IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2006 HCV 05100

BETWEEN	ANNETTE NELSON	1ST CLAIMANT
AND	LUSCELDA BROWN	2ND CLAIMANT
AND	GLASSPOLE MURRAY	DEFENDANT

Ms. Vinette Grant instructed by H.G. Bartholomew & Company for the Claimants

Mrs. Sharon Gordon-Townsend instructed by Gordon & Watson for the Defendant

Heard: 19th, 20th, 21st, 24th January 2011 and June 15, 2012

Private Nuisance – Construction of roadway on common property – Roadway constitutes a danger – Whether user unreasonable and alien.

Easement of Necessity – Rule in Wheeldon and Burrows – Presumed intention of parties – Alternate Access – Right of footpath or General right of way

Injunctive Relief – Principles governing the exercise of the courts discretion – Material infringement of Claimant's right – Conduct of parties.

Campbell, Q.C., J.,

Background

[1] Annette Nelson, 1st Claimant, is an administrative assistant, aged 38 years old. The defendant is 52 years old and a businessman. The 1st Claimant is the daughter of the 2nd Claimant, and the cousin of the Defendant. Caseta Brown, deceased, is the mother of the 2nd Claimant and the grandmother of the 1st Claimant and the Defendant. Ms. Caseta Brown died in 1992.

[2] All the parties are occupants of an unregistered plot of land of approximately 3½ acres, at Mount Moreland, in the parish of St Catherine. The land is steep and rocky, and had been owned by Caseta Brown for 41 years up to the time of her death, in 1992. All the Parties have been on the land from birth. The land is bounded on three sides by registered properties owned by strangers, and on its western side by the Spanish Town to Sligoville main road.

[3] Caseta Brown died intestate, before her death she granted areas of her land to her relatives. This was done simply by pointing out the location where they could build their houses. There was no discussion as to the use of the other areas. The Defendant said he was first given a ñhouse spotò on the lower part of the land. Subsequently, he was offered a spot where his house now stands on the hill which is to the back of the land. He states, ñShe gave me permission to build my house and to use the same dirt track that the Claimant uses to get to my house.ò

[4] Caseta Brown occupied a dwelling house which fronted on the main road. It consisted of two rooms and a kitchen. It was further added to by the sister of the 1st Claimant. In 1997, the 1st and 2nd Claimants transformed the house into an imposing two-storey structure. The Defendant was raised in a two-family house, occupied by the Defendantôs mother and the mother of the 1st Claimant. The foundation of that house remains at the rear of the land above the Claimantôs house. In 1986 the Defendant started construction of his house on the plateau at the rear of the property. The construction would continue for more than a decade and a half. The third house on the property is that of Hector, a son to Caseta Brown, this is separated from the 1st Claimantôs house on the western boundary.

[5] The Defendant states that the dirt track had been used for fifty years by the family members. There is no evidence that at any time during that period, that the dirt track accommodated anything other than pedestrian traffic. In any event, the unchallenged evidence before the court it was unable to support anything else. There is no evidence before the court of the exact dimensions of the dirt-

track, other than being described as just a track, too narrow for vehicles. The defendant had to clear the land and raise the surface in order to lay the roadway. The evidence was the land was well fruited. The area cleared was a much wider area than the dirt track**.**

[6] Mr. Doyen Johnson, Acting Deputy Superintendent of Roads and Works, testified that the roadway passed within sixteen inches of the front steps to the Claimantôs house, and barely two feet three inches from her kitchen. The roadway, as it exists, is 10 feet six inches wide. Where the road curves by the Claimantôs house, it comes within 18 inches of the house. The prescribed turning distance would be between nineteen and twenty feet from the house. The unchallenged evidence of Mr. Johnson is that the roadway presents a real and present danger to the Claimant and the adjoining property, because of the inadequacy of the turning area, vehicles attempting such a manoeuvre could overturn on the dwelling house on the adjoining property or on the Claimantôs house.

[7] The road was retained by walls that rose to some six feet in height on either side of the roadway, and the road surface is on level with these walls. There is no space for a rail to prevent a vehicle from falling into the adjoining property. The retaining wall has no structural integrity, and is unlikely to be able to withstand the pressure caused by vehicles on the road. Instead of its present thickness constituted of one block, the engineers view is that there should be three blocks. The hydrostatic pressure on the wall, would have been lessened if weep holes had been built in the walls to minimize the effect of water building up. Further, the marl is not properly impacted, so the surface has not got the required traction. The septic pit, over which the roadway passes, in the opinion of the engineer, cannot maintain the weight of the vehicle and is liable to collapse. The opinion of Mr. Johnson is that the road, as it exist constitutes a danger. The topography of the land militates against it being able to be reconfigured to take vehicular traffic without a great deal of modification.

Nuisance

[8] On the 27th December 2006, the Claimants filed an action seeking:

(a) Damages for Nuisance.

(b) An Injunction to restrain the Defendant by himself, his servants and or agents or otherwise howsoever, from continuance or repetition of the said nuisance of constructing a roadway on lands occupied by the Claimants and the Defendant at Mount Moreland.

The Nuisance was particularized, *inter alia:*

(i) Stockpiling marl in the Plaintiffs' front yard and in the vicinity of the garage of their house which prevented the 1st Plaintiff from driving her car in the same garage.

(ii) Beginning and continuing the construction of a roadway and a 4 foot retaining wall bordering on the aforesaid roadway and which roadway slopes upward and also passes approximately 3 feet from the side and back of the Plaintiffs' house and approximately 7 feet from the front of the aforesaid house whereby the plaintiffs are prevented from exiting their house from the back, using their back or front yard, or walking around the house.

(iii) Re-covering the septic pit for the Plaintiffs' house with marl which has caused the noxious odours from the aforesaid pit to enter the Plaintiffs' dwelling-house through the waste water pipe in the bathroom and kitchen.

[9] Has the defendant the right, whether express, implied or prescriptive, to build a roadway on the existing dirt track? Whether the construction of the roadway constitutes a nuisance to the Claimants. In 1940, the House of Lords, in **the Sedleigh-Denfield v O'Callaghan {1940} A.C. 880**, Lord Atkin, defined the tort of nuisance as follows:

> "I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself. The occupier or owner is not an insurer, there must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or

> negligence is not an essential ingredient but some degree of personal responsibility is required which is connoted, in my definition, by the word ôuse'. This conception is implicit in all the decisions which impose liability only where the defendant has ôcaused or continuedô the nuisance.ò

[10] The learned authors of **Winfield and Jolowicz on Tort**, **Thirteenth Edition**, 375, states:

> ñThe essential feature of nuisance liability is that of the protection of private rights in the enjoyment of land, so that the control of injurious activity for the benefit of the whole community is incidental. ñ

There is a distinction between private and public nuisance. Public nuisance deals with an injury to the public at large, and affects the reasonable comfort and convenience of a class of citizen that falls within the scope of its operation. Public nuisance is a crime, private nuisance is a tort. The individual may institute action for public nuisance, if he can prove particulars of damage up and above that cause to the general public at large.

[11] Private nuisance, with which we are dealing in this case, is essentially concerned with the wrongful interference of the Claimantôs use or enjoyment in land or of some right or interest in land. In a substantial number of cases, the actions are constituted of interferences over a long period of time by owners or occupiers of property with the use and enjoyment of neighbouring property. The impugned conduct will only be deemed unlawful, if it is unreasonable. A balance needs be struck between the contending rights of the occupier and his neighbour. Lord Wright, in **Sedleigh-Denfield** said:

> ñA balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbor not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly, in a particular society.ñ

It is settled that in order to be unreasonable, the interference must not be trifling, or inconsequential, it must be substantial. Unreasonableness is a question of fact in the determination of which should be considered the time, place, manner of commission, the permanence or in transitory nature of the effects of the interference upon the Claimant.

[12] What then is reasonable in the context of Jamaican rural society, particularly in Sligoville district where the land, on which the parties live, is situated? It was not until the last six years, in 2006, that the dirt track was transformed to facilitate vehicular traffic. The Defendant has, for almost half a century, used the dirt track as a footpath only. The evidence of the technical unsoundness of the roadway raises concerns as to its ability to accommodate motor vehicles. I am particularly concerned that this infringement, if allowed to continue, would diminish drastically the Claimantôs enjoyment of her property permanently. On the other hand, the Defendant has established a home atop the highest point on the land. Itôs a project that, on his testimony, took sixteen years to complete. He might very well have thought that he has a right to transform the land to allow a motor vehicle to drive into the gate of his home. He has made tremendous outlays in money, estimated at $580,000 to construct the roadway. To clear the land in order to abate the nuisance, is quite likely to be equally costly an enterprise. He may well argue that he made attempts to secure the consents of the other occupants of the land and that the extension of the Claimantôs house resulted in some of the interference of which she now complains. He may wish for himself, the convenience and comfort afforded the Claimant by her ability to drive to her house.

[13] In **Greenidge v Barbados Light and Power Co. Ltd. (1975) 27 WIR 22**, a case on which the Defendant relied, an action was brought in private nuisance by the Plaintiff who complained that the noise and fumes emitted from the Defendantôs electricity undertaking, injured the enjoyment of his tenants who were tourists vacationing from abroad. The court held, the character of the neighbourhood is an important consideration in determining whether or not a nuisance exists; that

the law does not allow a defence that the operation causing the nuisance is useful to the persons generally in spite of its annoyance to the claimant; that standards alien to the community would not be used in the determination of the relevant standards. Williams J. at page 28 c:

> ñIt may be useful to stress that just as a tourist cannot seek to introduce into a district standards of comfort and convenience which are alien to that district, so an industrial undertaking cannot seek to prejudice by its operations the standards of comfort and convenience to which the ordinary resident of the district have grown accustomed to.ò

Was the standard of comfort and convenience that the Defendant sought to gain from building of the roadway alien to that plot of land that he had used for almost half a century? It is clear that the occupiers of Caseta Brownôs plot of land had become accustomed to having the land fruited and devoid of the noise, dust and stench that the Defendantôs roadway had introduced into the community. There is nothing in the evidence that the Claimants had been exposed to the level of risk and danger that the technical evidence states the roadway posed to its neighbours. I find that the construction of the roadway is an unreasonable and alien use of the right of way, and exceeds the right of access, which he hitherto, enjoyed. The construction has wrongfully interfered with the claimantsôenjoyment of their land.

[14] An Easement of Necessity

The Claimants are seeking an injunction to restrain the Defendant from the continuance of the nuisance of constructing a roadway on the lands occupied by the parties. The answer of the Defendant is a denial of nuisance and that the roadway constitutes a right of way of necessity. Does the dirt track constitute a right of necessity? If a right of necessity exists, is the Defendant able to construct a roadway in order to convert a walking track into a driving track?

[15] An implied easement may arise under the rule in **Wheeldon v Burrows** (1879) 12 CH.D. 31 (C.A), per Thesiger L.J.:

> ñOn the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements) or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.ò

[16] Conveyancing Act, S65, provides, statutory authority for the vesting of easements, rights, etc on the conveyance of freehold lands:

> ñA conveyance of freehold land to the use that any person may have for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty or privilege in or over, or in respect to that land or an part thereof, shall operate to vest in possession in that person that easement, right, liberty or privilege for the estate or interest expressed to be limited to him, and he, and the person deriving title under him, shall have use and enjoy the same accordingly.ò

[17] The weight of authority leans in favour of the presumed intention, and not public policy, being the basis for the grant of an easement of necessity. The learned author of **Commonwealth Caribbean Property Law,** by Gilbert Kodilinye, at page 180, notes:

> ñIn **Nickerson v Barraclough** [1979] 3 All E.R 312, Megarry J at first instance took the view that the doctrine of easements of necessity is based on public policy, in that it is against public policy that land should be made inaccessible. But the English Court of Appeal denied that view and stated that the doctrine was based on the presumed intention of the parties. In so doing, the Court of Appeal appeared to have blurred the distinction between easement of necessity and intended easements.ò

[18] It follows that where the presumed intention is deemed to be the basis for the acquisition of the way of necessity, the easement may be excluded if it can be demonstrated by the evidence that there was no such intention held by the parties. It may be expressly excluded from the grant. What then was the intention of the parties? Both sides are agreed that there existed a dirt track from the Sligoville main road to the remains of the foundations of the old family home

and all the parties used this track. There was, however, some disagreement as to the Claimantôs contention that her grandmother had cautioned the Defendant when he opted to build his house on the hill, by asking him, ñYou must know how you are going to get up there,ò which would have been a pertinent question, based on the topography of the land. The house-spot being fifty feet above the land at the front of the premises.

Determining a general right of Way

[19] There is no contest that the Defendant has an unrestricted right to a foot path, described by the parties as a dirt track to his home. What is strenuously denied by the Claimant is that such a right is convertible into a path for trucks. In **Cannon v Villars** (1878) 8 CH. D. 415, the court was considering the extent of an implied right of way arising from a lease of premises for business purposes. Sir George Jessel, M.R. said:

> ñAs I understand, the grant of a right of way per se and nothing else may be the right of footway or it may be a general right of way, that is a right of way not only for people on foot but for people on horse back, for carts, carriages and other vehicles. Which is a question of the construction of the grant, and that construction will of course depend on the circumstances surrounding, so to speak, the execution of the instrument.
>
> . . . if we find a right of way granted over a metalled road with pavement on both sides existing at the time of the grant, the presumption would be it was intended to be used for the purpose for which it was constructed.
>
> If, on the other hand, you find that the road in question over which the grant was made was paved only with flagstones, and that it was only four or five foot wide, over which a wagon or cart or carriage ordinarily constructed could not get, and it was only a way used to a field or close, or something on which no erection was, there, I take it, you would say that the physical circumstances showed that the right of way was a right for foot passengers only . . . . **I take it that is the law, prima facie the grant of a right of way having regard to the nature of the road over which it is granted and**

> **the purpose for which it is intended to be used; and both those circumstance may be legitimately called in aid in determining whether it is a general right of way or a right restricted to foot passengers or restricted to foot passengers and horsemen or cattle . . . . or a general right of way for carts, horses, carriages, and everything else."** (emphasis mine)

[20] The evidence before the court as to what is called a ñdirt trackò, would indicate that because of its history, width, surface, the terrain over which it traverses and proximity to dwelling-houses, it was never intended for anything other than a footpath. That it was not a general right of way but intended for foot passengers only. That it was not intended nor is it to be presumed that it would accommodate vehicular traffic, moreso a truck. The evidence before the court provides proof on a balance of probabilities that the Defendant made a dramatic transformation of the ñdirt trackò into a marl roadway. The Defendant cleared some 50 feet of land some thirty-eight feet six inches of which was used by the Claimant to expand her house. Thus, a width of cleared space of some eleven feet six inches remained.

[21] Further, there is an alternative means of accessing the Defendantôs property. The unchallenged is that the building of the Defendantôs home was done over a period of fifteen years or more during the period, the evidence is that the building materials were transported substantially through property in the hands of a third party, Mr. Huntley Gayle. In cross-examination, the Defendant admits he used Huntley Gayleôs land during the building process, but says there is no road there now. There are indications of reserve roads on the registered title to the Gayle lands; this supports the contention of the Claimant that there is an alternative route to the dirt-track on Caseta Brownôs land.

Exercise of Court's discretion to grant injunction

[22] The question for the court is whether, applying the civil standard of the balance of probabilities, the Claimants have discharged the onus of establishing that they

are entitled to the injunction claimed which are, in addition, or alternatively damages for nuisance.

The learned authors of **Gayle Easements, Sixteenth Edition** at page 321stated:

> ñApplying the general principle that every easement is a restriction of the rights of property of the party over whose lands it is exercised, the real question appears to be, on the peculiar facts of each case, whether proof has been given of a right co-extensive with that amount of inconvenience sought to be imposed by the right claimed.ò

It is clear that the inconvenience caused the Claimant by the Defendants use of the right of way greatly outweighs the right of the Defendant in the use of the footpath.

[23] The court would be loathed to encourage Defendants to think that they may commit wrongful acts of nuisance then pay for such damages in satisfaction of such breaches. In the matter of **Patterson v Murphy** [1978] I.L.R.M. 85 at page 99, Costello J, enumerated certain established principles that were germane to the consideration as to how the courtôs discretion should be exercised; at p. 99 and 100 of the judgment, Costello, J. stated:

> ñThere are, however, well established principles on which the Court exercises this discretion. The relevant ones for the purposes of this case can be summarised as follows:-
>
> (1) When an infringement of the plaintiffsô right and a threatened further infringement to a material extent has been established the plaintiff is *prima facie* entitled to an **injunction** there may be circumstances however, depriving the plaintiff of this *prima facie* right but generally speaking the plaintiff will only be deprived of an **injunction** in very exceptional circumstances.
>
> (2) If the injury to the plaintiffsôrights is small, and is one capable of being estimated in money, and is one which can be adequately compensated by a small money payment, and if the case is one in which it would be oppressive to the defendant to grant an **injunction**, then these are circumstances in which damages in lieu of an **injunction** may be granted.

> (3) The conduct of the plaintiff may be such as to disentitle him to an **injunction**. The conduct of the defendant may be such as to disentitle him from seeking the substitution of damages for an **injunction**.
>
> (4) The mere fact that a wrongdoer is able and willing to pay for the injury he has inflicted is not a ground for substituting damages.ò

[24] Is there any exceptional circumstance which would preclude the court from exercising its discretion so as to disentitle the claimant from securing injunctive relief for the material infringement of her rights and further threatened infringement of those rights? In the case **Shelfer-Denfield**, (supra), the court expressed the view that to exercise the discretion to allow for damages, because the Defendant was able to pay may have the unintended result to enable a company who could afford it to drive a neighbouring proprietor to sell, whether he would or not, by continuing a nuisance, and simply paying damages for its continuance.

[25] The injury in this case is substantial and diminishes the enjoyment of the Claimant of her property. The money payment would not be small, but would be of such a scope as to recognise the fall in value of the house should the Plaintiff wish to sell. Further, there is nothing in the Plaintiffôs conduct to disentitle her from injunctive relief. On the other hand, is the conduct of the Defendant, in acting unilaterally, in stockpiling marl in close proximity to the Plaintiffôs home and in undertaking such a fundamental transformation without the requisite permission and consent of the Claimant and others who were likely to be affected, disentitle the defendant from seeking damages in lieu of an injunction. The Defendant has said that he has, for more than four decades, used the pathway as a footpath; there is no oppression in requiring him to continue doing so.

[26] Accordingly, the Claimants are entitled to an injunction to restrain the Defendant from continuance or repetition of the said nuisance of constructing a

roadway on lands occupied by the Claimants and the Defendant at Mount Moreland, in the parish of St. Catherine, and to remove all stockpiles from the premises. The Defendant is to dismantle and remove all the material used in the construction of the roadway and retaining wall, and to restore the dirt track to its original position, as far as is possible.

I cannot fail to appreciate that the injunction which I am granting, and the operation which will ensue, will involve the dismantling of the roadway that was constructed. I have no doubt, care will be exercised to avoid, as far as possible, any further discomfort, dust, emissions, such as have given cause for complaint in these proceedings. The result is that there must be judgment for the nominal sum of one hundred dollars for damages, and there must be an injunction. Costs to the claimants to be agreed or taxed.