if there was one, in the way they chose to marshal their evidence. Accordingly, there is no evidential basis upon which the court could award Mr. and Mrs. Willard the damages they claim for the alleged diminution in the value of the property.

[42] Further, I rather doubt that either side with the requisite industry would have been unable to find authorities which would have been of assistance to the court. Neither were the additional submissions by learned counsel Mrs. Ruan very helpful to the court.

[43] In view of the totality of circumstances of the court, the court has no access to any relevant cases in order to determine the quantum of damages. In fact, I have carefully reviewed the authorities that Mrs. Ruan has cited on the issue of quantum of damages and I am afraid that those authorities are of very little assistance to the court. Quite apart from the fact that the circumstances in those cases are far removed from those in the case at bar, the authorities do not address the same sort of trespass or nuisance that have been created as the ones in the case at bar. The infringement of Mr. and Mrs. Willard's rights are of a totally different nature from that which obtained in the case to which Mrs. Ruan referred. The damages that were awarded in the old case of ***Elizabeth Cordice Mapp v. Cammie Mathewes*** ibid which dealt with trespass are appropriate to the factual circumstances of that case. Should the court accede to Mrs. Ruan's eligible request and award a similar sum as in the ***Cordice Mapp***, thus would amount to awarding Mr. and Mrs. Willard contemptuous damages.

[44] This is the first case in which I have seen counsel on both sides adopt what may euphemistically be referred to as strident positions. In any event, the postures they have maintained are unhelpful to the ends of justice, to say the least.

[45] The award of damages that the court makes must compensate Mr. and Mrs. Willard for the loss they have suffered and will suffer in the future as a consequence of the defendants having constructed Building 2 in close proximity to Unit 3BE.

[46] Looking at the matter in the round and being faced with the unenviable situation of not being referred to helpful authorities to assist in the quantification of the damages, the court must do the best it can to ensure that the interests of justice are served. Applying all of the well-known principles to the case at bar, I am of the considered view that it is appropriate to award of EC$10,000 to Mr. and Mrs. Willard for the trespass and EC$10,000 for use and nuisance that the defendants have created, making it a total of EC$20,000.

Conclusion

[47] Accordingly, it is further ordered that Mr. John Willard and Mrs. Patricia Ann Hurst-Willard are awarded damages in the sum of EC$10,000 for trespass against Paragon Holdings Ltd., Mr. John M. Erato, Mr. Michel Soons and Turtle's Nest Beach Resort jointly and severally.

[48] Mr. and Mrs. Willard are also awarded EC$10,000 as damages for the nuisance created by Paragon Holdings Ltd, Mr. John M. Erato, Mr. Michael Soons and Turtle's Nest Beach Resort jointly and severally.

[49] Mr. John Willard and Mrs. Patricia Ann Hurst-Willard are awarded costs in the sum of EC$7,000 together with interests at the rate of 3% from the date of judgment.

Louise Esther Blenman
Resident High Court Judge, Anguilla