

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. 2017-02552

BETWEEN

ANN EDWARDS

ALLANA EDWARDS

Claimants

AND

**NEOMI HINDS
(wrongly sued as
NAOMI HINDS)**

Defendant

Before the Honourable Madam Justice Margaret Y Mohammed

Date of delivery: November 16, 2018

APPEARANCES:

Mr. Bryan McCutcheon instructed by Ms. Tonya Rowley Attorneys at law for the Claimants.

Ms. Danielle Marcano Attorney at law for the Defendant.

JUDGMENT

1. The Claimants are in possession of premises known as Lot 2 Road Reserve, Off Harris Drive, Blue Basin, Diego Martin ("Lot 2") shown in the Amended Plan of Winston J. Sylvester dated 17th January 2017 ("the Survey plan") shaded pink and marked "2". The First Claimant also lives on the adjoining Lot 3 on the Survey plan and the Defendant lives on the adjoining Lot 1

on the Survey plan which is north of Lot 2. The Claimants have instituted the instant action seeking certain order from the Court namely: (a) and order that the Defendant, her servants and/or agents forth with pull down a Wall (“the Wall”) erected on part of Lot 2; (b) an order that the Defendant her servants and/ or agents forthwith remove a 2 inch PVC pipe and a 4 inch PVC pipe (collectively referred to as “the Pipes”) which run along Lot No 2 and stop waste water escaping from Lot No 1 unto Lot No. 2; (c) damages; interest and costs.

2. The Claimants claim that sometime during the period May to July 2008, the Defendant and/or her predecessors in title and/or their servants and/or agents wrongfully and without their permission erected and/or caused to be erected the Wall on Lot 2. The position of the Wall was marked on the Survey plan.
3. Sometime after the erection of the Wall, the Defendant and/or her predecessors in title and/or their servants and/or agents wrongfully erected and/or caused to be constructed and/or erected and/or installed the Pipes which emanate from the Defendant’s house on Lot 1 onto Lot 2 and which carry waste water from the Lot 1 onto Lot 2 and from which water escapes onto Lot 2 and causes damage thereto.
4. The Claimants claimed that the Defendant and/or her predecessors in title and/or their servants and/or agents acted negligently by using, or permitting to be used, the Pipes although the Defendant knew or ought to have known that the Pipes run onto Lot 2 and the waste water escapes from Lot 1 onto Lot 2; by using, or permitting to be used, the Pipes to allow the flow of water from the Defendant’s house on Lot 1 onto Lot 3; and the Defendant failed in all of the circumstances to exercise reasonable care and skill in the construction and/or erection and/or installation of the Pipes.
5. Based on the aforesaid facts the Claimants claimed that they have suffered loss and damage to Lot 2 in particular, the Wall has encroached on Lot 2 and Lot 2 has become saturated with the waste water which escapes from the Pipes which run from the Lot 1 onto Lot 2. Further, the flow of water from the Pipes which run from the Defendant’s house on Lot 1 onto Lot 2

has begun to initiate a level of slope instability in the area where the flow is concentrated and has caused soil erosion.

6. Before the Claimants instituted the instant action on 17th October 2016, their Attorneys-at-Law wrote to the Defendant and requested *inter alia* that she remove the Wall and the Pipes. On 29th November 2016, the Defendant's Attorneys-at-Law wrote to the Claimants' Attorneys-at-Law and *inter alia* stated that the Defendant denied that the Wall was encroaching on Lot 2. On 6th February 2017, the Claimants Attorneys-at-Law sent the Defendant a pre-action protocol letter requesting *inter alia* that the Defendant demolish the Wall and the Pipes. The Defendant failed to respond to the pre-action letter and has failed and/or refused and/or neglected to remove the Wall and/or the Pipes.
7. The Defendant denied that she and/or her servants and or agents and /or her predecessors erected the Wall. The Defendant stated that sometime during the year 2006 she and her family made a complaint to the Drainage Division of the Ministry of Works ("the MOWT") concerning the slippage of Lot 1 which threatened her house with imminent collapse. Officers of the Drainage division of the MOWT investigated the matter and took the decision to erect a Wall at the expense of the MOWT to prevent the collapse of the land and the Defendant's dwelling house.
8. Before the construction of the Wall the Defendant and one of the officers of the MOWT informed the Claimants that the MOWT intended to erect the Wall in the same position where the Defendant and her family had planted croton trees to define their eastern boundary. The Claimants requested the said officers to erect a similar wall for them. This request was not acceded to by the MOWT. The MOWT broke down the croton fence on the Lot 1 and proceeded to erect in the same position where the croton trees were planted the Wall at the expense of the MOWT.
9. The Defendant pleaded that the Claimant and/or their servants and/or agents were present when the Wall was being constructed by the MOWT. The Claimants never objected to the

construction of the Wall nor did they ever raise any objection while the Wall was under actual construction.

10. The Defendant therefore asserted that the Claimants are estopped from requesting the Defendant to pull down and remove the Wall. Further the Defendant stated that she and her family have been in continuous and undisturbed possession of the disputed portion of land enclosed by the Wall for over sixteen years and that the Claimants' title if any, to the said disputed portion of land has been extinguished.
11. The Defendant denied that she has wrongfully erected or caused to be erected the Pipes on Lot 1 which caused water to flow unto Lot 2. The Defendant also denied that the Pipes emanated from her house onto Lot 2 and that they carried waste water from Lot 1 onto Lot 2 and from which water escaped onto Lot 2 and cause damage thereto. The Defendant stated that the waste water from the time she and her predecessors in title have occupied Lot 1 has flowed in the same direction in which it presently flows. The Defendant denied that Lot 2 has become or becomes saturated with waste water which escapes from the Pipes which run from Lot 1
12. The Defendant further denied that the flow of water from Lot 1 has begun to initiate a level of slope instability on Lot 2 or that it has caused any soil erosion. The Defendant stated that Lot 1 is flat land and in an effort to maintain peace and good neighbour relations since the institution of these proceedings she has redirected the flow of the excess water from her home on Lot 1 to prevent any further complaints by the Claimants.
13. By letter dated 29th November, 2016 the Defendant's Attorney-at-Law had made proposals to the Claimants' Attorney-at-Law to settle the issue of the waste water but the Claimants' Attorney-at-Law never responded to the said letter or the proposals contained therein. On September 30th 2017, the Defendant engaged the services of the one called Frederick Samuel who installed six (6) lengths of drainage pipes and fittings at Lot 1.
14. The Defendant did not make a counterclaim.

15. The issues which arise for determination are:
- (a) Did the Wall and Pipes encroach on Lot 2?
 - (b) If there has been encroachment, are the Claimants estopped from having the Wall removed from Lot 2?
 - (c) If there has been encroachment by the Wall on Lot 2, has the Defendant been in continuous undisturbed possession of the encroached area for 16 years?
 - (d) Has the Defendant caused damage to Lot 2?
 - (e) If so what quantum of loss has the Claimants sustained to Lot 2?
16. The aforesaid issues are primarily a question of fact. In determining the version of the events more likely in light of the evidence, the Court is obliged to check the impression of the evidence of the witnesses on it against the: (1) contemporaneous documents; (2) the pleaded case: and (3) the inherent probability or improbability of the rival contentions. (**Horace Reid v Dowling Charles and Percival Bain**¹ cited by Rajnauth-Lee J (as she then was) in **Winston Mc Laren v Daniel Dickey**²).
17. The Court of Appeal in **The Attorney General of Trinidad and Tobago v Anino Garcia**³, took the position that in determining the credibility of the evidence of a witness any deviation by a Claimant from his pleaded case immediately calls his credibility into question.
18. At the trial the First Claimant, her mother in law, Mrs. Kathleen Edwards and Mr Vaughn Lezama, gave evidence in support of the Claimant's case. The Defendant was the only witness to support her Defence.

Did the Wall and Pipes encroach on Lot 2?

¹ Privy Council Appeal No. 36 of 1897

² CV 2006-01661

³ Civ. App. No. 86 of 2011 at paragraph 31

19. The authors of **Clerk & Lindsell on Torts**⁴ at paragraph 19.01 described a trespass to land as an unjustifiable intrusion by one person upon land in the possession of another. Trespass is a direct entry on the land of another and is actionable per se and the slightest cross of the boundary is sufficient.
20. **Clerk & Lindsell on Torts** also described as a private nuisance an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of his ownership or occupation of land or other right used or enjoyed in connection with land. Nuisance is the infringement of a party's interest in property without direct entry by another, and generally actionable only on proof of special damage. The Claimants have grounded their claim in trespass and nuisance.
21. The First Claimant's evidence in chief was that she and the Second Claimant have been the owners of Lot 2 since the 14th February 2018 by Deed registered as DE201800366622D001 ("the Deed of Gift"). Previously Lot 2 was owned by her mother in law Ms. Kathleen Edwards who gave Lot 2 to the Claimants by the Deed of Gift. She annexed a copy of the Deed of Gift to her witness statement as proof of ownership.
22. The First Claimant also annexed to her witness statement the Survey plan which identified Lot 1 and Lot 2. The authenticity of the Survey was not challenged by Counsel for the Defendant during the First Claimant's cross-examination. The Survey plan showed that the area occupied as a result of the Wall was an area of 27.3m².
23. The First Claimant testified that she lived on Lot 3 which is next to Lot 2 since 1976 with her husband and her daughter the Second Claimant. According to the First Claimant Lot 2 is predominantly fenced except where the Wall is and where a small section of the Defendant's plants were placed. She said that she and her husband often visited Lot 2 at least two to three times per week. They cut the grass and from 2013 to 2014 they have hired a gardener to do so. In 2013 to 2014 she and her husband planted various fruit trees and plants including

⁴ 22nd Ed (2017)

bananas, avocados and coconuts. In 2016 the Defendant planted a coconut tree on Lot 2 but after she and her husband objected the Defendant cut down the tree in early 2017.

24. The Claimant also testified that the Defendant and her family were in possession of Lot 1 which was north of Lot 2. She stated that sometime around May to July 2008 the Defendant or her predecessor in title erected the Wall consisting of stone on Lot 2. The Wall is approximately 45 feet in length from east to west and it is approximately 12 feet high. Sometime in September 2008 the First Claimant testified that she, Kathleen Edwards and the Second Claimant visited the Defendant and explained that the Wall was constructed over the boundary between Lot 1 and Lot 2 and that since the Defendant did not have their approval to erect the Wall they told her to remove it. The Claimant testified that the Defendant was amicable at first but then she refused to remove the Wall and she was abusive. The following day the Claimants were visited by police officers who indicated that the Defendant had complained that they had threatened her but after giving an explanation to the police officers, they left.
25. The First Claimant testified that in or around 2015, she and the Second Claimant engaged Mr. Sylvester to conduct a survey of the boundaries of Lot 2 since they wanted to erect a fence on the boundary between Lot 1 and Lot 2. She said as she walked on Lot 2, she saw, for the first time, the Pipes from the Defendant's house spilling water upon Lot 2⁵. The First Claimant described the Pipes as one two-inch PVC pipe and another four-inch PVC pipe running from Lot 1 to Lot 2⁶.
26. The First Claimant's evidence was unshaken in cross-examination. She stated that she heard that the Wall was constructed by the MOWT but nobody from the said Ministry had spoken with her. She was adamant that nobody from the said MOWT told her that the Wall was being constructed to prevent erosion. She denied that the Wall was constructed where there were

⁵ Paragraph 21 of the witness statement of Ann Edwards

⁶ Paragraph 22 of the witness statement of Ann Edwards

croton tree. She explained, that while she was aware of the construction, she felt that she could not object to same as she was not the owner of Lot 2.

27. Ms Kathleen Edwards evidence corroborated the evidence of the First Claimant that the former owned Lot 2 from 1960 until 2018 when she gave it to the Claimants; she lived on Lot 3 which was next adjoining Lot 2 until 1976 and after she moved she passed by it nearly every 2 to 3 months; she was familiar with the Defendant; she was in Canada visiting her son in 2008 but she could not recall when she returned but she was not in Trinidad when the Wall was built; she found out about the Wall while she was in Canada; before the Wall was built there was no fence and she did not seek legal advice at the time about the Wall.
28. The Defendant testified that she has resided on Lot 1 since the 1960s and she has never left it. In or around the 2006, and subsequently there was erosion and slippage of Lot 1. She became fearful that her dwelling house would collapse and she submitted a claim to the Drainage Division of the MOWT for assistance to prevent the imminent collapse of the dwelling house situated thereon.
29. According to the Defendant, in response to her claim, officers of the Drainage Division of the MOWT investigated the matter and in 2008 a decision was taken to erect the Wall at the expense of the MOWT and the MOWT erected the Wall in 2008 in the same position of her fence of croton trees. The Defendant testified that she saw the Claimants were outside while the Wall was being constructed and she heard the Officers inform them of the MOWT's intention to construct the said Wall in the exact location in which her family had planted the croton trees to define the eastern boundary of Lot 1.
30. The Defendant did not attach any survey plan to support her assertion that the Wall was constructed in the same position as the fence of croton trees. Instead the Defendant relied on a few photographs which she annexed to her witness statement. The said photographs were of a poor quality and the contents were hardly discernible and unreliable. In cross-examination, the Defendant admitted that she did not take the photographs and she accepted

that there were no date stamps on the photographs, nor was there any way to identify where exactly the photographs were taken and the location that of the trees.

31. The Defendant testified in cross-examination stated that her son, who from time to time visited Lot 1 took the photographs. However, the Defendant did not call her son as a witness to give evidence to support the allegations that he took the photographs or to speak to when and where they were taken. In my opinion there was no basis for the Court to attach any weight to the photographs.
32. In cross-examination the Defendant stated that although she testified that the persons from the MOWT said they had a survey plan she did not present a copy of the said survey plan to the Court. She admitted that the MOWT did not give her any document such as a plan or a report in writing concerning the construction of the Wall. She also admitted that she did not call any person from the MOWT as a witness to support her case. The Defendant stated in cross-examination, for the first time in these proceedings, that she requested documents from the Ministry concerning the construction of the Wall. When pressed whether this request was oral or in writing, the Defendant claimed that it was an oral request allegedly upon a person named Mrs. Grey. In her oral evidence, the Defendant claimed that Mrs. Grey telephoned “persons who were in charge” and they apparently said that they had moved from Sackville Street and the papers were misplaced.
33. With respect to the Pipes the Defendant testified that she has lived on Lot 1 since the 1960s but she did not erect the Pipes which were taking water from Lot 1 unto Lot 2. She disagreed that the Pipes were carrying water from Lot 1 unto Lot 2. However she stated that since the institution of the instant action she has caused the flow of excess water emanating from Lot 1 to be redirected in order to maintain peace and good neighbour relations and to prevent further complaints by the Claimants.

34. Counsel for the Claimant brought to the Defendant's attention a copy of a receipt from Fred Samuel which she had annexed to her witness statement. The Defendant accepted that the receipt did not state that the money which she paid to Fred Samuel was with respect to the work with the Pipes on Lot 2 and it did not state the problem to be addressed.
35. In my opinion, the evidence of the Defendant was self-serving and it was not corroborated since she did not call or summon any witness from the MOWT to give evidence and she failed to provide a credible reason for this omission. The Defendant also failed to provide any survey plan to support her assertion that the Wall was not built on Lot 2. As such I have found that there was no credible evidence by the Defendant to support her assertions that (i) she applied to the MOWT to construct the Wall, (ii) the land on Lot 1 was unsafe or unstable, (iii) the MOWT attended the site for an inspection, (iv) the MOWT recommended that the Wall be constructed, (v) the MOWT attended the site to construct the Wall (vi) the officers of the MOWT spoke to the Claimants (v) the Wall was built where the fence of croton trees were situated, (vi) the Defendant contacted the MOWT to obtain the information she requested such as plans or reports or (vii) the Defendant had taken steps to remove the Pipes.
36. On the other hand I found that the First Claimant's evidence that the Wall was constructed on part of Lot 2 was credible since it was substantiated by the Survey plan which was unchallenged by the Defendant and there was no credible evidence that the Wall was constructed where the Defendant asserted she had planted a fence of croton trees. For these reasons I have concluded that the Wall and the Pipes encroached on Lot 2.
37. In the Claimants closing submissions Counsel requested that the Court under their claim for such further relief as the Court deems just, to grant the Claimants a declaration that the boundaries of Lot 2 are those boundaries that are described in the Survey plan as this Declaration will ensure that no further dispute can arise between the parties on the boundaries of the properties and it is just to do so.

38. I have no difficulty in making the declaration requested by the Claimants since the contents of the Survey plan were unchallenged.

If there has been encroachment, are the Claimants estopped from having the Wall removed?

39. To establish a defence in estoppel, the Defendant must plead and prove the elements of the estoppel namely that there has been a representation made by the estopped party upon which the person relying on the estoppel has so relied to her detriment⁷.

40. The Defendant did not expressly plead that the Claimants, or Mrs Kathleen Edwards consented to the encroachment at the time of the construction of the Wall or that she detrimentally relied on any representation made by the Claimants. The Defendant pleaded at paragraph 7 of her Defence that the Claimants never objected to the Wall and as such the Claimants are estopped from the injunctive relief sought.

41. The First Claimant's evidence was that after the Wall was constructed in September 2008 she, Kathleen Edwards and the Second Claimant visited the Defendant and explained to her that the Wall was constructed over the boundary between Lot 1 and Lot 2 and that since she did not have their approval to construct the Wall they told her to remove it. The Claimant testified that the Defendant was amicable at first but then she refused and she was abusive.

42. Mrs Kathleen Edward testified that in 2008 she was the owner of Lot 2. She visited her son in Canada in 2008 and when she returned she saw that the Wall was built. She corroborated the First Claimant's evidence that in September 2008 she and the Claimants visited the Defendant and explained to her that the Wall was constructed over the boundary between Lot 1 and Lot 2 and that since she did not have their approval to construct the Wall they told her to remove it. She testified that the Defendant was amicable at first but then she refused and she was abusive.

⁷ Halsbury's Laws of England, 5th Ed. (2014) Vol. 47, para. 313

43. The Defendant testified that the Claimants had knowledge of the construction of the Wall as they were outside and she heard the officers of the MOWT inform them of the intention to construct the Wall in the location of the fence of croton trees⁸. However, the Defendant did not plead this specific allegation in her Defence. Further, this evidence was inadmissible hearsay and there was no corroborative evidence from any person from the MOWT adduced by the Defendant to support the allegation.
44. In my opinion the Defendant has failed in her assertion of a defence of estoppel since her case was that the MOWT built the Wall on Lot 2, The Defendant could not detrimentally rely on any action or inaction of the Claimants since at the time of the erection of the Wall, the Claimants were not the owners of Lot 2.
45. Further, there was no credible or corroborative evidence to support the Defendant's position that the Wall was erected by the MOWT with the knowledge and or approval of the then owner of Kathleen Edwards in 2008. In any event, even if the First Claimant was present at the time of the construction of the Wall, she was not the then owner of Lot 2. As such she could not do anything at that time to stop construction of the Wall.
46. Even if the Defendant Defence of estoppel was the delay by the Claimants, there was no credible evidence from the Defendant that the Claimants encouraged or allowed her to believe, to her detriment, that they consented to the erection of the Wall on Lot 2⁹. As such the lack such evidence meant that the Defendant has not demonstrated any detriment at all.
47. I have concluded that neither of the Claimants nor the then owner of Lot 2, Ms Kathleen Edwards was aware of the construction of the Wall in 2008. They were not informed by the MOWT that a Wall was going to be constructed and they were not present when it was being built. In the absence of any knowledge of the construction of the Wall it was improbable that they consented to its construction. Therefore, the Claimants could not have encouraged or

⁸ Paragraph 8 of the witness statement of Neomi Hinds

⁹ Jones & Another v Stones [1999] 1 WLR 1739

allowed the Defendant to believe that to her detriment they consented to the erection of the Wall on Lot 2. In any event, the consistent evidence of the First Claimant and Kathleen Edwards was that in September 2008 they informed the Defendant that they objected to the Wall. Therefore, the Claimants are not estopped from having the Wall removed.

If there has been encroachment, is the Defendant in continuous undisturbed possession of the encroached area?

48. Section 3 of the Real Property of Limitation Act¹⁰ prevents the paper title owner from the right to recover lands either by action or entry within 16 years from the time when the right to bring the action or make an entry first accrued. Section 22 provides that where after the expiration of the limitation period prescribed by section 3 (i.e. 16 years) the person entitled to do so has not brought an action or made an entry for the recovery of the land his right and title to the land shall be extinguished. The conjoint effect is the person making the claim extinguishes the right of the title of the paper title owner to the land at the end of the statutory period. Time stops running when the owner either makes an effective entry on the land or takes legal proceedings.

49. In my opinion, the Defendant has failed to demonstrate that she has been in continuous undisturbed possession of the piece of land occupied by the Wall for the following reasons. The Defendant has failed to particularize when her occupation by adverse possession of the piece of land came into existence and what she did to be treated as the owner of it. The Defendant has not made a counterclaim that she should be treated as the owner by adverse possession. The Defendant in cross-examination admitted that she was not in continuous and undisturbed possession of the piece of land occupied by the Wall. Based on the Defendant's evidence the Wall was constructed in 2008 and therefore 16 years has not passed. Lastly, the only evidence to support the Defendant's assertion was her own self-serving evidence which was bare and uncorroborated to support her assertion of adverse possession.

¹⁰ Chapter 56:03

Has the Defendant caused damage to Lot 2?

50. The First Claimant's evidence was that in 2015 for the first time she observed the pipes from the Defendant's house on Lot 1 spilling water on Lot 2.

51. The Claimants also relied on the evidence of Mr Vaughn Lezama a civil engineer with over 38 year experience to support their claim of the damage to Lot 2 caused by the water emanating from the Pipes. Mr Lezama was appointed an expert by the Court and he prepared a report ("the Lezama Report") on the condition of Lot 2. He described the site as:

"Lot #2 is partly bounded on the north by a property occupied by Ms. Naomi Hinds. For most of the shared 86 metres long boundary there exists a Rubble Retaining Wall which runs for a distance of approximately 81 metres from the west to east. The average height of the Rubble wall above the adjacent lands of Lot #2 is approximately 4.0 metres (12 feet). For the entire length of the rubble wall the property occupied by Ms. Hinds is elevated to height within 0.8 metre (30 inches) from the top of the wall. From the point at which the rubble wall terminates on the eastern side there exists an area approximately 5 metres wide where the lands of Lot # 2 becomes contiguous with the lands of the property occupied by Ms. Hinds.

Both Lot # 3 and the plot occupied by Ms. Hinds are bounded on the north by Wyan Road. This road is straddled by a box drain on its northern side and a kerb and slipper drain on the southern side. Storm water in both of these drains flow downhill toward the west.

Lot No. 2 general slope downhill towards the south where is it bounded by a Road Reserve".

52. Mr. Lezama's observations were stated as:

(i) Storm water collected by roof gutters around the house occupied by Ms. Hinds is in general directed by means of a PVC Pipe to the eastern side of the Rubble

wall where the lands of Lot # 2 is contiguous with the lands occupied by Ms. Hinds.

- (ii) Grey water, i.e. household water, from kitchen sink, wash basins and wash tubs from the house occupied by Ms. Hinds is also directed via PVC Pipes to the same location as does the storm water.
- (iii) Because the land which comprises Lot # 2 is generally sloped towards the south, the storm water and grey water discharged from the residence occupied by Ms. Hinds unto Lot # 2 flow over a concentrated area from the point of discharge down to the Road Reserve on the south side of Lot # 2.
- (iv) The water from the property on the north which flows onto the property of Lot No. 2 includes both storm water and household water and as such the flow of water through Lot # 2 largely continuous and occurs in and out of the rainy season and increases with the occurrence of any rainfall event.
- (v) The continuous flow of water from the property on the north onto Lot # 2 has begun to initiate a level of slope instability in the area where the flow is concentrated and this can be seen from evidence of soil erosion in the area.
- (vi) Wyan Road straddles the northern and western sides of the property occupied by Ms. Hinds. There exist a Kerb and Slipper drain along the southern side of this road and this drain flows downhill towards the west.
- (vii) Based on an observation of a cadastral plan of Lot # 2 prepared by a Licensed Surveyor engaged by the Land Owner it appears that the Rubble Wall which was constructed to retain the slope on the southern side of Ms. Hinds property was partly built on lands which forms part of Lot # 2. The area of encumbrance of the wall on Lot # 2 was identified on the Cadastral as 27.3 sq.m.”

53. Mr Lezama listed his conclusions and recommendations as:

- (a) Water has a deleterious effect in reducing the strength of soils and the failure of soils on slopes is by and large always as a result of the effects of water.

- (b) The continuous flow of water at a concentrated location over Lot # 2 has initiated a level of slope instability which if left unchecked will result in further erosion and slope failure that would present an unstable condition that will adversely affect the use of the land for the intended purpose as a residential site.
- (c) Apart from the deleterious effect of water being discharged over the sloping lands of Lot # 2 the discharge of household grey water poses a health risk since harmful elements, chemicals and bacteria can be present in household water.
- (d) It is possible to collect and redirect the household water and storm water from roof gutters from the residence occupied by Ms. Hinds to the western side of the property into the kerb and slipper drain on Wyan Road.
- (e) The strip of land upon which the Rubble wall has encroached can be utilized for installation of diversion pipes to redirect all runoff water from Ms. Hind's property to the kerb and slipper drain on the southern side of Wyan Road.

54. Mr Lezama's evidence was unshaken in cross-examination. He explained that grey water in his report referred to domestic water and storm water referred to rain water. He admitted that trees would present a barrier for the water hitting the ground and that he was unable to state the present condition of Lot 2.

55. I have attached significant weight to the Lezama Report on the condition on Lot 2. In my view, Mr Lezama is a trained professional in civil engineering for over 38 years. His findings in the Lezama Report were based on his observations and his knowledge in the field of engineering. I was of the opinion that the findings in the Lezama Report were unchallenged and independent which I accepted.

56. The Defendant did not call any expert in the field of soil instability to support her case. Her evidence was that she has always known the areas surrounding Lot 1 to be deteriorating since there are cracks in the soil and the said cracks grew bigger over time and the land was always eroded when rain fell. The Defendant also testified that Lot 2 is uninhabited and is located

near an abandoned ravine and that in the past Lot 2 was used for rearing pigs and the said pig pens are still present today. She also testified that all of the residential houses situated in hilly areas encircling the said ravine permit their waste water and runoff to drain into the said ravine which also contains box drains to accommodate the flow. Consequently, Lot 2 is overgrown and covered in bush and nothing can be built as there is not even an access road for the passage of vehicles.

57. The Defendant denied that the instability on Lot 2 was caused by waste water runoff emanating from Lot 1 where she resides. She disagreed that the said waste water caused Lot 2 to be saturated. The Defendant testified that that natural rain water and water emanating from neighbouring lots flowed unto Lot 2 which is affected by the runoff.
58. She testified that at present, all excess water emanating from Lot 1 exits and flows towards the road at the front of Lot 1 which contains box drains to accommodate the flow since she caused the water to be redirected.
59. In cross-examination the Claimant admitted that she had no qualification on land erosion and she only report from her own observations. She agreed that she had not presented any report from an expert on the condition of Lot 2 as the Lezama report. She also accepted that she had no report from the MOWT on land slippage or imminent land collapse in 2006. She agreed that the Wall was constructed in 2008 about a week or two after she and her mother made an application to the MOWT.
60. I attached little credibility to the Defendant's evidence since it was self-serving, uncorroborated by any other witness' evidence, unsubstantiated by any expert evidence and she had no expertise in the field of soil instability.
61. Having accepted the unchallenged evidence of Mr Lezama, I have concluded that the damage to Lot 2 was caused by the Pipes which caused waste water to flow from Lot 1 unto Lot 2.

If so, what quantum of loss has the Claimants sustained to Lot 2?

62. I have concluded that the damage to Lot 2, in particular with respect to a level of slope instability was due to the continuous flow of water from Lot 1. However, in determining the quantum of the loss there was a paucity of evidence from the Claimants. It was submitted on behalf of the Claimants that in such circumstances the Court should award nominal damages and based on the authorities of **Gillian Thomson & Or v. Gunbridge Enterprises Limited**¹¹ and **Mano Sakal v. Dinesh Kelvin**¹² the Court should award the sum of \$30,000.00 as nominal damages.
63. In **Gillian Thomson & Or** Rajkumar J. (as he then was), accepted the claimant's evidence as that certain of their personal goods were damaged, some were stolen and some were detained. The Court held that it was difficult to arrive at a value for each such category of items and in the absence of evidence as to the value of those items, nominal damages in the sum of \$15,000.00 was awarded on 5th April, 2011.
64. More recently in **Mano Sakal**, on 22nd March 2016, Donaldson-Honeywell J awarded \$30,000.00 in nominal damages since the Claimant established loss but the value was not adequately quantified.
65. In the instant case the Claimants have established that they have suffered loss to Lot 2 as a result of the water which was emitted from the Pipes where were laid by the Defendant. They have established that the nature of the loss is slope instability. In my opinion, an award of nominal damages is appropriate and the sum of \$30,000.00 is reasonable given the judicial trends.

Conclusion

66. I found that the First Claimant's evidence that the Wall was constructed on part of Lot 2 was credible since it was substantiated by the Survey plan which was unchallenged by the

¹¹ CV2009-02823

¹² CV00748-2015

Defendant and there was no credible evidence that the Wall was constructed where the Defendant asserted she had planted a fence of croton trees. For these reasons, I have concluded that the Wall and the Pipes encroached on Lot 2.

67. In the Claimants closing submissions Counsel requested that the Court under their claim for such further relief as the Court deems just, to grant the Claimants a declaration that the boundaries of Lot 2 are those boundaries that are described in the Survey plan as this declaration will ensure that no further dispute can arise between the parties on the boundaries of the properties and it is just to do so. I have no difficulty in making the declaration requested by the Claimants since the contents of the Survey plan were unchallenged.
68. I have also concluded that neither of the Claimants nor the then owner of Lot 2, Ms Kathleen Edwards was aware of the construction of the Wall in 2008. They were not informed by the MOWT that a Wall was going to be constructed and they were not present when it was being built. In the absence of any knowledge of the construction of the Wall it was improbable that they consented to its construction. Therefore, the Claimants could not have encouraged or allowed the Defendant to believe that to her detriment they consented to the erection of the Wall on Lot 2. In any event, the consistent evidence of the First Claimant and Kathleen Edwards was that in September 2008 they informed the Defendant that they objected to the Wall. Therefore, the Claimants are not estopped from having the Wall removed.
69. The Defendant has failed to demonstrate that she has been in continuous undisturbed possession of the piece of land occupied by the Wall for the following reasons. The Defendant has failed to particularize when her occupation by adverse possession of the piece of land came into existence and what she did to be treated as the owner of it. The Defendant has not made a counterclaim that she should be treated as the owner by adverse possession. The Defendant in cross-examination admitted that she was not in continuous and undisturbed possession of the piece of land occupied by the Wall. Based on the Defendant's evidence the Wall was constructed in 2008 and therefore 16 years has not passed. Lastly,

the only evidence to support the Defendant's assertion was her own self-serving evidence which was bare and uncorroborated to support her assertion of adverse possession.

70. On the issue of damage to Lot 2, I found that there was damage to Lot 2. I attached significant weight to the Lezama Report on the condition on Lot 2. In my view, Mr Lezama is a trained professional in civil engineering for over 38 years. His findings in the Lezama Report were based on his observations and his knowledge in the field of engineering. His findings were independent and unchallenged. Having established loss in the nature of slope instability on Lot 2 I award nominal damages in the sum of \$30,000.00.

Order

71. Judgment for the Claimant.
72. It is declared that the boundaries of Lot 2 are those boundaries that are described in the Amended Survey Plan of Winston Sylvester dated 17th January 2017.
73. It is ordered that the Defendant her servants and/or agents forthwith pull down the Wall erected on part of Lot 2 on the Amended Survey Plan of Winston J Sylvester dated the 17th January 2017.
74. It is ordered that the Defendants her servants and/or agents forthwith remove the pipes which run along Lot 2 and to stop the waste water escaping from Lot 1, the Defendant's land unto Lot 2.
75. The Defendant to pay the Claimants nominal damages in the sum of \$30,000.00.
76. The Defendant to pay the Claimants prescribed costs in the sum of \$9,000.00.

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Margaret Y Mohammed
Judge