

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)**

CLAIM NO. BVIHCV 2022/0086

(1) **LORREL SULLIVAN**
(2) **VICTORENE SULLIVAN**

Claimants

-and-

(1) **JAVIER SMITH**
(2) **MAUREEN PRINCE**

Defendants

Appearances:

Ms. Marie-Lou Creque of Creque Global Group for the Sullivans
Ms. Akilah Anderson of HP Anderson for Mr. Smith and Ms. Prince

2022 July 6
July 12

JUDGMENT

[1] **JACK, J: [Ag.]** This action follows an earlier matter, the title of which is **Javier Smith and Maureen Prince v Lorrel Sullivan and Victorene Sullivan** (Claim No BVIHCV 2020/0200). In the current action the parties are the same but their rôles as claimants and defendants are reversed. The Sullivans by a fixed date claim form dated 18th March 2022 seek orders or declarations against Mr. Smith and Ms. Prince that:

- (a) upon their satisfaction of the judgment debt in the earlier action in which Mr. Smith and Ms. Prince are judgment debtors, there be made in the Sullivans' favour a possession order in respect of land known as Parcel 187 in Block 2437B of the West Central Registration Section on Tortola and that they be declared the owners of Parcel 187;

- (b) that the Registrar of Lands do transfer Parcel 187 to the Sullivans;
- (c) that enforcement proceedings against them arising out of the previous claim are stayed until the determination of this claim.
- (d) that various consequential orders be made.

[2] The facts are these. In Windy Hill, West End, Tortola, there are two adjacent plots of land: Parcel 187 registered in the names of Mr. Smith and Ms. Price and Parcel 188 registered in the names of the Sullivans. The Sullivans started building a house on Parcel 188, but the house encroached on Parcel 187. Mr. Smith and Ms. Price commenced the earlier action seeking damages and an injunction, as well as other relief. The injunction sought was an order that the Sullivans remove from Parcel 187 “so much of their residential dwelling house as encroaches on [Mr. Smith’s and Ms. Prince’s] land.” At the first case management conference, Mr. Smith and Ms. Price withdrew their claim for an injunction. In the light of an admission by the Sullivans that their house did encroach on Parcel 187, judgment was given for damages to be assessed.

[3] Judgment assessing the damages was given by Master Gill on 2nd March 2022.¹ She held.

“14. By abandoning the injunctive relief initially sought, in effect, [Mr. Smith and Ms. Prince] have agreed to the permanent encroachment by the [Sullivans] on Parcel 187. Therefore, there is no issue of reinstatement or restoring the land to its original position. [Mr. Smith and Ms. Prince] have suffered actual damage by the construction of part of the [Sullivans’] residential family home on their property. The measure of damages here would be the diminution in value of Parcel 187 as a result of the trespass.

15. The claim alleges that the encroachment diminished the value of Parcel 187 to the extent that it has no developmental value. On that basis, [Mr. Smith and Ms. Prince] are seeking the full current market value of Parcel 187. [They] rely on a valuation...

...

21. The valuation was conducted by BCQS International, Property and Development Consultants throughout Latin America and the Caribbean. It states that it was prepared in accordance with the Royal Institution of Chartered

¹ [2022] ECSCJ No 93.

Surveyors (RICS) Global Standards. It is identified in the statement of claim and exhibited to the witness statement of the first claimant filed on 11th May 2021. There being no alternative valuation of the diminution in value of Parcel 187, although cautiously, I accept the determination of the area of encroachment as 2,066 square feet and the market value of the unencumbered interest of Parcel 187 as 'in the region of US\$60,000.00'. I agree with the submission of [Mr. Smith and Ms. Prince] that the finding of loss of developmental value supports the claim for the full, current market value of Parcel 187, and not simply payment for the encroached portion."

[4] She proceeded to award \$60,000 under this head, \$15,000 in respect of mesne profits, out of pocket expenses of \$2,197.50 and costs.

[5] The Sullivans have not yet paid the judgment debt, however, they seek relief which effectively transfers ownership of Parcel 187 to them, once they have paid the judgment debt. Mr. Smith and Ms. Prince deny that the Sullivans are entitled to that relief. Further they say in any event it is too late for them to make this claim. It should have been brought in the earlier action and the current claim is an abuse of process under the doctrine of **Henderson v Henderson**.²

[6] As to the substantive relief, Ms. Creque, who appeared for the Sullivans, argued that similar relief was granted in **Hugh Charles v Lyndis Wattley**.³ In that case, the defendant had fenced off the claimant's land and built an apartment block. Master Lanns assessed damages at the full market value of the land. At the end of her judgment, she said:

"45. The claimant has asked for an order that upon payment of the sums awarded to him, his certificate of title to his property be canceled and a new certificate of title be issued to the defendant at the defendant's expense. I can see no reason not to grant this order. This approach results in the claimant's receiving all that he could ever have received. At the same time the defendant receives title to the land and its lucrative and aesthetic values. The equities are equal."

² (1843) 3 Hare 100 (Wigram VC).

³ [2013] ECSCJ No 178.

- [7] Unfortunately, the learned master did not explain the jurisdictional basis on which she was able to make such an order. The point (so far as appears from the judgment) was not argued. She seems to assume that the Court had a discretion to be exercised on equitable grounds. This is not, however, born out by the development of the law of this area in the course of the nineteenth century.
- [8] Sir Thomas Bingham MR discussed the historical development of claims for damages and their interaction with the equitable power to grant injunctions in **Jagger v Sawyer**, where he said:⁴

“Historically, the remedy given by courts of common law was damages. These afforded retrospective compensation for past wrongs. If the wrongs were repeated or continued, a fresh action was needed. Courts of equity, in contrast, were able to give prospective relief by way of injunction or specific performance. A mandatory injunction would require the defendant to observe a legal obligation or undo the effects of a past breach of legal obligation. A negative injunction would restrain a defendant from committing breaches of legal obligation in future. But these courts could not award damages. This anomaly was mitigated by the **Common Law Procedure Act 1854**,⁵ which gave courts of common law a limited power to grant equitable relief as well as damages. It was further mitigated by the **Chancery Amendment Act 1858** (‘Lord Cairns’s Act’)⁶ which gave the Court of Chancery the power to award damages. Section 2 of Lord Cairns’s Act provided:

‘In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct.’

This enabled the Chancery Court on appropriate facts to award damages for unlawful conduct in the past as well as an injunction to restrain unlawful conduct in the future. It also enabled the Chancery Court to award damages instead of granting an injunction to restrain unlawful conduct in the future. Such damages can only have been intended to compensate the plaintiff for future unlawful conduct the commission of which, in the absence of any injunction, the court must have contemplated as likely to occur. Despite the repeal of Lord Cairns’s Act, it

⁴ [1995] 1 WLR 269 at pp 276-277.

⁵ 17 & 18 Vict. c. 125.

⁶ 21 & 22 Vict. c. 27.

has never been doubted that the jurisdiction thereby conferred on the Court of Chancery is exercisable by the High Court and by county courts.”

[9] The effect of section 14 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act 1969**⁷ is in my judgment to give the Court the powers given by Lord Cairns’s Act as “a legal right which before the 1st day of November, 1875 could in England only have been given by a court of equity.”

[10] The effect of a refusal to grant an injunction in a case like the present is that the party ceases to have any further remedy against the encroaching party. In particular, the refusal of an injunction bars the injured party from exercising self-help: **Burton v Winters**.⁸ The award of damages in lieu of an injunction is a statutory remedy; any subsidiary rights, such as a transfer of ownership of the relevant land, must in my judgment be sought in statute as well. There is at common law no power of expropriation. (Apparent common law exceptions such as the doctrine of lost modern grant and the presumption that a judgment debt is paid after twenty years are not example of expropriation. A defendant can seek to disprove the existence of a modern grant or the presumed payment of the judgment debt.) Lord Cairns’ Act gives no express remedy of transfer of title on payment of damages in full, and in my judgment no such remedy can be inferred. Accordingly, the Court has no power to grant such a remedy.

[11] Ms. Creque argues that “[o]nce an insurance company pays their insured the full value for a damaged vehicle, the insurance company gets to keep the damaged vehicle.” The Court, she submits, should apply the same rule by analogy. The insurance rules are, however, more complicated than she says. As **MacGillivray on Insurance Law** states:⁹

“Where the insured property is totally destroyed and cannot be repaired and the debris is of no value whatever, the insured is entitled to a cash payment of the full value of the property. In cases of marine insurance where the cost of repairs will exceed the repaired value, the doctrine of constructive total loss comes into play

⁷ Cap 80, Revised Laws of the Virgin Islands.

⁸ [1993] 1 WLR 1252 (English Court of Appeal).

⁹ 15th Ed (2022) at para 19-027 (footnotes and citations omitted).

whereby the insured is entitled to give notice of abandonment and underwriters are bound to pay the full value as for a total loss, but are entitled to the damaged property as salvage. There is no such doctrine in non-marine insurance law and the insured is, strictly speaking, only entitled to the difference between the value of the undamaged property and the value of what remains. In practice, however, insurers often pay as for a total loss on goods which are seriously damaged and when they do so they are entitled to the damaged goods as salvage, or their value.”

- [12] In my judgment, the analogy with insurance law does not assist in giving the Court a power to transfer property as sought in the current case. The current case is a claim arising from a tort. Insurance matters are always claims in contract. The special rules applicable to marine and non-marine insurance cannot be carried over to very different areas of law, such as trespass to land and to Lord Cairns’s Act.
- [13] I agree that there is an oddity in the legal position if an order as that given in **Charles v Whattley** cannot be made. The legal title in that part of the house which encroaches on Parcel 187 will remain vested in Mr. Smith and Ms. Prince. However, they cannot (by way of self-help) demolish that part of the house, nor can they exercise rights of access to it. That will remain the position until the limitation period expires, whereupon the Sullivans will be able to register title to that part of Parcel 187. What the position would be, if Mr. Smith and Ms. Prince were able to obtain peaceful possession of that part of the house before the expiration of the limitation period, was not argued before me. Despite what is effectively a suspension of Mr. Smith’s and Ms. Prince’s rights, in my judgment there is no sufficient basis for clothing the Court with a power to expropriate the legal and beneficial ownership of Mr. Smith and Ms. Prince, even if they can in practice do nothing with their title.
- [14] I should add that, even if I am wrong in my decision that the Court has no jurisdiction to grant the relief sought, I would not make an order in respect of the whole of Parcel 187. It is true that Master Gill assessed damages based on the whole value of Parcel 187. That, however, was because she found that as a result of the encroachment Parcel 187 was robbed of its development value. The development value represented substantially the whole value of the land, even though only a fraction of it was encroached upon. The

injunction was sought solely in relation to that part of the house which encroached, not in relation to the whole of Parcel 187. It is solely the 2,066 square feet of encroachment which would be the subject of the transfer, assuming (contrary to my view) that **Charles v Whattley** was good law.

[15] It follows that the claim stands to be dismissed. I will hear counsel as to costs.

[16] As regards Ms. Anderson's argument based on **Henderson v Henderson**. I agree that the current claim could and should have been claimed in the earlier action. However, I do not need to determine whether this is an absolute bar as she submits, or whether, if there had been merit in the claim for the form of relief sought, as a discretionary matter I should nonetheless dismiss the claim. I am inclined to the view that **Henderson** abuse of process gives the Court some discretion, but since the underlying claim to compulsory transfer of title has, as I have found, no merit it would be difficult to carry out a proper balancing exercise. It is always necessary to determine the facts before exercising any discretion. Accordingly, I prefer to rest my decision solely on the issue of the Court's power to order a transfer.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar