IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007HCV01945

BETWEEN	MAGERINE MCWILLIAMS	1ST CLAIMANT
AND	MARCIA MCWILLIAMS	2ND CLAIMANT
AND	MELBOURNE MCWILLIAMS	3RD CLAIMANT
AND	MAGIL CONSTRUCTION JA. LTD.	DEFENDANT

Ms. Tameka Jordon instructed by Ms. Jacqueline Samuels-Brown for the Claimants

Defendant unrepresented

Heard: June 29, 30 and November 12, 2009

Breach of Contract – Encroachment on Land- Trespass

Lawrence-Beswick J

1. In this matter, Magerine and Melbourne McWilliams together with their daughter Marcia McWilliams (the McWilliamses) filed suit claiming damages from Magil Construction Jamaica Limited (Magil) for damages for breach of contract, negligence and trespass.

2. Ms. Marcia McWilliams' evidence was that in about March 2000 her parents and herself became interested in purchasing one of the lots of land which they had seen advertised by Can-Cara/Magil.

3. The McWilliamses contacted the offices of Can-Cara/Magil indicating an interest in Lot 553 Summerleyton Place, Old Harbour and expressing that they also wished a house to be built on it.

4. Subsequently, the McWilliamses who lived abroad received by mail a Land Contract Agreement and a House Construction Agreement. In or about September 2000, the McWilliamses returned the signed contracts to Can-Cara/Magil.

5. Agreed sums of money were paid and the boundaries of the lot were identified by pegs and a Surveyors Diagram. Construction started but not before the McWilliamses had visited the location and had had the boundaries pointed out to them.

6. Magil built the house and the McWilliamses paid in full, including escalation costs, in April 25, 2001. By about July 2001 they took possession of the property and in about August 2001 the McWilliamses started to construct a retaining wall.

7. During the construction, the McWilliamses observed that part of the adjoining property, Lot 554, had been constructed by Magil on their property. The McWilliamses immediately informed Magil of the observation.

8. An exhibited letter dated December 6, 2002 bore the news to the McWilliamses that the east boundary of their property had been re-assigned to the owners of Lot 554 but that the size of the lot had not changed. The McWilliamses had been unaware of that re-assignment and had not consented to it.

9. The McWilliamses informed Magil in February 2003 that the re-assignment was unacceptable. The response was an offer to re-locate them to a more expensive lot, with the cost to be borne by the McWilliamses. That response did not find favour with the McWilliamses.

10. By about February 2004, the McWilliamses suggested that Magil buy back the property at the current market value. There was no response.

Mrs. Samuels-Brown, attorney-at-law for the McWilliamses sought to ascertain from Magil how it intended to remedy the situation.

11. According to the only witness who testified, Ms. McWilliams, the front of the McWilliamses' property had been made smaller by the re-assignment which had also changed the shape of the property. Marcia McWilliams' evidence was that they had intended to expand their property to suit their own needs and they no longer had appropriate space to do so. They had intended to construct a driveway for parking. In an additional witness statement, Ms. Marcia McWilliams added that they had also intended to build a swimming pool, a deck and a two door garage, to allow the home to be used as a summer home and for retirement of Magerine and Melbourne McWilliams.

12. Magil responded in July 2004 that it was Can-Cara's responsibility. On December 16, 2004, Can-Cara denied responsibility and wrote that Magil was the responsible party. Mrs. Samuels-Brown again wrote to Magil in December 2004 and January 2005 demanding that they buy the property back from the McWilliamses. No response was received. The McWilliamses filed this action in 2007.

13. Magil did not acknowledge service of this claim on them so that judgment was entered against Magil.

14. Counsel for the McWilliamses argues that the contract was breached by the re-assignment of the boundaries and that the McWilliamses should be awarded damages amounting to the difference between the current market value and the purchase price.

15. She argues alternatively that the McWilliamses be compensated for the land re-assigned, which according to Ms. McWilliams was 61.37 square metres.

16. In **Ruxley Electronics & Construction Ltd. v Forsyth** [1955] 3 WLR 188, the House of Lords discussed the established law that, "damages for the breach of the contract must reflect, as accurately as the circumstances allow, the loss which the claimant has sustained because he did not get what he bargained for."

There the landowner contracted for a 7'6" deep swimming pool to be constructed, but the contractor built it 6' deep thus lessening the landowner's ability to enjoy the pool.

Lord Bridge referred to the fact that the completed work served the practical purpose for which it was required but it did not satisfy the landowner's personal preference because the work fell short of the contract specification. The contractual defect could only be remedied by re-building the pool. The learned Judge regarded that course as resulting in a cost which would be too great in proportion to any benefit it could confer on the landowner, that no reasonable owner would think of incurring it, and asked what was the measure of the loss which the landowner had sustained.

Lord Bridge opined that, "If there is no clear English authority which answers this question, I suspect this may be because parties to this kind of dispute normally have the good sense to settle rather than to litigate."

17. The instant case is one which in my view, the parties ought to have exercised the good sense to settle. The evidence shows that Magil had access to various portions of land and may well have been in a position to try to remedy the error. The McWilliamses tried to open channels of negotiation but there was no meeting of the minds.

18. In **Ruxley**, Lord Bridge concluded that the justice of the case required that the award should be the diminution in the value of the contract.

19. In **Robinson v Harman** (1848) 1 Exch 850, Parker B at p. 855 enunciated the general principles applicable to damages. There he said that:

> *"Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed."*

20. Lord Cohen in **East Ham Corporation v Bernard Sunley & Sons Ltd** [1966] AC 406,434-435 expanded, that for defective building work:

> *"[t]here is no doubt that wherever it is reasonable for the employer to insist upon reinstatement the courts will treat cost of re-instatement as the measure of damage."*

21. Re-instatement in the instant case would involve demolition of all or some of the house on Lot 554 to retain the original fence line. The evidence from Ms. McWilliams is that it was during construction of a fence that they realized a portion of the neighbour's house was on their land. I view this as indicative of the fact that the encroachment was not readily obvious to the naked eye. I am fortified in my view by the fact that the Appraiser' Report which was obtained by the McWilliamses and is exhibited, refers to the land as having a rectangular shape. Re-instatement in such a situation would not be reasonable. The cost of that re-instatement would far outstrip any value to be gained by the McWilliamses.

22. The learned authors of **McGregor on Damages** 15th Edition (1988) p 675-676, para. 1091-1092 state that where re-instatement is unreasonable damages fall to be

measured by the value of the building had it been built by the contract less its value as it stands.

23. Ms. McWilliams gave evidence that the McWilliamses paid $2,256,875.00 for the house, land and associated fees. She also testified that the property was valued at $5,500,000.00 on April 6, 2009. However, there is no evidence as to what the value of the house would have been, had the fence line been accurately maintained. I am therefore unable to assess the monetary loss, if any.

24. Nonetheless, the precise terms of the contract have been breached and have led to a lack of satisfaction by the landowner. The contract was for the purchase of 3888 square feet or 362.627 square metres but 61.37 square metres, according to Ms. McWilliams' unchallenged evidence, was re-assigned to their neighbour. The purchase price for the lot above was $223,300.00. The amount lost for the re-assigned portion was therefore $\frac{223{,}300 \times 61.37}{362.627} = \$37{,}790.68.$

25. However, Counsel urges that the damages must go beyond that because the breach has caused various plans to be dashed. The next question therefore is as to how these plans have been changed.

26. It is my view that the evidence about all the plans that the McWilliamses had for the land may be somewhat exaggerated. In her original witness statement of March 9, 2009, Ms. McWilliams referred primarily to constructing, "a driveway suitable for parking a vehicle without issue." It was not until her witness statement of April 2, 2009 that she referred to the intention to build a swimming pool, deck and a two door garage.

However, in her March 2009 statement, Ms. McWilliams swears that before discovering the encroachment, the McWilliamses had constructed back and front walls, a driveway and a verandah. There is no evidence that the driveway which was being constructed, was substantially different from what they had intended to build in any event.

27. I have examined the photographs in evidence and the Surveyor's Identification plan. I find, on a balance of probabilities, that the additional plans stated were not initially within the contemplation of the McWilliamses. The land could not accommodate all those additions. I do not accept that the use of the land has been substantially changed.

I have been presented with no evidence concerning the actual difference in the value of the property as it now stands and the value that it would have had if the re-assignment had not been done.

In these circumstances I can only award a nominal amount for the damages for breach of contract. I award $537,790.68 which includes the actual value of the re-assigned land.

28. Counsel also urges an award for damages for disappointment, mental distress and loss of enjoyment as the McWilliamses are angry and disappointed for not being able to use the land as they wished.

Counsel submits that there is no local guidance as to how to compute damages for mental distress and loss of enjoyment and relies solely on English authorities.

29. In **Perry v Sidney Phillips & Son** [1982] 1WLK 1297, Lord Denning MR, at p. 1301 referred to the fact that, "anxiety, worry and distress may nowadays be the subject of compensation. Not excessive, but modest compensation."

Kerr L.J. added at p. 1307, that these damages are awarded, "because of the physical consequences of the breach which were all foreseeable at the time."

30. In this case, it is undisputed that the McWilliamses were unilaterally deprived of a portion of their land. The physical consequences would have been foreseeable as the use to which the McWilliamses could put their land would be altered in some way. There is evidence that they could not build the wall of the property at the precise location they had chosen although they could build it at a nearby location. Although it is my view that the evidence of their expectation as to the use of the land was somewhat exaggerated, I nonetheless accept that on a balance of probabilities, there were some improvements, minor though they might be, which the McWilliamses would not be able to make because of the change in shape and size of the land.

31. For damages for worry and distress in this regard, I award $500,000.00 which I regard as "modest compensation" in accordance with **Perry.**

32. Counsel also submitted that damages should be awarded in lieu of an injunction. Viscount Finlay in **Leeds Industrial Co-operative Society Ltd.** [1924] AC 851 at 857 opined that the court has the power to award damages to the party injured, either in addition to or in substitution for an injunction.

However, even if the McWilliamses had a right to an injunction, there is no evidence that it would be against Magil. No evidence has been presented that the adjoining premises are still owned by Magil.

I therefore make no award under this head.

33. As it concerns trespass to the land, Counsel submits that a trespass is occasioned by the location of a manhole on their property placed there by Magil for use by the occupants of Lot 554.

34. Magil is trespassing on the property and continues so to do while the manhole cover remains there. Counsel submits that the award for this trespass to the land should be $930,804.93 being 61.37 square metres (the land re-assigned)(according to Counsel) x $15,167.10 (the amount that Counsel submitted is the cost of the land per square metre).

She includes as part of the claim, the trespass which she says occurred when Magil unilaterally re-assigned the property resulting in the adjoining building being built on the McWilliamses' property.

35. I do not understand the re-assignment to be a trespass to land but rather I view it as a breach of contract, as I have earlier found. I am therefore unable to award damages for trespass due to Magil's re-assignment to the McWilliamses' land.

36. However, the evidence concerning the manhole cover is clear and I accept Ms. McWilliams' evidence that Magil placed it on her land thereby trespassing. In seeking to arrive at an appropriate award, I consider that Magil has unilaterally placed it there and has consistently refused to remove it. I have no evidence of the dimensions of the cover but take judicial notice of the fact that a manhole cover tends to be relatively small compared to a plot of land. I also take judicial notice of the fact that lying just below a cover is a hotbed of germs which is capable of overflowing at any time.

37. I consider the placing of the manhole cover on the land to be a trespass and regard the sum of $500,000.00 as being appropriate damages for its presence there from at least 2003 when Ms. McWilliams first noticed it, up until now.

38. However, the McWilliamses have no control over the contents of the manhole and in my view there is the potential for a public health concern. I therefore make a further award for the continuing trespass of the manhole cover in their yard and award an amount of $5,000.00 for each day the manhole cover remains in their yard after this judgment has been served on Magil.

39. The Order I make therefore is-

1. Damages assessed for:

    a. Breach of Contract in amount of $537,790.68

    b. Worry and Distress in amount of $500,000.00

    c. Trespass in the amount $500,000.00

        Plus $5,000.00per day in which the manhole cover remains in the claimants' yard after this judgment is served on the defendant.

2. Interest at the rate of 6% per annum from December 6, 2002 to today.

3. Costs to the claimants to be agreed or taxed.