

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE**

Claim No. BVIHCV 2013/0024

BETWEEN:

ANGELA ISAAC

Claimant

AND

VERMALENE SKYERS FAHIE (also known as SANDRA FAHIE)

**In her personal capacity and as Personal Representative of the Estate of Realdo Fahie, deceased
Defendant**

Appearances: Ms. Angela Isaac, Claimant in Person
Mr. David Penn, Counsel for the Defendant

**2020: January 29th – 30th
2021: August 24th**

JUDGMENT

- [1] **ELLIS J:** The Claimant herein seeks relief as against the Defendant, (in her personal capacity and as personal representative of the estate of Realdo Fahie, (deceased) who she contends (either personally or through her servants or agents) wrongfully entered upon her property registered as Block 3338B Parcel 274 ("the Claimant's Land") and excavated or otherwise removed trees, rocks and soil including topsoil. The Claimant also alleges that the Defendant and/or her servants or agents took soil including topsoil and rocks supposedly excavated from the Claimant's Land and used to it backfill the Defendant's retaining wall or otherwise utilized or discarded the same. The Claimant therefore contends that she suffered loss and damage and she seeks the following remedies:
- a. Damages for trespass and damage to the Claimant's Land;
 - b. Special damages;
 - c. Aggravated damages;

- d. Interest;
- e. Costs;
- f. Such further or other reasonable relief as this Honorable Court deems fit.

[2] By way of counterclaim, the Defendant who is the registered proprietor of land situated at Long Look Section Block 3338B Parcel 273 (“the Defendant’s Land”) seeks damages for the cost and expenses incurred by her in having to construct a 2-3-foot retaining wall to prevent the soil, rocks and dirt from the Claimant’s Land continually running down onto the Defendant’s driveway. The Defendant also contends that she incurred costs and expense of hiring a heavy equipment to remove the large quantity of the Defendant’s landfill which would continually running down onto the Defendant’s driveway.

THE PARTIES’ CASES

[3] During the course of the trial, the Claimant represented that a number of her witnesses were unavailable and would not attend the trial to be cross examined under oath. As a result, the Court struck out the witness statements of the following witnesses: Glenroy Henry; Dana George; Percy Fahie; Cliff Williams; Wilson Smith and Asburt John. The Claimant’s case therefore proceeded with the following witnesses: Burton Chalwell, Dion Soult, Loius Potter and of course the Claimant.

[4] The Defendant relied on her evidence as well as the evidence of the following witnesses: Lisberth Wheatley, Daniel Jeffery and Eugene Hodge.

[5] Both Parcels 274 and 273 had architectural plans approved 2006 by the planning and building authorities of Government of the British Virgin Islands, for the construction of residential homes. According to the Claimant, Parcel 274’s approved plans show a 12 foot retainer wall situated alongside the boundary lines 3C4684 and 3C4701. The 12 foot retainer wall is for specific structural support of the intended car parking for five vehicles and foundation support for the intended residential home. Parcel 273 approved plans show an intended car parking for five vehicles situated on the left side of the intended residential home. However, the car park is not bounded to government boundary lines 3C4684 and 3C4701, but is situated on annex Parcel 276 on boundary lines 3C4680 and 3C4682.

- [6] The Claimant contends that the car park constructed on Parcel 273 by the Defendant was built in contravention to the approved drawings authorized by the building and planning authorities and public works department. Moreover, the Claimant contends that on diverse dates in or around February, March and/or May 2007, or sometime thereafter, the Defendant, by herself or by her servants or agents negligently and wrongfully entered or encroached or trespassed unto her property. The Claimant contends that she and her witnesses observed agents/servants of the Defendant carrying out excavation works while they were operating a heavy equipment machine (excavator) which was positioned on the Defendant's land as it cut away and excavated a road through the Claimant's land removing soil, rocks and vegetation in order to make an access road to the Defendant's residential home.
- [7] Witnesses for the Claimant also say that sometime between February, March and/or May 2007, or sometime thereafter, they witnessed servants or agents of the Defendant, remove the ropes tied on shared boundaries, encroach/intruded/trespass over and unto the Claimant's Land, and cutting away and excavating a road intended to access the construction site on the Defendant's Land. They state further, that rocks, soil and vegetation were removed and taken away from the Claimant's Land.
- [8] As a result, the Claimant contends piece of her Property has become drastically eroded since the intrusion in 2007. She asserts that her experts found that the intended car park and residential building is at risk of insufficient structural support as the top embankment of the Claimant's Land has suffered extensive erosion over the years such that the approved 12-foot retainer wall intended for the structural support of the intended car park and building foundation of the residential home of the Claimant is now pointless. Instead, what is required to sustain and provide structural support and stability for the intended residential home and car park on the Claimant's Land and as well provide security against further erosion, slippage and landslides over and beyond the shared boundaries separating both properties (Parcels 274 and 273), is a 20-30 feet structural engineered retainer wall which has necessitated amendments to her plans and seeking a further or fresh planning and building permission.
- [9] The Claimant also contends that expert as-built survey plans and/or reports conducted in 2007, 2013 and 2016 prove and confirm that her property was encroached upon and detail the extent of damage. The Claimant referenced in particular, the as-built survey plans conducted in 2007 and 2013 by

licensed surveyor, Mr. Burton Chalwell of Chalwell Surveying Services Ltd. which she says shows the extent of damage caused by intrusion/encroachment upon her land by the Defendant. The Claimant provided the Court with photographic evidence which she contends shows the excavation of a road cut and giving access to and from Parcel 273 and this road was encroached in and onto Parcel 274 by some approximate 15-feet.

- [10] The Claimant also relies on the valuation report dated September 2013 and prepared by the firm, BCQS International, which provided a valuation of the piece of land which is alleged to have been disturbed by purported encroachment. Clause 2.4 of the BCQS report indicates that the Claimant's Land was inspected, and photographs taken on 18th September, 2013. The report notes that the adjacent owner carried out reduced level excavation in order to create a suitable driveway to the adjacent residence located on the Defendant's land and confirms an encroachment upon the Claimant's Land as a result of an access road cut for the use of a driveway on the Defendant's Land.
- [11] At clause 4.2.5 of the BCQS report, the valuer opined that the market value of the piece of disturbed/encroached land measuring 0.0006 acres or 261 square feet as referred to in the previous As-built Survey conducted by Chalwell Surveying Services Ltd. is US\$4,500.00 as at September 2013. The report provided photographs of the referenced disturbed, excavated or encroached land owned by the Claimant.
- [12] The Claimant contends that the Defendant knew or ought to have known the boundaries of her property. She further contends that in her defence and counterclaim the Defendant admitted that she encroached/intruded upon her land in 2007. She also asserts that the Defendant was negligent in failing to adequately supervise her workmen; failing to carry out works within her own boundaries and excavating Claimant's land without express consent.
- [13] By reason of the foregoing, the Claimant contends that she has suffered loss and damage to her property. She asserts that she was prevented from continuing any aspect of her building development on her land and that her architectural approved plans have to be revised and amended, costs for new drawings apply and these drawings have to be resubmitted to and approved by the Government's Planning and Building Authorities. The Claimant further asserts that the portion of her

property has been undermined and now requires support. The increased costs include the labor and materials required for amendments to her plans, particularly, in remodeling the footing of the proposed building structure and importantly she now has to build a wall in excess of the 12-foot wall which was approved in 2006. The Claimant therefore claims damages together with interest at a rate of 5% per annum on the amount found to be due pursuant to the Judgments Act.

- [14] The Defendant has robustly defended the claim. The Defendant asserted that at all times she was familiar with the boundary markers which were set down by the Survey Department. She asserted that the boundary is marked with steel and spray paint and she categorically denied that either she or her servants or agents ever removed the same. She further denied that her servants or agents removed anything from the Claimant's land to facilitate the retaining wall.
- [15] The Defendant concedes that the Claimant wrote to her in September 2009 about an alleged encroachment which measured 261.36 square feet or 0.0006 acres. In that letter, the Claimant noted that the Defendant's excavation had rendered her land susceptible to slippage and she invited that Defendant to contribute to the cost of constructing a retaining wall to avoid large scale slippage. The stated estimate was between US\$55,000.00 and US\$70,000.00. The Defendant stated that in October 2009, she responded in writing to the Claimant indicating that any boundary dispute would have to be determined by the Registrar and stating that she was under no obligation to assist the Claimant in constructing a retaining wall. The dispute was later referred to the Registrar of Lands and was determined in the Defendant's favour in 2016.
- [16] The Defendant therefore denies that she caused any of the loss and damage alleged by the Claimant. Instead she contended by way of Counterclaim that she has suffered loss and damage to her property as a result of the Claimant's negligence. She contends that the failure of the Claimant to build a retaining wall has caused the Claimant's land to erode onto her property and behind her retaining wall. She states further that the Claimant has failed or refused to compensate her for the loss of having to construct a retaining wall and she seeks to have the Claimant pay the cost of having to construct a retainer wall to stop the continued erosion of the Claimant's property onto her own.

- [17] The Counterclaim was trenchantly defended by the Claimant who categorically denied any liability to the Defendant relative to the cost of constructing a retaining wall or at all. She specifically denied that her actions caused the Defendant's Land to be undermined. Instead, she pleaded that any loss or damage caused to the Defendant's land was wholly or in part the result of her own actions and/or negligence in carrying out her developments works on her property or that she voluntarily accepted the risk of any loss or damage incurred by her own actions.
- [18] She further alleged that the Defendant never had any permission from the requisite governmental or public authority to construct her roadway, parking lot and retaining wall at, on or abutting the shared boundaries with the Claimant's land and the Defendant operated in breach of the actual planning permission which had been granted.
- [19] Further and in the alternative, the Claimant contended that the Defendant's cause of action arose more than 6 years prior to the date of her counterclaim and accordingly is time barred under section 4 of the Limitation Act.

COURT'S ANALYSIS AND CONCLUSION

1. The Boundary Determination

- [20] Trespass to land relates to the unauthorized physical entry of one person onto another's land. Within the context of a boundary dispute; trespass is the basis of a claim a landowner has that his neighbour is encroaching upon his land. Where disputes as to possible trespass and encroachments arise, it is important that landowner recognize that the boundaries of properties registered at the Land Registry are general boundaries unless shown to have been fixed or determined by the Registrar.
- [21] Section 17 of the Registered Land Ordinance¹ ("the Ordinance") makes it clear that a general boundary does not determine the exact line of the boundary or indeed who owns a particular boundary feature. So that any filed plan is deemed to indicate only approximate boundaries and the approximate situation of a parcel of land. This means that it is possible for an area of land to be within a registered title, even though it falls outside the red edging on a title plan. Conversely, it is

¹ Cap 229 of the Laws of the Virgin Islands

possible for an area of land not to be included within the registered title, even though it is within the red edging on a title plan.

- [22] Section 17(2) of the Ordinance provides that where there is any uncertainty or dispute as to the position of any boundary, the Registrar upon application of any interested party may on such evidence as he/she considers relevant, determine and indicate the position of that uncertain boundary. Having exercised his/her power under section 17(2) the Registrar must then make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.
- [23] The general import of these provisions is that filed plans at the land registry are usually and largely irrelevant for the purposes of ascertaining the location of a legal boundary. So, for most of the registered land in Territory, the boundaries as shown for the purposes of the register are general boundaries which do not determine the exact line of the boundary unless, following an application by the owner of a parcel, the exact line of boundary has been determined by the Registrar. It follows that the only correct approach for determining a legal boundary is that prescribed at section 17(2) – (3) of the Ordinance. This contemplates an application to the Registrar supported by such evidence as the Registrar may prescribe which may include a description of the exact boundary, a plan or oral evidence.
- [24] The normal practice and procedure also involves notification to adjoining landowners of the proposed registration allowing for representations and/or objections. In practice such disputes are generally resolved by reference to the relevant facts including the description of the property in the parcels clause in a conveyance, and any relevant plan and the physical features on the ground. In certain cases the Registrar may also consider certain common law presumptions and extrinsic evidence such as building plans, topography and boundary features and the use of the land.
- [25] Critically, section 17(4) and (5) the Ordinance also provides that:
- (4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

[26] This clause mandates that where in legal proceedings parties seek to have the court determine any issue regarding boundaries without these having been fixed by the Registrar of Lands, the court must decline jurisdiction. Section 17(5) also provides that except where, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit.

[27] Turning now to the facts of this case, it became clear that as early as 2009, the Parties herein were involved in a boundary dispute which was ultimately referred to the Registrar of Lands for determination. Proceedings commenced in 2015 at the instance of the Claimant, who claimed that her property had been encroached upon by the Defendant. A site visit was conducted on 30th July 2015, and after investigating and reviewing the findings of the Chief Surveyor's memorandum dated 12th February 2016, together with survey plan MI-3338B-005-T dated 15th February 2016, the Registrar of Lands determined that there was no encroachment and fixed the relevant boundaries. The Boundary Declaration and Determination which was dated 4th November 2016, declared as follows:

1. The common boundary line between Parcel 273 with registered owner Vermalene Skyers-Fahie, as personal representative of the estate of Realdo Fahie (deceased) and Parcel 274 with registered owner Angela Isaac runs from the boundary marker 3C4684 to 3C4701:
2. The Survey Plan MI-3338B-005-T shows that:
 - i. That there is no encroachment onto Parcel 273 Block 3388B Long Look Registration Section.

[28] The Registrar directed the Chief Surveyor after a period of 30 days to update the Registry Map to reflect the boundary as shown on Survey Plan MI-3338B-005-T and submit a copy of the CA Plan to the Chief Registrar for registration and filing together with a copy of this declaration on the affected parcels with a notation that the boundary has been fixed. Importantly, the Boundary Declaration and Determination further warned that:

“The statutory limitation of thirty (30) days by which Notice of an Intention to Appeal this Declaration under section 147 of Registered Land Act (Cap 229) may be made to the Land Registry prior to filing proceedings in the High Court applies.”

[29] Section 147 provides that any person aggrieved by a decision, direction, order, determination or award of the Registrar may within 30 days of the decision, direction, order, determination or award, give notice to the Registrar in the prescribed form of his intention to appeal to the court against the decision, direction, order, determination or award. It is common ground between the Parties that the Claimant did not file an appeal against the Registrar's decision in accordance with this provision or at all. The Claimant very frankly makes clear that she neglected to read and analyse the findings of the Boundary Determination and Declaration or the details of the boundary investigation survey. She stated that she was not concerned about it simply because she was under the impression that the survey was conducted to determine:

- a. Whether the shared boundary points are positioned where they should be;
- b. Whether the 2-3-foot block wall was erected directly on or over the shared boundary line or encroached over onto the Claimant's land; and
- c. Whether there were any visual signs of excavation of a cut road in or over Parcel 274 the portion of land between the shared boundaries were distributed / encroached / intruded upon.

[30] According to the Claimant, this was the basis upon which she had requested the boundary investigation and determination. She accordingly did not put much store into the questions that were asked during the course of the investigation by Survey Department as she assumed that they were simply practical questions. In these premises, she confessed that she did not bother to read and understand the Declaration but remained confident that the "survey inspectors" would realize the eroded and damaged area of the cut/erected section of her property, as it was visually evident that the property had been interfered with and that the affected area was filled with landfill as a result of landslides and erosion caused by the intrusion of Parcel 273.

[31] The Claimant now asserts that the Boundary Determination and Declaration is erroneous and she takes issue with clause 2 (1) of the declaration which provides, "*That there is no encroachment onto Parcel 274 by Parcel 273 Block 3338B Long Look Registration Section*", when, as she alleges, there is in fact a road which had been cut through Parcel 274 causing extensive damage.

[32] The Claimant further contends that no engineer or inspector from the department of disaster management was present to assist with the inspection and determination of the status of the damaged portion of her land. She opined that the boundary investigation conducted by the Survey Department was futile and unproductive for the following reasons:

- a. Eight years had gone by after the actual cutting of the road over into her property. she contends that the Registrar of Lands was therefore unable to provide a proper survey investigation as he was unable to identify the damage to her property because the cut road had already been landfilled by landslides/fallen debris/erosion from the top embankment of my property;
- b. The inspectors failed to ask relevant questions in order to ascertain what actually took place at the time of the incident regarding the cutting of the road. There were visual signs of excavation but there was no reference made to that issue by the “inspectors of survey Department”;
- c. An engineer or someone from the department of disaster management should have been present at the inspection to identify signs of intrusion into my property; there was no analysis or examination of the soil surrounding the affected area of my property;
- d. The survey department did not conduct a survey on the damaged area of my property, what they conducted was a survey on whether the existing 2-3 feet wall erected on Parcel 273 encroached on the boundary line and/or over onto Parcel 274;
- e. The survey department made their analysis based on the 2-3 feet wall and the boundary lines separating both properties.

[33] In light of these concerns, the Claimant wrote to the Registrar on 3rd January 2019 and in a subsequent email outlining her disagreement with the analysis and she requested that a fresh survey be conducted. That request was denied in a letter dated 8th January 2019. The Registrar however, invited that the Claimant to pursue her legal remedies through the courts. The Claimant sent a further letter dated 31st January 2019, requesting the square footage/measurement of the distance between the boundary line and the top of embankment and height and volume of that area as shown on the boundary investigation survey plan provided by Land Registry. In refusing to assist, the Registrar urged the Claimant to seek confirmation of those measurements from a local licensed surveyor.

[34] The Claimant submitted that the action herein was extant prior to this purported inspection. She referred the Court to the following excerpt from clause 2 (a) of the Boundary Determination and Declaration, which states “*The statutory limitation of thirty (30) days by which Notice of an Intention*

to Appeal this Declaration under section 147 of the Registered Land Act (Cap 229) may be made to the Land Registry prior to filing proceedings in the High Court, applies.” She further contended that the thirty day limitation period to give notice of intention to appeal the Boundary Declaration and Determination is therefore void and holds no relevance to this case, as it could only be applicable prior to filing proceedings in the High Court.

- [35] In the Court’s judgment, this submission has no merit. The claim herein was initiated in 2013 and sought damages for negligence and/or trespass and damage to the Claimant’s land. At that time the relevant boundaries were not fixed in accordance with section 17 of the Ordinance. Given the dispute between the Parties, it is therefore not surprising that the Claimant would have chosen to commence proceedings before the Registrar of Lands to have the boundaries formally fixed.
- [36] However, it is beyond doubt that the Claimant (who was legally represented at the time) never appealed the Registrar’s decision. Having thoroughly reviewed the full text of the Boundary Determination and Declaration, this Court is satisfied that it was unequivocally intended to determine and indicate the position of a disputed boundary between the Parties’ properties and to resolve whether there was an actual encroachment. It is clear that the Claimant was at the time represented by Counsel and that she was afforded an opportunity to make representations before the Registrar.
- [37] The Boundary Determination and Declaration which followed this process was clear and unambiguous and it is not disputed that this decision was reduced into writing and communicated to the Parties. In the Court’s view, this finally and conclusively decided the extant boundary dispute between the Parties. The Court finds that this decision is binding on the Parties and that the location of the boundaries is *res judicata* as a result of that determination. Having advanced no appeal within the time prescribed, the Claimant would be barred from making any further applications in relation to same, much in the same manner as parties would be time barred from making claims about were the cadastral boundary line should or should not have been. see: **Louisen v Jacob**² as quoted in **St Torrence Matty et al v Alicia Francois**.³

² [2009] UKKPC 3

³ SLUHCVP 2011/0025 & 2012/0037

- [38] It follows that the boundary between the Parties' properties are fixed as per the Survey Plan MI-3338B-005-T. That survey plan reflects that the existing concrete road which runs parallel to the Claimant's boundary is located on the Defendant's Land and does not encroach on the Claimant's Land. The Decision also states that the survey plan unequivocally demonstrates that there was no encroachment on the Claimant's Land.
- [39] This decision has not been appealed by the Claimant and so in accordance with section 17 (5) of the Ordinance, this Court is not inclined to disturb the Registrar's findings on the basis of the matters represented by the Claimant or at all.
- [40] Counsel for the Defendant has submitted that the Registrar's finding that there was no encroachment on the Claimant's Land (which remains binding on all the Parties) is fatal to the claim because no trespass could be made out. He therefore submitted that the claim should on the basis alone be dismissed with costs to the Defendant.
- [41] This Court does not agree. Having regard to the matters alleged in the claim, that is not a complete answer to the Claimant's case. There is an obvious legal difference between encroachment and trespass and case law supports this distinction. Generally, a trespass applies to a person making an unauthorized entry onto another's land. An encroachment, on the other hand, applies to a structure or some other physical object (structural, nonstructural or vegetative) that illegally protrudes or invades adjoining land, occupying or using that property without an agreement or easement.
- [42] As it unfolded, it is apparent that Parties in these litigation proceedings would have conflated the two legal issues. While the Boundary Determination, may have settled the boundary dispute by fixing the boundaries, and by making clear that there was no encroachment measuring 261.36 square feet or at all, it is far from determinative of all of the issues which arise in the Claimant's pleaded case and it is to this pleaded case that this Court must adhere.
- [43] Litigation proceeds on the basis that the court is a court of pleadings. Pleadings are critical in that they give fair notice of the case that has to be met, so that the opposing party may direct its evidence to the issues disclosed and they assist the court in adjudicating on the allegations made by the

litigants. Not only should they define the issue(s) between litigants with clarity and precision, but they also serve as a record of the issues involved in the action which can (if necessary) be referred to at a later date. The provisions of CPR Part 8.7 make that position plain. The Court does not accept that in these circumstances, it is appropriate for a claimant to ignore the requirements set out under the CPR and to seek to litigate an issue which has not been raised in his pleadings.

- [44] In light of the way that the Claimant has chosen to plead her case, the Court has no reservation in discounting her attempt to litigate matters which have been definitively resolved in the Registrar's Boundary Determination. The Claimant cannot outside of her pleadings, purport to advance a claim which she deliberately chose not to advance in her written pleadings and it is clear that her pleadings do not advance a CPR Part 60 appeal from the Registrar's Boundary Determination. However, it is clear that the Claimant, takes issue with the fact that during the process of construction of the road on the Defendant's Land, the Defendants and her servants or agents crossed the boundary line and came on to the Claimant's Land without permission and carried out excavation works thereon. She alleges trespass and negligence and she seeks compensatory damages as a result. That case is considered below.

2. Trespass to land

The Evidence

- [45] Trespass to land occurs where a person directly enters upon another's land without permission, or remains upon the land, or places or projects any object upon the land. It is an intentional tort. However, while most trespasses to land are intentional, in **League Against Cruel Sports v Scott**⁴ the courts decided that it could also be committed negligently. Intention for the act is required, not an intention to trespass. Consequently, deliberate entry is required and lack of knowledge as to trespass is not a defence.⁵ Accidental trespass therefore also incurs liability.⁶

⁴ [1986] QB 240

⁵ *Conway v George Wimpey & Co* [1951] 2 KB 266, at page 273

⁶ *River Wear Commissioners v Adamson* [1877] 2 App Cas 743

- [46] Importantly, this tort is actionable per se without the need to prove damage. Where the trespass is trivial, damages may be nominal. Where a trespass concerns some use of the land without causing damage, the damages will be measured in relation to the value of the defendant's use. on the other hand, where the trespass has actually caused physical damage to the land, damages will generally measured by the decrease in value of the land and not the cost of restoration.
- [47] In support of her claim, the Claimant stated that she purchased her property in 2003 and that since that time she has tied ropes around the perimeter of the boundary lines to form a visual perimeter to keep out unwanted intruders and trespassers off her property. She stated that she also tied "DO NOT ENTER" and other similar signs, clothing and fencing to do the same.
- [48] The Claimant stated that in and around February, March and/or April 2007, a narrow road was excavated into and through Parcel 276, some 20 feet onto the Defendant's Land. This was done in order to access the work site where the Defendant was constructing a residential home. The Claimant indicated that the Defendant and her agents were seen using that road to transport materials to and from that work site.
- [49] The Claimant further stated that in and around February, March and/or April 2007, she received a telephone call from the offices of Burton Chalwell Surveying Services Ltd. alerting her to the fact that they had observed that her property was being encroached upon by a heavy excavator machine that was positioned the Defendant's Land and conducting works on the lower end of Parcel 274 (the Claimant's Land).
- [50] The Claimant further stated that when she arrived at her property, she observed Mr. Rex Brannigan standing close just below the lower side of her property between boundary lines 3C4684 and 3C4701 looking onto her property. Next to him was someone called "Darky", along with an operated excavator machine that was being driven by an operator, who was unknown to her. She observed that the lower end of her property had been eroded away and the rope which she had tied between the boundary lines 3C4684 and 3C4701 was pulled backwards and propped up unto some vegetation and trees further above her property in an effort to make room for the excavator to cut away her property.

- [51] The Claimant stated that from what she could observe, the area of land cut from her property was some 15 feet. The area of land was cut by the excavator to connect to the existing road that had been cut from access Parcel 276 (right of way) to enter/access the proposed building site located on Parcel 273 which had been seen often times being used by owner/agents of Parcel 273 to transport materials manually (by foot) to and from the building site on Parcel 273. According to the Claimant, she could see that the road had been cut wider over through the government boundary line 3C4684 and 3C4701 and into her property. As there was an existing cliff alongside the right of way road that had been cut previously which separated the plot area (*area where the residential house for Mrs. Skyers Fahie is to be placed*) on Parcel 273 of which the owner/agents of Parcel 273 used to access the building site, the Claimant surmised that the Defendant's servants or agents had cut away her property to make the road wide enough for vehicles and heavy equipment machines and materials to access the plot and property Parcel 273.
- [52] The Claimant stated that she shouted at Mr. Rex Brannigan and the other agents including the machine operator and demanded him to stop, but to no avail. She saw that they were intruding, digging away into her property more and more as she shouted out to them even more. The Claimant stated that when she managed to get Mr. Brannigan attention he shouted to her "*Man, the woman needs to get to her house, don't worry about the dirt, you can slap it back on the hill*".
- [53] The Claimant stated that she quickly telephoned the Defendant and requested that she ask her agents to desist from any further encroachment of her property. According to the Claimant, the Defendant responded, "*no, they know what they are doing; they are not encroaching on your land*". She then hung up the telephone. She stated that despite her repeated loud exhortations, the Defendant's servants or agents refused to stop what they were doing. Consequently, she attempted to contact the East End Police Station but to no avail.
- [54] The Claimant stated that she subsequently telephoned her architect Mr. Dion Stoutt, Mr. Burton Chalwell, the licensed surveyor and Cliff Williams of W & W Reliable Construction Ltd, her contractor and informed them of the incident. These persons visited the property on separate occasions and observed and assessed the interference.

- [55] Mr. Dion Stoutt's written evidence confirms this. He stated that after he was advised by the Claimant that there had been an intrusion on her property, he visited the site and observed that there was a cut road which led to the residential building erected on the Defendant's Land which encroached on the Claimant's Land. He referenced the survey plans of 2007 and 2013 which depicted the encroached area and the progress of erosion between the properties. He stated that over a period of time the erosion from this cut road became bigger and the septic tank of the Claimant's property became more exposed and her proposed driveway and parking was now rendered useless. Mr. Stoutt then proceeded to described in some detail what remedial works would be required to repair the damage caused to the Claimant's Land.
- [56] The Claimant also commissioned Mr. Burton Chalwell to prepare an as-built survey of her property in May 2007. That survey plan dated 8th May 2007 shows the damage to the Claimant's property depicts an encroached area measuring 261.36 square feet of property eroded/removed. That survey shows the extent at which the road had been cut into the Claimant's Land. In September 2013, the Claimant requested assistance from Chalwell to provide an updated survey assessment. That as-built survey dated 24th September 2013, confirms the encroachment onto the Claimant's property and shows further erosion in effect. The analysis also noted 392.04 square feet of eroded area, which means that there had been continued erosion of a further 130.68 square feet of land.
- [57] The Claimant's evidence was corroborated by the evidence of Mr. Burton Chalwell, licensed land surveyor who in his witness statement confirmed that in and around 2007 one of his employees alerted him that the Claimant's property was being encroached upon by excavation being carried out by an excavator machine seen situated on the Defendant's Land while carrying on other excavation works. According to Mr. Chalwell there is a clear line of sight between the front view of his business offices located from East End to both Parcels 274 and 273.
- [58] Mr. Chalwell went on to explain that he later visited and inspected the Claimant's Land to assess whether there was any damage. Having done so, he concluded that not only was the Claimant's Land encroached upon, but that there was a road cut through the boundary lines 3C4684 to 3C4701 over and onto her land to access the building that was being erected on the Defendant's Land. He also noted that rocks, soil and vegetation were removed from the Claimant's Land as the result of

the cutting of the access road to the Defendant's Land and he further observed that the current 2-3 foot retaining wall which was placed very close to the boundary line separating both properties would not provide adequate support for erosion.

[59] Importantly, Mr. Chalwell prepared an as-built survey in 2007 which observed an area of encroachment. By 2013, he prepared a further plan which showed 392.04 square feet of encroached area. According to Mr. Chalwell this raised serious concerns about further erosion causing the top embankment of the Claimant's Land to continuously recede. This would have implications for the future use the Claimant's land and safety of the Defendant's Land. He went on to recommend that in the interest of restoring the property and protecting against earth movement, rain, floods and other natural disasters an engineered structural retainer wall of about 20 – 25 feet would need to be constructed between both properties.

[60] The Claimant also relied on evidence of Mr. Louis Potter of James Frett & Associates Construction Limited. They were approached by the Claimant to provide expert advice on the restoration of her property due to the damage sustained as a result of the alleged intrusion/encroachment by the neighboring property owner. He was also retained to construct a retainer wall for the purpose of providing structural support to the proposed residential building and parking area on the Claimant's property. Mr. Potter observed that the Claimant's Land was undermined by a road cutting by adjacent property below (Parcel 273). He concluded that this area needs to be reinforced to accommodate development on the Claimant's Land.

[61] The Defendant trenchantly denied that she or her workers ever crossed the common boundary line that separates Parcel 274 from Parcel 273. She disclosed photographs which demonstrate that there is about 5 feet of land between her boundary line and where she built her 2-3 foot retaining wall to prevent the dirt from the Claimant's property from continually running down onto her driveway on her property.

[62] When she was examined under oath, she further testified that during the cutting of the driveway, there was a string clearly showing the limit of the boundary line, which was never crossed and she relied on the survey department's map relied upon in the Boundary Investigation conducted by the

Registrar of Lands. She submitted that the Defendant noted that the Registrar of Lands found that the relevant boundary markers still in place and she submitted that this showed clearly that all the excavation work was done within her boundary. She stated that she has always been aware of her boundary markers which were marked by steel tied with blue and pink ribbons on the said property and she reiterated that at no time did she or her agents encroach upon, or trespass onto the Claimant's property.

[63] The Defendant relied on the evidence of Mr. Daniel Jeffrey, the heavy equipment operator and excavator who worked on the Defendant's property under the instruction of Mr. Lisberth Wheatley, the owner of LDK Heavy Equipment Ltd. Mr. Jeffrey is said to have had some thirty (30) years of experience, doing excavation work and operating heavy equipment and excavators. From his written evidence, it became clear that Mr. Jeffrey had in the past carried out excavation works on the Claimant's Land so that as he testified, he was, at all times well familiar with of the boundary line between the Parties' respective properties.

[64] According to Mr. Jeffrey before commencing the excavation, (as with all properties that they work on) they followed their normal practice of first walking around the entire property to locate the boundary markers, in order to ensure that that they only cut within the customer's boundaries. He further stated that if they are unable to find the boundary markers for any reason, they would not cut the property. He noted that the two properties share a common entrance from the public road and he asserted that he was well aware of the boundary markers for the Defendant's property when he operated the excavator to cut the driveway and the foundation for her; and he was also aware of the boundary markers for the Claimant's property, when he did, the excavation work on her property. Mr. Jeffrey stated that he. He repeatedly emphasized his familiarity with the location of the properties and the common boundary line.

[65] Mr. Jeffrey testified that at no time while carrying out the excavation work for the Defendant did he cross the boundary line or encroached on the property belonging to the Claimant. Indeed, he stated that he did not cut up to the boundary line and that there are several feet of land between the driveway and boundary markers. According to Mr. Jeffrey as the driveway was cut, the dirt was just spread on the road and compacted with the excavator while the dirt from the Defendant's foundation was

trucked away by another heavy equipment company owned by Mr. Eugene Hodge. At no time was dirt taken from the Claimant's property for use on the Defendant's property.

[66] This evidence was corroborated by the evidence of Mr. Eugene Hodge who was the truck driver and operator who was contracted to carry out trucking services and transport dirt from the Defendant's property. He confirmed that at no point did he or any other workmen remove dirt from the Claimant's property. He was contracted by Mr. Lisberth Wheatley who was at the time cutting the driveway and the foundation for the Defendant. His specific job was to transport the dirt removed from the Defendant's foundation, and to take it down the hill, to Crabbe's place, by the seashore in Fat Hog's Bay.

[67] When he was examined, Mr. Hodge testified that the excavator operator would carry the dirt from the Defendant's foundation up to and fill the truck he would then simply truck the dirt down the hill to Crabbe's place. He testified that at no time did he truck any dirt from the property belonging to the Claimant onto the Defendant's property.

[68] Mr. Lisberth Wheatley was employed as the Defendant's contractor and gave evidence on her behalf. He stated that at no point was there any encroachment on the Claimant's property neither did they take any soil, dirt, earth or rocks from her property. Mr. Wheatley's evidence is that, he personally supervised the work on the Defendant's project including the work of Mr. Daniel Jeffrey who operated excavator. He confirmed that as with all jobs, the first order of business, is to ensure that he knows where the boundary markers for the customer's property are, and to ensure that all cuttings are done within the customer's boundaries.

[69] Mr. Wheatley recalled that there is a common boundary lines between the Claimant's and the Defendant's properties and he confirmed that he had also been hired to carry out some work on the Claimant's property sometime prior. He was therefore well familiar with the location of the common boundary line. He trenchantly asserted that that there was absolutely no encroachment on Claimant's property when he and his workman were cutting the Defendant's driveway and the foundation. Mr. Wheatley's evidence is that at no time, while carrying out the excavation work did they take any soil, dirt, earth or rocks from Claimant's property and put on the Defendant's property. Mr. Wheatley

asserted that the driveway was cut leaving about 2 to 3 feet, at the least, between the Defendant's driveway and the boundary line and that after he had finished cutting both properties, all of the boundary markers were left in place.

[70] Both Mr. Wheatley and Mr. Jeffrey agree that bearing in mind that the works on the Defendant's property had been done as far back as 2007; they revisited the properties after the claim was filed. They noted that the Defendant has since completed her home, and paved her driveway; while the Claimant's property remains incomplete. They both confirm that the relevant boundary markers were still in place about 2 to 3 feet behind the retaining wall which the Defendant erected to keep the dirt from the Claimant's property from running onto her driveway.

[71] As indicated earlier, trespass to land consists in any unjustifiable intrusion by one person upon land in the possession of another. There can be no doubt that the burden of proof in trespass to land lies with the Claimant to establish the interference by the Defendant on a balance of probabilities. The slightest crossing of the boundary is sufficient. In **Ellis v Loftus Iron Co.**,⁷ Lord Coleridge CJ put the position in the following terms;

"It is clear that, in determining the question of trespass or no trespass, the court cannot measure the amount of the alleged trespass; **if the defendant places a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.**" Emphasis added.

[72] Ultimately, the decisive factor in the determination of this claim is the discharge of the Claimant's legal and evidential burden to satisfy this Court on a balance of probabilities of the merits of her case. In that regard, the Court notes that none of the Claimant's witnesses are actual eye witnesses to the alleged trespass.

[73] The Claimant's case begins with report from an unidentified employee of Burton Chalwell to the effect that her land was being encroached by excavation being carried out by a machine which came onto the Defendant's land. This was clearly hearsay evidence with limited probative value as it merely reveals that the location of the excavator while it was carrying out works on the Defendant's land.

⁷ (1874) L.R. 10 C & P 10 at page 12

[74] When he was cross examined under oath, Mr. Chalwell amplified his evidence significantly. He revealed for the first time that he would have been personally witnessed the purported trespass through the lens of a telescope from his offices at East End. He agreed that this would have been at least two miles away from the Claimant's land in Fat Hogs Bay. Nevertheless, he testified that he could clearly see the Claimant's boundary line and the work being done on the Defendant's property. In evidence which stretched credulity, he testified that even from that distance, he could tell that the Claimant's boundary line had been crossed because according to him, as a surveyor the telescope is one of the means by which he is able to see things from a distance. However, he stated that he could not identify the operator of the excavator or indeed the company who owned it.

[75] In the Court's judgment, there is no rational reason which explains why such critical evidence was not included in Mr. Chalwell's written evidence. Certainly, this is wholly inconsistent with modern litigation practice as it would have no doubt have caught the Defendant off guard with no time to assess or test its veracity. That it arose for the first time at trial and during his cross examination was unfortunate and gave rise to some doubt as to its reliability.

[76] The Claimant's evidence was equally challenging. Initially her oral evidence vacillated. When she was asked whether she saw anyone working on her property she vehemently stated that she did. She was directed to a photograph and she pointed to the location where she would have seen Mr. Rex Brannigan standing. She emphasized that the area was Parcel 274 which is her property and not Parcel 273, which is the Defendant's property. She further stated that there were other persons ("Darky") standing there. However, this evidence is not consistent with her written evidence which makes clear that while she may have witnessed damage to her property, she did not actually see the Defendants servants or agents on her Property. In her witness statement, she stated as follows:

"...on my arrival to my property, I observed a Mr. Rex Brannigan standing close just below the lower side of my property between boundary lines 3C4684 and 3C4701 as he looked on to my property; next to him was a guy they call by nickname "Darky"..."

As I looked on further, I observed that the lower end of my property had been erected away and the rope with which I had tied between the boundary lines 3C4684 and 3C4701 was pulled backwards and propped up unto some vegetation and trees above my property an attempt to make room to cut away more of my property."

- [77] The vacillation continued during her oral evidence. First, she testified that she saw Mr. Rex Brannigan handling the rope which delineated the boundary. However, when she was taxed, she testified that when she arrived at her property, the rope was perched behind some trees and the machine operator was digging under the rope but she did not actually see anyone touch the rope. She later represented that they confirmed to her that they were the ones who moved the rope. Again, when she was taxed, she corrected that no one actually told her that they had removed the rope. The Court therefore could not be satisfied that she actually witnessed the Defendant's servants or agents physically on her property or actually moving the rope.
- [78] However, it is also a trespass if a defendant suffers to continue on his own land anything which invades the airspace of another⁸ or removes any part of the land in possession of another or any erection which is attached to the soil so as to form part of the realty or pulls down or destroys anything permanently fixed to it or wrongfully takes minerals from it.
- [79] In the case at bar it is common ground that the Defendant was engaged in carrying out construction works on her property. In such premises, a landowner has a duty of care to ensure that he/she does not trespass on the neighbouring lands. In the process of the excavation, the Defendant's servants or agents would have utilised heavy equipment to clear her land to provide road access road to her property along the common boundary. Given the sloping topography, and that proximity of the road to the common boundary (as see in the survey plan survey plan MI-3338B-005-T dated 15th February 2016) and reported damage to the Claimant's land observed by her witnesses following the excavation, this Court has no doubt that such damage would have been the direct result of some trespass on the Claimant's Land. While it may not have been deliberate or intentional, the Court is satisfied that the rope delineating the Claimant's boundary would have been displaced and soil, top soil and vegetation as a consequence.
- [80] The Court has also weighed the report from CSE Civil and Structural Engineering Ltd, a company of consulting structural and civil engineers and project managers, which provided a report dated 3rd December 2013, to the Claimant which confirms the following:

⁸ Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd. (1987) 2 E.G.L.R. 173

- a. That there has been a driveway cut parallel to the Claimant's boundary;
- b. That there is an existing string line that has been erected along the boundary line;

Critically, the Report also indicated that:

"Natural ground will generally remain at its natural angle of repose until such time as there is a destabilizing force. This is usually in the form of flooding (either manmade by altering a natural water course or natural flooding). Other destabilizing forces can be by a seismic event, or by human excavation. When the slope is made steeper than its natural slope then landslides become more likely."

[81] At paragraph 6 (3) her Reply and Defence, the Claimant asserted the following:

"The Claimant will also say that the Defendant's servants and or agents acknowledged their wrongful actions of trespassing and excavating the Claimant's land and said "it was ok", and advised that they were encroaching on the Claimant's Land "because the Defendant needed an access road to her house". The Defendant's servants and or agents further said to the Claimant that "it is only a little piece they needed" and that the Claimant can simply "slap back on the dirt back on the hill".

[82] This is essentially reiterated at paragraph 16 of the Claimant's witness statement. She recounts her efforts to get the Defendant's agents to stop "intruding, digging into (my) property more and more". However, her shouts were of no avail neither were her frantic efforts to get the Defendant and the police officers at East End to stop the wrongful actions.

[83] The Court does not doubt that the Claimant had cause to urgently rush to her property in 2007 having been warned by employees of Chalwell Surveying Services. The Court has no doubt that on arrival she would have witnessed the displacement of the rope used to delineate her boundary and she would have had panicked exchanges with the Defendant's servants or agents once she thought that their works had crossed over the boundary line. The Court further has no doubt that her pleas would have been ignored for precisely the reasons represented.

[84] The Defendant's surprisingly forthright pleadings fortify the Court's conclusion. At paragraph 3 of her Defence and Counterclaim filed 2013, she makes the following frank admission:

"The Defendant will, say that around 2007 she was clearing her own property for development and she cleared an extra foot the exact measurement she does not know into the Claimant's yard. The Defendant will say that no loss or damages was suffered by the Claimant and that the Defendant I did not go any further in building or excavating any of the claimant's property and/or hereon."

[85] Later on, at paragraph 4 of her Defence and Counterclaim, she stated:

“The Defendant will further say that she has no knowledge of any rope being placed to mark any boundaries by the Claimant and/or her servants.”

[86] When she was examined under oath, the Defendant attempted to address this admission in amplification. She stated that:

“When I made that statement I remember saying that it is possible that the Himac cut about one foot but I do not know. I did not get a surveyor to get a measurement or anything but after she got a surveyor and its shows me that I did not encroach I realize that I was probably wrong for saying that.”

[87] The Defence and Counterclaim was never amended, and in her Reply and Defence to Counterclaim, the Claimant denied that the Defendant only cleared up an extra foot into her land. Instead, she stated that the Defendant cleared an area of 261.36 square feet into the Claimant's land.

[88] Pleadings are the formal documents by which parties to litigation state their cases. They inform both or all sides of the nature of the case which they have to face and they enable them to properly prepare for trial. There are occasions where a court will allow a party to depart from their pleaded case but those are rare. In **UK Learning Academy Ltd v Secretary of State for Education**⁹ **Richards LJ** made the following observations which provide guidance to this Court:

“I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was “a prevailing view that parties should not be held to their pleaded cases”, it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished.”

⁹ [2020] EWCA Civ 370

[89] It is of course open to a trial judge to permit a departure from a pleaded case where it is just to do so. However in any case where such a departure might cause prejudice the trial judge is entitled to insist on a formal application to amend being made: see **Loveridge v Healey [2004] EWCA Civ 173 at [23] per Lord Phillips MR**. In **Charles Russell Speechlys LLP v Beneficial House (Birmingham) Regeneration LLP**¹⁰ Mr. Justice Cotter considered the issue of prejudice in that context. At paragraph 62 of the judgment he observed:

“...I accept Mr Barclay's submission, set out above, that the prejudice threshold is a low one and a party need only show that a departure from the pleaded case "might" cause prejudice before an application to amend is required. If that threshold is met, it would ordinarily not be just to allow a party to depart from the pleaded case advanced up to trial. Context is important. A party who has prepared for trial not anticipating that a particular point will arise may not have the ability at the outset of the trial to fully assess the implications of a point, whether evidential or in terms of applicable law, without time, something that an adequately pleaded case would have afforded him.

The court should also bear in mind that a litigant in person may be at a greater disadvantage than a represented party in this regard.”

[90] In these premises, the Court has taken into account that the fact that this Claimant is an unrepresented litigant who, for the better part of this litigation would have been proceedings on the basis that the Defendant admitted to trespassing on her property. Indeed, during the course of the trial when the Claimant put the fact of this admission to each defence witness presented.

[91] When a fact is admitted in a pleading it ordinarily ceases to be “in issue” and neither party has to advance evidence as to it at the trial. At paragraph 6 of her Reply and Defence to Counterclaim, the Claimant provides her response to paragraph 3 of the Defendant's Defence. She denied that the Defendant only cleared an extra foot into the Claimant's lad (or yard) and she further denied that the Defendant did not go any further in building or excavating the Claimant's land. Instead she asserted that the Defendant cleared an area of approximately 0.006 acres of 261.36 square feet of her land. It follows that at the close of pleadings, the only issue in dispute between the Parties was the extent of the excavation on the Claimant's land and not the fact of the trespass.

¹⁰ [2021] EWHC 3458 (QB)

- [92] The Court is satisfied that the Defendant's amplified evidence was, in event less than convincing and did little to detract from the unequivocal terms of her pleaded case. The Court cannot ignore that the boundary investigation (survey) and the determination would occurred some 8 years after the alleged trespass and almost three years after this claim was filed and served. While no lasting encroachment may have been found, this would not *without more* militate against a finding that a trespass on the Claimant's Land to place in 2007.
- [93] The Court therefore finds that the Defendant should be bound by her pleaded case. In the Court's judgment, it was an honest and forthright acknowledgement of a wrong which the Defendant knew had been committed by her servants or agents during the excavation process. While there may not have been any lasting encroachment, the Court is satisfied on a balance of probabilities that the Defendant (through her servants or agents) would have trespassed on the Claimant's Land and cleared an indeterminate portion of the same in the course of cutting the access road to her property.
- [94] The Defendant represented that no loss or damage would have been suffered by the Claimant as a result. However, this completely ignores the fact that trespass is a tort which is actionable per se and that it is not necessary that there should have been any actual damage.¹¹ The Defendant also represented that she would have cleared an extra foot into the Claimant's yard but she is forthright that she was unaware of the exact measurement. Again, she has ignored the fact that the trifling nature of the trespass is also not a defence. see: **Yelloly v Morley**.¹²
- [95] In the case at bar, the trespass may have been temporary and not a permanent encroachment but the Court is satisfied that it involved clearing/excavating "*into the Claimant's yard.*" In arriving at this conclusion, this Court has taken into account the Claimant's evidence of what she would have witnessed when she arrived at her property in 2007. The Court has no doubt that she would have attempted to get the Defendant's servants or agents to stop digging away into her property and that her exhortations would have been given short shrift.

¹¹ Anchor Brewhouse Developments v Berkley House (Docklands Developments) Ltd. (1987) 2 E.G.L.R. 173

¹² (1910) 27 T.L.R. 20

- [96] When the Court weighs the fact that there was excavating machinery carrying out works in order to create an access road along the common boundary and to the Defendant's construction site, the Court is satisfied on a balance of probabilities that the Defendant, her servants or agents would have displaced soil including top soil and rocks, trees and vegetation from the Claimant's land. This may well have been compacted on the road rather than trucked away. Given the topography of the Claimant's Land, the Court has no doubt that such removal would have amounted to actual physical damage to the Property notwithstanding that the boundary markers would have remained intact.
- [97] It is not disputed that over time, erosion would have been exacerbated the damage with the result that the embankment on the Claimant's Land would have significantly receded because there is not enough earth/foundation support. The Court accepts the evidence of Mr. Potter that both properties are at risk of continuous slippage and erosion. The Defendant does not deny this; indeed it forms the basis of her counterclaim. However, she contends that any damage would be the result of the Claimant's failure to construct a retaining wall on her property in a timely manner, combined with the effects which significant rainfall would have on the topography. It may well be that the significant rainfall may have exacerbated the damage to the Claimant's land. However, the Court has no doubt that a major contributing factor would have been excavation carried out by the Defendant's servants or agents for the purpose of constructing an access road to the Defendant's property.
- [98] In the Court's judgment, this claim and counterclaim could well have been avoided if the Defendant had provided notice to the Claimant as the adjacent landowner of the fact that excavations would be carried out along a common boundary. Given the topography of both properties and the location in relation to each other as well as the fact that the Claimant's land was sloping, it is surprising that this was not done because there was an obvious risk of trespassing onto the Claimant's property.
- [99] The tort of trespass to land is committed simply by entering upon, remaining upon or placing or projecting any object upon land that is in the possession of another without lawful justification.¹³ Without an agreement between the Parties, the Defendant and her servants or agents, had no lawful justification to be on the Claimant's Land, let alone cause damage to the same. Notwithstanding the observations made about the Claimant's supporting evidence, the Court finds that on a balance of

¹³ Salmond and Heuston on the Law of Torts, 19th ed. (London: Sweet & Maxwell, 1987) 46 (quoted at para 21)

probabilities (whether deliberately or accidentally), that the Defendant's servants or agents did in fact trespass on the Claimant's land in 2007.

3. What is the appropriate remedy?

[100] A claimant in trespass is not required to prove actual damage in order to recover damages for trespass to land. Trespass in all its forms is actionable *per se*, i.e., without the need for a claimant to prove he has sustained actual damage. Where however, the trespass involves actual physical damage to the land, it has generally been held that the measure of damages in such a case is the amount by which the value of the land has been diminished and not the cost of restoration. Where, for instance, in widening a ditch, a strip of field was cut and carried away, the measure of damages was the value to the owner of the land removed and not the costs of restoring it to its original condition.¹⁴ The case of **Jones v Gooday**, is illustrative of this principle. That case concerned a trespass involving the cutting into the claimant's close, and carrying away the soil. On appeal, counsel for the claimant argued that the learned trial Judge ought to have directed the jury that the claimant was entitled to such a sum, by way of damages, as would restore the land to the condition in which it was before the commission of the trespass. Lord Abinger, C. B. disagreed holding:

"I cannot at all assent to the principle which has been contended for, that a person whose land has been cut into, and the soil carried away, is therefore entitled, by way of damages, to the amount which would be required to restore the land to its original condition. All that he is entitled to is to be compensated for the damage he has actually sustained."

[101] Alderson, B. was of the same opinion, holding:

"The plaintiff is entitled, by way of compensation, to what the land was worth to him. If the principle for which Mr. Kelly contends were to be adopted, it would follow that a party who has let the sea in upon the land of another, the land itself being worth only £20, would have to pay, by way of damages, the expense of excluding it again by extensive engineering operations."

[102] However, more recent case law has suggested that there is no longer any general rule. The modern approach reflects that whether diminution in value or cost of reinstatement is the appropriate measure depends on the reasonableness of the claimant's wish to reinstate the land to its pre-tort position. As Donaldson LJ stated in **Dodd Properties (Kent) Ltd v Canterbury City Council**:¹⁵

¹⁴ Jones v Gooday (1841) 8 M&W 146 and see: Moss v Christchurch RDC [1925] 12 K.B. 750

¹⁵ [1980] 1 WLR 433 at page 456

“Which is appropriate will depend on a number of factors, such as the plaintiff’s future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the measure of damages. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in-between situations.”

- [103] Whether the diminution in value or replacement costs is chosen depends on the overriding principle of putting the claimant in the position he had been in prior to the infliction of harm. Accordingly, where the claimant has no intention, or is unable, to reinstate the land to its original condition, or where the cost of doing so is out of all proportion to the damage caused by the trespass, the claimant will be precluded from claiming reinstatement damages. **Hole & Sons (Sayers Common) v Harrison of Thurnscoe [1973] 1 Lloyd’s Rep 345; Taylor (Wholesale) v Hepworths [1977] 2 ALL ER 784.**
- [104] In assessing damages there is an inherent difficulty in deciding between diminution in value and the costs of reinstatement because invariably a claimant will want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property diminished. The Court must then assess the reasonableness of the claimant’s desire to reinstate the property. The court will have to consider the advantages of reinstatement to the claimant relative to the extra costs to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in the value of the land. see: **Hutchinson v Davidson 1945 SC 395.**
- [105] In weighing the question of reasonableness, this Court notes in 2010 BCQS Appraisal Report valued the Claimant’s land together with the partially complete building structure thereon at US\$126,000.00. By way of breakdown, BCQS indicated that the structure at the time was 25% complete and valued those works in the region of US\$78,776.00. This means that the raw land would be valued at US\$47,224.00. However in 2019, BCQS carried out a further appraisal of the Claimant’s raw land without taking into account the improvements thereon. That report sets the market value of the Claimant’s property as at 21st May 2019 at US\$50,000.00. The Claimant’s evidence therefore does not disclose any actual diminution in value.

[106] In the case at bar, it has not been represented to the Court that the Claimant intends to sell the property. From all accounts, the Claimant had already commenced constructing her residence on the property. She concedes that under her original constructions plans she would have had to construct a 12 foot retaining wall along the common boundary. The evidence now reveals that the placement of this wall may be difficult to now achieve due to the excavation of the material below. In order to stabilize the area, the following possible alternatives have been suggested:

- i. A full height wall of 30 feet will need to be constructed on the property boundary to retain the fill on Ms. Isaac's land or;
- ii. A wall of approximately 10 – 15 feet height will need to be built on the property boundary so that the originally designed retaining wall can be built in the location indicated on the plans."

[107] She claims therefore does not seek the diminution in value. Instead, she claims the increase in costs of the retaining wall in the sum of US\$175,000.00 and the costs of restoring the eroded land and subsidence in the sum of US\$15,000.00 and the costs of the soil, top soil removed in the sum of US\$2,000.00.

[108] While the Claimant has on a balance of probabilities proved that the Defendant trespassed on her property and excavated the same in the process of building an access road and caused some physical damage, the Court is not satisfied that the actual damage claimed is completely attributable to the Defendant's actions in 2007. Ultimately, the opinion expressed by Mr. Potter (upon whom the Claimant and her witnesses and appraiser's rely) is predicated on a narrative which has definitively been proved erroneous. The following paragraph of his statement makes that clear:

"...without the proper support of the 20-30 feet height retainer wall, Ms. Isaac's property stands to suffer further erosion and damage to her property and hinders any further development of her residential building (see survey plans dated 2007 LP 9 shows 261.3 square feet of soil, rocks and vegetation removed; and in 2013 LP6 shows 392.04 square feet of soil rocks and vegetation removed and in 2016 LP12 shows continuous further and extensive erosion from boundary lines #C4684 and 3C 4701 to top of embankment showing growth of the receding area of Parcel 274."

[109] Following the Boundary Determination, it is clear that the purported encroachment as ascertained by the Claimant's surveyor (alleged to measure 261.36 square feet) is a fallacy. It follows that the extent and impact of the purported erosion would be equally suspect and so would all of the claims for damages which it underpins.

[110] For reasons which are only known to the Claimant, she chose to commence this action almost 6 years after the Defendant's impugned actions. It does not appear that the Claimant took any steps in the interim to mitigate her loss with the result that her property which would in any event had needed a retaining wall, continued to erode up until the date of this Claim. The reports which are relied upon are premised on the purported encroachment of some 261 square feet and therefore would not accurately quantify the true damage sustained immediately following the trespass, nor cost of reinstatement. Moreover, almost 6 years after the purported trespass, the Claimant advanced that the type of retainer walls needed to stabilize the ground uphill of the excavation and design of retaining walls for various heights up to 20 feet along with drainage to back of wall will costs in excess of US\$175,000.00.

[111] Ultimately, the Court's task is to put the Claimant in the position which she would have been prior to the damage.¹⁶ In the Court's judgment, without more cogent evidence, it would not be reasonable to conclude that the Defendant should be compelled to fund the substantial costs involved in building a 20 – 30 foot retaining wall when the actual or original damage caused by the trespass in 2007 may well have been minimal.

[112] The Claimants' evidence does not disclose that her property has sustained any significant diminution in value and for the reasons indicated her evidence as to repair and reinstatement is less than satisfactory. However, the Court is satisfied that the Defendant, her servants or agents would in fact have committed an trespass on the Claimant's property which would have caused some physical damage and so some measure of damages is due to the Claimant by way of compensation. Given the circumstances of this case, the court has determined that an award of damages for the trespass should be more than a nominal sum. As explained by A.I. Ogus in *The Law of Damages* (London: Butterworths, 1973) at 23:

“Damages for torts actionable per se are said to be “at large”, that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained.”

¹⁶ *Dominion Mosaics and Tile Co. v. Trafalgar Trucking Co.* [1990] 2 ALL E.R. 246; *Anchor Brewhouse Developments Ltd v. Berkley House (Docklands Developments) Ltd.* (1987) 2 E.G.L.R. 173

[113] The lack of cogent evidence however obliges this Court “*to do its best on such evidence as it feels able to accept to place some kind of value on*” even if the precise identity cannot be established and its value is in doubt.”¹⁷ In this case, the Court has considered the costs of the soil; top soil and rocks advanced in the claim and will award a global sum of \$5000.00 in damages.

[114] Given the Court’s findings regarding the purported encroachment, the Court is not satisfied that the Claimant is entitled to recover the special damages claimed at paragraph 11 of the claim. Finally, although in her prayer for relief, the Claimant seeks aggravated damages, her claim does not set out the particular facts which are relied on in support of that claim. This aspect of the claim was essentially not pursued at the trial.

THE COUNTERCLAIM

[115] By way of Counterclaim, the Defendant seeks to recover the sum of US\$3,936.70 for the building of a 2-3-foot retainer wall to prevent her property from being undermined by the negligent actions of the Claimant. The actual particulars of negligence are not pleaded but in her evidence the Defendant asserts that she suffered damages which were incurred as a result of the Claimant failing to adequately erect a retaining wall on her land, thereby minimizing damage from runoff onto her driveway. The Defendant contends that the Claimant knew that she needed a retaining wall to support her hillside property before constructing her building, but was unable to finance the same.

[116] Because of the sheer gradient of the hill, every homeowner in the area will need to build a retaining wall around their properties to prevent erosion and land slippage which may occur due to heavy rain or other seismic or environmental events. The Defendant contends that the Claimant failed to construct her retaining wall, prior to or shortly after cutting her foundation, as she was required to by the Land Development Authority, and this, combined with severely heavy rains in the Territory, caused the fill which was compacted and mounted up on the Claimant’s property to give way and create huge landslides from her property. The heavy rain fall caused a lot of soil erosion from her land, which came down onto the Defendant’s property. The Defendant asserts that she had to get heavy equipment to remove the large amount of dirt that was blocking the access to her home and

¹⁷ *Zabihi v Janzemini* [2009] EWCA 851; *Biggin v Permanite* [1951] 1 KB 422 at page 438

subsequently she had to build a retaining wall within the boundary of her property, with about two feet of space and up to about five feet of space, at different sections, between her retaining wall and the boundary line of her property.

[117] In her response, the Claimant denied that she is liable to the Defendant for the sum of US\$3,936.70 or any sum at all. Instead, she asserts that any loss or damage caused to the Defendant's Land are the results of her or her servants or agents' wrongful action/or negligence in carrying out works on her property. Moreover, she contends that the Defendant's cause of action arose more than six (6) years prior to the date of her counterclaim and accordingly her counterclaim is barred by section 4 of the Limitation Act.

COURT'S ANALYSIS AND CONCLUSION

[118] This Counterclaim was generally pursued with very little enthusiasm both from the point of view of the evidential underpinning. This was not assisted by the legal submissions which were filed and which barely addressed the evidence or the legal issues which arise on the counterclaim.

[119] The Claimant's evidence in support of this claim is set out at paragraphs 17 – 22 of her witness statement. She asserts that because of the sheer gradient of the hill every homeowner in the area will need to build a retaining wall around their properties to prevent the kinds of erosion which the Claimant's land continued to suffer and she further asserts that the Claimant is well aware of this but has failed to take the necessary steps to construct this wall. The result of this is that the after the heavy rains in 2013 and 2014 and later in August 2017, the Claimant's land experience landslides which came down onto the driveway of her property. In the Court's judgment, the limitation defence would have no merit.

[120] Counsel for the Defendant did not address the cause of action or the legal principles which arise in the Counterclaim. Although the Counterclaim ascribes liability on the basis of the "*negligent actions of the claimant*", like the court in **Leakey v National Trust**¹⁸ this Court is prepared to regard this claim as being properly described as claim in nuisance.

¹⁸ [1980] Q.B. 485

[121] It is clear that the Defendant takes issue with harm which originates from the natural condition of the Claimant's land and seeks to ascribed liability for the failure of the Claimant to take adequate remedial measures. Prior to **Goldman v Hargrave**, the general position was that harm originating in some natural condition of land was not generally actionable as nuisance. **see: Giles v Walker (1890) 24 Q.B.D. 656**. However, in recent times the courts have extended the responsibilities of landowners towards their neighbours.¹⁹ It is however, clear that the duty in cases of nuisance caused by naturally occurring conditions is a duty of care which measured by the personal capabilities and circumstances of the Defendant. As Lord Wilberforce stated in **Goldman v Hargrave**²⁰:

"So far it has been possible to consider the existence of a duty, in general terms. But the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be "reasonable" since what is reasonable to one man may be very unreasonable, and indeed ruinous to another: the law must take account of the fact that the occupier on whom the duty is cast, has, ex hypothesi, had this hazard thrust upon him through no seeking or fault of his own. His interest, and his resources whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it."

[122] A party's ability to abate is therefore a critical factor to be weighed. This is made clear in the following extract from Lord Wilberforce's judgment:

"...the standard ought to be to require of the occupiers what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more."

¹⁹ [1967] 1 A.C. 645 and see: *Bybrook Barn Centre v Kent CC* [2001] B.L.R. 55

²⁰ [1967] 1 A.C. 645 at 663

[123] In the case at bar, the Defendant's evidence on this issue is critical. At paragraphs 14 – 15 of her witness statement, she details the fact that the Claimant's financial difficulties including the fact that Claimant had tried to borrow the sum of US\$15,000.00 from her in order to pay off her workers. At paragraph 16 she states:

“The Claimant knew that she needed a retaining wall to support her hillside property before constructing her property, but did not have the money to build that retaining wall as her loan was not approved.”

[124] In the face of such clear statement of fact, it is therefore surprising that the Defendant would have chosen to litigate this Counterclaim rather than have this issue resolved either in court connected mediation or through out of court negotiations. The relevant case law clearly recognises that in such cases there is a practical stipulation that the circumstances of the parties may qualify the duty to act on the sharing of the costs of remedial work, and, if it is not possible that in circumstances the standard of care may be no higher than that of giving a warning and allowing the neighbor to enter and himself abate the source of the threatened or actual nuisance.

[125] The Court is satisfied that while the Claimant's lack of financial resources would not be determinative of liability, it is certainly a relevant factor which must be weighed. The Court has also had to factor in the Defendant's actions in trespassing and excavating the Claimant's land and finds that this no doubt would have contributed to the harm which she would have experienced because it is apparent that her complaints would have only arisen after she would have carried out these works. The Court has no doubt that the Claimant's land would have been undisturbed prior to the Defendant's actions. Certainly, her Defence and Counterclaim does not allege that there was any erosion which predated her own wrongful actions.

[126] When the Court balances these factors, the Court is satisfied that the Defendants' counterclaim must fail and should be dismissed.

[127] Ultimately, what is clear is that these Parties face a common hazard, the Court can only urge them to take reasonable steps to arrive at some agreement which would ultimately preserve the integrity and value of their respective properties.

COSTS

[128] Given the Court's findings herein and the fact that the Claimant was only partially and nominally successful in her claim, the Court is satisfied that the result should be costs neutral.

[129] **It is therefore ordered as follows:**

- i. **Judgment is entered for the Claimant on the claim in the sum of \$5,000.00.**
- ii. **The Defendant's counterclaim is dismissed.**
- iii. **No order as to costs on the claim or counterclaim.**

[130] Finally, the Court conveys its sincere regrets for the inordinate delay in rendering the judgment in this matter and must thank Counsel and the Parties for their patience.

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar