IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1982/R161

BETWEEN	SELBOURNE REID	PLAINTIFF
A N D	ERROL ANDERSON	1ST DEFENDANT
A N D	MINION JEAN BARRETT	2ND DEFENDANT

Mr. Maurice Frankson instructed by Messrs Gaynair & Fraser for Plaintiff.

Miss Janet Morgan and Miss Paula Blake instructed by Messrs Dun, Cox & Orrett & Ashenheim for Defendants.

Heard: 22nd, 23rd, 24th, 26th November, & 3rd December, 1993, 27th February, 19th, 20th July, & 21st September, 1995

HARRIS, J.(AG.)

The plaintiff's claim against the defendants is for damages for the following:-

(a) Breach of restrictive covenants 4, 7 and 8 endorsed on certificate of title registered at Volume 953 Folio 253 in respect of 4 Lipscombe Drive, owned by the plaintiff and on certificate of title registered at Volume 953 Folio 252 in respect of 2 Lipscombe Drive, owned by the defendants.

(b) Trespass

(c) Nuisance

In 1981 the plaintiff and defendants were neighbours. The plaintiff owned and occupied 4 Lipscombe Drive while the defendants were in occupation of 2 Lipscombe Drive which they also owned, in a sub-division in Saint Andrew referred to as "Mount Pleasant". They are no longer neighbours. The plaintiff has been resident in the United States of America since 1986 and the defendants have divested themselves of their fee simple interest in 2 Lipscombe Drive.

Sometime in, or, about April 1981 the first defendant informed the plaintiff of a proposal to erect helper's quarters at the rear of his property. As trucks could not gain access to the back of

the defendants' premises, the plaintiff's permission was sought by them to allow trucks to enter his property so that debris from the excavation site could be transported. To this, the plaintiff consented. The exercise commenced in or about May, 1981. On completion of the helper's quarters, the defendants began the construction of a dividing wall between the plaintiff's and their land to replace an existing wire fence.

It was the plaintiff's testimony that the first defendant had told him that the escavatory process and the transportation of the debris would have lasted between two and three weeks. This operation continued for approximately eight months, during which time, heavy trucks came on his premises causing damage to his driveway and a column at his gate. In addition, a 4" p.v.c pipe from the roof of the defendant's house was chanelled to an area in his driveway close to where the debris was stored. Whenever it rained heavily the water from the pipe contributed to "the extensive damage to his driveway". He notified the defendants about this, and the pipe was thereafter directed down to the main road where the water was released.

He stated that although the defendants utilized his driveway about eight months, after six months, he spoke to 1st defendant and wrote informing the defendants that the 2 - 3 week period on which they had agreed had expired. He also requested them to undertake repairs of his entire driveway which had been damaged. The defendants workmen repaired only that area on which the debris had been placed. He had to carry out the remaining repairs.

After the construction of the helper's quarters had been completed, he arrived home one evening to discover a rock garden which he had built adjoining the boundary line between the defendants' premises and his, as well as, a stonewall with steps, on his property, destroyed. He also saw evidence of the commencement of construction of a wall in the area where his rock garden once stood. He spoke to the 1st defendant about it, who, advised that the service of a surveyor would be engaged to identify the boundary line. This survey

was done by the defendants without reference to him. The original survey marks were removed.

He subsequently instructed the defendants' workmen to discontinue the erection of the wall but the construction continued nonetheless. During the process of erection of the wall, his gate column and a picket fence were also destroyed by the defendants' workmen. When completed, the defendants planted tendrils on their side of the wall which eventually grew over to his side, covering his rock garden and stone wall which he had reconstructed by them.

It was his further evidence, that he retained a surveyor to identify the boundary line and it was found that the defendants had encroached on his land by a distance of 2 feet. A further survey was done by agreement of the defendants and himself through reference of the matter by arbitration, to the Director of Surveys.

He also related that the defendants erected an entertainment area on top of their newly constructed helper's quarters, from which persons could view the inner areas of his bedroom and bathroom. As this eroded his privacy, he brought the matter to the attention of the defendants. They built the dividing wall higher but his privacy was not restored.

He also reported that subsequent to and during the construction of the helper's quarters and the dividing wall he took photographs of their respective properties. These photographs were tendered in evidence and marked Exhibit '1' and '3'.

Trevor Shaw, a commissioned land surveyor employed to the Department of Surveys who testified on behalf of the plaintiff, stated that he had carried out a field check of premises 2 and 4 Lipscombe Drive, which were Lots 1 and 2 Lipcombe Drive, respectively. His terms of reference were for him to determine whether the differences between the distances and bearings on earth and those on deposited plan 2022 part of Mount Pleasant, in the parish of Saint Andrew, constituted an encroachment on lot 2 owned by the plaintiff, by the defendants owners of lot 1.

His findings revealed a difference in the position and length of the de facto and de jure boundary between lots 1 and 2. The differences comprised an encroachment of 206 square feet on lot 2 by lot 1. The extent of the encroachment along the northern section was1.6 feet and approximately 0.6 foot at the south westerly section between Lots 1 and 2.

He admitted that an allowance of a 2 feet discrepancy is acceptable on a surveyors report in respect of urban land and in rural areas a more generous tolerance of a discrepancy of up to 5 feet is permissible.

He also stated that he had prepared a written report. This report to which a plan was annexed, was tendered in evidence as Exhibit "2".

Evidence for the defendants was furnished by the second defendant, Mr. Ronald Haddad, a commissioned land surveyor and Dugal Bennett a clerical officer attached to the Office of Titles.

The second defendant testified that construction of the helper's quarters lasted 4 months but could not recall the month it commenced. She stated that the plaintiff had never been advised that it would have lasted 3 weeks and that only one truck was used to collect and transport the rubble from the plaintiff's driveway, for about a month, doing so, once or twice per week, or fortnightly. She also reported that she had been unaware that the trucks had done damage to the plaintiff's driveway but had received a report, a consequence of which, she examined the plaintiff's premises and saw small cracks covering an area of his driveway, 2 feet in length and 1 foot in width. She thereafter requested her supervisor on the site to visit and repair the surface of the driveway where the cracks appeared. The repairs were done within a day and was subsequently inspected by her. The plaintiff had also informed her of a crack in the column at his gate, which was also fixed. She saw no other damage on the plaintiff's premises.

On completion of the helper's quarters, the defendants made inquiry of the plaintiff whether he would assent to their

building a common wall jointly, to replace a broken down wire fence. He was also asked whether he would have been prepared to bear a portion of the building cost. He disagreed to payment of part of the expenses for erection of the wall. They then sought his permission to proceed with the construction of the wall, to this he consented. Following this discussion, the defendants requested a surveyor, Mr. Barrington Smith to check the boundaries. The plaintiff was notified of the date of the survey, but she could not recall if he attended.

After the commencement of the foundation of the wall, the plaintiff complained that the pegs along their boundary line had been removed. Following that, the defendants requested Mr. Ronald Haddad, to carry out a survey. She said she was not sure but believed her attorney-at-law had arranged for a further survey to be conducted by the Director of Surveys.

She also declared that the plaintiff charged that his privacy was invaded by accusing her of looking into his bedroom and bathroom. She said it was impossible to view the inner areas of the plaintiff's bedroom and bathroom from her house. In an effort to appease the plaintiff, she increased the height of the wall.

She denied that storm water or any water, from her land flowed to the plaintiff's land. Rain water from their property proceeded through a plastic pipe and emptied on the main road, while, bathwater was discharged into a pit. She also disclaimed responsibility for damage to the plaintiff's rock garden and denied that a balcony behind their helper's quarters had ever been used as an entertainment area.

The second defendant further stated that she could not recall the period the plaintiff advised he would have no longer accommodated trucks on his property but acknowledged that he had withdrawn his permission. She had seen a letter from the plaintiff complaining about damage to his driveway and rockgarden but had no knowledge of his allegation of the destruction of picket fence at the time the plaintiff stated the defendants were so informed.

Ronald Haddad stated he conducted a survey on premises 2 and 4 Lipscombe Drive, St. Andrew and on other properties in the subdivision. He prepared a written report, which was tendered into evidence as Exhibit '4'. His survey of lot 1 and frontages of lots 2 and 3 revealed small differences between the bearings on earth and those on the registered plan.

It was also his evidence that he resorted to the use of iron pegs found at corners of lots 1 and 2 as his guide. He saw a cement monument on the south western corner of lot 1 and another on lot 3. At the front corner between lots 1 and 2 he found a difference of 1.4 feet between the measured distance on earth and the distance on the plan but there was no difference at the south western boundary of these lots.

He further reported that this type of discrepancy is expected, as, surveying is not a precise science. A 2 feet discrepancy in a survey of an urban area and a 5 feet discrepancy in a suburban area are acceptable in accordance with land surveying guidelines. The small difference in distance of 1.4 feet led him to conclude that the existing boundary represented the most acceptable position of the registered boundary of lot 1 and 2 (2 & 4 Lipscombe Drive).

Dugal Bennett produced deposited plan number 2022 relating to the subdivision of Mount Pleasant, St. Andrew. A certified copy of the plan was tendered into evidence as Exhibit '5'.

I will now direct my attention to the claims of the plaintiff and will first examine restrictive covenant No.4 to determine whether the defendants are in breach of that covenant. The covenant is expressed in the following terms:-

> "4. The main building to be erected on the said land shall face the roadways bounding the said land and no building or structure shall be erected on the said land nearer than thirty feet to any road boundary which the same may face nor less than five feet from any other boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all out buildings shall be erected to the rear of the main building."

The covenant stipulates, among other things, that a minimum distance of 5 feet must be maintained between any building, or structure on the defendants' land and the boundary with the plaintiff's property. That covenant, on the defendants' title, had been modified by order of this court, permitting a building or structure on the defendants' land to be within 2 feet from any boundary excepting the road boundary.

It was the plaintiff's contention that the defendants caused part of their building to be erected less than 2 feet from their respective boundaries and even asserted in cross-examination that "I have always been concerned by the fact that part of the defendants' house is resting on my land". The matter of the position of the boundary line was a source of conflict between the parties, as a result of this, a number of surveys were conducted by them both. Finally, the matter was referred by way of arbitration to the Director of Surveys. His findings revealed a difference in the positions and lengths of the de facto and de jure boundaries between lots 1 and 2. The extent of the discrepancy along northern end of the/ boundary was 1.6 feet and approximately 0.6 foot at the south westerly section of that boundary. The question is whether this constitutes an encroachment by lot 1 on lot 2.

It is trite law that the boundary lines of any surveyed parcel of land is governed by monuments placed in the ground. If an orginal monument can be located, there being no evidence that it had been fraudulently erected, then it establishes conclusively, the correct borders. The deposited plan of Mount Pleasant records concrete monuments as boundary markers. Mr. Shaw in his wisdom, endeavoured to secure as many concrete monuments as possible to carry out his identification procedure. Having found none between the plaintiff's and defendants' land, had nonetheless identified one across Lipscombe Drive in a straight line to the line of demarcation between the parties' land. This, he utilized, in addition to other monuments he could find, together with iron pegs. Mr. Haddad on the other hand, relied solely on iron pegs as

markers in his survey of lot 1 and frontage of lots 1, 2 and 3. He found a 1.4 foot discrepancy at the boundary area to the north, or front of lots 1 and 2. He found no discrepancy at the south western end of the boundary. His report shows that the defendants' building lies 1 foot from the boundary line. He intimated that Mr. Shaw's method of arriving at his conclusion was by way of mathematical calculations, while he had resorted to actual measurements. It was his opinion that Mr. Shaw's calculations could have been inaccurate but conceded that this could also be true in the case of his measurements.

I am of the view that the procedure adopted by Mr. Shaw is correct and accept his findings. This notwithstanding, both Mr. Haddad and himself declared that a 2 feet margin of error in the case of urban land and a 5 feet margin of error in respect of suburban land is generally acceptable in the process of survey. Mount Pleasant's subdivision is considered urban land. Mr. Shaw's observation of discrepancies ranging from 1.6 feet to 0.6 foot along the boundary line and even Mr. Haddad's 1.4 foot discrepancy fall within the 2 feet exception, which is an acceptable variation arising from the vageries of surveying practice. This being so, disturbance of the position of the common border would not be justifiable and the dividing wall should be treated as the boundary line. As a consequence of this, I find that the defendants are not in breach of covenant 4.

I will now allude to covenant 7 which provides:-

> 7. No bath water or water used for domestic purposes in respect of the said land or any part thereof or any water except storm water shall be permitted or allowed to flow from the said land or any part thereof on to any portion of the land now or formerly comprised in Certificate of Title registered at Volume 940 Folio 386 or on to any road street or lane adjacent to the said land but all such water as aforesaid shall be disposed of by being run into an absorption pit or pits or by evaporation or percolation on the said land and nothing shall be done by the Registered Proprietor whereby the drainage or flow of storm water along any drain, gully or water course may be obstructed or impeded."

The plaintiff averred that the defendants constructed guttering on their land which caused storm water to flow from their land to his. In recounting his testimony, he made reference to water being chanelled by way of a 4" p.v.c pipe from the defendants' roof which was discharged on his premises, causing damage to his driveway which had been extensively damaged, during the construction of the defendants' helper's quarters. He went on to state that the defendants' permitted storm water to flow to his premises.

The plaintiff admitted that on his complaint to the defendants about the flow of water from the defendants' roof to his premises, the p.v.c pipe was channelled to the mainroad where the water was discharged above his gate but from the defendants' land. The second defendant stated the pipe was channelled underground to the mainroad. The covenant contains an express exception for the flow of storm water to the plaintiff's land. There is no evidence that storm water which the covenant permits, or for that matter, bath, or, domestic water which the covenant prohibits, was allowed to flow from the defendants' land to that of the plaintiff. This being so, I am constrained to hold that the defendants are not in breach of any of the restrictions imposed by covenant 7.

Has a breach of covenant 8 been established by the plaintiff? The covenant is couched in the following terms:-

> "8. No fence or hedge or other construction of any kind nor any tree or plant of a height of more than four feet six inches above road level shall be erected grown or permitted within 15 feet of any road intersection and the Road Authority shall have the right to enter upon the said land and to clean repair improve and maintain all or any of the drains gullies or water courses which may be thereon and to remove cut or trim any fence hedge or other construction any tree or plant which may be erected placed or grown upon the said land in contravention of this restrictive covenant without liability for any loss or damage hence arising and the Registered Proprietor shall pay to the Road Authority the cost incurred by reason of the matters aforesaid."

The plaintiff alleged that the defendants in contravention of the covenant constructed a fence more than 4 feet 6 inches along road level along the road. There is no provision in the covenant to demonstrate that the erection of a fence exceeding 4' 6" in height, along the roadway is restricted. The covenant forbids the construction of a fence, among other things, surpassing 4' 6" in height within 15 feet of any road intersection.

There is in existence, a fence built by the defendant which surpasses a height of 4' 6". This fence is the common boundary wall between the plaintiff's and defendants' properties. The wall ranges from 20 feet to 12 feet in height. However, this wall, on the plaintiff's own admission is 20 yards from the intersection. In cross-examination he stated that the wall was "20 yards from the 'y' junction". This I accept.

The covenant, prohibits structures hedges, or, plants of a height of more than 4' 6" within 15 feet of any road intersection, the common boundary wall would fall outside the precint of the restriction. It is obvious therefore, that no breach had been committed by the defendants with respect to this covenant, their boundary wall being 20 yards from the intersection.

I will at this juncture, advert to the plaintiff's claim for trespass. Judicial authority has established that every invasion of property, be it ever so minute, constitutes a trespass, see Entrick v. Carrington (1765) 19 St. Fr. 1030, 1066. The slightest crossing of a boundary is sufficient to comprise a component of the tort. The tort may be committed even in circumstances where a defendant had originally been granted leave by a plaintiff to enter his premises and refuses to depart from the plaintiff's property after authorisation for his entry no longer exists.

In consideration of this ambit of the plaintiff's claim, two issues will have to be addressed. The first is whether the defendants as well as their servants, or, agents being the drivers of the trucks, committed any acts of trespass during the period of the construction of the helper's quarters. The second relates to

whether the defendants, through their workmen trespassed on the plaintiff's land during the construction of the dividing wall.

I will now refer to the first issue. The plaintiff, on one hand declared that his consent to the defendants having access to his property for the removal of debris taken from excavatory work on their property, was, with the understanding that, the debris would have been loaded directly onto trucks and this process would have lasted 2 - 3 weeks. The rubble was instead thrown on his driveway. This exercise commenced about May 1981 and continued for about 8 months. The debris was deposited on the driveway for about 8 months, and was allowed to remain there for various intervals before being collected by heavy trucks. These trucks damaged his entire driveway and a gate column. In November 1981, he withdrew his consent and requested the defendants to remedy the damage. Only a section of the driveway, where the debris had been placed, was repaired by them. He stated he was compelled to carry out the remaining repairs at a cost of $4,000.00.

The defendants' on the other hand, reported that the construction of the helper's quarters lasted about 4 months, yet could not recall when it began. They declared they had not informed the plaintiff that the construction would have lasted 3 weeks. I must pause here to make reference to the plaintiff's statement that they had notified him that the excavation and removal of the excavated material would have had a 2 to 3 week duration, not the construction.

The second defendant stated that only one truck was engaged in the removal of the rubble. The truck came once, or twice weekly, or fortnightly and this operation lasted a month, yet, in cross-examination she asserted that the truck entered the plaintiff's property once. She continued by stating she had made 3 or 4 payments to the truck. In my opinion it is impossible that a truck would be required only once to transport the debris, which would have been a great volume. It is also interesting to note that 3 or 4 payments to the truck could only relate to more than one visit by the truck. She was aware the plaintiff had withdrawn his permission for them

to use his premises but had no recollection when this had transpired. She denied that damage was done to the plaintiff's driveway yet carried out certain repairs upon being informed of the damage.

In delivery of his testimony, the plaintiff was frank, fort-right and displayed good demeanour. I regard him a credible witness and accept his evidence. This has led me to the conclusion, that the defendants having been initially granted licence to enter the plaintiff's premises in order to facilitate the removal of rubble from their property, allowed the debris to remain there even after their right of entry had ceased. They caused the excavated material to accumulate on the plaintiff's premises for approximately two months after he had withdrawn his permission for them to do so. The defendants, therefore, having allowed the debris to remain after their right to do so had been terminated, are liable as trespassers.

However, I must point out that although the plaintiff had in November 1981 withdrawn his permission and informed the defendants of damage to the driveway but having granted permission to them in April 1981, he would have acquiesced not only in their depositing the rubble on his land from April to November 1981 but his acquiescence would also extend to period during which the driveway was damaged by the trucks. At that time, the defendants were not trespassers.

I will now allude to the second aspect of the claim for trespass. It was the plaintiff's complaint that his rock garden 3 feet in width and 1 foot in height, adjoining the boundary line with the defendants' land, was demolished by their workmen. On speaking with the 1st defendant, he was informed by him that they were building a fence and the garden had to be destroyed. A stonewall with steps on his property, was destroyed and his gate column and picket fence were damaged.

At that time, the common boundary line on earth, between the respective properties was 1.6 feet in excess of that on the deposited plan at the northern (front) end of the boundary and

0.6 foot at the south western (rear) end. The rock garden stood contiguous to the boundary. It has already been established that an incursion of 2 feet into the plaintiff's land does not amount to a breach of the boundary line. If the rock garden had been 2 feet in diameter, then that would have been the end of the matter. However, the garden was 3 feet in width and its destruction could only mean that the defendants had invaded the plaintiff's territory by 1 foot. This invasion must necessarily constitute a trespass by the defendants.

The plaintiff expended $500.00 to rebuild and landscape his garden but cost of repairs to his picket fence was neglible. The expenditure of $500.00 being special damages must be strictly proved. In the case of Bonham-Carter v. Hyde Park Hotel Limited '3' (1948) 64 T.L.R. p.178 Lord Goddard declared:-

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; is not enough to write down particulars and so to speak throw them at the head of the Court saying:- 'This is what I have lost; I ask you to give me these damages." They have to prove it."

The plaintiff, in the case under consideration, having not exhibited any proof of his defrayal of the sum of $500.00 for replacing his garden, or any sum for repairing his fence, is precluded from obtaining reimbursement of any amount which he may have expended on replacing these items.

He is, however, entitled to compensation by way of general damages in respect of the deposit of debris on his driveway after the defendants had been enjoined not to do so. He is also at liberty to receive an award relating to the damage, to his rock garden, stone wall picket fence and column, which had been done by the defendants' workmen. What is the measure of damages? The leading case of Jones v. Godday 1841 8 M & W 146 established that the measure of damages ought to be an amount in relation to the dimunition in the value of the land. In that case, the defendants cut a ditch in the plaintiff's land and took away soil. It was held

that the plaintiff could only be awarded damages for the injury he had actually sustained by removal of the soil from his land and not an amount which would be required for restoration of the land to its original condition.

In the present case, the value in the dimunition of the land must incorporate the cost of the use of the plaintiff's land by the defendants. The defendants, having utilised the plaintiff's driveway by allowing debris to be stored thereon, for a period of approximately 2 months after they were no longer permitted to do so, must pay him for such use of his property for that period. This, I assess at $3000.00. They are also liable to the plaintiff for damage done by their workmen to his rock garden, stonewall picket fence and gate column and this I assess at $2,000.00.

Finally, I will give consideration to the plaintiff's claim for nuisance. Approval has been frequently given to the following judicial definition of private nuisance:

"Private nuisance, at least in the vast majority of cases are interferences for a substantial length of time by others, or occupiers of property with the use, or enjoyment of the neighbouring property" per Talbot J, in Cunard v. Autifyre [1933] 1 KB 556 - 556.

It was the plaintiff's contention that the defendants caused water to escape from their land to his property, causing damage to his driveway. It was also his allegation that the plaintiff allowed creepers which were planted on his land to cause an overgrowth on his property, covering his rock-garden and stonewall.

Did the defendants create and maintain a state of affairs which disturbed the plaintiff's use and enjoyment of his land for a long time? It was his evidence that during the period of construction of the helper's quarters, the defendants permitted water from the roof of their house, conduit of which was a pipe, to be discharged on his land. On occasions when it rained heavily, the water assisted in causing damage to his driveway. It may be that the water escaping from the defendants' roof which was released on the plaintiff's driveway, damaging same, did create a nuisance.

However, by the plaintiff's own admission, on his registration of his discontent to the defendants, the water was diverted. This act, as emerged in evidence, was done during the construction of the helper's quarters and was certainly not in existence after the building was completed. The construction began in or about May 1981, and lasted for approximately eight months. The injury of which the plaintiff complained would have ended by December 1981, or, January 1982. Further, the Writ of Summons was filed on 8th September, 1982, at that time the breach had already been remedied and thus there would have been no cause to ground an action based on the act of the defendants as alleged. The plaintiff is therefore barred from obtaining damages for this aspect of his claim.

I will now make reference to the limb of his claim, relating to the creepers planted by the defendant, invading his property. He stated that these tendrils which were planted on the defendants' side of the common boundary wall spread over to his premises covering his rock garden and stonewall. Exhibit '3' a photograph of 2 and 4 Limpscombe Drive, show the dividing wall fully covered by foliage. The overgrowth does not extend to the ground and would therefore not cover the area where the rock garden is situated. It appears that a wall to the back of the plaintiff's premises does in fact harbour some of these plants. In my opinion, the growth on the wall is rather aesthetic and enhances the beauty of both properties and is not worthy of being the subject of a complaint. Assuming however, the overgrowth was deemed to be noxious to his property and did in fact amount to a nuisance, it would have been lawful for him to have abated the nuisance by removing the plants. Having not resorted to his right of abatement, he cannot now seek redress by means of process of the court.

The plaintiff maintained that the defendants constructed an entertainment area on their house from which persons could view the internal areas of his bedroom and bathroom. This in my view is frivolous and completely devoid of merit.

The evidence presented has established that the defendants are not in breach of restrictive covenants 4, 7 or 8. It has been

shown that although the defendants created certain acts of nuisance on the plaintiff's property, one of these acts was not in existence on the date of the commencement of this action, and the other was such which could have been easily eradicated by the plaintiff; he ought to have taken steps to have it abated. It has, however been proved that the defendants did commit several acts of trespass on the plaintiff's land.

Judgment is accordingly entered in favour of the plaintiff against the defendants in the sum of $5,000.00.

Costs to the plaintiff to be agreed or taxed.