

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

BRITISH VIRGIN ISLANDS

CLAIM NO: BVIHCV 2020/0200

BETWEEN:

JAVIER SMITH

First Claimant

MAUREEN PRINCE

Second Claimant

and

LORREL SULLIVAN

First Defendant

VICTORENE SULLIVAN

Second Defendant

Appearances:

Ms. Akilah Anderson for the Claimants

Ms. Marie-Lou Creque for the Defendants

2021: December 3;
2022: January 28.
Re-issued March 2, 2022.

JUDGMENT ON ASSESSMENT OF DAMAGES

- [1] **GILL, M.:** The claimants seek damages for the encroachment of part of the defendants' dwelling house upon their land.

The facts

- [2] The claimants own a parcel of land at Windy Hill, West End, Tortola more particularly described as Registration Section West Central Block 2437B Parcel 187 ("Parcel 187"). The defendants own an adjoining portion of land ("Parcel 188"). The defendants commenced construction of a dwelling house which wrongfully encroached on Parcel 187. The structure is about 50% to 55% complete.

[3] All attempts at negotiating an amicable outcome failed, and on 20th October 2020, the claimants filed a claim against the defendants seeking the following relief

1. A declaration that the defendants and each of them are not entitled to continue to encroach on the claimants' land at Parcel 187 by reason of a part of their residential dwelling house being built on the said Parcel 187.
2. An injunction ordering the defendants and each of them to remove from the claimants' land so much of their residential dwelling house as encroaches on the claimants' land and as confirmed by Plan No MI-2437B-003-T prepared by the Land and Survey Department and dated September 26, 2019; alternatively
3. An order that the defendants and each of them pay to the claimants the full current market value of Parcel 187 as so determined by a reputable surveyor in the British Virgin Islands; and
4. Damages for conversion; alternatively
5. Damages for trespass; and alternatively
6. Mesne profits for the occupation of the claimants' land from the date of the defendants' encroachment unto the claimants' property to the date of judgment.
7. Aggravated damages for the defendants' conduct in engaging the claimants in bad faith negotiations in order to delay a resolution.
8. The claimants' out of pocket expenses in the sum of \$2,197.50;
9. Costs;
10. Interest; and
11. Any such other or other relief as this honourable court sees fit.

[4] Court-ordered mediation was not successful.

[5] The defendants filed an application to strike out the claim. However, at case management, the claimants withdrew their claim for injunctive relief, and given the defendants' admission of the encroachment on the claimants' land, judgment was entered for the claimants with damages to be assessed.

Issue

- [5] The court must determine the quantum of damages to be awarded to the claimants for the encroachment on their property by the defendants.

The law

- [6] Every unlawful entry by one person on land in the possession of another is a trespass for which a claim may be brought even though no actual damage is done.¹

- [7] The law in relation to damages for trespass to land is explored in Halsbury's Laws where it is stated:

"In an action of trespass, if the plaintiff proves the trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the plaintiff actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as should reasonably be paid for that use."²

- [8] In summarising noteworthy authorities on the subject of damage to land as a result of a trespass, Master Lanns in **Hugh Charles v Lyndis Wattley**³ explained:

"The fundamental rule on recovery for damage to land is that the owner of the land is entitled to be restored, as far as money can do it, to the position he would have been in had the wrong not been suffered. Put another way, the successful claimant in a trespass action is entitled to that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting compensation or reparation.

Where actual damage to the land can be proved, the normal measure of damages is the diminution in value of the land as a result of the trespass or the cost of reasonable reinstatement."

- [9]] In claiming damages for trespass where there is physical damage to the property, the onus is on the claimant to prove that entitlement. In **Asot A. Michael v Astra Holdings Limited**, Rawlins JA (Ag.), as he then was, stated:

"A claimant who suffers actual damage as a result of a trespass is entitled to be compensated with substantial damages, which he must prove. He must set out in

¹ See Halsbury's Laws of England 4th Ed. Vol. 45 at paragraph 1384

² Halsbury's Laws of England, 4th Ed. Vol. 45 at paragraph 1403

³ NEVHCV2012/0015, delivered June 19, 2013 at paragraphs 15 and 16

his pleadings the value by which his land is diminished and the expense of removing any debris left by the trespass, if any. On the other hand, he may set out the costs of correcting the damage and restoring the land to its original condition. Where there is a continuing trespass, damages are usually measured by the worth of the use of the land. This would normally be the rental value.”⁴

Out of pocket expenses/consequential loss/special damages

[10] At paragraph 13 of the statement of claim, the claimants plead out of pocket expenses as follows:

“13.3.1. Survey Department receipt dated July 18, 2029 (*sic*), for payment of boundary investigation \$512.50
13.3.2 Survey of Block 2437B Parcel 187 (Boundary demarcation) - \$885
13.3.3 Site visit with Sylvia Richards of Survey Department - \$250
13.3.4 Obtaining a private valuation from BCQS International - \$550.”
(Total \$2,197.50)

[11] Initially, the defendants queried the sums of \$885.00 and \$250.00 on the basis that the exhibited receipts for these items are private receipts from Government officials, and not Government issued receipts. At the assessment hearing, the defendants conceded the sum of \$885.00 so that the only sum of the pleaded items remaining in dispute is the sum of \$250.00 for the site visit. Whether or not this sum should have been charged by a Government officer, the fact remains that the claimants have provided evidence that they paid for the site visit. The circumstances surrounding how this came about are not in evidence. I am satisfied that all the above sums sought have been pleaded, particularised and proved by the claimants and I will award them accordingly.

[12] Although not pleaded, in the witness statement of the first claimant, the following out of pocket expenses are also sought:

- 1) Topographical survey and calculation of areas and volumes to quantify encroachment Parcel 187 Block 2437B by Systems Engineers - \$3,000.00
- 2) Survey done by PyMyriad - \$700.00
- 3) Deposit on Land Appraisal from BCQS - \$450.00.

⁴ Civil Appeal No. 17 of 2004 at paragraph 56, (Antigua & Barbuda)

- [13] The defendants submit that apart from not being pleaded, these sums ought to be rejected on the basis that they are not actual sums expended by the first claimant prior to the filing of the claim. The claimants contend that the characterisation of these expenses as “special damages”, as was done in the defendants’ submissions, is not strictly correct and they may be properly subsumed as consequential loss, since they form part of the claimants’ efforts to resolve the matter and to support the claim. I am of the view that the expenses incurred after the filing of the claim in this case, and therefore not pleaded, should not be awarded as special damages. However, based on the evidence, if the court is satisfied that these sums were reasonably incurred by the claimants in support of their case, compensation may be awarded accordingly. The quotation from Systems Engineering is a fee proposal dated 21st April 2021. The court is not relying on any survey purported to be provided by the claimants in 2021. Any survey fees expended before the filing of the claim should have been pleaded. This sum is disallowed. There is no evidence of the sum of \$700.00 for a PyMyriad Survey. This sum is also not allowed. The court is not relying on any appraisal by BCQS other than the report dated 24th September 2018. Therefore, the receipt for the sum of \$450.00 dated 10th May 2021 does not attract an award. The award to the claimants for what they plead as out of pocket expenses will be \$2,197.50.

Diminution in value/valuation

- [14] By abandoning the injunctive relief initially sought, in effect, the claimants have agreed to the permanent encroachment by the defendants on Parcel 187. Therefore, there is no issue of reinstatement or restoring the land to its original position. The claimants have suffered actual damage by the construction of part of the defendants’ 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, the claimants are seeking the full current market value of Parcel 187. The claimants rely on a valuation by BCQS International, Property and Development Consultants in the BVI. At pages 12 and 13 of the BCQS Report, it is stated:

“The subject property is an average sized residential lot which now have [sic] been compromised for development purposes. The lot has great views but with a reduction in the lot area this will somewhat restrict the capital value achievable.

The issues surrounding the encroachment dramatically impacts [sic] the value of the remaining portion of parcel and the intended use. It is our contention that the severed portion of the subject property adversely affects the value of the retained land. Consequently, the encumbered land is of no value to the owner of 187 but would result in an increase in value to the adjacent parcel.

The only likely purchaser of the Parcel 187 or part thereof is the owner of the adjacent parcel to the east, who is the subject of the encroachment. The sale of Parcel 187 in its entirety to the adjacent owner (parcel 188) would be the most straightforward and simple solution to this situation...”.

[16] Using the Comparable Sales Approach, the BCQS Report concluded that the market value of the unencumbered interest in the subject property is in the region of US\$60,000.00 and a fair value of the encumbered portion of the subject property is US\$25,000.00. The claimants are asking the court to award them damages of US\$60,000.00 for the encroachment, the full current market value of Parcel 187.

[17] As pointed out by the defendants, no witness statement was filed by the maker of the BCQS Report which is untested, and the defendants warn the court to be cautious as to what weight it attaches to the report, especially as the report itself pointedly states, “Any other persons who rely on this report do so at their own risk.” The report names the client and intended user as Javier Smith, the first claimant.

The encroachment

[18] An issue of significance in this case is the determination of the actual square footage of the claimants’ property encroached upon by the defendants. There are three different quantifications before the court.

- i. A survey dated 26th September 2019 by the Chief Surveyor of the Survey Department of the Government of the Territory of the Virgin Islands depicted 403 square feet of encroachment by the building and 440 square feet of encroachment by a driveway, a total of 843 square feet.
- ii. A drawing included in the BCQS Report shows 2,066 square feet of building and land encroachment.

- iii. In light of the difference, the first defendant caused a survey to be done by a private surveying company, Virgin Islands Survey Services Limited (VISS). That survey notes an encroachment area of 1,056 square feet.

- [19] The defendants accept, and invite the court to accept, the survey as prepared by VISS. Outlined in his witness statement, licensed surveyor, Marc Downing, determined what he considered to be the most appropriate boundary settlement in respect of the encroachment of a portion of the building and wall from Parcel 188 onto Parcel 187. He states that after he visited the site, he measured, what in his opinion, “is an appropriate area around the encroachment such area including the above mentioned wall, with which to adjust the boundary line. The area measures 1,056 square feet”. Mr. Downing considered the plan in the BCQS Report and opined that given there was no encroachment, whether by building or any concrete access point, at the top of Parcel 187, there was no need to consider this portion of raw land as an encroachment as was done in the plan in the BCQS Report.
- [20] I consider that, as submitted by the defendants, the BCQS Report is untested. However, it provides the only evidence before the court of the diminution in value of Parcel 187. VISS was retained “to carry out an inspection and draft a survey to determine the most appropriate boundary adjustment in respect of an encroachment...”. Apart from raising some concerns about the BCQS valuation, and while a boundary adjustment approach may well be a suitable resolution to the issue, the defendants have put forward no evidence of diminution in value of the land from a competent valuator.
- [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 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 the

claimants 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.

- [22] I am of the view that the claimants are also entitled to an additional award in the form of mesne profits for the defendants' unlawful occupation by the encroachment on Parcel 187. The claimants are seeking mesne profits from the date of the defendants' encroachment to the time of judgment. A formula for the calculation of mesne profits was advanced in **Horsford v Bird**,⁵ being an annual rate of 7.5 per cent of the capital value of the property. No evidence was adduced to support the statement of claim of the date of the commencement of the trespass. The first claimant's witness statement does not address this date. The BCQS Report is dated 24th September 2018 and states that the date of inspection was 26th August 2018. Therefore, it is reasonable to infer that the trespass commenced sometime in 2017 or 2018. For the purposes of a calculation in this matter, in all the circumstances and given the stage of construction of the building, I consider 2nd January 2018 as an appropriate date. The date of judgment is 20th April 2021. The capital value is taken as the market value of US\$60,000.00. Using this formula, the sum to be awarded to the claimants for mesne profits is US\$15,000.00 (7.5% x \$60,000 = \$4,500.00 per year or \$375.00 per month; \$375.00 x 40 months = \$15,000.00).

Attempts to settle

- [23] In her witness statement, the first defendant outlines different scenarios considered in the parties' attempts at arriving at an amicable resolution of this matter. They got to a point where it was agreed that the first claimant would purchase Parcel 188 in its entirety. They eventually agreed to a reduced selling price of US\$200,000.00 plus legal expenses. The first defendant states that she was constrained to withdraw her offer to sell Parcel 188 "because while the First Claimant was amenable to the sale price of US\$200,000.00 for Parcel 188, he stated that he could not pay my legal practitioners' expenses of US\$7,500.00. He even suggested that I did not need legal counsel in the sale/purchase of Parcel 188 matter".

⁵[2006] UKPC 3 (Antigua and Barbuda)

[24] I recall this part of the first defendant's evidence to highlight the unfortunate situation of the parties coming to an agreement in a matter of significant importance and value to them and then to have all the negotiations and progress derailed on the issue of counsel's fees, rendering the settlement process of the subject matter nugatory.

Aggravated damages

[25] Although pleaded, at the assessment, the claimants realised that the facts on which they rely do not meet the threshold for an award of aggravated damages. No award will be made under this head.

Costs

[26] The claimants are entitled to prescribed costs on the global award. In case management, it was determined that costs of certain applications would be dealt with at this stage. In relation to the application to strike out the claim, this was not adjudicated upon and the matter was otherwise determined by the entry of judgment for the claimants. In the circumstances, I make no order as to costs on that application. I am in agreement with the defendants that they are entitled to costs on the successful outcome of their application to strike out the claimants' supplemental and additional witness statements. On that application, I award the defendants costs in the sum of US\$1,500.00.

Interest

[27] The claimants have made a blanket plea for interest. The defendants point out that the claimants have failed to articulate the basis of any award of interest and therefore are entitled to post judgment interest only pursuant to section 7 of the Judgments Act.⁶ In support of this contention, the defendants cite the ruling of Master Lanns in the **Hugh Charles** case on this issue. The learned master stated:

"CPR 8.6(4) provides that a Claimant who is seeking interest must say so expressly in the Claim Form and must include in the Claim Form or Statement of Claim details of the basis of entitlement, rate and period for which it is claimed. The Claimant has run afoul of this rule and thus, he is only entitled to post judgment interest."⁷

⁶ Cap. 35 of the Laws of the Territory of the Virgin Islands

⁷ NEVHCV2012/0015 at paragraph 43

Adopting this approach, the claimants in this matter are entitled to post judgment interest only.

Order

[28] Based on the foregoing, it is hereby ordered that the defendants shall pay the claimants as follows:

- (1) Out of pocket expenses in the sum of \$2,197.50,
- (2) Damages for trespass in the sum of US\$60,000.00.
- (3) Mesne profits in the sum of US\$15,000.00.
- (4) Interest on the global sum at the rate of 5% per annum from the date of judgment on assessment to the date of payment in full.
- (5) Prescribed costs of US\$6,947.78 in accordance with Part 65.5 of the Civil Procedure Rules 2000 as amended less costs to the defendants on the application to strike out the claimants' supplemental and additional witness statements in the sum of US\$1,500.00, amounting to total costs of US\$5,447.78.

[29] Finally, I thank both counsel for their assistance in this matter.

Tamara Gill
Master

By the Court

Registrar