



[2016] JMSC Civ. 140

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014 HCV 01370

BETWEEN	TADA ESMIRILDA GORE	CLAIMANT
AND	LEROY HARRISON	DEFENDANT

IN CHAMBERS

Ms. A. Bernard: Instructed by Forsythe and Forsythe for the Claimant.

Mr. O. Nelson and Mr. Craig Carter instructed by Althea McBean & Co. for the Defendant.

HEARD: 21st and 22nd April and 5th August 2016

For the purposes of this judgment, it is necessary to briefly outline the history of the adjoining properties and; secondly, the circumstances in which the disputed column and wall boundaries between these properties came into existence

CORAM: G. FRASER, J.

INTRODUCTION

[1] The Claimant is the registered proprietor of land comprised in certificate of Title registered at Volume 1149 Folio 339 of the Register book of Titles and known by its civic address as 9 Lady Hamilton Drive, Kingston 19, St. Andrew. The Claimant has been residing at this address in excess of 35 years and the Defendant does not challenge her claim of right, possession of, or entitlement to the same. Neither does he dispute that she is entitled to quiet enjoyment of her property.

- [2] The Defendant is the Claimant's neighbor and the registered proprietor of lands comprised in certificate of Title registered at Volume 1048 Folio 351 of the Register Book of Title or premises known by its civic address as 3A Lady Hamilton Drive. Kingston 19, St. Andrew. The Defendant came into possession of his property sometime prior to 2009 when he obtained it from the previous possessor in title; the exact date is not known to the Court. In such circumstances he came to his premises and found a boundary wall already built there.
- [3] The dividing fence seemingly was erected by the Claimant and I say this based on her repeated references to "my fence and my column". In or about December 2008 a motor van had collided into the then standing column erected by Mrs. Gore as also the boundary fence resulting in damage to those areas and damage was also done to the Defendant's garbage bin. Accordingly claims were made to the Insurer of the said motor van and compensation was paid to Mrs. Gore and Mr. Harrison respectively.

THE CLAIM

- [4] The claim as brought by Mrs. Gore is one based essentially in trespass, with request for ancillary equitable relief of declarations and injunctions of both the prohibitory and mandatory kind. The Claimant is also asking the court to award her damages with interest thereon and to award her legal costs.
- [5] This Court had requested in the aftermath of the trial that Counsel, Miss Bernard and Mr. Nelson file written submissions so as to assist the Court in narrowing the real issues for determination. Miss Bernard has provided extensive and copious written submissions in which she advocates that the claim brought by Mrs. Gore contains pleadings of nuisance and negligence. I now bring to counsel's attention the provisions of rule 8.9(1) of the Civil Procedure Rules (CPR) which requires a claimant to include all the facts on which the Claimant relies.

- [6] The purport of the above rule was considered by the Jamaican Court of Appeal in ***Harley Corporation Guarantee Investment Company Ltd v Estate Rudolph Daley and Others*** [2010] JMCA Civ. 46, a case dealing with allegations of fraud.

Harris JA said, at paragraph [57]:

“The Civil Procedure Rules however do not expressly provide that fraud must be expressly pleaded. However, rule 8.9 (1) prescribes that the facts upon which a claimant relies must be particularized. It follows that to raise fraud, the pleadings must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud. Not only should the requisite allegations be made but there ought to be adequate evidentiary material to establish that the interest of a defendant which a claimant seeks to defeat was created by actual fraud.”

- [7] Although the issues raised by this Claimant do not resound in fraud, nevertheless I would urge that the same principles should apply. This court proposes to closely examine the pleadings and evidence herein and to determine whether there is any basis laid in respect of a claim for either nuisance or negligence and to determine whether the Claimant unjustifiably seeks to extend the boundaries of her claim on 19th March 2014. At this juncture therefore I wish to indicate that this Court will not stray beyond the bounds of the pleadings and evidence filed and elicited by either party.

THE DEFENCE

- [8] The Defendant denies the allegations and all the complaints levied by the Claimant; whether sounding in negligence nuisance or trespass and avers that the Claimant at all times had consented to his course of action; inclusive of the erection of the shared column and the housing of the two (2) JPS Co. Meters within that column. He avers that the claim is vexatious, dishonest and unconscionable and that he relies on the agreement made between the Claimant and himself relative to the rebuilding of the boundary fence and gate column in good faith.

- [9] The Defendant disputes that the Claimant is entitled to any relief sought, whatsoever, and posit that if the Court deems there to be any trespass then only a nominal sum ought to be awarded. In the alternative he seeks to rely upon the provisions of the ***Dividing Fences Act*** and accordingly, he urges the Court to dismiss the Claimants' case and award costs against her.

ISSUES

- [10] Having looked closely at the pleadings and evidence of both parties, the issues I have identified that arise and therefore for the Court's determination are as follows:

1. Whether the Claimant has established a case for negligence
2. Whether the Claimant has established a case for nuisance
3. Whether the Claimant has established a case for trespass
4. To what remedies, if any, is the claimant entitled.
5. Whether the ***Dividing Fences Act*** is applicable in this case

THE CLAIMANT'S EVIDENCE

- [11] The evidence at trial was given by way of witness statements, with supporting documentation, and supplemented by further examination-in-chief and cross-examination of the witnesses on both sides.

- [12] The Claimant was the sole witness called on her case and her evidence in chief was comprised of a supplemental witness statement signed and dated 15th April 2016 and a prior statement dated 1st June 2015. The 2015 statement was the subject of some preliminary objection relative to paragraphs 22, 24, 28, 34, 35 and 36, in that the Defendant complained that they contained hearsay and or scandalous material. The objection was upheld in part and the offending portions of paragraphs 28, 34, 35 and 36 were stricken from the said statement.

Thereafter the Claimant was allowed to amplify her evidence pursuant to rule 29 of the CPR and to tender into evidence a surveyors report dated 15th February 2016; which is now Exhibit 1.

[13] Mrs. Gore was cross examined by Counsel Mr. Nelson and gave answers, wherein she admitted some issues and denied other issues. The following is a summary of the witness' testimony in cross examination:

- She testified that she had commenced work to erect the disputed column, meaning she had, dug a foundation, erected a structure and brought the structure to 4 - 5 feet above ground. After the Claimant constructed this portion of the column, the completion of it was undertaken by the Defendant using boards provided by the Claimant;
- She conceded that since she commenced the structure, meaning the column she could not therefore complain about its location or its width or height. This Court therefore infers that it was Mrs. Gore's own actions that determined these factors and there was no departure from the common agreement in so far as these factors are concerned.
- She agreed that a portion of wall that the previous column had been attached to had also been damaged and was rebuilt as well.
- She grudgingly agreed that she and the Defendant had a discussion regarding his participation in the rebuilding of the column and there was a mutual participation of the parties to repair the fence and the gate column
- She reluctantly conceded that in fact the cost of the construction was shared between her and the Defendant and the Defendant purchased materials for construction of the Column and wall.
- She admitted that the defendant had asked and she had agreed that he could house his two (2) JPS meters in the said column, but claimed that she did not consent to electrical wires attaching thereto.

- She admitted that she had not indicated any restrictions in the placement of the meters, but that her unvoiced expectation was that both would be placed on the Defendant's (inner) side of the column.
- She agreed that while there was consent on her part for the extension of the column, there was no detailed agreement as to the finished dimensions, and neither was there any stipulations by her that the Defendant was not to exceed any particular dimensions/height
- She denied any contemplation on her part or any consent given by her of electrical wires running to/from the meters or the installation of sockets within the column to house the said meters.

Defendant's Evidence

- [14] The Defendant relies on his witness statement dated 14th December 2015 as his testimony in chief as also exhibit 2 as tendered by him, which is the surveyors report dated 4th May 2014, supplied by Commissioned Land Surveyor, Mr. Wallace B. Smith.
- [15] Mr. Harrison was extensively cross examined by Miss Bernard and essentially stuck to the defence as pleaded. He reiterated that there was discussion and agreement between him and Mrs. Gore that the column would be rebuilt in the same position and location it was previously in. Mr. Harrison did concede however that in the discussions between them; no actual dimensions were agreed only that it would be higher than before. He also conceded that nowhere had he previously said that Mrs. Gore agreed to a column being built to the particular dimensions stated as 18" x 18" x 14' being constructed.
- [16] Mr. Harrison also agreed that before the accident the column that was at the gate was about 5 – 6 feet tall. He agreed that he had not shown Mrs. Gore any written plan for the column being built. He insisted that although there was no agreement for a specific height there was nonetheless an agreement for a higher column than what had previously existed. He says that these discussions were

instigated by his need to relocate his meters so as to comply with the JPS Co. policy; and he had specifically raised this with Mrs. Gore.

- [17] The policy in question instructs owners/occupiers of premises that “ [T]he placement of meters shall be at the perimeter fence or at the property boundary, and shall be installed such that safe and reasonable access to meters is afforded to JPS personnel on a 24 hour basis. Meters shall be viewable and accessible without the need to enter locked premises”. Mrs. Gore in her evidence agrees that the discussions had with Mr. Harrison would have included this disclosure. The Defendant admitted that the height of the column being beyond 6ft is really to accommodate the wires on his property but he denied that he only approached Mrs. Gore for permission regarding the meters but had also asked her to allow the facilitation of wires to go to the meters as well.
- [18] Significantly Mr. Harrison indicates that the Claimant never made any complaint about the finished height of the column until long after its completion some 8 – 10 months after. He posits that she was in a position to see the work as it progressed including the height of the column and did not at anytime protest or complain or express any dissatisfaction or allege any breach of their agreement.

The Law

- [19] In modern law the word trespass is used commonly to describe the intentional and wrongful invasion of a person’s real property. An action for trespass can be maintained by anyone who has a lawful right of possession of the land, and in this case it is the registered proprietor and occupant who make this claim. The action can be maintained against anyone who interferes with the right of ownership or possession; whether the invasion is by a person or something that a person has set in motion or controls; in this case the Defendant is said to have intrude upon the Claimant’s land.

- [20] Every unlawful entry onto another's property is trespass, even if no harm is done to the property (**Stokeon-Trent City Council v W & J Wass Ltd** [1988] 1 WLR 1406; **Nicholls v Ely Beet Sugar Factory Ltd** [1936] 1 Ch 343 and **JPS v Enid Campbell and Marcia Clare** [2013] JMISC Civ 22). Injury to the property is not necessary for the Defendant to be guilty of trespass, although the amount of damages awarded will generally reflect the extent of the harm done to the property. In other words this tort is actionable per se without the need to prove damage to the land but the Claimant would probably receive only nominal damages.
- [21] The above principle, was highlighted in the decision of the Supreme Court of Belize in **Maxwell Samuels v Samuel Flores** Claim No 558 of 2009, delivered 15 January 2010 where it was held that: "Though there was a trespass and nuisance, in the absence of specific evidence of damage cause[d] to the claimant.....nominal damages is appropriate...." The same reasoning was eschewed in the Court of Appeal decision of **Archibald McIntyre v Delroy and Revolene Greenwood** SCCA No 48/2002, delivered 26 October 2007.
- [22] In some cases a defendant is not liable for trespass even though he has intruded onto another's property; because the intrusion was with the permission of the owner/occupier. Permission to enter someone else's property can be given either by consent or by license; consent simply means giving or allowing another onto the land. Consent may be implied from all the circumstances or sometimes consent to enter is called a license, or legal permission, (**Horrocks v Forray** [1976] 1 WLR 230 and **Street v Mountford** [1985] AC 809). This licence is not necessarily a certificate and may be in the form of a written or oral agreement; it can also be expressed or implied from the existing circumstances.
- [23] If a licensee exceeds his licence, or remains on the land after it has expired or been revoked, the licensee becomes a trespasser (**Wood v Leadbitter** (1845) 13 M&W 838; **Hillen v ICI (Alkali) Ltd** [1936] AC 65). Such a person is to be

allowed a reasonable time in which to leave (***Robson v Hallett*** [1967] 2 QB 939; ***Minister of Health v Bellotti*** [1944] KB 298).

- [24] Trespass to airspace above the land can also be committed as was expressed in ***Kelsen v Imperial Tobacco Co*** [1957] 2 QB 334, where the Defendant had committed trespass by allowing an advertising board to project eight inches into plaintiff's property at ground level and another distance above ground level. In this case the Claimant according to my understanding of her pleadings is saying that the electrical wire running above the dividing wall is trespassing on her property.
- [25] Lawsuits invoking the law of nuisance, typically involves neighbors suing their neighbors and the Claimant usually seeks to control or limit the use of the land owned by the defendant. The claimant is basically saying to the defendant, your action is interfering with my enjoyment of my property; therefore, you must stop acting in that manner.
- [26] Under the common law, persons in possession of real property (either land owners or tenants) are entitled to the **quiet enjoyment** of their lands. If a neighbour interferes with that quiet enjoyment, either by creating smells, sounds, pollution or any other hazard that extends past the boundaries of the property, the affected party may make a claim in nuisance. A private nuisance as is averred in this claim; means there has been a loss of the use or enjoyment of property without an actual physical invasion of that property, whereas an action for a physical invasion of property is known as a trespass action.
- [27] Lord Lloyd in ***Hunter v Canary Wharf*** [1997] 2 All ER 426, stated that private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land. "The term 'nuisance' is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land." To be subject to

injunctive relief, the interference with the claimant's property as averred in this case must be proven to be substantial and continuous.

ANALYSIS AND FINDINGS

- [28] In relation to the claim for trespass, the Claimant relies upon numerous authorities, including ***Nielson v Poole* [1969] 20 P & CR 909** ***Burghardt v Burghardt***; Claim No HCV 04861/2010 and to say that she had not consented to the course of action complained of. In the alternative she posits that notwithstanding any consent or licence extended to the Defendant, the same would be revocable and was in fact revoked by her. The evidence from which I am to determine this issue relates to the conduct of the parties in 2010 when repairs were been effected to the damaged wall and column separating the parties respective premises.
- [29] Generally speaking there is a commonality in the evidence of both parties that there was some discourse about the rebuilding of the damaged wall and column and an apportionment of the cost of the same. The Defendant testified that he had approached Mrs. Gore in 2009 on the subject but she was not then minded to commence construction/repairs. Mrs. Gore denies that she had approach the Defendant in 2010 and suggested to him that it would be economical and convenient to effect the repairs then, as she was in the process of extending her house. There is much dispute as to how the agreement was arrived at, but however the agreement was arrived at and who approached who is immaterial to the issues I have to decide.
- [30] The Claimant is adamant that there was no agreement in so far as the height of the column is concerned; and this is not disputed by the Defendant. I have looked closely at her evidence however and found it to be much conflicted and this is important as to inferences that can properly be drawn relative to the issue of consent. There is much confusion in the evidence of the Claimant as to what height the previous column was, what height the present column is and what height she had intended the present column to attain.

[31] In her witness statement of 2016 she indicates that “this dispute concerns the improper and unlawful construction ...of a twelve foot column...” In cross examination the Defendant was taxed to the effect that the column was 14 feet high. Further in that said witness statement Mrs. Gore testified that she “paid to take construction of the column to about half of its original height which is about 5 feet... we agree that he would finish it and restore it to its original height...” In re-examination she said she had brought it to half of the original height to about 4 feet. The Claimant in cross examination vehemently denied any discussion as to the finished height where she testified “...he and I had no discussion about size, height of the column, none whatsoever” thus contradicting her earlier testimony.

[32] The said wall/column is partially on the Claimant’s land and likewise partially on the Defendant’s land and therefore is a dividing fence within the meaning of section 3 of the ***Dividing Fences Act***. The surveyors report commissioned by Mrs. Gore indicates that there is no breach of any of the relevant restrictive covenants, contrary to her allegations levied against Mr. Harrison. That said report also indicates that the physical boundaries appear to be well settled and are of long standing and this therefore strengthens the inference of a dividing boundary fence. The other report commissioned by Mr. Harrison is consistent with Mrs. Gore’s exhibited report, but provides greater details in relation to the fence and column in dispute.

[33] Where trespass is alleged the burden lies on the Claimant to establish all the elements of that tort, albeit on a balance of probabilities. There are five elements which the claimant must establish for a valid claim:

- 1) There was a volitional act made by the defendant.
- 2) The Defendant acted with the intent of intruding on the plaintiff’s land.
- 3) There was an actual intrusion on the plaintiff’s land
- 4) The plaintiff was in possession, or was entitled to immediate possession, of the land when the intrusion took place
- 5) The intrusion was caused by the defendant’s act.

- [34] Assuming for the moment that the Claimant has established the element of possession and bearing in mind that the Defendant does not dispute the acts complained of, or that they were intended by him. The question I need to ask and answer is; was there an actual intrusion committed by the Defendant on the Claimant's land? I say yes having regard to the surveyor's report canvassed by the Defendant. The Commissioned Land Surveyor, Mr. Wallace B. Smith indicates in his report dated 4th May 2014, that "...The concrete utility pole, which is 18" x 18" x 14' (0.45 x 0.45 x 27M), at the gate to this property is completely inside the adjoining property registered at Vol. 1149 Fol. 339..." Therefore the 2 JPS meters and their sockets are wholly onto the Claimants land.
- [35] The next question that I ask myself is, does the above intrusion amounts to an act of trespass? The answer lies in an examination of the circumstances leading to the Defendant installing the meters into the column; because it is not in all cases that a defendant will be liable for trespass even though he has intrude onto another's property. If permission is sought and obtained from the owner/occupier then this would be a valid defence.
- [36] In this case the evidence on both sides indicates that Mr. Harrison did seek and obtain Mrs. Gore's prior permission relative to the 2 JPS Co. Meters been installed. In the circumstance where Mrs. Gore allowed him to participate in the building of the column and contributing money and material to the erection of the said column, I will say that the Defendant had a licence to act as he did. (See *Horrocks v Forray* [1976] 1 WLR 230 and *Street v Mountford* [1985] AC 809).
- [37] If however a licensee exceeds his licence, or remains on the land after it has expired or been revoked, the licensee becomes a trespasser (*Wood v Leadbitter* (1845) 13 M&W 838; *Hillen v ICI (Alkali) Ltd* [1936] AC 65). In this case Mrs. Gore is saying she had revoked the licence granted because the Defendant exceeds her authorization by building the column in excess of the anticipated height. As to what is the anticipated height, that is a mystery, because by her testimony, Mrs. Gore did not explicitly indicate this to the

Defendant and in her own mind seem not to have a settled position. She said she had intended it to be the height of the original column which she indicates had been some 5ft. In the next breath she says she had commenced erection of the column and took it halfway of the finished height, she built the column to a height of 5-6 ft above ground, the anticipated half way mark.

[38] Taking her evidence into account that she intended the Defendant to complete the column some 50% above the height that she attained, then she must have anticipated a height of 10 -12ft. If this was indeed her intention then it lends credence to Mr. Harrison's evidence that he had approached the Claimant not only in relation to the installation of meters but also the attachment of wires and she consented to both. I say this because it is pellucid on the evidence that the meters need a ground clearance of no more than 6ft and the greater height of the column is only necessary to accommodate the electric wires.

[39] It seems to me that Mrs. Gore had a change of heart, according to her after consulting with her children, and decided to renege on her consent. She had caused the Defendant to expend money and value in the completion of the column and caused him to act to his detriment. The Defendant is therefore entreating the court to determine the matter as per the principles laid down in **Liggins v Inge** 7 Bing 682. In that, "the agreement between the parties constitutes a licence and that the nature of the licence in and of itself is apparently intended to be so permanent and continuing that it would be irrevocable". In the absence of any reservations expressed by the Mrs. Gore or any limits for the duration of the licence; the Defendant is saying that the inference of irrevocability is strengthened.

[40] In the alternative the Defendant posits that the southern boundary wall and column together is one structure and constitutes a dividing fence pursuant to section 3 of the **Dividing Fences Act**. If the court accepts this interpretation then the acts of trespass complained of by the Claimant, cannot stand. The Defendant further submits that in circumstances involving a dividing fence, the Claimant has

no greater right to the use and possession of the said boundary wall and column and as such fails to meet the first criteria necessary to establish a claim in trespass. The first criteria as I understand it, is proof that the plaintiff was in possession of, or was entitled to immediate possession, of the land where and when the intrusion took place.

- [41] Before making a determination on this aspect of the claim I now examine the Claimant's position and reliance on the authority **Nielson v Poole [1969] 20 P & CR 909** where it was enunciated by Megarry J. that:

'But there is another type of boundary agreement. This does no more than identify on the ground what the documents describe in words or delineate on plans. Nothing is transferred, at any rate consciously; the agreement is to identify and not to convey. In such a case, I do not see how the agreement can be said to constitute a contract to convey land. In general, I think that a boundary agreement will be presumed to fall into this latter category. In short, in my judgment, a boundary agreement is presumed not to convey land:..'

- [42] I must point out that the Defendant herein is not seeking to acquire land belonging to The Claimant and neither is he saying that there has been any conveyance to him. He is saying that he is equally entitled to the use and benefits of a dividing fence same as the Claimant. Mrs. Gore's reliance on this passage is to my mind misconceived.

- [43] In relying upon the said above authority the Claimant through counsel further submits that by permitting the column to house meters she has not waived any rights or given a general freedom of use of the boundaries of her property to the Defendant. There is no conveyance to the Defendant and it is up to the Claimant, to eject his usage of her property where she has not consented to same as he is a mere licensee in respect of the consent given. The case of **Burghardt v Burghardt; Claim No HCV 04861/2010** (at para. 28) defines a licence as follows:

“A licence gives no more than permission to enter land, that is, a bare or gratuitous licence. It has been said that it makes lawful what would otherwise be unlawful”

[44] In the face of the above authorities I understand the legal principles distilled are as follows:

- I. Consent can be granted by the owner/possessor of land for another to intrude upon their property
- II. Consent so given is a mere licence and not a conveyance
- III. A licence given can be retracted and where there is a withdrawal of consent then the licensee becomes a trespasser.

The Claimant is asking this Court to find since the licence regarding the use of the column has been revoked by her, then the continued usage by the Defendant to house the two meters is now unlawful as there is no licence by which the Defendant is permitted to continue to do these acts. In the circumstances of this case notwithstanding that the column is wholly on the land belonging to the Claimant it is a seamless part of the dividing boundary line between the two properties and as such can properly be said to be a part of the dividing wall within the meaning of the ***Dividing Fences Act***. I have so found that this is the position that obtains in this case.

[45] There is also the consideration of the defence of estoppel by acquiescence, which is raised by Mr. Harrison. This equitable shield can prevail where there is a finding of consent which is expressed or implied from conduct, eg, inactivity or silence (***Jones v Stones*** [1999] 1 WLR 1739); however this Court bears in mind that mere delay in complaining is not acquiescence. The Defendant does not specifically plead an equitable estoppel but says that he was induced into building and or completing the column by the Claimant and having acted to his detriment, the column should be allowed to remain as is. The Claimant asserts that Mr. Harrison acted to his own benefit, but truly according to the evidence both parties are benefiting from this column. Mrs. Gore admits that she has hung a gate that is supported in part by this column.

- [46] In the absence of any expressed or implied limits imposed on the Defendant by the Claimant; that is, there were no specific restrictions regarding the height of the column; is the Defendant entitled to assume there was consent to him finishing the column in a manner that was suitable to house and accommodate JPS Co. meters and electrical wiring? Having regard to my finding of consent in these premises estoppel should be found in the Defendant's favour.
- [47] The Claimant is also urging this Court to find that she did not consent to the installation of the electrical wires and without her consent, said wires, supported by the shared column constitute a trespass on her property at their point of connection with the said column. I have already indicated the applicability of the ***Dividing Fences Act*** which would put paid to this argument; as it is my finding that neither party to the shared fence enjoys any greater usage of the same.

The Nuisance Issue

- [48] Mrs. Gore further submits that the wires running parallel and above the fence line are either on her or the Defendant's property. If the Court should find that the wires are on her property then she says this is a clear trespass. If however there is a finding that the wires are over on the Defendant's side of the divide, then they nonetheless present a danger to the Claimant and disrupt her enjoyment of her property. In this regard and in reliance on the authority of ***Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan***, [1987] 1 MLJ 393 the Claimant is urging that her claim also sounds in nuisance and negligence.
- [49] The evidence clearly shows that the wires running along the dividing wall are all on the Defendant's property and therefore the claim for trespass falls flat. In seeking to establish an alternative claim in nuisance the Claimant must prove that the interference complained of arise from activities taking place on the Defendant's land and which affected her enjoyment of her land. To be a nuisance, the level of interference must rise above the merely aesthetic and the

normal uses of a property that can constitute quiet enjoyment and for which acts one cannot be restrained in nuisance either.

- [50] I find support on this point in the very case cited by the Claimant and I am relying on the words of Lord Goff in **Cambridge Water Company v Eastern Counties Leather plc** [1994] 2 AC 264, at 299 liability for nuisance he said, is:

"kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which ' those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action'."

In deciding nuisance disputes, several factors influence the courts. First, courts will look at the location in which the alleged nuisance is occurring (**St. Helen's Smelting Co. v Tipping**) and any applicable zoning restrictions or as in this case covenants that may apply to that area.

- [51] For there to be a claim in nuisance, the claimant must further show that the defendant's actions caused damage. This can be physical damage, or discomfort and inconvenience, things such as the blocking of a pleasant view is not considered a nuisance as was discussed in **Hunter v Canary Wharf Ltd**, where the claimants argued that the blocking of their television signal by the construction of the Canary Wharf Tower was a nuisance. The House of Lords rejected this argument.
- [52] The Claimant must establish some sensible diminution of these rights affecting the value or convenience of her property. "The real question in all the cases is the question of fact, whether the annoyance is such as materially to interfere with the ordinary comfort of human existence" (Lord Romilly in **Crump v. Lambert** (1867) L.R. 3 Eq. 409). There must also be proved by the Claimant a continuous interference over a period of time with the claimant's use or enjoyment of land (**De Keyser's Royal Hotel v Spicer Bros Ltd** (1914) 30 TLR 257); and the

claimant must prove that the defendant's conduct was unreasonable, thereby making it unlawful.

[53] In this case the supply of electricity is a normal and reasonable part of the quiet enjoyment of the Defendant's property. The complaint of Mrs. Gore is that the wires are not convenient, at least not "in the sense predicated by Lord Goff - neither in their location atop the said column to which the Claimant has not consented, nor in their proximity to the Claimant's land, including and in particular, where they are in the vicinity of trees and pose potential harm to the Claimant. The height of the column and positioning of the wires in this instance are also not at a reasonable minimum".

[54] The inconvenience complained of by the Claimant in this case and in my view is fanciful and can affect only one of a fastidious taste, and is not such that it would affect an ordinary reasonable man; (**Hunter and Others v. Canary Wharf Ltd. & Hunter and Others v. London Docklands Corporation**). Therefore it does not constitute a nuisance.

The Negligence Issue

[55] Counsel, Miss Bernard submits that "the Claimant also grounds her case against the Defendant in Negligence. It is also canvassed on the Claimant's behalf that the claim sounds in Negligence based on the following pleadings, inter alia:

The Claim Form

"The Claimant..seeks the following orders:-

'An Order restraining the Defendant..... from interfering with the Claimant's right to the peaceful, quiet and unmolested occupation use and enjoyment of her property..'"

The Particulars of Claim

11. **'That without the benefit of an Order restraining the Defendant...from interfering with my right to peaceful, quiet and unmolested occupation of my property the Claimant will suffer loss..."**

13. **" That the encroachments erected by the Defendant inclusive of running the wires poses a real and imminent danger to the**

Claimant's property, the Claimant herself...)"

[56] I will therefore examine the evidence to determine if indeed a case of negligence has been proven by the Claimant. Negligence can be generally defined as conduct that is culpable because it falls short of what a reasonable person would do to protect another individual from foreseeable risks of harm. In the words of Lord Blackburn,

"those who go personally or bring property where they know that they or it may come into collision with the persons or property of others have by law a duty cast upon them to use reasonable care and skill to avoid such a collision."

For the Claimant to succeed in respect of a negligence claim, she would need to satisfy the elements of that tort. The primary and fundamental pre-requisites need to be established in each case respectively. These requirements of the modern tort of negligence were stated by Lord Wright in, ***Lochgelly and Coal Co Ltd v McMullan***, as being:

- i) *the existence of a duty of care owed by the defendant to the claimant;*
- ii) *a breach of that duty; and*
- iii) *damage or injury caused by that breach of duty.*

[57] To start, the first task is to identify and define to whom a duty of care is owed, because if a duty of care cannot be established and shown to exist in this situation concerning the wires, then the remaining elements of the tort of negligence need not be recognized. I would say that definitely a duty of care is owed to your literal neighbor in ensuring that the power lines that provide you with electricity does not harm her.

[58] The next consideration is whether there has been a breach of the duty of care owed. Negligence is essentially concerned with compensating people who have suffered damage as a result of the carelessness of others; therefore resulting

damages must be proved in order to recover compensation in a negligence action. In this case I do not recall any evidence which demonstrates that harm, injury or damage has been caused to Mrs. Gore or anyone else as a result of the electrical wires installed at the instance of the defendant.

[59] The closest the Claimant has come to alleging harm is to say in her witness statement "That the encroachments erected by the Defendant inclusive of the running of electrical wires poses a real and imminent danger to my property, me, other users, occupiers and invitees to the said property". In so alleging the Claimant is merely prophesying that harm will or might occur at some point in the future not that harm and damage has in fact occurred. This Claimant has therefore failed to establish too very important elements of the tort, namely an actual breach and resulting injury/damage. In those circumstances this plinth of her claim fails.

DISPOSITION

[60] Having regard to my reasoning and findings above I accordingly give judgment in favour of the Defendant with costs awarded in an amount to be agreed or taxed.