

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
(SUB-REGISTRY, TOBAGO)**

Claim No. CV 2010 - 03625

BETWEEN

WINSTON ADAMS

Claimant

AND

STEVE WALDRON

Defendant

BEFORE THE HONOURABLE JUSTICE RICKY RAHIM

Appearances:

Mr. M. George for the Claimant.

Mr. G. Benjamin for the Defendant.

Judgment

1. For the reasons that follow the judgment of the court is as follows:

i. Judgment for the Claimant as follows:

- a. It is hereby declared that the Claimant is the owner and entitled to possession of that parcel of land comprising 4,652.9m² and bounded on the North by lands of E.C.V Kidman on the South by a Road Reserve 10.0 metres wide on the East by Lot C by lands of E.V.C Kidman and by a Road Reserve 10.0 metres wide and on the West by Lot A but which said lands by recent survey dated 4th February, 2010 is shown to comprise **FOUR THOUSAND SIX HUNDRED AND FORTY SEVEN POINT EIGHT SQUARE METRES (4,647.8m²)** and bounded on the North by lands of F Murray and the West by lands of Steve Waldron(hereinafter called “the said lands”).
- b. It is ordered that the Defendant do pay to the Claimant nominal damages for trespass to the Claimant’s land in the sum of \$10,000.00.
- c. The Defendant whether by himself, his servants, agents, or otherwise is hereby restrained from entering or remaining upon or in any way trespassing on the said lands.

ii. The Defendant’s counterclaim is dismissed.

iii. The Defendant shall pay the prescribed costs of the Claimant on the Claim in the sum of \$14,000.00.

iv. The Defendant shall pay the prescribed costs of the Claimant on the counterclaim in the sum of \$14,000.00.

Background

2. The Claimant claims to be the owner of a parcel of land comprising 4,652.9 m², more particularly described in Certificate of Title dated 30th April 1992 and registered in Volume 3531 Folio 507, which land is situate at Buccoo, Tobago.
3. It is the Claimant's case that the Defendant has trespassed onto his land causing damage thereon. The Claimant avers that in or about January 2010 the Defendant entered onto his land with a backhoe and without authority, excavated and removed soil from the land to the extent of 181.3 m² ("the disputed portion of land").
4. Consequently, the Claimant avers that the land is now vulnerable to landslides even without rainfall as there is now no support for the land. Prior to excavation the gradient of the Claimant's land was that of a gentle downward slope towards the Defendant's land. This slope allowed for the gradual runoff and drainage of water. The Claimant claims therefore that the resultant damage to his land was caused by the trespass and negligence of the Defendant, his servant and/or agents.
5. The Claimant therefore claims, inter alia, (a) a declaration of ownership and entitlement to the portion of land described in Certificate of Title dated 30th April 1992 and registered in Volume 3531 Folio 507, (b) damages for trespass to the said land, (c) damages for malicious damage to his property by the destruction of shrubbery on and for the undermining of the foundation of his said land, (d) an injunction restraining the Defendant from entering or remaining upon or in any way trespassing on the said land, (e) a mandatory injunction compelling the Defendant to restore the land and provide support for same by way of the construction of a brace and retaining wall and (f) a mandatory injunction compelling the Defendant to restore the destroyed drainage system by erecting drains on either side of the cleared land to provide an adequate runoff for water.

6. The Defendant's property is situated to the west of and abuts the Claimant's property. The Claimant's property rests on a higher plane than the Defendant's property. The disputed portion of land is located between the Claimant's and Defendant's properties. Both the Claimant and Defendant have built their respective houses on their land.
7. The Defendant denies the Claimant's entitlement to the disputed portion of land and claims to have been in undisturbed possession of it for upwards of 26 years to the exclusion of the Claimant and that he (the Defendant) has always exercised acts of ownership over the disputed portion of land. The Defendant therefore asserts that the Claimant's title to the disputed portion of land has been extinguished by virtue of his possession thereof for over 16 years before the commencement of the action. The Defendant argues that in the alternative the Claimant is estopped by acquiescence from denying the Defendant's right to the disputed portion of land.
8. The Defendant avers that there was never any support for the land and further that the slope of the land caused water to runoff onto his property.
9. The Defendant in his counterclaim avers that the Claimant erected a building on lands bounding and sloping onto the Defendant's land sometime in March or April 2007. It is the Defendant's case that the building has no guttering and as a result rain water runs off onto the Defendant's land. This runoff water, according to the Defendant, threatens and undermines the foundation of his house and creates a nuisance.
10. The Defendant claims that on the 19th January 2010 he employed the services of an excavator operator to grade the disputed parcel in order to direct the runoff water away from his house and property. The Defendant used some of the excavated earth as a buffer to mitigate the heavy flow of runoff water from the Claimant's property; however the runoff water breached the buffer and charted a new course through the Defendant's property causing substantial damage.

11. In June 2010, the Defendant claims he hired Sookdeo Contracting and Transport Services of Kilgwyn Estate to put in infrastructural work to take away the problem of the runoff water. However the Defendant claims that the Claimant stopped the work of the contractor, and as a result the infrastructural work remains incomplete.
12. The Defendant claims that he also employed the services of a road paving contractor to re-grade Waldron's Crescent, a road which he says previously formed part of his property but which he permitted the Claimant to use. However, the Defendant avers that the constant water runoff caused substantial damage to the road. The Defendant asserts that he had the road re-graded, compressed and sheeted with "crush-run" material.
13. The Defendant consequently counterclaims for, inter alia, (a) an injunction restraining the Claimant from continuing the said nuisance, (b) an injunction restraining the Claimant from obstructing infrastructural work on the disputed portion of land, (c) possession of the disputed portion of land and (d) damages.

Issues

14. The court has identified the following issues for determination:
 - (i) Whether the Claimant's title to the disputed portion of land has been extinguished whether by adverse possession or otherwise.
 - (ii) Whether there was runoff water onto the Defendant's property caused by the actions of the Claimant, and if so, whether this constituted a nuisance.
 - (iii) Whether the Defendant's entry and excavation of the disputed portion of land was a reasonable measure to abate the nuisance.

Issue (i)

15. The Claimant employed the services of Antoine and Associates to survey the land and redefine the boundaries between his land and that of the Defendant. On the 4th February 2010 the survey was conducted and a redefinition plan dated the 1st March 2010 was produced. It showed the Claimant's land as comprising 4,647.8m² and an area of encroachment measuring 181.3m² of the Claimant's land.

16. When the General Plan filed in Volume 3468 Folio 157 showing both the Claimant's and Defendant's land is compared to the survey plan dated 1st March 2010, it is clear to the court that the disputed portion of land forms part of the Claimant's land. Further, the Defendant has admitted in cross examination that although he has a Certificate of Title, it is not for the disputed portion of land.

17. The Defendant has sought to argue that he has been in exclusive possession and occupation of the disputed portion of land for over 16 years. The Defendant testified in cross examination that having sold the parcel of land to the Claimant and executed a Memorandum of transfer on the 17th July 1991 he then began to occupy the disputed portion of land.

18. The Defendant in his submissions raises adverse possession. In this regard, he submitted that adverse possession could only commence after 17th July 1991 (date of execution of the Memorandum of transfer). While the Defendant has specifically referred to adverse possession in his submissions, he has not specifically pleaded same in his Defence. At paragraph (1)(xii) it appears that the Defendant is saying that the Claimant's title could be extinguished by mere non user, that is extinguished without claiming adverse possession. But the argument has not been articulated and appears to have been abandoned.

19. The court is of the view however that when the chaff is dusted off, the case argued on behalf of the Defendant is that of the acquisition by way of adverse possession. This is evident in the fact that the Defendant's submissions centre around adverse possession.
20. The Defendant testified that he had excavated the disputed portion of land since 1991 without any obstruction or interference from the Claimant. The Claimant however has testified in cross examination that from the time he became the owner of the parcel of land he exercised total control over the entire parcel.
21. For the Defendant's claim in adverse possession to be made out he must prove both factual possession and an intention to possess the land. This factual possession should be exclusive and ought not to have been by force, hidden or with the paper owner's permission. He must also show an intention to take possession on his own behalf and for his own benefit to the exclusion of all other persons including the owner with the paper title so far as is reasonably practicable: **JA Pye (Oxford) Ltd v Graham [2002] UKHL 30.**
22. Whether the Defendant has met the requirements turns on the evidence before the court.
23. Although the Defendant says he began occupying the disputed parcel from the time of the Memorandum of Transfer, he testified that at the time of the transfer he had no intention to possess the land and did not make it known to the Claimant that he was occupying the disputed portion of land.
24. The Claimant's evidence was that the Defendant began excavating the disputed portion in January 2010. The Claimant immediately called upon the Defendant to abstain from encroaching upon his land. When the Defendant failed to desist from his encroachment the Claimant retained a licensed surveyor, Antoine and Associates, to survey the land

and redefine the boundaries. The Claimant testified in cross examination that prior to this encroachment, he (the Claimant) had always planted on the land. According to the Claimant at the time of the excavation there was only shrubbery and bush on the disputed portion of land. The Claimant denied that the Defendant ever stored material on the disputed portion. The Claimant testified that the Defendant would drop the building material for his house on the disputed portion of land and wheel it to his premises.

25. It is therefore the court's finding that the Defendant has failed to prove his possession simpliciter. He has given evidence that he transferred to the Claimant 4,652.9 m² but that he had no intention to possess the land and that he did not make it known to the Claimant that he was occupying the disputed portion of land.

26. Additionally the court find's the Defendant's evidence on the issue to be improbable. The court does not believe that the Defendant would transfer a parcel of land to another and from the inception secretly withhold part of that parcel from that person for a period of 16 years. Further, even if the court was to accept that evidence, there is no evidence which emanates from the case for the Defendant from which the court could find that the Defendant would have exerted control over the disputed lands over the period. The Claimant's evidence in cross examination that the Defendant stored building material on the disputed portion of land is also insufficient in any event to fulfill the requirement for factual possession. This type of use is transient in nature and will not in these circumstances establish possession in fact.

27. The Defendant having failed to surmount the first hurdle, that is proof of possession, his submission of adverse possession is bound to fail. In any event the evidence given by the Defendant that he had no intention to possess the land has removed the necessary animus.

28. The court therefore finds that the Claimant's title to the disputed parcel of land has not been extinguished. The Claimant therefore is the legal owner and entitled to possession of the disputed portion of land.

Issues (ii) and (iii)

29. The Defendant alleges that the Claimant erected a building (not his dwelling house) on the portion of the Claimant's lands which slopes in the direction of the Defendant's land and that the building has no guttering to cater for runoff water. As a consequence rain water ran off onto the Defendant's land. This the Defendant said created a nuisance. The Defendant averred that he attempted to alleviate this nuisance by grading the disputed land so as to channel the runoff water away from his property. It was pleaded however that what was in fact done by the Defendant was excavation of a portion of the Claimant's land. This description was also used and accepted in cross examination. Whether one chooses to use either nomenclature, it remains clear on the evidence that substantial soil on a portion of the Claimant's land was removed. This does not appear to be in dispute.

30. Further, the Defendant says that the water runoff is not caused simply because of the natural layout of the respective parcels of land, but because of the buildings and cultivation on the Claimant's land.

31. In support of this contention the Defendant submitted as a principle of law that his entry on the disputed portion of land would only be a trespass if there is no justification or other defence. The Defendant argues that his entry was not a trespass as it was to abate the nuisance of the runoff water.

32. The Claimant's evidence is that he has erected his house and a shed on his property, and that the shed may in fact be the building of which the Defendant speaks. He explained that the shed is nearer to the Defendant's property. He testified in cross examination

that there is guttering on the shed and that when the shed was constructed it was constructed with the guttering. It was the Claimant's evidence that the water from the guttering on the shed falls into a tank and the excess overflows onto his land and then runs onto the lower plane, which is the Defendant's land but not in the area of the disputed lands. The purpose of the tank, according to the Claimant was to collect water to facilitate plant irrigation.

33. A private nuisance is an unlawful interference with the private use and enjoyment of land or rights over land. To be unlawful, the interference must be substantial and the claimant must have suffered actionable damage: ***Common Law Series: The Law of Tort 3rd Edition. Chapter 22: Nuisance, Part B. Private Nuisance para 22.9.*** Interference is substantial if in all the circumstances the Claimant cannot reasonably be expected to put up with it. Further, "abatement" is the summary removal or remedy of a nuisance by the party injured without having recourse to legal proceedings: ***Halsbury's Laws of England 5th Edition Volume 78, para 214.***
34. It is reasonable to expect a level of water runoff from land situate on the higher plain to that on the lower plain. However, it is quite possible for such runoff to become a nuisance, within the legal definition, if such water runoff is not monitored and/or controlled. The court finds therefore that water runoff onto a person's property may amount to a substantial interference with that person's use and enjoyment of land in particular circumstances, one such circumstance being where the runoff is excessive.
35. Although the natural gradient of the land in this case allows for the flow of water in the direction of the Defendant's property, it is reasonable to conclude that the additional use to which the Claimant has put his land (by way of the addition of the shed on that part of his land where the downward slope towards the Defendant's land begins) would have made this natural flow more intense. This, it appears from the evidence, was done without the addition of a drainage system to facilitate such increase in flow resulting

ultimately in the interference with the use by the Defendant of his land. Besides proper drainage being a matter of practical sense, the need for drainage is evident from the recommendations of Anthony Henry of Anthony Henry & Associates Co. Ltd.

36. In a pre action protocol letter dated 9th June 2010, the Defendant's Attorney highlighted that the constant runoff water caused damage to the Defendant's land and created deep water ways which appear like trenches through the Defendant's property.

37. Although the court made a site visit during the course of the trial and was able to observe the respective properties, the court is unable to make a finding as to damage to the Defendant's land. No evidence was led of such damage or substantial interference with the use of his land. The court's visit though, assisted the court in understanding the layout of the land. However, it would be quite improper for the court to aver unto itself the ability to find that there was or was not damage and/or substantial interference to the Defendant's use and enjoyment of his land without expert evidence on the subject. Although the Defendant's evidence was that there had been damage to his land, there was no proof of the nature of that damage (save that several channels were made by the water) and that it was substantial. The court would have expected expert evidence in this regard at the least but none was forthcoming on the Defendant's case.

38. Notwithstanding this, the instant facts however appear to fall within the rule in ***Rylands v Fletcher***. To succeed in this tort a Claimant must show: (1) That the defendant brought something onto his land; (2) That the defendant made a "non-natural use" of his land; (3) The thing was something likely to do mischief if it escaped; and (4) The thing did escape and cause damage.

39. In this regard the court finds that:

- i. The Claimant built a shed and a house on his land with what appeared to be inadequate drainage for runoff water. Thus the court finds that the

Defendant did bring something on his land within the requirements for the rule in *Rylands v Fletcher*;

- ii. With regards to the definition of the term 'non-natural' in relation to user the court finds that construction of a shed without the appropriate drainage system is in the court's view a non-natural user of land. Further, the court finds that in any event, when coupled with the act of the Claimant in collecting water running from the roof in a tank placed in such a position it overflows with some measure of frequency unto the land of the Defendant, such user becomes non-natural.
- iii. If one constructs a building on his land, one must also expect that it would require proper drainage. This is because the water which runs off from the roof of the building will chart its own course. This is particularly so on land such as in this case (sloping towards the Defendant's land). It was therefore likely, especially in these circumstances that the constant flow of water was likely to cause harm. Further, the court considered that the shed was placed on that part of the Claimant's land where the downward slope towards the Defendant's land began. This made the likelihood of mischief greater if the water escaped;
- iv. The water did in fact runoff onto the Defendant's property, causing damage thereon although the precise nature and extent is unknown.

40. The Claimant would therefore ordinarily be liable in the court's view for the escape of water overflow from the tank and from the shed onto the Defendant's premises. The fact of this escape is sufficient to found liability without proof of actual damage as liability within the rule in *Rylands v Fletcher* is strict and no proof of damage is required: see *Clement Thomas; Phyllis Thomas v Yvette Hackett H.C.T.7/1999* per Beraux J.

41. But this is not determinative of the issue. The Defendant was as a consequence entitled to take steps to abate the nuisance. However, the court must go on to consider whether

the Defendant's entry and excavation or grading of the disputed portion of land was a reasonable measure to abate the nuisance. As a guiding principle, the action taken by the victim of the nuisance must not be greater than is necessary to abate the nuisance: ***Common Law Series: Buckley: The Law of Negligence and Nuisance. 5th Edition. Part 10 Nuisance, Chapter 30, Abatement of Nuisance para 30.13.*** A person abating a nuisance must exercise reasonable care, and where the measure is beyond necessity, an action in trespass may be maintained against the victim as the act to abate would have been unjustifiable. This court must therefore now determine whether the Defendant acted beyond that which was necessary in the circumstances. SEE **Carmen Gobin v Dwarika Lutchmansingh H.C.S. 361/1986.**

42. In this regard the court finds that even if the water also ran off on the area of the disputed land, in addition to the other areas of the Defendant's lands to the back of his house, (in respect of which the evidence is unsatisfactory), the Defendant's act of excavation of the disputed lands was not a reasonable measure to abate the nuisance and his plea of abatement fails as a consequence. What was necessary, in the court's view to reasonably abate a nuisance of water runoff onto one's property, was that of taking adequate steps to divert the water runoff. As a matter of practicality, this may have been achievable by way of construction of a drain, or the addition of runoff pipes or by any other method which could have been reasonably implemented. What is clear to the court though is that the excavation or grading of the disputed land was quite unreasonable and wholly out of proportion to the nuisance as it involved the removal of soil as opposed to the diversion of water.

43. Further, there is no evidence on the Defendant's case (whether expert or otherwise) from which it could be demonstrated that the act of excavation or grading was a reasonable one in relation to the abatement of the danger presented by the water runoff.

44. In the circumstances, the court finds that the Defendant has committed a trespass and is liable in respect of same.

Negligence

45. The Claimant alleges that in excavating his land, the Defendant was in breach of a duty of care owed to the Claimant.

46. In this regard, Counsel for the Defendant submitted that no cause of action in negligence arises or could arise on the facts. It was further contended that there exists no such claim or cause of action known as a negligent trespass.

47. The court does agree with the Defendant's submission that it is a matter of making a claim in "negligent trespass" and the court interprets the claim by the Claimant in this regard to be raising the issue of loss of support. In the natural state of land, one part of it receives support from another - upper from lower strata, and soil from adjacent soil. This support is natural and is necessary as long as the statue quo of the land is maintained; and, therefore, if one parcel of land be conveyed so as to be divided in point of title from another contiguous to it or (as in the case of mines) below it, the status quo of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself sine quo res ipsa haberi non debet: **Dalton v Angus [1881] UKHL 1**. This is a right of easement.

48. However, in his Particulars of the Defendant's Negligence, the Claimant fails to set out a claim in this respect. What is more, such a claim would be properly proven with reference to some expert evidence on the effect of the excavation or grading on the Claimant's property and right of support. No such evidence was given and the court is unable to make a finding on same.

49. In any event, Counsel for the Claimant has failed to advance any arguments on negligence by virtue of loss of support of land. As a result the court finds that this argument has been abandoned by the Claimant.

Malicious Damage

50. Although the Claimant has claimed damages for malicious damage to his property by the destruction of shrubbery on and for undermining the foundation of his land, he has not proven same. The Claimant has not made any submissions on this issue, and has not lead any evidence on same. It therefore appears to the court that this too has been abandoned by the Claimant.

Estoppel

51. Additionally, the Defendant sought to argue that the Claimant was estopped by acquiescence from denying his entitlement. This argument appears in the Defendant's Defence and Counterclaim but has not been further addressed either in submissions or in cross examination and appears to have been abandoned. In any event, the court sees no merit in this argument as the evidence from both parties clearly show that the Claimant knew nothing of the Defendant's claim until the filing of his Defence and Counterclaim. The Claimant thus could not have acquiesced to a something of which he knew nothing.

Relief

52. The exercise of a right of abatement destroys any right of action in respect of the nuisance: *Halsbury's Laws of England. 5th Edition, Volume 78 (2010) Nuisance para 214*. The finding of the court was that the Defendant did exercise his right to abatement but in so doing went far beyond that which was necessary. He has therefore lost his right of action on the counterclaim in relation to the nuisance.

53. Trespass is a tort actionable per se and once it is proved the Claimant is entitled to at least nominal damages. Nevertheless, the prima facie measure of damages for all torts affecting land is -

- i. The diminution in value to the Claimant; or
- ii. The cost of reasonable reinstatement.

54. A claimant is entitled to either diminution in value or the cost of reasonable reinstatement, but not to both. Counsel for the Claimant explained that in order to obtain full reparation, the Claimant will have to recover the cost of reinstatement as well as the diminution in value of the land. Since this cannot be awarded, Counsel submitted that the court ought to order that the Defendant construct a retaining wall to alleviate the further erosion of the Claimant's exposed land, and to replace the drainage system which was destroyed by the excavation. However, Counsel submitted that this would still leave the Claimant without the use of the part of his land which had been removed and consequently an award of nominal damages is appropriate.

55. Nominal damages is awarded in two circumstances:

- (a) In recognition of an infraction of a legal right giving the successful party judgment; and
- (b) Where damage is shown but its amount is not sufficiently proved: **Jacob & Polar v Samlal CV 2005-00454**

56. This case falls within (b) above. That is, despite the fact that damage to the Claimant's land has been shown, the monetary extent of this infraction has not been proven. In the circumstances and award of nominal damages is appropriate. In **Jacob & Polar v Samlal (supra)** my sister Pemberton J iterated that the range for an award of nominal damages stands between \$3,500.00 to \$10,500.00. Consequently, having regard to the nature of the damage and the action which may become necessary to restore, the court is of the

view that an award at the higher end of the scale will be just. The court therefore considers that the sum of \$10,000.00 shall be an adequate award.

57. The court is of the view that it is prudent to put an end to the nuisance despite the fact that no action may lie on the part of the Defendant in respect of same. The court considers that the Claimant has placed on his land a shed which causes some level of discomfort to the Defendant. In as much as the Claimant is allowed to use his property for his enjoyment, he may not do so at the expense of another. The court therefore considers that the Claimant ought to provide proper drainage for water runoff from both the shed and his house. If he has placed something on his land which has the potential to obstruct another's enjoyment of his own property he must take responsibility for same.

58. Further, although the Claimant has asked that the court mandate the Defendant to replace the drainage system which was destroyed by the excavation he has not given evidence to the satisfaction of the court that there ever existed such a drainage system. The court will not therefore order that the Defendant construct a retaining wall to alleviate the further erosion of the Claimant's exposed land, and to replace the drainage system which was destroyed by the excavation.

59. The court therefore finds that the Claimant is entitled to damages for trespass and therefore costs of the claim.

60. For these reasons the court would dispose of this case in manner appearing at paragraph 1.

Dated this 29th day of October, 2012.

Ricky Rahim

Judge