

THE REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY SAN-FERNANDO**

CLAIM NO: CV2017-03247

BETWEEN

BALDEO MOHANSINGH

CLAIMANT

AND

UNICOMER (TRINIDAD) LIMITED

FIRST DEFENDANT

REDSTART INVESTMENTS (TRINIDAD AND TOBAGO) LIMITED

SECOND DEFENDANT

Before the Honourable Madame Justice Quinlan-Williams

Date: 27th September, 2019

Appearances: Mr. Alvin Pariagsingh and Mr. Dindial instructed by Robert Abdool-Mitchell for the Claimant
Mr. Colvin Blaize and Mr. Alexei Mc Kell instructed by Jeunille Trancoso-Blackman and Mr. Maurice Fermin for the Defendants

JUDGMENT

1. The claimant has used a Road Reserve to access his home since he constructed it in the 1980s. The defendants, recently, have commenced using that same Road Reserve as the entrance to their premises on which they operate a commercial venture. To enable them to utilize the Road Reserve the defendants undertook major works that changed the configuration of the Road Reserve. It is the works on the Road Reserve undertaken by the defendants that have given rise to the dispute between the parties.

Issues

2. The issues for the court's determination are whether:
 - i. The claimant is entitled to an easement by way of the Road Reserve and if so, what is the extent of his entitlement;
 - ii. Was the claimant's right to lateral support and light breached by the defendants;
 - iii. The defendants have caused a nuisance to the claimant; and
 - iv. The claimant and/or the defendants is entitled to damages.

The Claimant's Pleaded Case

3. From the claimant's birth on the 4th May 1958, he resided on the land located at the southern boundary of the defendants' land described as Lot A with his parents and siblings. During that period, the claimant's parents rented Lot A from Ms. Mavis Teelucksingh. In the late 1970's Ms. Teelucksingh offered to sell Lot A to the claimant's parents.
4. In early 1980s, in contemplation of the claimant's marriage, the claimant's mother asked and Ms. Teelucksingh agreed to sell the back lot i.e. Lot 109 B to the claimant.
5. It is the claimant's case that he has resided at No. 109 B Calcutta Road Freeport for over 36 years. By a deed of conveyance registered as Deed No.

2485 of 1981 dated the 2nd February 1980 the claimant became the fee simple owner of Lot 109 B; that certain piece or parcel of land situate at Calcutta Settlement in the Ward of Monserrat in the Island of Trinidad comprising five thousand and twenty five (5,025) superficial feet and bounded on the North by lands of the Vendors on the South by lands of the Vendors on the East by lands of the Vendors and on the West by a Road Reserve (“the claimant’s land”).

6. The Road Reserve on the western boundary of the claimant’s land forms the subject of this claim.
7. Before finalization of the agreement for sale, the claimant and Ms. Teelucksingh inspected the claimant’s land where the specific issue of access arose. Upon the realisation that there was no access to the claimant’s land, Ms. Teelucksingh agreed to grant access by means of a Road Reserve. On the 25th August 1980 a survey of the lands was drawn by Mr. Jardine to show the Road Reserve; and on the 2nd February 1981 the claimant purchased the claimant’s land and was issued the deed of conveyance which described the western boundary as the Road Reserve.
8. In or about the year 1983 the claimant mortgaged his land for the sum of \$71,200.00 which was used to complete the construction of his home. As part of the completion works, the claimant backfilled the Road Reserve because it was low lying and waterlogged. He also sheeted the Road Reserve to his home with gravel. In addition, the claimant built a second driveway to the claimant’s land for the specific purpose of accessing a cow pen he constructed to the back of his house. As a result, the claimant avers that the Road Reserve has been used by him uninterrupted and unhindered and/or without causing disturbance or inconvenience to anyone since 1983 as an access route to his house.

9. On the 24th February 2017 the claimant observed construction trucks and workmen assembled near to his home. A short while thereafter, the claimant noticed that the defendants were constructing a wall running parallel to his existing wall on the north-western side of the claimant's land. Eventually, it became apparent that the newly constructed wall was obstructing the access point created by the Road Reserve to the claimant's land. Furthermore, the said wall measured approximately seven feet high. This caused excessive heat and discomfort to the claimant and his family as it resulted in the blockage of natural sunlight and air flow to five windows to the downstairs of the claimant's home.
10. The claimant immediately complained to Mr. Roberto Gozman and thereafter filed a formal complaint to Member of Parliament, Mr. Bhoendradatt Tewarie in efforts of obtaining some form of resolution or agreement between himself and the defendants.
11. As a result, the claimant caused his attorneys-at-law to issue a Pre-Action Protocol letter dated the 9th March 2017 to the first defendant requesting a written undertaking that the first defendant cease the works and demolish and remove any structures built on the Road Reserve on or before the 10th March 2017. Nevertheless, on the 10th March 2017 at about 1:00pm the claimant observed that the defendants had begun to grade the road in a steep slope from a south to north direction creating a gradient of about 15-20 feet. These works continued until the 12th March 2017 on which day the Road Reserve was rolled with a steam roller.
12. By letter dated the 12th March 2017, the defendants wrote to the claimant's attorneys-at-law arranging a joint site visit scheduled for the 13th March 2017. Upon the completion of the site visit, the defendants by letter dated the 14th March 2017 proposed a number of recommendations including the re-opening of the claimant's pedestrian access to the north of his driveway by breaking the wall along the western side of his premises;

that the newly completed pavement be extended further southwards parallel to the claimant's perimeter wall along the western side of his property; that a security fence be constructed on the outer side of the pavement along the western edge of the said pavement so as to create a virtual corridor between the remainder of the claimant's wall and security fence; and that the height of the seven foot high perimeter wall be reduced to the extent of two block heights along the length of same.

13. In the said letter, the defendants also made an undertaking not to proceed with further works at this part of the site until an agreement between the parties was approved. However, in breach of the defendant's undertaking, the claimant asserted that works to the wall was conducted including the removal of blocks and the re-opening of the second driveway although there was no agreement to same.

14. By letter dated the 28th March 2017 the claimant rejected the defendant's proposal and counter proposed that the defendant do break and remove the wall along with all other structures constructed on the Road Reserve and do restore the Road Reserve to its original position and gradient. The defendants were given until the 3rd April 2017 to state their position, failing which the claimant undertook to initiate legal proceedings against them. However, no response in this regard was received.

15. It is the claimant's case that the works undertaken by the defendants' servants and/or agents amounted to the wrongful disturbance of the non-natural right of support for the dwelling house situated on the claimant's land. An easement was established on the Road Reserve by agreement which was granted to the claimant by the previous owners of the claimant's land for the specific purpose of providing access to the neighbouring lands. Moreover, the claimant claims entitlement to the easement through long use and enjoyment on a continuous basis of over 34 years.

16. Furthermore, due to the excavation works undergone, the claimant fears that the natural right of support to his lands has been compromised and the foundation of the claimant's house has been substantially undermined. The claimant contends that the constant vibrations and drillings have caused the tiles in the upstairs part of his house to shatter and have also resulted in several cracks in the walls of his home.

17. Additionally, the defendants have substantially interfered with the claimant's enjoyment of his property by the construction of the wall as it impedes the natural light and airflow from entering the claimant's land.

18. In this regard by claim form filed on the 8th September 2017, the claimant claimed against the defendants:

- i. A declaration that the Claimant is entitled by virtue of Section 2 of the Prescription Ordinance Chap. 5 No. 8 (1950 Revised Laws), to a right of way along the entire length of the Western Boundary of the land known and described as ALL AND SINGULAR that certain piece of land situate at Calcutta Settlement in the Ward of Monserrat in the Island of Trinidad comprising FIVE THOUSAND AND TWENTY FIVE (5,025) SUPERFICIAL FEET and bounded on the North by lands of the Vendors on the South by lands of the Vendors on the East by lands of the Vendors and on the West by a Road Reserve;
- ii. A declaration that the Defendants are not entitled to build, block or in any other way, impede the Claimant's use and enjoyment of the said right of way;
- iii. An order that the Defendant do break and remove all structures constructed on the said right of way including the wall constructed by the Defendants on the Claimant's western boundary;

- iv. A declaration that the Claimant is entitled to the right of support of his lands from the neighbouring lands, that is, the road reserve by virtue of long enjoyment;
- v. An order that the Defendants restore the right of way and the attendant right of support to the Claimant's land;
- vi. An injunction restraining the Defendants by themselves, servants and or agents or workmen from building and or blocking in anyway whatsoever, the said right of way;
- vii. A declaration that the Second Defendant's title to the lands which abut the Claimant's lands on the Northern and Eastern Boundary subject to the said right of way;
- viii. Damages for nuisance resulting in damage and consequential loss caused to the Claimant's property as a result of works carried out by the Defendant, whether by itself servants and/or agents or workmen or howsoever otherwise in the excavation and construction of the said wall interfacing with the Road Reserve which forms the Western boundary of the Claimant's land;
- ix. Interest at such rate and for such period as may be just pursuant to Section 25 of the Supreme Court of Judicature Act, Chap 4:01;
- x. Costs; and
- xi. Such further and/or other relief as the Court may deem fit in the circumstances.

The Defendants' Defence and Counterclaim

19. The defendants aver that on or around the 30th October 2014 the second defendant by virtue of Deed of Conveyance register as No. DE201500656682D001 made between Alescon Readymix Limited as the vendor and the second defendant as purchaser, became seised with the possession in fee simple all of those two several pieces or parcels of land situate in the Ward of Montserrat in the County of Caroni in the Island of Trinidad together comprising SEVEN POINT FIVE FOUR EIGHT ZERO HECTARES (7.5480ha) be the same more or less THE FIRST THEREOF comprising ONE POINT EIGHT ZERO ONE FIVE HECTRES (1.8015ha) be the same more or less and bounded on the North by lands formerly of G. Teelucksingh on the South by Rambaran Trace on the East by lands of Beepat Ragoonanan and on the West by Sir Solomon Hochoy Highway and is delineated and shown coloured pink and numbered "A1" in the Plan annexed and marked "A" to Deed registered as No. 13598 of 2000 and THE SECOND THEREOF comprising FIVE POINT SEVEN EIGHT TWO FIVE HECTARES (5.7825ha) be the same more or less and bounded on the North by Rambaran Trace on the South partly by lands of A. Sinanan partly by Calcutta Settlement Road partly by lands formerly by A. Samaroo now D. Mohan partly by a parcel of land whose owner is not currently known partly by land of R. Rampersad partly by lands of B. Mohass partly by lands of M. Teelucksingh partly by lands of J. Deen partly by lands formerly of Norien now Rawlins Mookram partly by lands of A. Sinanan partly by lands of Edward Mookram and partly by lands of Nunkoo and on the West partly by parcel 6 and partly by an existing road partly by parcel 12 partly by of lands by M. Teelucksingh and partly by lands of J. Deen and is delineated and shown coloured pink and numbered "A2" on the said Plan annexed to Deed Registered No. 13598 of 2000 and which said two pieces or parcels of land together represent a consolidation of the four parcels of land described in the schedule to Deed No. 21133 of 1979 Save and Except the seven pieces or parcel sold there out by Deeds No. 21434 of 1979, No. 1980 of 1980, No. 20782 of 1980, No. 2485 of 1981, No. 3524 of 1981, No. 2061

of 1982 and No. 14984 of 1989 respectfully, together with ALL AND SINGULAR that certain piece or parcel of land situate at Calcutta Settlement in the Ward of Montserrat in the Island of Trinidad comprising FOUR ACRES AND SIXTY FIVE PERCHES be the same more or less (being portion of the lands describes as parcels 6 and 12 in the First Part of the Third Schedule to Deed No. 1711 of 1968) and abutted and bounded on the North partly by lands now or formerly of Mavis Teelucksingh and partly by the Sir Solomon Hochoy Highway on the South partly by the lands now or formerly of Mavis Teelucksingh and partly by Calcutta Settlement Road No. 1 on the East partly by lands now or formerly of Mavis Teelucksingh and partly by an existing trace 4.5 metres wide and on the West by the Sir Solomon Hochoy Highway and which said piece or parcel of land is delineated and shown coloured pink on the Plan annexed and marked "A" to Deed Registered as No. DE200200841653D001 ("the defendants' land).

20. The Road Reserve which measures 25 feet traversed onto the lands of the second defendant's predecessors in title, Mavis Teelucksingh and thereafter Alescon Readymix Limited. The Road Reserve was created to ensure access to and from the remainder of the lands owned or formerly owned by Mavis Teelucksingh in the event of a conveyance.
21. The defendants contend that when the claimant purchased Lot B, the claimant as the purchaser of adjoining lands which formerly belonged to Mavis Teelucksingh, held the lands subject to the rights of the heirs, assigns and successors in title of Mavis Teelucksingh, which includes the second defendant, to exercise its rights on the adjoining lands including the Road Reserve. The claimant is not the owner of the Road Reserve, therefore, the defendants denied that the claimant is or was entitled to have his land supported by the soil or minerals adjacent thereto and deny that the claimant has any superior right and entitlement to the use of the Road Reserve.

22. The defendants also averred that the claimant is not entitled to any declaration by virtue of Section 2 of the Prescription Ordinance Chap. 5 No. 8 (1950 Revised Laws), to a right of way along the entire length of the Western Boundary by way of the Road Reserve.
23. The defendants affirm that they have obtained all necessary planning permission and approvals from the requisite state agencies including the Town and Country Planning Division of the Ministry of Planning, Economic and Social Restructuring of Trinidad and Tobago, for the construction and operation of a modern distribution and commercial centre on the defendants' land. Additionally, the construction of an access way off the Churchill-Roosevelt Highway was approved by the Highways Division of the Ministry of Works and Infrastructure of Trinidad and Tobago for the purpose of providing an immediate access route to and from the lands of the defendants as well as onto Calcutta Settlement Road from the southbound land of the Solomon Hochoy Highway which did not exist prior to the defendants' development.
24. Upon the portion of its land which comprise 5.7257 hectares (Deed states 5.782ha) and shown coloured pink and numbered "A2" on the plan referred to in the First Schedule of its deed and which said plan is annexed to Deed Registered No. 13598 of 2000, the defendants constructed the "ServiTech" building. The Road Reserve directly services the land numbered A2. As a result, the defendants aver that they were entitled to develop, grade and pave the Road Reserve to afford sufficient access to its servants, agents, visitors, licensees and invitees to the said lands. The easement created by virtue of the Road Reserve also endured for the benefit of the second defendant as the owner of A2 and other parcels comprising its development. As a consequence, the defendants state that they possessed the right to let down the surface of the second defendant's land.

25. As part of the design calculations for the development of the defendants' lands, specifically in relation to parcel A2, the defendants' main contractor on site, Roberto Guzman the principal of Omni Contractors Limited, in conjunction with Seereeram Brothers Limited engaged the services of Trintoplan Consultants Limited to formulate the designs for the construction of a king pile retaining wall. After taking measurements and surveys of its lands and the Road Reserve, a king pile seismic load analysis report was formulated. The use of contiguous augured piles was also adopted for support and the foundation of the retaining walls, in order to minimize any vibrations in the process of the insertion of the piles.
26. The defendants, their servants or agents then undertook development works along the southern, eastern and western boundaries of the lands. The lands were excavated and foundations and perimeter walls were erected to preserved and maintain the security of the development and premises. The contractors on site graded and developed the access ways onto the site development and also repaired and developed the Road Reserve so as to permit ingress and egress to and from the second defendant's lands. A king pile wall with a pile depth of 27 meters at its foundation base was constructed with the use of augured piles along the south to south eastern side of its boundary to parcel A2, as well as along the eastern side of the Road Reserve which boundaries are partly appurtenant to the northern and western side of the claimant's land. In conformity with its approvals and Town and Country guidelines and restrictions, a seven foot high concreted block perimeter wall was then constructed on top of the augured pile king pile foundation wall which itself has a specified height elevation of 3.6 meters by the defendants, their servants or agents.
27. As it relates to the claimant's two storey dwelling house, the defendants state that it was constructed very close to the northern side of the claimant's land. There was also a concrete wall erected approximately

three to five feet high along the eastern side of the Road Reserve in which existed two entrances. The first entrance (“the primary entrance”) was located closer to the southern end of the claimant’s land which was wide and appeared to be used by him as driveway so as to enable access and egress to and from the claimant’s dwelling house by vehicle. Closer to the northern end of the Road Reserve, the claimant had a second entrance (“the secondary entrance”) which was significantly narrower in width when compared to the primary entrance. There was no gate erected on the secondary entrance nor was it wide enough to permit vehicular access. Moreover, as the western side of the claimant’s house stood behind the secondary entrance, it could not reasonably permit vehicular access to the claimant’s driveway.

28. The construction of the seven foot high perimeter wall which was constructed on the eastern side of the Road Reserve and parallel to the claimant’s existing wall was not intended to, nor did it ever block or impede the claimant’s access to his property as the said wall stopped short of the primary entrance. However, the defendants admit that the said wall did block the secondary entrance which was not used as the primary access to the claimant’s land.

29. Discussions were held among Roberto Guzman, the defendants’ Manager of Properties and Projects Mr. Garth Baptiste and Dr. Bhoendradatt Tewarie in efforts of providing some form of resolution to the issue. Additionally, on or about the 1st March 2017, Dr. Tewarie and Mr. Baptiste were invited to the claimant’s house. They were escorted to his kitchen whereupon the claimant contended that the floor tiles were being raised as a result of the defendant’s works. Upon Dr. Tewarie’s inspection of the floor tiles, he pointed out that in his estimation it seemed to be poor workmanship as it appeared to have insufficient thin-set placed on the tile to adhere to the floor. Dr. Tewarie also mentioned that in his opinion the works of the defendants was positive for the community as the project

would lead to improved access to and development of the area including the Road Reserve; as well as creating opportunities for downstream employment.

30. The defendants acknowledge the receipt of the claimant's Pre-Action Protocol letter dated the 9th March 2017 by Mr. Baptiste which was subsequently communicated to the defendants' attorney-at-law on the 12th March 2017. It was agreed that a joint site visit was required which was arranged for the following day. An undertaking was given by the defendants that no further works would be conducted in the vicinity of the claimant's premises for a period of 24 hours pending the outcome of the site-visit.

31. By letter dated the 14th March 2017, the defendants in the spirit of compromise, the parties having to co-exist as neighbours within the confines of the same community and within the realms of their respective corporate responsibilities, agreed to propose amendments to the works being conducted. Accordingly, that portion of the second defendant's seven foot high wall which ran parallel to the claimant's existing wall and which admittedly precluded the claimant's secondary access was removed. The pavement constructed by the defendants extended so as to provide a proper walkway which did not exist prior to their development. A sufficiently robust tensile strength security/safety fence was erected along the western edge of the pavement and served a triple function. Firstly, to protect the safety, security and well-being of all users of the walkway to the claimant's property via the secondary entrance. Secondly, to afford a reasonable level of security to the defendants' compound and thirdly, to afford the claimant a continued view and airflow from the downstairs of his premises and beyond his own existing wall.

32. The defendants contend that such amelioration and foundation infrastructural works have served to improve the claimant's own

infrastructure and stability of his lands. Moreover, the amelioration works were carried out in accordance with the terms of the proposals to have the issues resolved after the joint site visit. The defendants aver that they never had sight of the claimant's letter dated the 28th March 2017 rejecting the aforementioned proposals for the amelioration works agreed to at the site visit.

33. In any event, the defendants contend that it would have been manifestly unfair to them given their efforts at giving an undertaking to cease all works in the vicinity of the claimant's premises. In addition, even if the said letter was received it would have been two weeks after the site visit was conducted. Had the defendants held their hands on not performing the amelioration works, the losses that would have been incurred by the continued retention of the contractors and the cost overruns arising from a two week delay in the completion schedule, would have been substantial. In so doing, the defendants assert that they would have run the high risk of the inability of the claimant to adequately compensate them for such losses that would have been incurred.

34. The defendants further aver that during the construction of the aforementioned retaining walls, the defendants whether by themselves, their servants or agents, noticed that claimant whether by himself, his servants or agents acting on their own behalf, were seen pouring and/or allowing and/or causing running water from a hose situate in the claimant's property to escape daily and overnight onto the concrete foundation works for the perimeter walls. This resulted in extreme saturation, waterlogging, damage to subgrade and degradation of the concrete in the said perimeter wall and the works being performed by the defendants' contractors.

35. As a result, the defendants were forced to engage the services of their sub-contractors Seereeram Brothers Limited to excavate and re-do the works already undertaken to this part of the site. This was a very costly

undertaking for the defendants which had to be done under the protection of officers belonging to the Trinidad and Tobago Police Service who had to be paid for their presence on site. Therefore, the defendant counterclaimed for the cost of replacing crushed stone at 357.5 cubic metres; equipment, excavators, rollers, dump trucks, dozer and grader; hiring a supervisor, grade checker and labourers; and the police protection in the sum of \$217,115.00.

The Claimant's Reply to the Defence and Counterclaim

36. The claimant stated that the defendants' assertion that the Road Reserve was created to ensure that in the event of a conveyance of any part or parcel of the lands of Mavis Teelucksingh, her successors in title namely Alescon Readymix Limited, were afforded access and egress to and from the remainder of the lands formerly owned by Mavis Teelucksingh is not reflective in the second defendant's instrument of title. The second defendant's deed is not reflective of the Road Reserve granted for any purported access claimed by the defendants. In fact, the defendants' assertion is more reflective in the claimant's instrument of title by the plan annexed to the claimant's deed wherein the Road Reserve is depicted as the entirety of the western boundary of the claimant's land.

37. What is more, is that the defendants' reliance on the survey plan of Nasser Abdul dated the 17th May 2000 does not indicate any entitlement nor does it entitle them to develop, grade and or pave the Road Reserve. On the other hand, the claimant's survey was carried out prior to the purchase of the claimant's land and was done with the express intention to cater for access by way of the Road Reserve. As a result, the claimant states that the defendants have granted themselves a self-conferred title and or access to their lands by way of the said Road Reserve.

38. As it relates to the secondary entrance, the claimant posits that the said entrance was used as a driveway for the transport of material and tools for the construction of the claimant's son's property located to the back of the claimant's land. Additionally, during the building of the claimant's cow pen the second entrance was used to facilitate same. The claimant asserts that the secondary entrance was wide enough to facilitate vehicular traffic.
39. The claimant strongly denied that the defendant did not receive its letter dated the 28th March 2017, sent via facsimile rejecting the defendants' proposal. Moreover, even if the defendants did not receive the said letter, the defendant's letter of proposal dated the 14th March 2017, made provisions for a "mutually acceptable compromise" and a further undertaking "not to proceed with further works at this part of the site until an agreement between the parties is approved." Therefore, the defendants' reliance on cost overruns does not provide a viable explanation for renegeing the undertakings made in the letter dated the 14th March 2017.
40. With respect to the defendants' assertion and counterclaim that the claimant deliberately directed his hose to the defendants' constructed retaining wall causing damage and extreme saturation to same, the claimant denied such allegations. The claimant responded that at all material times, he was entitled to clean within the precincts of his own yard which included sweeping and washing of the space. The claimant was accustomed doing so but there was an increased need to wash his property as a result of the continued gathering of dust consequent to the defendants' works. Furthermore, it was contended that a garden hose was used to facilitate the cleaning of his yard which could not have caused such extensive damage as claimed by the defendants.

Law and Analysis

- i. Whether the claimant is entitled to an easement by way of the Road Reserve

41. The claimant's case and evidence is that he is entitled to the easement as he has used the Road Reserve undisturbed for a period of over 34 years for the purpose of accessing his home.

42. An easement is a right in alien solo i.e. in the soil of another¹. It is a right/benefit enjoyed by an owner of land (the dominant tenement) over land of another (the servient tenement); it must exist for the accommodation and better enjoyment of land to which it is annexed, otherwise a mere licence can exist². As regards to the owner of the dominant tenement, an easement involves the enhancement of his ordinary rights; and as regards to the owner of the servient tenement, it involves a corresponding diminution of his ordinary rights³.

43. Honourable Madam Justice Margaret Mohammed in CV2014-04577 *Nicolas St. Rose -v- Rattan Ramkissoon* stated that an easement can be created if the claimant was able to show that there was an implied grant of an easement. There are three ways by which an easement may be implied: (i) under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31 (ii) as an easement of common intention; (iii) as an easement of necessity.

44. The rule in *Wheeldon -v- Burrows*⁴ was explained by Lord Thesiger as:

“on the grant by the owner of a tenement of part or that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which of course I mean quasi easements) or in other words all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and

¹ Megarry & Wade, *The Law of Real Property*, 8th Edition, page 1249 at paragraph 27-011

² Osborne's Concise Law Dictionary 10th Edition

³ *Dalton -v- Agnus* (1881) 6 App Cas 740 at 830 per Lord Watson

⁴ *Wheeldon -v- Burrows* (1879) 12 Ch D 31, 49

are at the time of the grant used by the owners of the entirety for the benefit of the part granted ...”

45. At paragraph 25 of *Nicolas St. Rose* [supra] Mohammed J applied the rule in *Wheeldon -v- Burrows* where she stated:

“25. To prove that an easement has been created under the rule in *Wheeldon v Burrows* it is therefore necessary for the claimant to show that:

1. The dominant and servient tenements have at some time been in common ownership;
2. The common owner disposed of one tenement, retaining the other, or disposed of both simultaneously;
3. The right claimed is such that it could form the subject matter of an express grant;
4. It was continuous and apparent;
5. It was necessary for the reasonable and convenient enjoyment of the property conveyed;
6. At the time of the grant it had been used by the grantor for the benefit of the part conveyed.”

46. The claimant, by his claim, asserts that an easement was created under the rule in *Wheeldon v Burrows* [supra] as applied in *Nicolas St. Rose* [supra] for the following reasons:

1. The dominant and servient tenements were both formally owned by Ms. Teelucksingh and were therefore at one time in common ownership;
2. Ms. Teelucksingh sold a parcel from the lands formally owned by her to the claimant (the dominant tenement), retaining the other (the servient tenement);
3. The Road Reserve chiselled out by Ms. Teelucksingh could have been passed, by way of Deed to the claimant by an express grant;
4. It was clearly continuous and apparent because Ms. Teelucksingh identified the Road Reserve as the western boundary of the claimant land;

5. It was necessary for the reasonable and convenient enjoyment of the property conveyed because it was the means by which the claimant would have access to the land he proposed to purchase;
6. At the time of the grant, the claimant used the Road Reserve as this was the only access to the parcel of land conveyed to him by Ms. Teelucksingh.

47. However, the court is not satisfied, on a balance of probabilities that the claimant's evidence satisfies all six (6) requirements of *Wheeldon v Burrows* [supra] as applied in *Nicolas St. Rose* [supra].

48. With respect to the fifth (5) requirement in *Wheeldon v Burrows* [supra], the claimant's evidence is that it was granted for him to have access to his lands. The court is not satisfied what the claimant alleged is what was considered necessary for the reasonable and convenient enjoyment of the parcel of land the claimant purchased from Ms. Teelucksingh. The claimant's evidence is contradictory on the nature of reasonable and convenient enjoyment.

49. The claimant's evidence,⁵ is that the Road Reserve was created to provide access to the entire western boundary of his property. The court notes that the claimant also averred that the Road Reserve was low lying when he purchased his land. As a result, in 1983 he backfilled the Road Reserve during the time that he was completing the construction of his home.⁶ If the Road Reserve was low lying, it would seem to the court that it could not have been the intention and understanding of the parties that the Road Reserve provide access to the entire western boundary of the claimant's land. The reasonable and likely intention and understanding of the claimant and Ms. Teelucksingh was that the Road Reserve was to provide

⁵ Paragraph 16 of claimant's witness statement.

⁶ Paragraph 11 of claimant's witness statement

access to some part of the claimant's land. The claimant had access and still has access off the Road Reserve to his lands.

50. Additionally, the evidence does not satisfy the court, on a balance of probabilities, of the sixth (6) requirement of *Wheeldon v Burrows* [supra]. At the time the claimant and Ms. Teelucksingh completed their agreement for sale, there was no understanding that the claimant used or intended to have vehicular access from any point of the Road Reserve unto his parcel of land. There is no such evidence from the claimant that this was the discussion between himself and Ms. Teelucksingh or that they both had that understanding. It would seem logical that it was anticipated that the claimant expected to have vehicular and walking access from the Road Reserve; the precise nature of the access the claimant has pleaded has not been proven. There is no evidence that Ms. Teelucksingh knew or should have known that the claimant required two points for vehicular access. Or that the claimant required vehicular access from the point of the secondary entrance for the purpose of attending to cattle or to facilitate building on a lot behind the claimant's house. Without the access facilitated by the Road Reserve the claimant's land would be land locked. The claimant always had and continues to have access so that his land is not land locked.

51. The claimant cannot succeed in his claim relying on *Wheeldon v Burrows* [supra] as applied in *Nicolas St. Rose* [supra].

52. The claimant asserted, further, that he is entitled to an easement by virtue of section 2 of the Prescription Ordinance Chapter 5 No. 8 (1950 Revised Laws) ("the Prescription Ordinance"):

"When any claim shall be made to any right of common or pasture, or other profit or benefit, except rent and services, or to any way or other easement, or to any watercourse, or the use of any water, to be taken or enjoyed or derived upon, over, or from any land or water of the State, or of anybody corporate or person, and such right of common or other matter as in hereinbefore mentioned shall have been actually enjoyed by

any person claiming right thereto without interruption for the full period of sixteen years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.”

53. There is no dispute that the claimant continues to have vehicular access to his home by way of the main entrance. The secondary entrance forms the main part of the claimant’s dispute with the defendants and he has provided evidence to show his use of the secondary entrance. The claimant says that he constructed a cow pen to the back of his house and built a second driveway for the specific purpose of facilitating the cow pen. However, there is no evidence when this cow pen was built or used, whether it was more than sixteen (16) years ago or less than sixteen (16) years before the claim for protection was made. I am unable to determine whether the use of the secondary entrance by the claimant has been for more than sixteen (16) years and therefore the claimant is not entitled to the protection afforded by section 2 of the Prescription Ordinance.

54. The claimant also says that he has been using the secondary access to his home since he built his home and that the narrowing of the entrance is such that “vehicle access could not reasonably be permitted”. But there is no evidence that the claimant had vehicular access by way of the secondary access for sixteen years or more. Therefore, in this regard the claimant is also not entitled to the protection of section 2 of the Prescription Ordinance.

55. The claimant also testified that the second driveway was used for the transporting of construction material to facility his son building his home. There is no evidence and court does not know when that construction and the delivery of building material occurred; was it more than or less than sixteen (16) years before the filing of the claim?

56. The claimant's son in law (Kevin Kalloo), also gave evidence that he has visited the claimant's premises for the past fourteen (14) years and attested to the fact that the secondary driveway was used to deliver building material. Fourteen (14) years would not be sufficient time to entitle the claimant to the protections afforded by section 2 of the Prescription Ordinance.

57. Finally, the claimant averred that he has acquired the easement by necessity since there is no other way he can access his property and the Road Reserve is crucial for the access of same. The Halsbury's Laws of England⁷ describes a right of way by necessity as:

“A way of necessity is a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted to him, or over the land of the grantee where the land retained by the grantor is land-locked... the doctrine is not founded on public policy but on the implication into the document granting the land that the grant of some way was intended because otherwise the land would be inaccessible. A way of necessity can only exist where the implied grantee of the easement has no other means of reach his land...”

58. The case of *Corporation of London -v- Riggs* (1880) 13 Ch D 798 prescribes that the determination of an easement by necessity is strictly limited by the circumstances of the necessity that existed at the time of conveyance. As noted earlier, if the easement was as of necessity, the necessity was for the claimant to have access to his premises and he still has access to his premises as is necessary. Therefore this limb of the claimant's claim fails.

ii. Claimant's right to lateral support and light.

59. The claimant asserted that as the rightful owner of his lands in fee simple, he is entitled, as a naturally enshrined right, to have his land laterally

⁷ Volume 87 (2012), 5th Edition at paragraph 956

supported by any adjacent lands. The law on the right to support is outline in the Halsbury's Laws of England⁸ as follows:

“Apart from variations arising from easements, every owner of land has, as an incident of his ownership, the right to prevent such use of the neighbouring land as will withdraw the support which the neighbouring land naturally affords to his land. In the natural state of land one part of it receives support from another, upper from lower strata, and soil from adjacent soil, and therefore if one piece of land is conveyed so as to be divided in title from another contiguous to it, or, as in the case of mines, below it, the right to support passes with the land, not as an easement held by a distinct title, but as an essential incident to the land itself.

The natural right to support does not entitle the owner of land to insist upon the adjoining land of his neighbour remaining in its natural state, but it is a right to have the benefit of support, which is infringed as soon as, and not until, damage is sustained in consequence of the withdrawal of that support. A claim in respect of the tort of interference with a natural right of support for land only arises when there has been actual damage to the neighbouring land... It now appears that where the land of the dominant tenement is supported by land of the servient tenement the owner of the servient tenement has a positive duty to continue to provide support. However, liability only arises if there is negligence; the duty to abate the nuisance arises from the defendant's knowledge of the hazard that will affect his neighbour. In order to give rise to a measured duty of care, the defendant must know or be presumed to know of the defect or condition giving rise to the hazard and must, as a reasonable person, foresee that the defect or condition will, if not remedied, cause damage to the claimant's land. Depending on the facts the scope of the duty might be limited to warning the owner of the dominant tenement of such risk as the defendant was aware of, or ought to have foreseen, and sharing such information as the defendant had acquired relating to it.”

60. This right in tort; support from the adjoining land, arises by the owner of the dominant tenement against the owner of the adjoining servient tenement. In *Dalton v Angus* (supra) on the issue of the right to lateral support from adjoining lands, Lord Watson said:

⁸ Real Property and Registration, Volume 87 (2017) at paragraphs 900 and 901

“In one sense every easement may be regarded as a right of property in the owner of the dominant tenement, not a full or absolute right, but a limited right or interest in land which belongs to another, whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement. But a right constituted in favour of estate A. and its owners, in or over the adjoining lands of B., is in my opinion of the nature of an easement, and that whether such right is one of the natural incidents of property, or has its origin in grant or prescription. (Lord Watson 830)”

61. The court is not satisfied that the defendants are the owners of the land on which the Road Reserve stands. Rather the owner of the servient on which the Road Reserve stands is likely Ms. Teelucksingh.

62. In any event, while it is conceded that the defendants have undertaken substantial excavation and grading works along the western boundary of the claimant’s home, the claimant failed to adduce any evidence of actual damage to his property as a result of the loss of support, crucial to the tort of interference with a natural right of support for land.

63. The defendants’ evidence is that their contractors engaged the services of Trintoplan Consultants Limited to formulate the designs for the construction of a king pile retaining wall. After taking measurements and surveys of its lands and the Road Reserve, a king pile seismic load analysis report was formulated. The use of contiguous augured piles was also adopted for support and the foundation of the retaining walls, in order to minimize any vibrations in the process of the insertion of the piles. Therefore, based on the measures implemented by the defendants in the construction of the retaining wall, the court is not of the view that the foundation and structural integrity of the claimant’s home was adversely affected in so far as it relates to lateral support.

64. Even if the defendants were the owners of the land on which the Road Reserve stands, in light of the foregoing, there would no evidence that the construction of the retaining walls and structures built by the defendants would have deprived the claimant from lateral support from the adjoining

land. The owners of adjoining lands are entitled to do works even if the effect of those works changes the nature of the lateral support to the dominant tenement. The claimant still has lateral support to his lands from the retaining walls constructed by the defendants.

65. With respect to the claimant's right to light and the deprivation therefrom the claimant, similarly are not positioned to sustain a claim against the defendants. Even if there were such a deprivation, the defendants are not the owners of the servient tenement.

66. In any event, the claimant has not provided evidence to satisfy the court on a balance of probabilities, that the construction of the retaining wall or any other work done by the defendants have deprived the claimant of light. From the site visit as well as the photographs exhibited, there is no obstruction of the light to the claimant's home. At one point, from the evidence a wall was constructed, however now, there isn't a concrete wall but rather chain link fence through which light can penetrate.

iii. Nuisance

67. It appears, as the court noted earlier, that the Road Reserve was not included in the lands conveyed to the second defendant by virtue of the Deed Registered in 2015. Therefore the court is not satisfied on a balance of probabilities that the second defendant owns the land described as the Road Reserve. It would appear to the court that as the claimant's Deed of Conveyance uses the Road Reserve as the western boundary following discussions about the need to provide access to Ms. Teelucksingh lands, it is more likely than not that Ms. Teelucksingh would have excluded it from her conveyance to Alescon Readymix Limited. The survey plans relied on by the defendants do not include the Road Reserve as part of their property.

68. The defendants view is that the Road Reserve forms part of their parcel of land.

69. On the issue of nuisance, the claimant relied on the case of CV2010-2915 *Chanan Mahabir & Anderson Mahabir -v- Sandra Mahabir* where Madam Justice Gobin stated:

“13. The case of *Espley v Wilkes* [1871-72] L.R 7 Ex, 298 is helpful. There, the dispute as to the existence of a right of way arose between the lessor and lessee and not as in this case between the lessee and a third party. The ground on which it was held that there was indeed a grant is applicable to the facts in this case which are almost indistinguishable in the material aspects.

14. I have extracted some relevant parts of the judgment of Kelly C.B, at page 303, which I consider to be applicable:

(1) “But here the lessor, by the grant, has expressly described the land demised as abutting upon strips of land of his own to the north and the east, which he himself in the lease describes as newly-made streets, and which are distinctly delineated upon the plan, and therein called “new streets.” The lessor, therefore, is estopped from denying that there are streets which are in fact ways, and which ways run along the north and the east fronts of the houses to be built on the demised lands, including the defendant’s house, and of which streets or ways the way claimed in the plea to this action is a part.

(2) We should have thought this point clear upon the obvious and necessary construction of the lease and plan; but the case of *Roberts v Karr* (1) is a direct authority to that effect. There one Pratt granted a piece of ground to Compiegne (under whom the defendant claimed), described as abutting east on a new road. It appeared that between a public road and the abutment in question there was a strip of land, the property of the grantor, but upon which no road existed at the time of the grant. The defendant pleaded a public right of way over this strip of land, and it was held that the grantor and those claiming under him were concluded or estopped from denying that there was a road or way over this piece of land; Mansfield, C.J., observing in the judgment delivered, “If you (the lessor) have told me in

your lease this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road." And Lawrence, J., observes, "If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?" Here the land is described as abutting upon "newly-made streets," and the case is an authority to shew that the grantor is estopped from denying that the strips of land, his property, are what he describes them to be, that is to say, "streets," which they cannot be unless there be a way through and along them." (emphasis mine)

15. As I said at the beginning, this is a case of interference with an easement by a third party and it is brought in nuisance. The road reserve falls on land that belongs to neither party. I consider the learning to be applicable nonetheless, since Sandra's defence appears to rest mainly on the absence of an express grant of or entitlement to a right of way in the conveyance. I consider *Espley v Wilkes* to establish that the description of the parcels including the bordering road reserve, is sufficient to grant a way over the reserve, or the land allocated as the road reserve, even if it was not fully developed at the time of the conveyance.

16. In any case, Sandra has given evidence that the relevant authorities would not have given final approvals for the development unless they were satisfied that certain infrastructure was in place. It is common knowledge that the provision of proper access is one such pre-requisite and I am entitled to infer that access as was shown on the plan formed, in part, the basis on which approvals for Mahabirville must have been granted. The Court is entitled in the circumstances to find a right of the several owners to pass and repass over that access way shown, certainly as between the owners and occupiers and developers. If I can infer that the planning authorities considered the access necessary for the development, it would seem to follow that the persons who occupy the approved lots must be able to claim an entitlement to enjoy the access way."

70. Nuisance is described in Halsbury Law as:

"(1) acts not warranted by law or omissions to discharge a legal duty, which obstruct or cause inconvenience or damage to the public in the exercise of rights common to all the Queen's subjects; (2) acts or omissions which have been designated or treated by statute as nuisances; and (3) acts or omissions

generally connected with the user or occupation of land which cause damage to another person in connection with that other's user of land or interference with the enjoyment of land or of some right connected with the land.”⁹

71. Nuisance is defined by Clerk & Lindsell¹⁰ as a condition or activity which unduly interferes with the use and enjoyment of land. The text goes on to explain that a private nuisance:

“may be as usually is caused by a person doing, on his own land, something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his act are not confined to his own land but extend to the land of his neighbour by (1) causing an encroachment on his neighbour's land, when it closely resembles trespass. (2) causing physical damage to his neighbour's land or building or works or vegetation upon it, or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land... in nuisance of the first two kinds, liability for the nuisance is established by proving the encroachment or the damage to the land as the case may be.”

72. In this claim the claimant has pleaded nuisance caused by the defendants during the road works leading to the alterations to the Road Reserve. The road works by the defendants, the claimant says has interfered with his use and enjoyment of his property. Whether or not the Road Reserve forms part of the defendants' parcel of land, in the court's opinion is irrelevant in determining the claimant's claim in nuisance. The defendants have admitted altering the Road Reserve in a number of ways. These include by constructing a wall on the eastern side. The defendants also admit that they graded into the Road Reserve such that the claimant is no longer able to walk off or drive off the Road Reserve and enter the secondary entrance. The secondary entrance which was formerly used as a driveway has now been converted to a walkway by the defendants. As a result the claimant avers that the works which have restricted the use and enjoyment of his premises has caused a nuisance.

⁹ Halsbury's Laws of England. 303

¹⁰ 17th Edition, Sweet & Maxwell 1995 at paragraph18-01

73. The defendants' witness Mr. Garth Baptiste, Director of Properties and Projects observed the Road Reserve at the time the defendants commenced works. Mr. Baptiste admitted in cross-examination that the grading of the Road Reserve has resulted in the claimant no longer being able to walk from the road reserve and enter his premises using the secondary entrance.
74. The site visit to view the properties belonging to the claimant and defendants and the related Road Reserve, made it clear that the secondary entrance cannot be accessed directly from the Road Reserve. All the evidence has established that before the defendants' excavation, the claimant was able to walk from the Road Reserve and enter the secondary entrance. In fact, the claimant was also able to drive from the Road Reserve and enter the secondary entrance. The secondary entrance appeared to be wide enough to facilitate the entry of vehicles into the designated space bounded by two concrete pillars.
75. The excavation works of the defendants has had the effect of eradicating this use enjoyed by the claimant.
76. Furthermore, the Road Reserve was not conveyed to the defendants upon the purchase of their property from their predecessors in title. Both the claimant and the defendants share the mutual predecessor Ms. Teelucksingh who envisioned the use of the Road Reserve as an access way to the lands that she owned. Therefore, the defendants were not entitled to modify the Road Reserve to, as they have done, impact the use and enjoyment of the claimant's property.
77. They are simply entitled to use the Road Reserve as an access to their property. By excavating the Road Reserve, they have usurped the benefit once enjoyed by the claimant and caused him a nuisance.

iv. The claimant's and defendants' entitlement to damages.

78. The distinction between special and general damages was stated by Kangaloo JA in CA146 of 2003 *Mario's Pizzeria Ltd -v- Hardeo Ramjit* as:

"the general rule is that general damages are such as the law will presume to be the direct natural or probable consequence of the action complained of while special damages are such as the law will not infer from the nature of the act. They do not follow the ordinary course. They are exceptional in their character and therefore, they must be claimed specifically and proved strictly."

79. The case of Civil Appeal No. 20 of 2002 *Anand Rampersad v Willies Ice-Cream Ltd* the court addressed the evidential burden imposed on a party claiming special damages. His Lordship Archie JA (as he then was) at page 8, stated:

"I wish to emphasise at the outset that the fact that a Defendant may not challenge the values of destroyed items given by the Plaintiff does not automatically entitle the Plaintiff to recover whatever is claimed. The rule is that the Plaintiff must prove his loss. The correct approach is as stated by Lord Goddard, CJ in *Bonham Carter v Hyde Park Hotel* [1948] 64 Law Times 177:

"Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage, it is not enough to write down the particulars, 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."

80. Further, at pages 10 and 11 of his judgment Archie JA also noted:

"None of the latter three cases should be understood as derogating in any way from the principle that the plaintiff must prove any special damages claimed... In this case the Plaintiff/Respondent is a commercial enterprise. It would have been reasonable to expect that some evidence of the value of the larger items could be found in its books and records...
... The Plaintiff/Respondent cannot simply present a list of prices; it must show the basis upon which the figures are established."

81. As aforementioned the claimant is entitled to general damages for the nuisance as a consequence of the grading works done on the Road Reserve by the defendant.
82. The claimant has not pleaded any special damages with respect to what it would cost to restore the Road Reserve back to its former state. The court is of the view that such damages were quantifiable and it was the claimant's duty to plead such as special damages and to prove those special damages.
83. In any event, the court is not of the view that demolishing the retaining wall and the other structures constructed by defendants is the appropriate remedy in these circumstances. The detriment in this case far outweighs the benefit that would be caused if the wall was demolished and the Road Reserve restored to its original grade. Additionally, the claimant is afforded vehicular access to his premises via the primary entrance. This access meets what was agreed between the claimant and Ms. Teelucksingh.
84. It appears that demolishing the retaining wall, without the benefit of an expert opinion to the contrary, will do more structural damage to the claimant's premises than it would do good.
85. The claimant also pleaded damages for cracks in the walls and broken windows and tiles in his home as a result of the excavation and the construction of a wall along the Road Reserve forming the western boundary of his land. In support of his claim he attached two documents, the first being an estimate to repair the tiles and walls to the downstairs of his home from Shah's Merchants and Enterprise Limited amounting to \$46,200.00; and the second being an invoice from Rangee Singh for the cost of labour, material and equipment to carry out re-tiling work to the upstairs of his home in the amount of \$13,600.00.

86. The defendants averred that the claimant failed to sufficiently plead its case for special damages.
87. The court is not satisfied on a balance of probabilities that the claimant has specifically proven that the damages he complained of were caused by the defendants' nuisance. There are no photographs, any written or oral testimony identifying any actual damage nor is there any evidence from the claimant's builder/contractor stating that the alleged damage to the various parts of the house was caused by the excavation carried out on the Road Reserve as distinct, for instance, from the usual wear and tear associated owing a home.
88. Mr. Baptiste and Dr. Tewarie visited the claimant's home on the 1st March 2017. At that visit the evidence illustrates that Mr. Baptiste and Dr. Tewarie were escorted around the claimant's property by the claimant. The claimant stated that damage was caused to his kitchen tiles as a result of the defendant's augured piling and construction works. The defendants' submitted that Mr. Baptiste offered to replace all the kitchen tiles in the first floor of the claimant's home although he was unable to authenticate the source of the damage to the tiles as they had been shoddily set to the ground.
89. Eventually the claimant refused the offers made to settle the dispute and pursued this claim instead. The claimant cannot now rely on that agreement.
90. As it relates to the defendants' counterclaim, they seek damages in the amount of \$217,115.00 for the claimant's intentional channelling of water unto the defendants' works causing extreme saturation to their works, under the torts of nuisance and/or trespass.

91. Clerk & Lindsell on Torts¹¹ defines trespass to land as any unjustifiable intrusion by one person upon the land in the possession of another. A trespass can occur if one places anything on or in the land in the possession of another such as: by driving a nail into his wall; placing rubbish against his wall; growing a creeper up his wall; or even propping a ladder against his wall. Intention to enter is pertinent. Therefore, there is no defence to the trespass even if it was by mistake. Once the physical act of entry was voluntary, the intention is established, even if the entrant intended the act to be rightful. With regard to negligent entry, where there is no intention to enter at all, this appears to still amount to trespass. In the case of *League Against Cruel Sports Ltd. -v- Scott* [1986] Q.B. 240 the master of hounds was held to be liable for the entry of his pack onto prohibited ground if knowing the risk of entry he negligently failed to prevent an entry.

92. With respect to damages for trespass¹², a plaintiff is entitled to nominal damages even if no damage or loss is caused. However, if loss or damage was caused then he is entitled to recover in respect of his loss according to the general principles of foreseeability. The measure of damages for nuisance is the same as that for tort generally. The damages are whatever loss results to the injured party as a natural consequence of the wrongful act of the defendant. Generally where negligence is necessary to establish liability in nuisance, then if the kind of damage is not reasonably foreseeable, that kind of damage is too remote a consequence¹³.

93. The defendants' evidence is that Mr. Baptiste pursuant to email communication with the sub-contractors was informed that due to water being intentionally channelled onto the works, the sub-contractors had to replace crushed stone material that became saturated because of the

¹¹ 17th Edition, Sweet & Maxwell 1995 at page 837 paragraphs 17-01, 17-02 and 17-06

¹² Halsbury's Laws of England, Fourth Edition, Volume 12, Butterworths 1975 at paragraph 1170 and 1138

¹³ Clerk & Lindsell 17th Edition, Sweet & Maxwell 1995 at paragraph 18-22

increased moisture. It resulted in waterlogged surfaces and damage to the subgrade below which had to be excavated and repaired before any consideration could have been made for asphalt paving. The documentary evidence illustrating the additional costs incurred by the defendants were a series of "Daywork Forms" from Seereeram Brothers Limited and receipts from the TTPS.

94. The claimant under cross-examination admitted that at the time the waterlogging of the defendants' works occurred, in or around the months of February to April 2017, there was not a lot of rain which resulted in dust problem. The claimant contended that the dust was often so bad that at times they could not even cook in his household during that time. The claimant's case is that he used a garden hose to clean his yard which he was accustomed doing. There was an increased need to wash his property as a result of the continued gathering of dust consequent to the defendants' works.

95. As it relates to the tort of trespass, the court is not satisfied on a balance of probabilities that the defendants have established the requisite intention of the claimant to waterlog their works. In fact the court is not satisfied on a balance of probabilities that any act or omission of the claimant caused the defendants project to become waterlogged. The court took note of the photograph annexed to the defendants' defence illustrating the claimant holding a hose. This as the claimant said was a regular garden hose. It appeared that the claimant was indeed washing his property. He was entitled to do especially given the nuisance that he suffered during the period of excavation works conducted by the defendants.

96. The defendants have also not satisfied the court that they owned or were they in possession of the Road Reserve and cannot therefore successfully bring a claim for the tort of trespass.

97. The defendants' counterclaim in nuisance also fails. The water that emanated from the claimant's land did not flow into the land of defendants so as to interfere with their use or enjoyment.

98. With respect to the police officers hired by the defendants while the repair works were being performed, there is no evidence to suggest that the claimant was hostile or aggressive towards the defendants' servants and/or agents. It appears that given the scope of works being conducted by the defendants they took a decision to have security on site. Whatever reason the defendants thought it was necessary to hire police to patrol on their site is a matter for them and the consequent cost must remain with them.

99. For these reasons, the defendants counterclaim against the claimant is dismissed.

Disposition:

100. There shall be judgment for the claimant on the claim for nuisance against the defendant. It is hereby ordered as follows:

- a. An injunction restraining the Defendants by themselves, servants and or agents or workmen from building and or blocking in anyway whatsoever the Road Reserve;
- b. A declaration that the Second Defendant's title to the lands which abut the Claimant's lands on the Northern and Eastern Boundary shall not interfere with the claimant's use of the said Road Reserve so as to cause a nuisance;
- c. The court will award general damages – a nominal figure for the nuisance. The nuisance as pleaded continued over a number of days. Therefore the nominal damages are quantified and

calculated per day for the period of the nuisance. Damages for nuisance as a result of works carried out by the Defendant, whether by itself servants and/or agents or workmen or howsoever otherwise in the excavation and construction of the said wall interfacing with the Road Reserve which forms the Western boundary of the Claimant's land:

- i. Court orders general damages in the sum of \$15,000.00 per day for the duration of the nuisance from the 24th February 2017 to 12th March 2017, a period of 17 days totalling \$255,000.00
- d. Interest on the general damages awarded, at the rate 2% from the 24th February 2017 to date of payment pursuant to Section 25 of the Supreme Court of Judicature Act, Chap 4:01;
- e. The claimant being partially successful on the claim the defendant shall pay $\frac{3}{4}$ of the claimant's Costs as prescribed in the sum of \$35,437.50

2) The defendants' counterclaim against the claimant is dismissed.

- a. The defendants shall pay the claimant's costs on the counter claim as prescribed on the value of the counter claim in the sum of \$41,552.25

.....
Justice Avason Quinlan-William

JRC: Romela Ramberran