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Privy Council Appeal No.43 of 2004

Joseph W Horsford

Appellant

v.

Lester B Bird and others

Respondent

FROM

**THE COURT OF APPEAL OF
ANTIGUA AND BARBUDA**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 17th January 2006

Present at the hearing:-

Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Mance

*[Delivered by **Lord Scott of Foscote**]*

This case began life as a boundary dispute but, by the time the litigation had wound its way through the courts of Antigua and Barbuda and thence to this Board, the issue between the parties was the approach that should be adopted to quantification of damages. Before the Board there was no longer any substantial dispute about the line of the boundary. It is now accepted that the boundary wall and fence, constructed for the respondent by contractors, did encroach upon the appellant's plot of land and, in effect, added some 455 square feet of the appellant's land to the respondent's garden. The appellant's claim for the degradation to his land that had been caused by the respondent's contractors and their machinery

has been settled by a payment by the contractors of a sum of EC \$67,948. The appellant's claim for a mandatory injunction for the removal of the offending wall and fence was refused by Joseph-Olivetti J, the trial judge, and was not renewed on appeal. Joseph-Olivetti J instead ordered the respondent to pay damages in the sum of EC \$75,000. It is clear from her judgment that this sum included a substantial, although unspecified, amount in respect of aggravated damages. She said, at para 36, that the respondent:

“went about the building of his wall and the enhancement of his property in a high-handed manner and with a cynical if not total disregard for the rights of the claimant.” (p.89 of the Record).

The respondent appealed against the quantum of that award. The Court of Appeal took the view that no case for aggravated damages had been established (see paras 19-20) and reduced the damages to \$13,650, i.e. 455 square feet of land at \$30 per square foot (para 25).

The appellant has contended before the Board that the award made by Joseph-Olivetti J should be restored. Before the Board, as in the courts below, he has appeared in person. He conducted his appeal rationally and temperately and, assisted by the fair and helpful manner in which Mr Peter Knox, the respondent's counsel, put the respondent's case, the appellant has, in their Lordships' opinion, lost nothing by his lack of legal representation.

The facts

It is not necessary for the facts leading up to the appellant's commencement of proceedings on 20 November 2000 to be set out in any detail. But an outline is necessary in order to explain their Lordships' conclusion that although, in agreement with the Court of Appeal, no award of aggravated damages should be made, nonetheless an award limited to the bare value of the expropriated land does not represent due compensation to the appellant.

The appellant's Parcel 2 and the respondent's Parcel 6 were adjoining parcels to the north and south of each other in the Blue Waters area of Antigua. Pre 1986 both were undeveloped. But in or about 1986 the respondent decided to have a house built on his parcel. The house to be built was intended for his own occupation and was to have, among other facilities no doubt, a swimming pool. Boundary fencing was to be erected around the parcel.

The building works began. In the course of the building work the respondent's contractors and their machines trespassed on and damaged the surface of the appellant's still undeveloped land. A swimming pool was constructed not far from the boundary between Parcel 2 and Parcel 6 and a boundary wall and fencing were erected in order to create a physical boundary between the two parcels. The distance between the swimming pool and the new boundary wall was sufficient to allow space for a passageway wide enough to accommodate a vehicle and also for a garden area between the passageway and the wall. The respondent was at the time Prime Minister of Antigua and Barbuda and it seems likely that security considerations, prompted by his prominent public role, played some part in determining the nature of the boundary fencing.

The appellant gave evidence that in 1989 he visited his parcel and saw men working on the swimming pool on the respondent's parcel. He said no fencing had yet been erected. He said that in 1990 when he visited his parcel he observed that the respondent's parcel had been fenced but that it was not apparent that the new boundary wall encroached on to his (the appellant's) land. However in June 2000 he visited his parcel again and found that it had been trespassed upon by the respondent's contractors and its surface degraded. He said he protested and wrote letters to the respondent but to no avail. In his witness statement he said "They treated me with utter disregard and ignored me. They continued their trespass." By this time, June 2000, the boundary wall had been in place for some months and the evidence by the appellant to which I have referred must have related to the degradation of his land by the contractors rather than to the encroachment on to his land by the boundary wall.

Following his experiences on visiting the site in June 2000 the appellant took steps to have his parcel surveyed by a licensed surveyor, a Mr Matthew. Mr Matthew's report disclosed that the new boundary wall and fencing encroached on to the appellant's land. So the appellant commenced proceedings on 20 November 2000 against the respondent and against the contractors.

The litigation

It appears to have been accepted by the respondent at an early stage in the litigation that the wall did encroach on to the appellant's land to some extent. The exact amount of the encroachment was in issue but the respondent's main defence was a limitation defence. It was contended that the work on the new boundary wall had been completed before 20 November 1988 and that the appellant's title to the land encroached upon

had therefore been extinguished by twelve years adverse possession (see s.2 of the Real Property Limitation Act 1883 (cap 367)). But Joseph-Olivetti J accepted the evidence of the appellant and that of the builder of the wall that work on the wall had not been commenced until 1989 and had not been completed until 1990. So the limitation defence failed and, upon the rejection of the mandatory injunction claim, the issue became one of quantum of damages.

Joseph-Olivetti J, in deciding the amount of damages to be awarded, took into account the following matters:

(i) The value of the land encroached upon:

She took into account that the appellant's land was undeveloped. The respondent's expert witness, a Mr Winter, had estimated the appellant's undeveloped land to be worth EC \$20 per sq.ft. but had "generously recommended" EC\$30 per sq.ft. in view of the small amount of land encroached upon. (para.30 of Olivetti J's judgment).

(ii) The value of the land to the respondent.

Joseph-Olivetti J referred, at para 32, to:

"... the value which [the respondent] can be said to have indirectly attributed to the land by the use to which he has put it. The evidence ... is that between the fence and the swimming pool there is a small garden and a passage wide enough to be traversed by a regular size vehicle. In fact [the strip of land encroached upon] has made possible a drive around [the] pool. Great emphasis seems to have been placed on the aesthetics given the use. No doubt these amenities have enhanced the value of Parcel 6" (para 32).

(iii) The manner in which respondent had dealt with the appellant's claim.

I have already referred (in para.1 above) to the judge's comments about the respondent's behaviour. But the evidence on which the comments were based related to what had happened in June 2000. There appears to have been little, if any, evidence of high-handedness at the earlier time when the boundary wall was being built. The judge then went on:

"I note also that in the Defence [the respondent] did not even admit to knowing that Parcel 2 was owned by the Claimant, something the Court finds hard to credit as his legal advisers could with little effort have found this out. The Court also

takes into account the wholly unjustified attempt by [the respondent] to claim that the damages paid in respect of the wanton destruction of the claimant's land in 2000 included damages for the land encroached on when the documentary evidence clearly established it did not. The Court award of damages will therefore reflect an element of aggravated damages." (para.36).

As I have said, the award of damages was EC \$75,000 but there was no apportionment of that figure between the three matters referred to that the judge had taken into account.

The judgment in the Court of Appeal given by Redhead JA was concurred in by Saunders and Alleyne JJA. Redhead JA said, at paras 19-20, that "the basis for awarding aggravated damages does not exist" because the respondent had not established "that there was a wilful and deliberate encroachment on his boundary". Redhead JA then assessed damages simply on the basis of the value of the appellant's undeveloped land. He took Mr Winter's EC \$30 per sq.ft. as the appropriate value and, on the footing that 455 sq.ft. was the area of land encroached upon, awarded damages of EC \$13,650. There was no mention or discussion of the extent to which the encroached upon piece of land had enhanced the amenities of the respondent's new house. This was the second of the matters that Joseph-Olivetti J had taken into account.

And neither Joseph-Olivetti J nor the Court of Appeal took into account that ever since 1990 when the wall was completed the respondent had had the exclusive use and benefit of the encroached upon piece of the appellant's land. The refusal by Joseph-Olivetti J of the mandatory injunction and her decision to award damages in lieu had the consequence of, in effect, expropriating that piece of land from the appellant and enabling it to become thenceforth, *de jure* as well as *de facto*, part of the respondent's garden. But this expropriation could not in their Lordships' opinion be regarded as having a retrospective effect.

Conclusions

Their Lordships are not disposed to question the basis on which the value of the piece of land to the appellant was assessed by Redhead JA. It follows that the starting point for the calculation of the damages to be awarded in lieu of the injunction must be the EC \$13,650 ie. 455 sq. feet at EC \$30 per sq.ft. But Joseph-Olivetti J was, in their Lordships' view, correct in taking into account also the extent to which the encroached upon piece of land had enhanced the amenities of the respondent's house.

Without it either the passageway would not have been wide enough to accommodate a vehicle or the garden area would have had to be reduced in size. Moreover, the building of the wall along the north and east sides of the respondent's parcel had cost him approximately EC \$140,000 (see para.25 of Joseph-Olivetti J's judgment), an expenditure that would have been very substantially increased if the part of the wall forming the boundary with the appellant's parcel had had to be removed and rebuilt along the correct boundary line. These considerations demonstrate that the respondent, by building his wall on the appellant's land and thereby incorporating a piece of the appellant's land into his garden, had given the expropriated land a value to himself considerably in excess of its value simply as 455 sq.ft. of an undeveloped plot. In their Lordships' opinion this was a value proper to have been taken into account in assessing the damages to be paid in lieu of a mandatory injunction for the removal of the wall.

In *Wrotham Park Estate Co Ltd. v Parkside Homes Ltd* [1974] 1 WLR 798, damages in lieu of an injunction to remove a number of dwelling houses which had been built in breach of a restrictive covenant were assessed as a proportion of the profit the developer/defendant had made out of the development. Brightman J (as he then was) asked himself what sum the plaintiff might reasonably have sought from the developer as his price for waiving the restrictive covenants. In the present case the comparable question would have been how much the appellant could reasonably have sought from the respondent in November 2000 as the price of the appellant's land that the respondent had incorporated into his garden. On the basis that the value of the piece of land as part of an undeveloped plot was EC \$13,650 their Lordships think that its value to the respondent as part of the garden of his new house would have been at least double that figure. Their Lordships would therefore substitute the sum of EC \$27,300 for the sum of EC \$13,650 as the value of the land.

Their Lordships agree with Redhead JA that this was not a case in which a claim for aggravated damages for the building of the wall along the incorrect line could succeed. It is well established that trespass to land accompanied by high-handed, insulting or oppressive conduct may warrant an award of aggravated damages. The award in such a case is to compensate the plaintiff for the distress and injury to his feelings caused by the conduct in question (see Halsbury's Laws – 4th Ed., Vol 12(1), Para.1114). But there was no evidence of any such conduct associated with the building of the wall on the wrong line (see the comments of Redhead JA in paras. 16 to 18 of his judgment). Joseph-Olivetti J in awarding aggravated damages took into account such matters as the statement in the respondent's Defence that he did not know plot 2 was

owned by the appellant, the unsustainable plea that the damages paid to the appellant by the contractors had included damages for the encroachment and the circumstance that the respondent had not answered letters written to him by the appellant. Their Lordships agree with Redhead JA that none of these matters, which have their counterpart in a great deal of litigation, justify an award of aggravated damages. They might, at most, be matters relevant to costs.

But, in their Lordships' view, the appellant has a clear claim to damages in the form of mesne profits for the use made of his land by the respondent. Any such claim for a period more than six years before the commencement of proceedings would be statute barred, so the claim can only lie for the period starting 20 November 1994. The period for which mesne profits could be claimed terminated in their Lordships' view when Joseph-Olivetti J on 21 February 2003 gave judgment refusing the mandatory injunction and making an award of damages in lieu. So the use by the respondent of the appellant's land for which the appellant is entitled to compensation continued for 8 years and 3 months. The quantum of the claim should, in their Lordships' opinion, be assessed on a yearly basis as a percentage of the capital value of the piece of land in question. The capital value, in their Lordships' opinion, should be taken to be EC \$27,300 and their Lordships think that an annual rate of 7.5 per cent of that capital value would represent reasonable mesne profits. That rate would lead to an annual mesne profits figure of EC \$2,047.50. Eight years at that rate would produce \$16,380. The figure for three months would be \$512. The total figure would be \$16,892.

Accordingly, in their Lordships' opinion, the appellant is entitled to damages in lieu of an injunction of \$27,300 and damages for mesne profits up to 21 February 2003, the date of Joseph-Olivetti J's order, of \$16,892, a total of EC \$44,192. Their Lordships will humbly advise Her Majesty that this appeal should be allowed accordingly. Costs in the lower courts will be the appellant's costs at the prescribed rate. The respondent must pay the costs of this appeal.