THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2013/0150

BETWEEN:

KERRY WERTH

CHARMAINE WERTH

Claimants

AND

GLYNIS RICHARDSON

DEVELOPMENT CONTROL AUTHORITY

Defendant

Appearances:

Sir Gerald Watt Q.C., Mr. David Dorsett and Mr. Jarid Hewlett for the Claimants

Mr. Dane Hamilton Jr., holding for Mr. Dane Hamilton Q.C. for the First Defendant

Ms. Luann DeCosta for the Second Defendant

2013: March 12, 26
April 17
May 7

DECISION

[1] **HENRY, J**; The claimants are a married couple and the registered proprietors of property registered as Block 43 2197B Parcel 15 Registration section Hodges Bay and Thibous. The first defendant is the owner of the adjacent property to the western boundary of the claimants, that is, parcel 414. The second defendant is a

body corporate established under the Physical Planning Act 2003 of the laws of Antigua & Barbuda and the body responsible for issuing and granting development permits under the said Act.

[2] In their Statement of Claim, the claimants allege that on or about February 12, 2013 the first defendant without the knowledge or consent of the claimants commenced construction of a building which is in breach of the minimum allowed set-backs provided by Regulation 16 of the Regulations to the Physical Planning Act 2003, the Land Development and Control Regulations. That they have requested of the first defendant that she cease construction of the building but she has failed and/or refused to do so stating that the construction has been authorized by the second defendant. The claim further alleges that the claimants then sought assistance from one Frederick Southwell, the Chief Executive Officer to the second defendant, but that Mr. Southwell has failed and/or refused to take the necessary action.

[3] In addition, claimants allege that the second defendant has unlawfully approved a development proposal filed with it by the first defendant and which approval is contrary to Regulation 16 to the Physical Planning Act 2003. According to the claim, following the efforts by the claimants to prevent the continued construction, the first defendant by her contractors, continues to construct the building at a rapid pace and threatens, if not restrained, to continue the construction until the building is complete. They allege that they have suffered loss and damage.

[4] The claimants therefore seek the following remedies in its claim form:

(1) A declaration that the second defendant does not have the authority to authorize construction which amounts to a trespass of the claimants' property.
(2) A declaration that the permission granted to the second defendant authorizing construction of a building on the claimants' property constitutes a trespass on the claimants' property and is contrary to law.
(3) A declaration that the second defendant's granting of permission to the first defendant to construct a new structure in the same location and on the old "footprint" is contrary to Regulation 16 of the Regulations to the Physical Planning Act 2003.
(4) An Order that the first defendant:
    a. Do forthwith demolish and remove all structures currently under construction and within 10 feet of the western boundary of the claimants' property.
    b. Be restrained, whether by herself, her agents or servants or howsoever otherwise from continuing construction of the building

which is situated with 10 feet of the western boundary of the claimants' property.

[5] The claimants also seek general damages, interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act and costs.

[6] By Without Notice Application filed herein the claimants seek an order for interim injunction that the first defendant be restrained, whether by herself, her agents and/or servants, from continuing to build or building, or causing to be built, any structure whether of a permanent or temporary nature, within 10 feet of the claimants western boundary line until the determination of the claim or further order.

[7] The court ordered that the application and supporting documents be served on the defendants and the matter was set down for inter-parties hearing of the application. The first defendant responded to the application by Notice of Application seeking an Order that:

(i) The claimants' application be struck out and dismissed pursuant to CPR Part 9.7.1
(ii) The claimants claim allege no viable cause of action against the first defendant and is an abuse of the process of the court, and/or
(iii) The claim of the claimant is a public law claim and the relief sought are all public law remedies

[8] The application is supported by an affidavit of the first defendant, in it she states that on or about 19th July 1988, she became the registered proprietor of Parcel 414 containing an area of land approximately 0.15 acre. Constructed on the land was a dwelling house and a small concrete building located on the boundary line of the said parcel. Her understanding is that the cottage was erected on the land sometime during the early sixties. The first defendant has exhibited a valuation by Chartered Surveyor, George Plant of the lands of Joan Porter, the first defendant's predecessor in title, which indicates that as of 11th November 1979, the building inclusive of the cottage owned by the first defendant was 40 years old. Her affidavit evidence is that she took possession of the land and building July 1988 and has lived and occupied the dwelling house and small concrete building without let, protest or hindrance by any one. The first defendant further states that at the time she purchased there was no building erected on Parcel 15, the land presently occupied by the claimants.

[9] The first defendant admits that a survey plan prepared by Surveyor Ato Kentish on 8th April 2008 showed that the garage as constructed was 9 inches over the

eastern boundary. However, she states that the garage had been on the ground for a period in excess of 50 years and that she has been in possession of the cottage and garage without hindrance for the past 24 years.

[10] The first defendant further states that on August 20, 2012, she applied for and obtained from the Development Control Authority (DCA) permission in respect of "Major alteration or extension to a building"; that the works contemplated is to add a second floor extension to the cottage and to extend the southern part of the building to include the garage. The garage wall that was 9 inches over the boundary was not removed. Her evidence is that she is not erecting a new building.

[11] The first defendant points out that the claimants claiming through Ian McDonald purchased Parcel 15 well aware that some minor encroachment had occurred more than 50 years previously. She therefore concludes that the claimant cannot maintain any action for trespass. She asserts that she has not abandoned the garage or wall and that she does not need the claimants' consent since the alterations and extension in respect of which she has received planning permission are being carried out on Parcel 414. She therefore asks that her application to dismiss the action be granted.

[12] The second defendant responded by affidavit of Frederick Southwell who deposes that he is the Town and Country Planner for the DCA. In his affidavit he confirms that permission was granted by DCA to the first defendant in respect of a major alteration or extension on her property at Hodges Bay. According to him DCA only became aware of the encroachment in or around February 2013 when the claimants contacted his office and advised him of an encroachment by the first defendant on their property, and that he therefore set about on an investigation into the claimants' claims.

[13] According to Mr. Southwell, his investigation revealed the following:

(a) The property owned by the claimants was part of a larger parcel of land which belonged to one family who together occupied the land. At some point the land was subdivided;
(b) The first defendant became the registered owner of the parcel of land on 19th July 1988;
(c) The dwelling house constructed on the land belonging to the first defendant was constructed in or around the 1960's

(d) At the time of the construction of that dwelling house on the land belonging to the first defendant the DCA was not in existence and there were no building code guidelines in place in respect of lands;
(e) The adjoining parcel of land was bought by the claimants in 2006. At that time the cottage/dwelling house on the first defendant's land was in place and the claimants had knowledge of the encroachment of the dwelling house on the land at the time of their purchase.
(f) The land owned by the first defendant is of such dimensions that most points of the land, which includes the point of the encroachment , is smaller than the minimum plot size of land required by law.
(g) The said land belonging to the first defendant is so narrow that if the set back guidelines of 10ft are enforced, the dimension of the building which was in place since the 1960's would have to be reduced to a size which would then make the building impractical for dwelling;
(h) The claimants' dwelling house is approximately 20ft from the alleged encroachment
(i) The alteration and extension being done on the first defendant's property does not involve altering that side of the property of the alleged encroachment/trespass.

[14] Mr. Southwell states that taking into consideration the above matters, he decided to advise the claimants that he had exercised his discretion as provided in section 25 (2) (k) of the Physical Planning Act and not revoke the planning permission. Furthermore, he states that since the alleged encroachment took place over 50 years ago and did not occur during a time when the DCA was in existence, that in accordance with section 34 of the Physical Planning Act, the DCA would be statute barred from taking any action. Lastly, he opines that since the claimants in paragraph 3 of their affidavit indicates that they had notice of the encroachment at the time of their purchased, that they have acquiesced to the encroachment since 2006. Mr. Southwell is of the belief that the claimants do not have a cause of action in this matter and that the court ought to dismiss the claim.

[15] The court will consider the application pursuant to CPR Part 9.7 first, since if the application succeeds, no issue of the issuance of injunction can arise.

The Application Pursuant to Part 9.7 of CPR

[16] In an application pursuant to this section, a defendant may seek a declaration which may have the effect of determining the claim or any further applications. The circumstances under which Part 9.7 of the CPR may be invoked include

where it is alleged that the claimant does not have a good cause of action. Issues involving the expiration of relevant limitation periods can appropriately be raised.

[17] The first defendant submits that any cause of action which may have subsisted in the claimants is barred by section 17 of the Limitation Act No 8 of 1997; that the claimants are bound by laches and/or their acquiescence to the fact of the defendant's possession. Furthermore, that the claim seeks to establish that a decision of the second defendant, a public authority was unlawful being contrary to Regulation 16 of the Physical Planning Act 2003 and ought to proceed by way of judicial review proceedings; and that the claim as framed is an abuse of the process of the court and ought to be struck out.

Is an action for trespass against the first defendant barred?

[18] In regard to this first issue, the first defendant points out that a specific cause of action for trespass has not been pleaded against the first defendant; that in the Claim Form remedies the claimants seek "A declaration that the permission granted to the second defendant authorizing construction of a building on the claimants' property constitutes a trespass on the claimants' property and is contrary to law." The statement of claim, according to the first defendant, pleads no material facts which constitute and/or are germane to the cause of action of trespass. The prayer is that the first defendant be ordered to forthwith demolish and remove all structures under construction and within 10 feet of the western boundary with the claimants' property.

[19] The following allegations have not been contested by the claimants and therefore raise no issues of fact:

1. The original structures on lot 414 which encroached some 9 inches unto the lot now occupied by the claimants was constructed in excess of 50 years ago – sometime in the 1960's;
2. The first defendant purchased lot 414 and has been in occupation since July 1988.
3. The claimants purchased lot 15 in 2006 with knowledge of the 9 inch encroachment.

[20] The court accepts that the Statement of Claim does not specifically set out a claim of trespass against the first defendant. Trespass is mentioned in one of the declarations sought in regard to the permission granted by DCA. However, even if the claimants are minded to assert a cause of action in trespass against the first defendant, in the court's view, such a cause of action is not now open them. The

limitation period would have expired against the claimants' predecessor in title. The predecessor's title to the 9 inches would have been extinguished prior to the transfer to the claimants. It means that when the property was sold to claimants, they took subject to the infirmities in his title. The predecessor could not have given the claimants a better title than he possessed in 2006. They took with knowledge of the 9 inch encroachment and cannot now maintain an action for trespass in respect of the 9 inches. These claimants were never in possession of the 9 inches and their predecessor's title having been extinguished, it is a mistake on their part to refer to the 9 inches as "their land".

[21] The claimants' submission that they have a good claim against the first defendant in trespass therefore cannot stand.

The Alleged Violation of Regulation 16

[22] The gravamen of the claimants' action is the permission given to the first defendant by DCA allegedly contrary to Regulation 16 of the Physical Planning Act 2003 Land Development and Control Regulations. It is the first defendant's submission that this is a matter of public law and ought to proceed by way of judicial review. The claimants' position is that a claimant possessed of a private law right can seek to enforce that right by ordinary action notwithstanding that the proceedings would involve a challenge to a public law act or decision. They cite the case of **Roy v Kensington & Chelsea & Westminster Family Practitioner Committee**[1]. They point out that Lord Bridge of Harwich stated the correct position at 628G-629 of the judgment when he said:

> "It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him."

[1] [1992] 1 AC 624

[23] Additionally, claimants refer to the judgment of Lord Steyn in **Boddington v British Transport Police**[2] where he stated:

> "Since O'Reilly v Mackman decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law right which cannot be determined without an examination of the validity of a public law decision."

[24] What is the private law right that the claimants are seeking to establish? The claimants submit that the rights the claimants are seeking to establish are trespass and breach of statutory duty. The claimants allege that the 1st defendant has been given permission to "to rebuild on the old footprint" by the 2nd defendant; that the 1st defendant seems hell-bent on proceeding with building in accord with the permission granted. If this would be allowed they say, a clear trespass would have been committed. Further, they assert that the first defendant is clearly building less than 10ft away from the claimants' boundary; that the Town and country Planner has deposed that in February 2013 he became aware of the claimants' concerns and upon being made so aware he "set about an investigation into the claims made by the claimants"; that having taken into account the findings of his investigation, he decided to advise the claimants that he had exercised his discretion as provided for in section 25(2)(k) of the physical Planning Act 2002 not to revoke the DCA' planning permission.

[25] The claimants note that section 25 of the Physical Planning Act 2003 details the material considerations that come into play when an application for a development permit is being considered. They state that the development permit granted to the first defendant by the second defendant was approved on 20th August 2012 and that any discretion exercised under section 25(2)(k) of the Act would have had to be exercised no later than 20th August 2012. The claimants assert that the Town & Country Planner is seeking to bolt the barn door in February-March 2013 long after the horse has bolted from the barn. The time for exercising his discretion, they submit, was when the application for the development permit was being considered and not when a complaint has come in that someone, purportedly with an approved permit is constructing in a manner that is contrary to the Regulations.

[2] [1999] 2 AC 143

[26] The court has already ruled that an action for trespass cannot be maintained by the claimants.

[27] The only issues remaining surround the "lawfulness" of the decision by the DCA to grant the first defendant the permission it did. It is not appropriate for the court, at this time, to adjudicate on the "lawfulness" of DCA's decision, given the issues raised by both sides. Secondly, this is solely a public law issue and ought more appropriately to proceed by way of judicial review.

[28] The court therefore will grant the first defendant's application and declare that the court will not exercise its jurisdiction in respect of the claim against the first defendant and that claim is dismissed. It follows that the claimants' application for an injunction is denied. The claim against the second defendant ought to continue by way of judicial review.

[29] Accordingly,

(1) The application by the first defendant is granted and the claim against the 1st defendant is dismissed pursuant to CPR Part 9.7.1

(2) The application by the claimants for an injunction against the first defendant is denied.

(3) The claim against the second defendant shall continue by way of judicial review. The amended pleadings by the claimants shall be filed and served within 14 days. Response by the 2nd defendant shall be filed with 14 days of service. Thereafter, the matter shall take its normal course.

(4) The claimants are to pay to the 1st defendant cost in the sum of $1000.00

CLARE HENRY
High Court Judge
Antigua & Barbuda