

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2024/0256 (formerly GDAHCV2013/0549)

BETWEEN:

RITA STRAKER – ELLIS

Claimant

and

MARYBELLA SAMUEL

Defendant

Before:

The Hon. Justice Raulston L.A Glasgow

High Court Judge

Appearances:

Ms. Pauline Hannibal for the Claimant

Mr. Michael Lindo for the Defendant

2024: July 25th

REASONS FOR DECISION

Background

[1] The claimant, Rita Straker – Ellis (Ms. Straker – Ellis) and the defendant, Marybella Samuel (Ms. Samuel) both reside in the Westerhall Farm Allotments in the parish of Saint David. Ms. Straker – Ellis claims to own lot 48, and claims that Ms. Samuel owns lot 49. Ms. Straker - Ellis' complaint stems from events that occurred after she constructed a concrete fence on her property in April 2008. Ms. Straker – Ellis claims that she constructed a concrete fence with iron and plastic pickets on the side of her property, and Ms. Samuel threatened to

break it down. Sometime thereafter, Ms. Straker – Ellis alleges that Ms. Samuel trespassed on to her property and broke down the fence, and dug up the allowed road, leaving heaps of dirt on her property and damaging several of her fruit and ornamental trees.

[2] Ms. Straker – Ellis claims that she had to pay \$350.00 to have the dirt removed, and that Ms. Samuel moved her boundary marks, causing her to pay \$750.00 to a surveyor to re – establish the boundary marks. As a result of Ms. Samuel's actions, Ms. Straker Ellis contends that she has suffered loss and damage and claims a declaration about the ownership of the allowed road, damages for trespass, compensation in the sum of \$62, 721.00 for the cost to rebuild the fence, the surveyor's fees and the cost of removing the dirt from her property. She also claims interest and costs.

[3] Ms. Samuel filed a defence and counterclaim, indicating that Ms. Straker – Ellis wrongly erected her fence on the allowed road, which provides the only access to her property. Ms. Samuel also contends that Ms. Straker – Ellis' fence was a plastic picket fence attached to a concrete base, and in the presence of the police and Government officials, the fence was removed by being carefully lifted up and placed inside Ms. Straker – Ellis' property. Ms. Samuel denies that any damage was caused to Ms. Straker – Ellis' fence or land, that mud was deposited on Ms. Straker – Ellis' property or that any boundary marks were removed or displaced. She avers that the mud was removed when the excavation and clearing of her access road was done.

[4] Ms. Samuel denies that Ms. Straker – Ellis suffered any loss or damage and contends that if she did, such loss or damage was due to Ms. Straker – Ellis' own unlawful actions of deliberately placing her fence on Ms. Samuel's access road. Further, Ms. Samuel counters that Ms. Straker – Ellis' alleged cost to rebuild her fence is vastly inflated and false. Ms. Samuel accordingly denies that Ms. Straker – Ellis is entitled to any of the remedies sought. Ms. Samuel also counterclaims that Ms. Straker – Ellis illegally erected her fence on Ms. Samuel's access road, and erected galvanised sheets on part of Ms. Samuel's property, causing her to suffer loss. Ms. Samuel seeks a declaration that she is

entitled to use her allowed road, an order for removal of Ms. Straker – Ellis' fence and galvanised sheets, damages for trespass and costs.

[5] In Ms. Straker – Ellis' Reply and Defence to Ms. Samuel's Defence and Counterclaim, she claims that her fence was not erected on the allowed road, and that the fence was reinforced on the inside with steel rods, with the pickets attached to a concrete wall. Ms. Straker – Ellis alleges that the road was dug up after Ms. Samuel dismantled her fence, and it was at this time that Ms. Samuel caused large quantities of mud and debris to be deposited on to her property. She complains that Ms. Samuel caused her fence to be broken by using heavy machinery and that the fence could not be removed without substantial damage to the concrete wall and the pickets. Ms. Straker – Ellis denies trespassing on Ms. Samuel's property and Ms. Samuel's counterclaim in its entirety.

ISSUE FOR THE COURT'S DETERMINATION

[6] During the pendency of these proceedings, the parties commissioned a survey by order of this court to ascertain whether Ms. Straker – Ellis was encroaching on the allowed road with her fence. The survey report of Mr. David Abraham confirms that Ms. Straker – Ellis had in fact encroached by the placement of her wall or fence on the allowed road. Given that Ms. Samuel admitted that she had Ms. Straker – Ellis' fence removed, the court asked counsel for the parties to file written submissions on the following question:

Whether Ms. Samuel was entitled in law to remove Ms. Straker – Ellis' fence further to Ms. Straker – Ellis' trespass?

[7] Counsel for Ms. Straker – Ellis contends that Ms. Samuel's actions were not justified and that she was not entitled in law to remove Ms. Straker – Ellis' fence. Counsel for Ms. Samuel contends the opposite, submitting that the specific circumstances of the case and law entitled Ms. Samuel to remove Ms. Straker – Ellis' fence. Each of these contentions will be examined in turn.

DISCUSSION & ANALYSIS

[8] Both parties' claims are in the tort of trespass. In *Elements of Land Law*¹ by Kevin Gray and Susan Francis Gray the fundamental nature of trespass is explained:

“The roots of trespass to realty lie in the medieval action of trespass *quare clausum fregit*. The inviolability of land from the physical incursion of strangers is a principle deeply grounded in the common law, as fundamental to the concept of property as it is to basic notions of individual freedoms and personal privacy. Laws relating to trespass have been described as an important feature of any government dedicated to the rule of law. At the common law therefore, it is virtually axiomatic that any entry upon land unsupported by consent or other authorization or justification is a trespass. The right to exclude unwanted strangers has been described as one of the essential sticks in the bundle of property rights and it is the fundamental right of the owner of land to object to trespass. It is in this area that property and privacy concerns most obviously coalesce and the common law tradition has long endorsed the right of the citizen to the control of and enjoyment of his own property, including the right to determine who shall and who shall not be permitted to invade it.”

[9] There are therefore very limited circumstances where the law will regard a trespass as justifiable. In one of the few defences available, the law provides that the entry onto another person's land which amounts to a trespass may be justified in circumstances where there is an immediate and obvious danger, such that a reasonable person would conclude that there was no alternative to the act of trespass². This is known as the defence of necessity, or self – help/ self-redress as it was described historically.

¹ (5th edn. at paragraph 10.1.2).

² Halsbury's Laws of England, Tort (Volume 97A (2021) at 184.

[10] The entry on to the property and acts performed must be reasonably necessary for the preservation of life or the property of the person entering the property, and if entry is made, the acts must be done in a reasonable manner³. It was said that this summary method of redressing a grievance by the act of an injured party should be regarded with great jealousy and authorized only in cases of particular emergency, requiring a more speedy remedy than can be had by the ordinary proceedings of law⁴.

[11] This defence is usually engaged where a defendant destroys property belonging to another. The case law states that two elements must be satisfied to prove this defence – there must be a real, present or imminent danger⁵, and the decision to destroy the property must have been either the only practical means of halting the danger, or an objectively reasonable response to the danger in all the circumstances apparent at the time the decision was made⁶. The onus of proving these two elements is on the defendant⁷, and the reasonableness of the actions taken must be considered in light of the proportionality to harm, and the availability of alternative action. In **McPhail v Persons, Names Unknown**⁸, Lord Denning MR, while addressing the issues of squatters and the remedy of self-help to obtain possession cautioned:

“Although the law thus enables the owner to take the remedy into his own hand that is not a course that is encouraged. In a civilised society, the courts should themselves provide a remedy which is speedy and effective and this make self – help unnecessary. The courts of the common law have done this for centuries.”

[12] Counsel for Ms. Straker – Ellis accepts that the survey report of Mr. Abraham shows that there was an encroachment, but submits that it was a miniscule encroachment which only partially impeded Ms. Samuel’s access to the allowed

³ Halsbury’s Laws of England, Tort (Volume 97A (2021) at 181.

⁴ *Moffett v Brewer* (1848) *Iowa* 1 *Greene* 348 at 359 per *Greene J.*

⁵ *Dewey v White* (1827) 173 ER 1079.

⁶ *Esso v Southport Corp* [1956] AC 218.

⁷ *Cresswell v Sirl* [1948] 1 KB 241.

⁸ [1973] Ch 447.

road. Counsel for Ms. Straker – Ellis also relies on the cases of **Roland Frank et al v Henry Browne**⁹ and **Maria Thorne – Bramble v Lauriston “Yankee” Primus**¹⁰ to make the point that even if Ms. Samuel had the right to use the road which Ms. Straker – Ellis’ fence may have encroached on, the use of the remedy of self – help is limited and not applicable to this case, as Ms. Straker – Ellis’ fence was neither a nuisance to Ms. Samuel nor impeded her rights in any way.

[13] Ms. Samuel’s counsel argues, in reply, that she never purported to have an unqualified right to remove Ms. Straker – Ellis’ fence, but when Ms. Straker – Ellis was informed of her encroachment and asked to remove the fence, she refused to do so. Counsel further explained that Ms. Samuel needed to clear the access road of bush, rubble and rubbish to use her only way to get to and from her property.

[14] Counsel accepts that the remedy of self – help requires that persons act with restraint and reasonableness, and professes that Ms. Samuel acted reasonably and with restraint by requesting police officers to be present when she was clearing her access road. Counsel relies on **Lemmon v Webb**¹¹ and **Chamberlain v Lindon**¹² as examples of cases where self-help was upheld. Counsel also makes reference to section 63(d) of the Criminal Code ¹³ to make the point that the criminal law still upholds the right to exercise self – help to overcome an obstruction to a legal right.

[15] With respect to counsel for Ms. Straker – Ellis, it is trite that a trespass however miniscule occurs where a person wrongfully sets foot on, drives over or places/fixes anything on the land of another. The infinitesimal nature of the encroachment may only be relevant to the issue of damages, but the encroachment still amounts to an actionable trespass. Counsel for Ms. Samuel’s reliance on the cases of **Lemon** and **Chamberlain** equally misses the importance of the cause of action pleaded by Ms. Straker – Ellis and the

⁹ SVGHCV1999/0457.

¹⁰ SVGHCV2002/0162.

¹¹ [1895] AC 1.

¹² [1998] 1 WLR 1252.

¹³ Cap 72 A of the 2010 Revised Edition of the Laws of Grenada.

counterclaim filed by Ms. Samuel. Ms. Samuel's defence and counterclaim is for trespass and not nuisance, or criminal damage to property. It has not been alleged that the fence created a nuisance to Ms. Samuel, in which case **Lemmon** may have been of assistance. **Chamberlain** speaks to the defence being upheld in the context of criminal damage to property and is therefore inapplicable to the case at bar due to the different tests adopted by the criminal courts¹⁴.

[16] Though the tort of nuisance and trespass are similar, they are two separate and distinct torts as to defences and available remedies. The law does however recognize that abatement of a nuisance is similar to the defence of necessity. **Burton v Winters and another**¹⁵ was an action for trespass and nuisance, involving a boundary dispute where Mrs. Burton sought a mandatory injunction and other declaratory relief, arguing that her neighbours, Mr. and Mr. Winters remove a garage constructed by the Winters' predecessors in title. Mrs. Burton claimed that the garage substantially encroached on her land. At trial, the judge found that the garage was in fact over the boundary and gave a declaration as to the boundary line, but dismissed the claim for injunctive relief and adjourned the claim for damages, so that a valuation could be obtained as to the diminution in value of Mrs. Burton's property caused by the encroachment.

[17] Mrs. Burton thereafter started building a brick wall in front of the garage on the Winters' boundary line, and the learned judge committed her to prison, but suspended the sentence on terms that she remove the wall. Mrs. Burton rebuilt the wall, the suspended sentence was activated and Mrs. Burton was committed to prison for contempt. Mrs. Burton went to prison on two additional occasions for contempt, and she appealed. The appeal court queried whether inter alia Mrs. Burton was entitled to exercise a right of abatement or self-redress in relation to the garage wall.

Lloyd LJ reasoned:

¹⁴ [1998] 1 WLR 1252 at paragraphs 49 – 51.

¹⁵ [1993] 3 ALL ER 847.

“there is a common law right of self – redress for trespass by encroachment which was regarded as an ancient remedy in the time of Bracton. It is similar to the common law right of abatement in the case of nuisance. But at an early stage of our history, the right of abatement was supplemented by the assize of nuisance or “good permittat prosternere.” The action lay to have the nuisance abated by the defendants and to recover damages: see *Baten’s Case (1610) 9 Co Rep 53b*. If the plaintiff abated the nuisance himself, he lost his right to recover damages...

Every since the assize of nuisance became available, the courts have confined the remedy by way of self-redress to simple cases such as an overhanging branch, or an encroaching root, which would not justify the expense of legal proceedings, and urgent cases which require an immediate remedy.”

In the circumstances of this case, the court reasoned that the garage wall was built in 1975 and this case was not an appropriate one for self – redress as there was no emergency, and there were difficult questions of law and fact to be considered. The court also considered that the remedy by way of self-redress, if it had resulted in the demolition of the garage wall, would have been out of all proportion to the damage suffered by Mrs. Burton. In this instance, the court dismissed the appeal, but allowed Mrs. Burton to enforce her claim for damages for diminution in value of her property if she wished.

[18]As the claims are in trespass, it is for Ms. Samuel to convince the court that there was an immediate danger, and that her actions were reasonable and proportional to invoke the defence of self – help. From the evidence in this claim filed by Ms. Samuel and her witness Mr. Dexter Paul, though untested, I have not been able to glean that there was immediate danger to Ms. Samuel or her property, or that her actions were reasonable in light of the alternatives. Even as Ms. Straker – Ellis’ fence was encroaching on the allowed road, the proper avenue was to approach the authorities or the courts for a resolution of the issue.

[19] Ms. Samuel does depose in her evidence that she made contact with the authorities, but has provided no proof of this assertion. There was however the equally available alternative of court action. When presented with Ms. Straker – Ellis’ illegality, Ms. Samuel equally did illegal acts. If such actions by Ms. Samuel are allowed in circumstances where there is no immediate or present danger, society would descend into anarchy and chaos. This is why the defence is so strictly regarded, as borrowing from Lord Denning – actions of self-help without justification do not belong in civilised societies.

[20] Given the above findings, I find that Ms. Straker – Ellis illegally trespassed on Ms. Samuel’s land when she constructed her fence thereon. It is equally apparent that Ms. Samuel illegally removed Ms. Straker – Ellis’ fence without legal justification. The question of damages for both parties therefore remains. The parties did not present any submissions on damages. The parties will therefore attend a hearing on damages on a date to be notified to them by the court. They are to file all witness statements, submissions and authorities in support of their contentions on damages at least 21 days before the hearing date for the assessment of damages. The parties may also file a consent order if they arrive at consensus on the question of damages before the further hearing date.

Raulston L.A. Glasgow
High Court Judge

By the Court

Registrar