

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 3 of 2003

BETWEEN:

LESTER BYRANT BIRD

Appellant

and

JOSEPH HORSFORD

Respondent

Before:

The Hon. Mr. Albert Redhead
The Hon. Mr. Adrian Saunders
The Hon. Mr. Brian Alleyne, S.C

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Miss Karen Campbell for the Appellant
The Respondent in person

2003 : September, 16
2004: January 26.

[1] **REDHEAD J.A.** This appeal involves a land dispute between Lester Bryant Bird, the appellant and Joseph Horsford, the respondent. This dispute to my mind was engendered by the personalities of the parties.

[2] I say this for the following reasons:

- (i) Having regard to the small area of land encroached upon I am firmly of the view that a compromise or solution could have been arrived at if there were different parties to the dispute.
- (ii) I am fortified in this view because during the hearing of this appeal a compromise solution was agreed upon. The matter was adjourned to the following day so that a draft agreement could be presented to the Court.

When the Court resumed the following day the respondent announced to the court that he was unable to arrive at an agreement with the appellant because he did not want the appellant's lawyer to draft any agreement for him. He preferred the court to make a decision.

- (iii) The respondent felt a sense of outrage because of the way he said he was treated by the appellant. The appellant is the Prime Minister of Antigua and Barbuda. The respondent is a citizen of Antigua and Barbuda.

[3] The Hon. Lester Bryant Bird and Mr. Joseph Horsford are adjoining land owners. The former owns parcel 6 and the latter parcel 2. The Hon. Lester Bryant Bird built a house on his parcel 6 and enclosed the house by a wall.

[4] The uncontroverted evidence of Mr. Peter Nurse is that he was in charge of the construction of the wall. There is conflicting evidence as to when the construction of the wall began and the when that construction came to an end. Mr. Denfield Browne testified that he was employed by Mr. Peter Nurse to build the wall. He began building the wall in November, 1989.

[5] In Cross examination he said that he left the fence unfinished in January, 1990. Mr. Nurse said that he supervised the construction of the wall which was completed in 1987.

[6] Mr. Elphert Winter, Licensed Land Surveyor, deposed by affidavit and said among other things, that the masonry wall appeared to be extremely old. The learned trial Judge poured scorn on the evidence of this witness.

[7] The learned trial judge preferred the testimony of Denfield Browne and the respondent. The respondent testified that sometime in 1988 he visited parcel 2 and observed a house under construction on parcel 6. There was no fencing at the time. In 1989 he again visited parcel 2 and saw a number of men working on parcel 6. The respondent testified that after

one of the hurricanes in 1990 he saw that parcel 6 was fenced. Against this factual background, it is clear that the respondent was unaware that the appellant had encroached upon his land until November 2000 when the Surveyor, Denfield Matthew, gave him a verbal report. However, the learned trial judge found as a fact that the appellant began construction of wall in or about 1989 and it was completed sometime in 1990.

[8] There was no serious challenge to this finding of fact before us on appeal. To my mind what was vigorously challenged were the findings of the learned trial judge on the issue of damages and more particularly the conclusions she arrived at in assessing damages and awarding aggravated damages.

[9] The learned trial judge took into consideration or rather drew the inference:

“that the wall was going to be built whether or not it was built on the land of the first named defendant [respondent] or not. It seems to US (sic) the first defendant went about the building of his wall and the enhancement of his property in a high handed manner and with a cynical, if not with a total disregard for the rights of the claimant. [the respondent].”

[10] The respondent was paid the sum of \$67,948.00 in damages by the Public Works Department in respect of denuding or excavating the respondent's land. That in itself was a trespass admitted by the Public Works Department. The learned trial Judge took into account the acts of trespass by Public Works Department in assessing aggravated damages. She ought not to have done so because the building of the wall was a separate act of trespass.

[11] The learned trial Judge also took into account the respondent's evidence in cross-examination that he was upset at the manner in which the first defendant dealt with the claim or more precisely failed to deal with his claim, “his blatant refusal to respond to his letters from some one who is not unlettered and can be deemed to be aware of general property rights, and accepted modes of conduct”.

[12] Learned Counsel for the appellant argued that the respondent had not established that the appellant had failed to respond to letters written by the respondent or that such failure was blatant. She pointed to paragraph 10 of the respondent's statement where the respondent

stated: "I wrote to the Director of Public Works and sent a copy to Mr. Bird as well as other persons involved".

[13] Learned Counsel stated that a copy was provided to the appellant as well as six other recipients. She contended that no reply could reasonably be expected from this letter which was merely carbon copied to the appellant.

[14] The learned trial judge took into consideration that:

"The claimant felt justly so in my view that the first-named defendant acted out of spite and malice and his feelings and dignity were hurt"

[15] It is true that the respondent said under cross examination, "I believed it [the wall] was put there by wickedness - spite by the first defendant." In my opinion the mere fact that the respondent alleges spite is no justification for finding spite as a fact unless it is borne out by the evidence. The learned trial Judge should therefore have examined the evidence in order to establish whether that belief is borne out by the evidence.

[16] The uncontroverted evidence is that Mr. Peter Nurse was in charge of building the wall. The learned trial judge found that the appellant did not "walk" the boundary with Mr. Peter Nurse.

[17] The surveyor, Mr. Denfield Matthew whose evidence the learned trial Judge preferred to the other surveyor said:

".....All the marks along the WESTERN and NORTHERN sides of parcel 2 were absent.....It is my opinion that it would be practically impossible for anyone to tell without the aid of sophisticated instruments , that any of the boundary marks around parcel 2, or any other parcel, was removed and then placed in a different spot, intentionally or otherwise"

[18] In view of the evidence, I find it very difficult for the learned trial judge to draw the conclusion that the appellant acted out of spite. This court is in as good a position as the learned trial judge when it comes to drawing inferences from questions of facts.

See **Watt v Thomas**¹

¹ [1949] AC. 484

Benmax v Austin Motor Company Ltd²;

Grenada Electricity Services Limited and Isaac Peters³;

In Isaac Peters, Sir Dennis Byron, C.J at paragraph 7 of the judgment explained the different approaches a Court of Appeal should adopt when dealing with a trial judge's finding of facts as opposed to drawing of inferences from facts. He ended by saying:

“.....the court may have to consider a situation where what is in dispute is the proper inference to be drawn from facts in other words the evaluation of facts. In such a case the appellate court is in as good a position to draw inferences or to evaluate as the trial judge.”

[19] In light of the foregoing the basis for awarding aggravated damages does not exist. In my judgment this was a matter where there may have been a mistake with respect to the boundary lines. It might have been an error or carelessness on the part of Mr. Nurse.

[20] The respondent has not established, in my view, that there was a willful and deliberate encroachment on his boundary.

[21] The Surveyor Mr. Matthew, said that the area of the defendant's land encroached upon by the appellant was 455 sq. ft. whereas the surveyor, Mr. Winter said that the area encroached upon by the appellant was 324.25 sq. ft. The learned trial judge preferred the figure given by Mr. Matthew although the respondent said under cross examination:

“My land, parcel 2, is 1.57A about 66,080 sq. ft. encroached is in the vicinity of 324 sq. ft.”

[22] What is a fair level of compensation for the respondent's land encroached upon by the appellant? Like the learned trial Judge, I embrace the principles enunciated by **Shelfor v City of London Electric Lighting Co.**⁴ and referred to by **Sir Thomas Bingham M.R. in Jaggard v Sawyer**⁵ -

[23] The respondent estimated that the value of his land after he had developed it would be approximately US \$35.00 per sq ft. Mr. Winter put a value E.C. \$20.00 per sq ft on the

² [1955] All ER 326

³ Grenada Civil Appeal No. 10 of 2002;

⁴ [1995] 1 Ch 287

⁵ [1995] 2 All ER 187

land, but generously recommended E.C.\$30.00 per sq. ft. having regard to the size. The learned trial judge took into consideration, rightly in my view, that the land was not developed. She also made the observation that the respondent was not asked neither did he volunteer what he thought the present value was neither did he volunteer what was the value in 1990.

[24] I am of the view that the higher estimated value as given by Mr. Winter should be used as the basis for calculating the cost of the encroached land. I also accept the learned trial judge's acceptance of the surveyor, Mr. Matthew's estimate of the amount of the respondent's land encroached upon by the appellant.

[25] The damages which the respondent is therefore entitled to is 455sq.ft.by \$30.00 or \$13,650.00.

[26] The judgment is varied to the extent that the respondent is awarded judgment in the sum of \$13,650.00 and prescribed costs in the court below in the sum of \$4,095.00 and this court in the sum of \$2,730.00.

Albert J. Redhead
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal