IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2017/0008

BETWEEN

JULIA ERNESTINEN LEE	Claimant
AND	
HAROLD SWEENEY	1St Defendant
MONTSERRAT UTILITIES LIMITED	2nd Defendant

APPEARANCES

Mr Sylvester Carrott for Lee.

Mr David Brandt for Sweeney.

Mr Kharl Markham for MUL.

2019: APRIL 4

MAY 7

JUDGMENT

Concerning trespass by laying pipes

1 Morley J: Conducting a trial on 04.04.19, hearing evidence from the parties, I have been asked to resolve a dispute over the placement of a hydrant and water pipes.

2 I heard evidence from Lee, with Stanford Kelly in support; then from Sweeney, with Thomas Greenaway in support; and then from MUL[1], from works supervisor Vagan Daway, with MUL manager Kendall Lee in support.

3 By way of overview, Lee bought land sloping down a hill from Sweeney, parcel 14/13/136, for $32000ec in February 2011. While undeveloped, Lee being in the UK on vacation, without her permission in January 2016 MUL trespassed on her land by laying water pipes downhill along the roadside border of Lee's land to four further undeveloped plots owned by Sweeney, and later installed a hydrant in the top corner of her land. Sweeney disputes Lee owns the top corner, claiming he owns it; countering, Lee claims Sweeney moved a surveyor's marker to make it look as if he owned the corner. In addition, Sweeney claims the further plots are owned by Joel Osborne, (to whom MUL made out an invoice for laying the piping for $10706.20ec on 15.01.16), so that he has no financial interest in them, nor therefore in the hydrant or the pipes leading to them. MUL claims Osborne was only ever Sweeney's agent, doing Sweeney's bidding, and it was Sweeney who told MUL where to lay the pipes and hydrant, denied by Sweeney.

4 It is accepted by all the pipes have been wrongly placed on Lee's land. MUL has paid Lee $12000ec as the cost of removing the pipes, and wants the money back from Sweeney, while through Counsel Carrot Lee wants 'aggravated, exemplary and vindicatory' damages from Sweeney for trespass, negligence, and what has been described as 'high-handedness'. Sweeney says the pipes and hydrant are nothing to do with him, nor their positioning, and that any wrongdoing to Lee was by MUL without his input.

5 This action has been made surprisingly complicated by the lawyers, on the facts and law, with learned submissions filed of some length, over what is at present merely a concrete-paneled hole in the ground with a hydrant in it. Lee has found herself running between the parties, having complained to Sweeney by skypecall on 18.01.16, and in writing to MUL on 16.02.16, with both blaming the other. Led by their lawyers, the defendants have pursued each other around the courtroom and through filings, chased by an exasperated Lee, in what has become expensive

[1] [1] The parties will be referred to as such for ease of reading without writing out full titles and the legalese of whether claimants or first or second defendants, no disrespect being intended by this easier form of referencing.

and protracted litigation, yet for a modest sum, when realistically, if perhaps all had been more cooperative and realistic, the case could properly have settled in mediation.

6 Concerning Lee, though she complains of access being required to her land for water pipe maintenance, I sense whatever the outcome it is not Lee's intention the pipes must be dug up and re-laid elsewhere; instead she simply wants recompense for the damage done by the digging and the hydrant moved. To this end, she already has $12000ec from MUL, which would be the cost of moving the pipes, though I understand she will not pay out to move them but will keep the money instead, to which she is entitled. It may be she is further wondering, with counsel's help and encouragement, how much more money she might be able to claim from Sweeney.

7 Concerning Sweeney, having heard his evidence, I am wholly unpersuaded he is innocent of the trespass caused by MUL. It is a demonstrable fact he asked MUL for the piping to be laid, sending them a plan of his further four plots, as exhibit HS1. He has produced no evidence they are or were owned by Osborne, who no party has called. I am satisfied the piping and hydrant have been to Sweeney's advantage, benefitting land in which he retains an interest, or at least at the relevant time had one, leading to minor enrichment in that his own land was unaffected by the digging, about which as a farmer on the land he has been well aware, and he is hoping to preserve this enrichment as solely MUL's mistake, when at all material times he has been aware of where the piping was laid.

8 Concerning MUL, supervisor Daway asserted in evidence Sweeney specifically pointed out where to lay the pipes, in October and November 2015, but his affidavit was silent on the specificity of these two events. During the trial he was vague about when. I find this evidence unreliable. However, I do accept in that timeframe he was given a broad idea, not pinpointed, from Sweeney as to where to lay the piping, at a time before the road was built over other Sweeney land (which was in December 2015, as overlaid concrete). This strongly suggests in January 2016, seeing the newly built road, trying to remember where to lay the piping, he mistakenly thought it right to lay it alongside, probably not realizing the land alongside the road was a curtilage belonging to Lee. Simply put, Daway made a mistake. However, on about 16.01.16, Sweeney was called by phone by Daway to the scene to confirm the location of the piping, and on attending Sweeney did not say the piping was on Lee's land, when he knew so.

Moreover, it would have been possible there and then to relocate the piping if he had but said, as the equipment and workmen were present. Instead, Sweeney kept quiet, maintaining his silence to MUL the pipes were in the wrong place, and even to Lee, to whom he was evasive when Lee made the skypecall to him on 18.01.16 to ask why her land was being dug up by MUL.

9 As for the hydrant, I am satisfied Sweeney directed where it should be placed. He has tried to claim its placement is on his land. I do not accept this. The boundary of the property as represented on the map at the Land Registry is plainly supposed to be the curtilage of the road, nestled between the upper road and the perpendicular downhill road. Sweeney has proposed he owns the corner where the roads meet in a curve, creating a small triangle measuring a few square feet, where the hydrant now is, owing to dispute over the precise location of surveyor's markers. I have visited the scene on 04.04.19. I reject that the markers define the plot where there is instead a more obvious boundary created by a road curtilage, as represented on the Land Registry plan. I will add please, obiter, there seems a communal obsession with surveyor's markers on happy Montserrat, leading to inordinate litigation over areas of a few feet, when commonsense may show the lie of the ground, which can be uneven, with line of sight on it dictates the reality of a boundary slightly differently. Land ownership cannot always, exclusively and mathematically only ever rigidly be the consequence of laser sighting between theodolites atop small splodges of concrete-mounting (where in addition even the position of the spoldges is often challenged). Markers are strongly indicative, but in appropriate cases not conclusive. In having said this, I put to one side the dispute about Sweeney moving the marker, which had to be moved back by Lee, as unnecessary to resolve.

10 To distill this case, I find Sweeney should have told Daway he had made a mistake, and that Lee owns the land where the hydrant sits so that it must be removed and relocated by MUL, and the hole filled in, with the cost billed to Sweeney. As to MUL reclaiming from Sweeney the $12000ec paid to Lee, I disallow this, as the originating mistake was by MUL, who ought to have done more to be sure where to dig. As to damages from Sweeney to Lee for not telling MUL of their mistake, I will allow this in the sum of $12000ec, being the amount as paid by MUL to Lee as the cost to lay the pipes. These are exemplary damages against Sweeney, noting with regret I find he was sly in his behaviour to his neighbor when he realised he could profit from a mistake MUL were

specifically asking him about on 16.01.16 and about which he kept quiet to them. In a sense, this is a civil fine for being exploitative, designed to strip him of at least some of his opportunistic enrichment.

11 Though I have been invited by learned counsel to consider vast conflicting legal treatises[2] on how to approach liability between the parties, I consider this case turns neatly on its facts, on cutting through the thicket of competing claims. MUL got it wrong, Sweeney took advantage, and where the hydrant is always belonged to Lee.

a. The principle that makes MUL liable to give Lee the $12000ec is they should put her in the position she would have been in had there been no digging, which in monetary terms is the cost of the digging, which they have done.

b. The principle that Sweeney should pay exemplary damages is he has a duty of care to his neighbor under *Donoghue v Stevenson* [1932] AC 562, noting Lord Atkin famously pondered:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law, is my neighbor? The answer seems to be–persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

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[2] See MUL submissions filed 03.04.19, citing: Halsburys laws 4th edition, vol 45 para1384; Clerk & Lindsell on torts papra274; Halsbury's laws 2017 vol 1 para 152, 758, 764-8; AG v Blake 2001 1AC268; Livingstone v Raynard Coal 1880 5APPCas25; Biggin v Permanite 1951 2KB314; Freeborn v Leeming 1926 1KB160.
See further MUL filing on 11.04.19, citing: *Donoghue v Stevenson* [1932] AC 562, p580.
See Sweeney submissions filed on 11.04.19, citing: Licensing of Utilities Services Act cap 18.02; Clerk & Lindsell 19th ed, para 6.01; Simpsons & Weber 1925 41TLR 302; Stoke on Trent Council v WAJ Ltd 1989 WLR 1406; Ascot Michael v Astra Holdings Ltd Antigua Appeal 17 of 2004; A v Bottreil 2003 2WLR 1406 (PC); Greenlands Ltd v Willshurt and London Association 1913 3KB507; Cassell v Broome 1973 UKHL3.
See Lee submissions filed on 03.04.19, citing: Horsford v Bird UKPC3; Jurgenson v PUA ANUHCR 2004/0529.
See further Lee filing on 01.05.19, citing Rookes v Barnard 1964 1AC1129.

In my judgment, this inevitably extends to a person A not knowingly exploiting the mistake of another B on the land of his neighbor C, to A's advantage, where the mistake arises from action requested of B by A, and both B and C ask A if there has been a mistake, about which he is then silent at a time the problem can be put right by B.

c. The reason I do not find Sweeney vicariously liable for MUL's error, is because MUL, when paid to lay piping, as a state utilities body, governed by statute[3], regularly digging up land, can be expected to act with greater diligence as to where to dig and who owns the land than arose here.

d. The reason MUL must move the hydrant and fill in the hole is they have the skills to do so, having put it there in the first place; and the reason Sweeney should pay to move it is he wrongly directed its placement on land he did not own.

12 As to costs, Lee shall have hers paid by MUL, whose originating mistake laying the pipes caused this action, including later positioning the hydrant and hole without consulting Lee, while MUL and Sweeney shall bear their own.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

7 May 2019

[3] See Montserrat Utilities Limited (MUL) Act cap 18.01.