

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA & BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2013/0796

BETWEEN:

[1] ARIAN BLANCHARD

Claimant

and

[1] NALDA PETERSON

Defendant

Appearances:

Mrs. Samantha May Francis of May Knight Law for the Claimant

Mr. Lawrence Daniels and Mr. Pete McKnight of Daniels, Phillips & Associates for the Defendant

.....
2017: October 20

2018: April 13

June 1

December 19
.....

JUDGMENT

[1] **HENRY, J.:** This is a claim in private nuisance. The claimant is the owner of premises situated at Scotts Hill and described as Registration Section: Potters & Belmont; Block 1891D; Parcel: 173. The

defendant is the owner and occupier of a house and land adjacent to that of the claimant. The claimant claims against the defendant:

- 1) An order that the defendant abates the traversing of waste water over the claimant's property at Scotts Hill;
- 2) Damages for loss suffered as a result of the nuisance;
- 3) Interest; and
- 4) Costs.

[2] The claimant pleaded that during the construction of her property, she noticed that there was waste water running over onto her property. When she investigated, she found that the waste water was coming from the defendant's property. The claimant brought this to the defendant's attention and offered to have her Engineer go onto the defendant's land to have the problem fixed at the claimant's expense. The defendant however, declined the offer and indicated that she would have the problem fixed so as to abate the nuisance and trespass. The efforts taken by the defendant were unsuccessful and after months of continued traversing of waste water over the claimant's property, the claimant through her attorneys, issued a letter demanding that the defendant take the necessary steps to abate the nuisance.

[3] According to the claimant, the traversing of the water over her property has gone on for a prolonged period and the waste water continues to flow over the claimant's land. This has caused the claimant to suffer damage to her property as the paint on the retaining wall has begun to strip due to the constant water flow and moisture on the wall. The claimant has also incurred cost in having the driveway frequently cleaned, as the constant presence of moisture causes green moss to grow. The runoff of waste water onto the claimant's property is dangerous to the health of the claimant, her family and visitors to her house and it has caused the claimant loss, discomfort and damage.

[4] The defendant was personally served with the Claim Form and Statement of Claim on 28th January 2014. No Defence was ever filed. From the Affidavit filed by the claimant, it appears that after service upon her of the Claim, the defendant took certain steps to abate the nuisance, but those steps failed. Subsequently, the claimant made an application pursuant to CPR Part 15 and 26.3 that judgment be entered for the claimant on its claim. The claimant states that the remedy sought by the claimant

cannot be obtained by way of a Request for Default Judgment. Therefore the claimant has proceeded by way of an application for summary judgment and damages to be assessed thereafter.

- [5] In the court's view, the matter does not fall under Part 26.3 of the CPR since there are no pleadings of the defendant to be struck out. The matter falls under Part 12 of the CPR where permission to enter a default judgment must be made. Such application must be supported by evidence on affidavit. The court therefore deems the application filed to be one for permission to enter default judgment.
- [6] On 20th October 2017, the first hearing of the application, the defendant appeared for the first time. She was represented by Counsel. Both sides agreed to the appointment of an Engineer to carry out an inspection of defendant's premises and to file a Report with the court. The court made the appropriate order. The parties were to agree on a date for the inspection. The filing of the Report was substantially delayed, since the first Engineer left the Island and a second Engineer had to be appointed. The Engineer's Report was finally filed on 26th April 2018 by K. J. Cassell Consultants Ltd, Architects, Engineers and Project Managers. On the final hearing date, the court ordered written submissions to be filed and exchanged.
- [7] The essence of Nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of his ownership or occupation of land. Private nuisance is usually caused by a person doing, on his own land, something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his act are not confined to his own land but extend to the land of his neighbour by (1) causing an encroachment on his neighbour's land, when it closely resembles trespass, (2) causing physical damage to his neighbour's land or building or works or vegetation upon it, or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.¹ Further, it is necessary, in any particular case where interference is alleged, to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort or causing material damage to the land²
- [8] Mr. Cassell in his Report notes that it was evident from his first site visit that some type of drainage water was flowing onto and down the access road on to the north side of the lot. After investigation, it was determined that the effluent was flowing from the adjacent house's sewage system. The grey

¹ Thompson-Schwab v Costaki [1956] 1 W.L.R 335 cited by Clerk & Lindsell on Torts, Seventeenth Edition, Sections 18-01 and 18-05

² St. Helens Smelting Co v Tipping (1885) 11ER 1483

water effluent was eventually determined to be a sewage system overflow, due to inadequate percolation of effluent in the soil around the defendant's septic tank. Mr. Cassell also noted that the defendant's septic tank has a setback approximately 10 ft from her eastern boundary and the effluent originated in that general area. The report further states:

"The excavation for the Arian Blanchard's new driveway did not impact on the neighbouring property in anyway; it only exposed the source of a pre-existing sewage problem. This problem is typical of soil types that have a low percolation rates, which can lead to overflowing soak pits or drain fields of limited capacity, that are ultimately unable to handle the amount of effluent from the septic tank. The problem would fluctuate with dry and wet weather conditions as the amount of ground water changes, as a result unsuspecting property owners are often unaware that the problem exists."

- [9] It is evident from the evidence submitted that effluent from the defendant's soak pit continues to escape unto the claimant's property. The claimant has therefore established a claim of nuisance for which an abatement order will be granted.

Damages

- [10] The defendant submits that the court may order the defendant to take further steps to abate the nuisance. However, if the court is also minded to award damages, the general damages should not exceed fifteen thousand dollars (EC\$15,000.00). The defendant refers the court to the cases of **J.B. Julian and Bernadette Bobbette**³ and **Elton Scatliffe and Anette Scatliffe v Dwite Flax**⁴. In addition, the defendant submits that the Special Damages pleaded have not been proved, since receipts for the claimed expenditures are lacking

Damage to Property

³ SLUHCV 1998/58

⁴ Claim No 2010/0053

- [11] The claimant has pleaded damage to her retaining wall and driveway. The court accepts that no documentary evidence in support of the \$2,000.00 claimed for cleaning the driveway has been tendered in evidence. In her Affidavit in support of the application, the claimant merely makes the statement that she has had to have the driveway cleaned frequently, as the presence of moisture causes green moss to grow. She fails to mention any cost attached to the cleaning. Her pleading is therefore unsupported by any evidence. Therefore only a nominal award can be made under this heading of \$1,000.00. In support of her claim for damage to the retaining wall however, the claimant has tendered a Cost Estimate for Rectification of Wastewater Seepage by C.E.A.S Civil Engineers. They list the costs associated with rectification as follows:

Temporary remove soil from behind retaining wall	\$ 750.00
Clean blockwork and apply drylock waterproofing to back face of wall	1620.00
Replace backfill behind retaining wall	450.00
Connect weephole drain pipes below concrete	250.00
Repair channels created for subsurface drain pipes	500.00
Scrape face of retaining wall, prepare & repair	1260.00
Cleanup and demobilization	300.00
Total	\$5,130.00

- [12] The claimant has also submitted a Valuation Report on the property signed by Patrice Francis, Civil Engineer, which indicates a 15% depreciation of the overall structure. Most of the defects observed were unrelated to the water seepage. The observations in regard to the retaining wall are already accounted for in the above rectification estimate. The claimants have failed to prove any loss of market value of the property due to the nuisance. The court is satisfied that damage to the retaining wall has been proven. The court awards the sum of \$5,130.00 plus \$2,000.00 for the costs of the assessment and valuation plus \$1,000.00 in respect of the driveway for a total of \$8,130.00 as Special Damages.

Inconvenience and Discomfort to the Claimant

[13] As was noted in the case of **Dobson and others v Thames Water Utilities Limited (No,1)**⁵, the assessment of damages for loss of amenity will involve a considerable degree of imprecision. However, the measure of damages will be affected by the size and commodiousness of the property, and the experience of the members of that family is likely to be the best evidence available of how amenity has been affected in practical terms, upon which the financial assessment of diminution of amenity value must depend.

[14] The claimant pleads that as a result of the above matters she has been deprived of the full use and enjoyment of her property and has therefore suffered damage. The claimant, who is an avid basketball player, is unable to walk in the entry way of her property and is unable to play basketball in her driveway, as the majority of the waste water flows over this portion of her property. Further, she is unable to access her garbage receptacle and is unable to open and close her gate. The court therefore awards general damages of \$15,000.00

[15] Accordingly, Judgement is granted in favour of the claimant, Arian Blanchard, as follows:

- 1) An order that the defendant Nalda Peterson do abate the nuisance in the form of waste water flowing from her property unto the claimant's property situated at Registration Section: Potters & Belmont; Block 1891D; Parcel 173 within 30 days after service of the Order on her.
- 2) Special damages in the sum of \$8,130.00 and general damages of \$15,000.00
- 3) Prescribed cost on the sum awarded.

Clare Henry
High Court Judge

By the Court


Registrar

⁵ [2009] EWCA Civ 28