

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L.1990/M.304

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| BETWEEN | MARGARET MORRIS | PLAINTIFF |
| A N D | DANHAI WILLIAMS | FIRST DEFENDANT |
| A N D | NADINE WILLIAMS | SECOND DEFENDANT |

Mr. Ian Wilkinson for Plaintiff instructed by Ms. Portia J. Nicholson.
Defendants absent and unrepresented.

HEARD: November 3, 4, 14, 1997
and February 20, 1998

SMITH, J.

On the 3rd November, 1997, Mrs. Jacqueline Samuels-Brown informed the Court that she had told the defendants that she would not be able to represent them. She had filed a summons to remove her name from the records and had served a Notice thereof around May, 1997. She had sent the Notice of hearing to the defendants. She spoke to the defendants and told them what the position was and that they should retain other counsel. Accordingly counsel's application to have her name removed from the record was granted.

Mr. Wilkinson told the court that the defendants were served on the 27/10/97 with notice of trial and that an affidavit of service was filed on the 29/10/97.

By Writ of Summons dated 10/10/90 the plaintiff claims damages for trespass to land and an injunction restraining the defendants from continuing the trespass. Paragraph 5 of the Statement of Claim reads:

And the plaintiff claims:

- (a) Damages for Trespass.
- (b) Aggravated and/or exemplary damages.
- (c) The said sum of \$144,000 with interest thereon.....
- (d) Injunction.....

The plaintiff is the registered proprietor of land known as 17A Westmeade Belgrade Heights, Lot 34, part of Belgrade in the parish of Saint Andrew and registered at Volume 1057 Folio 455 in

in the Register Book of Titles.

The defendants are the registered proprietors of land contiguous to the plaintiff's said land and known as Lot 33 part of Belgrade in the parish of St. Andrew and registered at Volume 1057 Folio 454 in the Register Book of Titles.

The plaintiff and her husband bought the land and built their house and have been living there since 1982. They met the defendants in 1990 when the first defendant started to construct a house next door to them.

The first defendant asked the plaintiff to sell him a strip of land where she had her boundary wall. The plaintiff refused. The first defendant demolished the plaintiff's boundary wall in spite of her husband's plea to him not to do so. Mrs. Morris, the plaintiff, testified that Mr. Danhai Williams the first defendant, drove a tractor up her drive way and used it to pour earth over his place. After demolishing the plaintiff's wall, the defendant proceeded to build another wall. This was erected in defiance of the plaintiff's wishes and constitutes an encroachment.

The plaintiff commissioned Llewellyn Allen and Associates to survey her property. Mr. Llewellyn Allen, a very qualified commissioned land surveyor with over 20 years experience deposed that Mrs. Margaret Morris and her husband requested him to carry out a survey to investigate the possible encroachment by an adjacent party. He commenced this survey on April 14, 1993 and completed it in May, 1993.

This survey, he said, was in respect of Lot 34 Belgrade Heights St. Andrew located on Belgrade Loop registered at Volume 1057 Folio 455. The adjoining property is Lot 33 Belgrade Heights St. Andrew also located on Belgrade Loop registered at Volume 1057 Folio 454.

He testified that the survey indicated that a retaining wall constructed on Lot 33 i.e. on the Williams' property and which serves partly as the side of their driveway encroaches on the Morris' property at the south-east corner of the Morris' land.

The wall further extends substantially along the road reservation in front of the Morris' property. This, he said, though not an encroachment on the Morris' property is highly unusual.

The encroachment is significant in terms of the physical structure but not in terms of the portion of land. He completed a plan from the data, this plan was received as Exhibit 1. He charged and was paid \$7,500 by Mrs. Morris.

Mr. Wesley Walker, a practising Quantity Surveyor and an associate member of the Chartered Institute of Builders also gave evidence on behalf of the plaintiff. He knows the plaintiff and her husband. He was engaged by them to do an estimate for reinstatement of retaining wall at their premises at 17A Westmeade Road, Belgrade Heights. The first estimate was done in 1993. The most recent one was done on the 30/1/97. This retaining wall is about 34 feet in length and is along the southern boundary running east to west.

He makes the estimate to be in the region of \$136,500. The work involves:

- (i) Excavation of wall footing.
- (ii) Placing of about 6 cubic yards of concrete.
- (iii) The construction of a rubble limestone retaining wall.
- (iv) Back-filling of void with earth - about two truck loads.
- (v) A capping on top of wall - this would be made out of concrete.

It is a sloping wall with average height of about 8 ft. The construction would take approximately four (4) calendar weeks, using about 3 common labourers and about 3 stone masons.

Special Damages

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| Cost to rebuild wall | \$136,500.00 |
| Cost of Surveyors Diagram | 7,500.00 |
| | <u>\$144,000.00</u> |

General Damages

Mr. Wilkinson submitted that in addition to an award for damages for trespass there should also be an award for exemplary damages for the wilful persistence of the defendants in committing the trespass. He relied on Beckles v. Chandler and Others 2 W.I.R. 1; Rookes v. Barnard 1964 A.C. 1129 at 1227 and Carrington et al v. Karamath 38 W.I.R. 306 at 316H- 317B and Brinkman Douglas v. Marjorie Bowen 22 W.I.R. 333. Counsel for the plaintiff suggested

an award of no less than \$1M as compensatory damages. He further suggested that exemplary damages should be at least \$2M to make a statement to the defendants.

Compensatory Damages

The court must consider what sum would be appropriate to compensate the plaintiff for the inconvenience, annoyance and distress that the conduct of the defendants must have caused the plaintiff. The fact that this trespass has been going on for over seven (7) years must also be taken into account.

To place a money value on such inconvenience, annoyance and distress is difficult. Must an award in a case as this one be compared with an award in personal injury cases? It has been said that there can be no precise correlation between personal injury and a sum of money. The same can no doubt be said of annoyance or distress. Such^{an} exercise has been likened to an attempt to equate the incommensurable.

Also there can be no precise correlation between the loss of a limb, the fracture of a bone and annoyance or distress caused by a defendant's conduct. The same is true as between the above and damages suffered as a result of false imprisonment. However an award for general damages in trespass should not normally be greater than an award in respect of general damages for personal injury or false imprisonment or assault. Perhaps as was said in Elton John v. MGN Ltd. (1996) 2 All E.R. 35 the time has come when lawyers should be free to draw attention of judges or juries to these comparisons.

Bearing this in mind I think an award of \$1M as suggested by counsel would be excessive.

It is my view that, in all the circumstances of this case and in light of the fact that a mandatory injunction is sought, a sum of \$100,000 would be appropriate to compensate the plaintiff.

Exemplary Damages

Mr. Wilkinson contended that the conduct of the defendants in demolishing the plaintiff's wall in defiance of the plaintiff's wishes and in building another wall which constituted an encroachment is outrageous and merits punishment.

The principles of law governing the circumstances in which

exemplary damages might be awarded and which were enumerated in Rookes v. Barnard (supra) and explained in Cassell and Co. Ltd. v. Broome (1972) A.C.1027 are applicable in this country - See Douglas v. Bowen (supra).

The House of Lords enumerated three such categories in Rookes v. Barnard. The second of the two common law categories of circumstances in which exemplary damages may be awarded is relevant in this case. It is:

"Where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff."

Lord Devlin at p.1227 in reference to this common law category said:

"This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which either he could not obtain at law or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrong doer that tort does not pay."

However Lord Devlin was at pains to emphasise that exemplary damages should only be awarded where the sum awarded as compensation (which may be a sum aggravated by the way the defendant had behaved to the plaintiff) was inadequate to punish the defendant for his outrageous conduct and to deter him from repeating it.

It seems to me that the power of the court to grant a mandatory injunction to compel the defendants to remove the encroachment on the plaintiff's property, is adequate to prevent the defendant from making a profit from his wrong doing and thus exemplary damages should not be awarded.

The mandatory injunction in this case would be adequate to teach the defendant that tort does not pay and to deter him from repeating it.

I am therefore inclined to the view that exemplary damages should not be awarded as a sum for compensatory damages coupled with a mandatory injunction is adequate to punish the defendant for his conduct.

Mandatory Injunction

The grant of a mandatory injunction is discretionary. Every case must depend essentially upon its own particular circumstances. The court must aim at justice between the parties having regard to all the relevant circumstances. The court must be satisfied that damages will not be a sufficient or adequate remedy.

Where a defendant has acted without regard to his neighbour's rights or "wantonly and quite unreasonably" he may be ordered to restore the status quo even if the expense to him is disproportionate to the advantage to the plaintiff - See Redland Bricks Ltd. v. Morris (1970) A.C.652 at 666B.

In the instant case the defendants offered to buy a strip of land near the plaintiff's boundary wall. The plaintiff refused to sell. The defendant demolished the plaintiff's boundary wall and erected another wall in defiance of the plaintiff's wishes. This other wall constitutes an encroachment. I am firmly of the view that in the circumstances of this case the defendants should be ordered to remove the offending wall.

Conclusion

1. Special Damages assessed at \$144,000 with interest at 10% \$7,500 from May 1993 to date of judgment.
2. General Damages assessed at \$100,000 with interest at 10% from the 11th December, 1990 to date of judgment.
3. The defendants are hereby ordered to remove the boundary wall erected by them at the south-east corner of the Morris' land within 30 days of the date this order is served.
4. Costs to the plaintiff to be taxed if not agreed.
5. Liberty to apply.