

VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
(CIVIL)

CLAIM NO 361 OF 2005

BETWEEN:

CARMEN GRANT

Claimant

AND

STEVE OLLIVIERRE  
of Dorsetshire Hill

Defendant

Appearances

Mr Joseph Delves for the Claimant  
Mr Grant Connell for the Defendant

.....  
2014: September 30; October 21  
2015: January 30  
.....

JUDGMENT

INTRODUCTORY AND BACKGROUND

- [1] **LANNS, J [AG]:** By Fixed Date Claim Form and Statement of Claim filed 29<sup>th</sup> July 2005, the Claimant herein, Carmen Grant claims damages for: (a) trespass to, and wrongful interference with support for her land; (b) a declaration that the Defendant is not entitled to use or occupy or construct any structure in the area of land shown on Plan G/10 as a ravine; (c) an order that the Defendant remove all works constructed in the ravine; (d) an order that the Defendant return the ravine to its original state; and (e) costs.
- [2] The pleadings show that the Claimant, and the Defendant, Steve Ollivierre are neighbouring landowners and that a ravine divides their lands. Indeed, the Claimant's land is described in part as being "bounded on the North by Oscar Greaves; On the South by a ravine; On the East by a road; and on the West by a ravine."

- [3] From around the year 1965, the Claimant had been ordinarily resident in both England and St Vincent and the Grenadines. When she is in England, her brother Herbert Joseph (Mr Joseph) looks after her land. In or about June 2003, Mr Joseph wrote to the Claimant informing her that the Defendant had filled up the ravine on the Southern edge of her land with stones, soil and concrete, and replaced it with a small drain, tagged on to her Southern boundary. Upon receiving the news, the Claimant travelled to St Vincent and the Grenadines, and, having made her own observations, and taken some pre-action steps, she resorted to the court for interim relief pending final determination of the matter.
- [4] On application made by the Claimant without notice, the Claimant obtained an injunction against the Defendant restraining him, his servants or agents or howsoever otherwise from constructing a road or any structure upon the parcel of land described as a ravine, which divides the Claimant's land from that occupied by the Defendant until trial of the matter, or until further order.
- [5] On the 22<sup>nd</sup> September 2005, on a further notice of application, the injunction was continued until trial of the matter or until further order. The injunction is still in place, much to the disgust and frustration of the Defendant who has deposed that the injunction has prevented him from constructing a road which already has planning approval to access his land. This, he deposed<sup>1</sup>, has caused him significant financial hardship having lost two potential buyers for the said land.
- [6] It appears from the court record, that the trial of the matter occurred before a Judge on 27<sup>th</sup> November 2009, 15<sup>th</sup> December 2009 and 10<sup>th</sup> April 2010, following which the decision was reserved. Regrettably, the record shows that there were some administrative issues which hindered the delivery of the judgment<sup>2</sup>; hence, the case had to be heard de nova, and this retrial eventually took place after several adjournments to allow the Claimant, whose whereabouts were said to be unknown, and who had not been in contact with her legal practitioner, to appear. Indeed, in a notice of application for the retrial date of 30<sup>th</sup> June 2014 to be vacated, the Claimant's legal practitioner stated the grounds of the application as being: (1) 'The Claimant, by all investigations resides in England.'; 2) 'It is unknown whether or not the Claimant is still alive, based on past illness and the inability to reach her.'

## THE CLAIMANT'S CASE

- [7] The Claimant's pleaded case is that she and the Defendant occupy properties separated by a ravine. On or about 25<sup>th</sup> March 1991, she bought the house and land at Upper Sion Hill/Devonshire Hill where she presently lives. Her land is described in registered Deed

<sup>1</sup> See Affidavit of the Claimant filed the 30th June 2013.

<sup>2</sup> The record discloses that the trial was not recorded, so the evidence was not available to write the decision. (See *letter* dated 30<sup>th</sup> June 2014 from Registrar to Defendant's Counsel.

numbered 713 of 1991 and comprises 25.873 square feet; bounded on the North by Oscar Greaves, on the South by a ravine, on the East by a road, and on the West by a ravine.

- [8] The Claimant has lived between England and St Vincent. While In England, she learnt that the Defendant had filled up the ravine on the southern edge of her land and replaced it with a small drain, which he tagged on to her southern boundary. On the southern boundary of the Claimant's land was a ravine about **10 feet deep and about 8 feet wide** in parts. The ravine was there from time immemorial. The Dorsetshire Hill Public Road runs along the eastern boundary. There is a deep gutter between the road and the claimant's land. This gutter runs all the way up Dorsetshire Hill
- [9] Water from elevations higher than the Claimant's land and from houses on the lands runs into the gutter which empties into the ravine and then to the Sion Hill Bay. In bad weather, the flow of water is so heavy it often fills the gutter to a capacity greater than the gutter can handle. In very bad weather, even the ravine has filled up and overflows its banks. The force of the after over the years created the ravine.
- [10] The gutter that the Defendant attached to the Claimant's land was poorly constructed that it has cracks at one particular point. Water is seeping under and through the northern edge of the gutter and this seeping water is eroding and will erode the southern part of the claimant's land..
- [11] The Claimant has a small retaining wall at the corner of her land where the gutter along the road meets the ravine. The seepage from the "new" gutter and the sharp angle of its juncture with the "old" gutter causes the water to backflow into Claimant's wall and to undermine it. Because there is no longer a natural curve for the water to enter the ravine, and because that natural curve was replaced by a sharp corner, trees, branches and other debris coming down in the gutter jams at the corner and then both debris and water overflows the Claimant's land.
- [12] The Defendant constructed the gutter in a straight line along the Claimant's southern boundary. But her southern boundary was not straight. And the Defendant wrongfully cut off parts of the Claimant's land. The Defendant conceded that he had indeed cut off part of the Claimant's land but said it was only a few inches of the land.
- [13] The Defendant backfilled the ravine to give himself more land. He bought land to the west of Lot No 1. The Defendant intends to use the backfilled ravine as access road to Lot No 1 and to the more recently purchased land. Instead of using Lot No 1, he purports to use the ravine to place the road. The Defendant is preparing to develop the backfilled ravine and construct a road thereupon.
- [14] The backfilling of the ravine has caused the Defendant a myriad of problems. Her land is eroding. The inadequate drain fills up with water, floods her land, and turns portion of it into a lake, and a swamp in others. Further, the debris, objects, and assorted junks brought by the roadside gutter from Dorsetshire Hill now frequently empties into the Claimant's land. Her wall is eroding. All the trees, grass and shrub which grow on the Claimant's side of the ravine and which supported the soil there and prevented its erosion

have been destroyed because of the wrongful action of the Defendant; her land is breaking away in ways at a rate that it never did before.

- [15] In addition, because of its size, the water in it and the vegetation on it, the ravine has acted as a natural barrier on the Claimant's southern boundary. Now that the whole area has been levelled off, the Claimant's land is now easily accessible to human and animal intruders. Because of the wrongful action of the Defendant, the Claimant is now a regular victim of praedial larceny. Dogs, sheep goats and cows now destroy or eats any crops the Claimant plants on her land. Animals trample the Claimant's crops and defecate in and around her cultivation, so she has stopped planting food.
- [16] In June 2003, the Defendant visited the Claimant. He told her he was going to put a road in the ravine. She told him not to do so. And she told him all the problems his construction had caused her.
- [17] The Defendant came back a second time in 2003 and offered to construct a wall on the northern side of the gutter. The Claimant told him that the gutter was already on to her boundary; so any wall he was proposing to build would necessarily further encroach on her land. When the Claimant asked the Defendant how he could propose to build on her land, the Defendant replied, "leave that to him.". The Defendant promised to have his engineer check out the problems that the water was causing to her property, but he never did.
- [18] As a result of the Defendant's wrongful action, the Claimant instructed a solicitor to write to the Defendant whereupon the Defendant again visited the Claimant enquiring why she had caused a lawyer to write to him. She responded that he did all the backfilling while she was in England.

### **THE DEFENDANT'S CASE**

- [19] In his defence, the Defendant has denied the causes of action pleaded, and most of the allegations, and he has put forward his own version of events. The Defendant's pleaded case is that the water which is diverted from the gutter at the side of the road leading to Dorsetshire Hill flowed uncontrolled between both properties to the extent that *it* caused excessive erosion to both sides of their lands.
- [20] The water which flows from the small gutter is only a minute tributary to the large ravine located at the Western boundaries of both Claimant and Defendant. The said ravine measures in excess of fifteen feet in width at parts and is approximately ten feet deep. This ravine was formed as a result of the topography of the land from the top of Dorsetshire Hill, and it is this ravine which meanders down pass Sion Hill
- [21] The ravine at the western bank of the respective properties, which said ravine the Claimant has failed to refer to throughout her claim, is the main source of the damage to her property which "floods her land and turns portions into a lake and swamp in others". In fact the drain which the Defendant has constructed has prevented any further erosion and minimised any further damage to the Claimant.

- [22] The Defendant has constructed a gutter which is connected to the old gutter which runs along the public road 'from Dorsetshire Hill on the eastern boundary of the said properties and diverts between them. The new gutter bears the same dimensions of the gutter at the side of the public road to which it is connected and therefore capable of holding the same capacity of water.
- [23] The Defendant has constructed the gutter which is identical in diameter to the gutter which . is diverted from the side of the public road which said gutter 'runs all the way up Dorsetshire Hill. Water from elevations higher than the Claimant's land and from houses on those lands runs into the gutter; therefore, the gutter which the Defendant has constructed could not be considered a "household gutter".
- [24] The gutter which the Defendant constructed has in fact prevented any further erosion of the Claimant's land on the Southern boundary and has acted as a support to the said area of land. The Claimant's wall was not damaged by any act of the Defendant. The base of the new gutter is cast in concrete. The Claimant's wall was poorly constructed initially and the "underminell which the Claimant refers to is a result of the wall not having adequate foundation to withstand a constant flow of water from the gutter at the side of the public road even prior to the construction of the new drain. Indeed, the concrete drain that the Defendant constructed supports the Claimant's poorly constructed wall.
- [25] As a result of the natural 'curve' prior to the Defendant's constructing the "new" gutter the water from the drain at the side of the public road which is diverted between the said properties used to overflow onto the Defendant's land and erode his land. This was merely due to the Defendant's land being at lower incline than the Claimant's property. There is now a three foot distance between the wall of the new gutter and the Southern boundary of the Claimant's land. Therefore, that which is pleaded in paragraph 13 of the statement of claim is practically physically impossible.
- [26] The Defendant has not trespassed on the Claimant's land nor has he at any period during the construction of the new gutter cut off any part of the Claimant's land. In fact, there is a three foot distance between the wall of the new gutter, and the Claimant's Southern boundary.
- [27] In September 2005 Mr Keith Francis a licensed surveyor in St Vincent and the Grenadines drew a sight plan of the said property showing the location of the drain which the Defendant has constructed. The plan shows that there was no trespass on the Claimant's property. The Defendant intends to construct a road to access his land to the West of his property, other than that paragraphs 15 and 16 of the statement of claim are denied

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<sup>3</sup> Paragraphs 15 and 16 allege, among other things that the Defendant backfilled the ravine to give himself more land; that he intends to use the backfilled ravine as access road to land to the West of the land which he owns or occupies, and he purports to use the ravine to place his road; and is presently preparing to develop the backfilled ravine to construct a road thereon

- [28] The drain which the Defendant has constructed has in fact supported the Claimant's land and has prevented any further erosion to land on the Southern boundary of her property. The debris, objects and assorted junk to which the claimant refers is brought down in the ravine which is located at the Western boundary of the Claimant's land. The Claimant failed to construct a similar gutter at the Western boundary of her property to curtail the flow of that ravine. It is this ravine which causes all the flooding erosion and damages to the property. The Defendant, having constructed the new gutter has prevented any further erosion to Southern boundary of the Claimant's land. At present, numerous young coconut trees are growing up on the reclaimed land. These have sprouted from dried nuts which fell from trees on the southern boundary of the Claimant's property
- [29] The Claimant has failed to erect a fence around her entire property save and except the eastern boundary facing the public road and the northern boundary facing Dorsetshire Hill. She was subject to praedial larceny and other animals entering her yard for this very reason, and not as a result of any act of the Defendant.
- [30] The Defendant admits that he had a conversation with the Claimant when she arrived in June 2003. He told the Claimant of his intention to construct a road and she did not object. Defendant told Claimant of his intention to develop the lands to the West of his property and the Claimant expressed concern as to the number of vehicles that the use of the road would cause.
- [31] The Defendant offered to construct a wall for the Claimant along the southern side of the new gutter since this would both minimise the noise and further enhance her property and support the land. The Claimant entertained the offer. And the Defendant discussed placing speed bumps on the said road when completed so as to guarantee that any vehicles which would use the said road would not drive at excessive speed.

### **THE ISSUES**

- [32] Learned counsel for the Claimant (Mr Delves) identified the issues for determination as being:
1. Did the Defendant own the ravine;
  2. Did the Defendant fill in the ravine;
  3. Did the Defendant build a drain in the ravine
  4. Did the construction undertaken by the Defendant cause the Claimant loss and damage;
  5. Did the Defendant wrongfully trespass onto the claimant's land by taking in a portion thereof or otherwise;
  6. Did the action of the Defendant breach any of the Claimant's rights?
- [33] A corollary issue is, if it is found that the Defendant did, by plastering the Claimant's boundary wall, trespass on the Claimant's land; and did, by backfilling the ravine interfere with support for the Claimant's land, what is a just order to make?

## THE EVIDENCE ON BEHALF OF THE CLAIMANT

### The Claimant

- [34] The Claimant was not called. As previously stated, no one knows of her whereabouts - whether she is dead or alive. Nevertheless, her Witness Summary dated 27th January 2009 was admitted as her evidence in support of her case pursuant to Section 47 of the Evidence Act Cap 220, and CPR 26.12 (n (29.2 (1) and (2) ; and 29.8. It is to be noted that the decision to *allow* the Witness Summary to be admitted into evidence did not sit happily with Counsel for the Defendant, (Mr Connell) although he had been served with the requisite notice under CPR 29.8 (2). He was strongly opposed to the application for permission to do so, based on the history of the Claimant's non-appearance, and in light of the uncertainty as to whether she is dead or alive.
- [35] The Claimant's Witness Summary is for the most part a repetition of the averments in her Statement of Case. I do not think it bears repeating. Obviously, as the Claimant was not present, her evidence could not be tested by cross-examination.

### Rodney Grant

- [36] Rodney Grant (Mr Grant) is the son of the Claimant. He gave a Witness Statement on behalf of the Claimant. In it, he identified himself as a social worker living in London. He too, was not called. His Witness Statement dated 28<sup>th</sup> January 2009 was also admitted into evidence under Section 47 of the Evidence Act Cap 220, and CPR 26.12 (n (29.2 (1) and (2) and 29.8.
- [37] Mr Grant's evidence corroborated that of the Claimant but not in every material respect. He stated that the ravine was often filled up when it rained heavily. The ravine was 10 feet deep and 8 feet wide. He came to St Vincent in 2003 and found the ravine completely filled up with gravel and a new small gutter had been built which was attached to his mother's stone wall. The new gutter ran straight down the south side of his mother's land and he noticed cracks in it. He pointed out the cracks *in* the gutter to the Defendant who acknowledged same. The Defendant spoke to his mother stating that *in* filling the ravine, he had improved the Claimant's land. The Defendant later told them that his intention was to build a road so that he could access some land locked land he had in the area. The Claimant expressed concern about vehicular traffic and noise and the Defendant offered to build a wall to dampen the noise and sleepers to slow down the vehicles. He also mentioned that he had fixed the cracks. His mother asked for an engineer's report to determine whether the gutter could accommodate the water which would flow through it and the Defendant agreed to get the report. On a later visit to St Vincent, he went to the Planning Office of the Ministry of Finance. To the best of his knowledge, the Defendant did not have planning permission for any of his construction.

### Brian George

- [38] Brian George, a Civil Engineer, gave a Witness Summary on behalf of the Claimant. However, he did not appear at the trial; so his evidence was not tendered.

### David Greaves

- [39] David Greaves gave a witness statement on behalf of the Claimant dated 28th January 2009. He has since died on 22<sup>nd</sup> June 2009. By virtue of s. 47 of the Evidence Act, coupled with the CPR 26.12 (1) (29.2 (1) and (2); and 29.8, the Claimant was permitted to rely on the Witness Statement of David Greaves.
- [40] In his Witness Statement, Mr Greaves stated that he lives in the property opposite the Claimant for almost 28 years. The property had always had a large ravine to the south side of it. A roadside gutter runs along side the Claimant's property and enters into the ravine. This carried water from the surface rainfall and households into the *ravine*. It also carries rubbish and household water from the top of Dorsetshire Hill which empties into the ravine. In heavy rain, the gutter would sometimes overflow and there would be blockages.
- [41] The Claimant has a front wall erected around much of her east facing and nearing the larger ravine was left off cut to allow access to the back of the property as much of this land was used for agricultural uses.
- [42] Mr Greaves stated that he was aware that the large ravine to the southern boundary of the Claimant's property has been backfilled by the Defendant since 2003 Where a relatively small guttering has been placed with a substitute for the ravine. This guttering is by far smaller than the ravine that was once there that was at least 10 feet deep.

### Close of Case for the Claimant

- [431] On the evidence as contained in the witness summary of the Claimant and Rodney Grant, and the witness statement of David Greaves, Mr Delves closed the case for the Claimant.

## **THE EVIDENCE ON BEHALF OF THE DEFENDANT**

### The Defendant

- [44] By his witness statement, the Defendant stated that he is the owner of 16,088 sq feet of land bearing registration number 3156 of 1994 situate at Dorsetshire Hill in St Vincent and the Grenadines. He purchased the land in 1994 from one, Jack Joachim. In that same year he noticed that there was a deep gutter outside the Claimant's land, which is south of the Claimant's land and north of his land. He noticed the gutter was much deeper to the extent of a ravine and had caused much erosion of lands and a build up of debris making the grade of his land much lower than normal. The ravine was approximately 6ft in depth

and 6 to 7 ft in width in most parts except for one section that had eroded more towards his land making it about 9 ft in that section.

- [45] In light of the erosion, he decided to correct this matter by constructing a proper drainage instead of having continued erosion. The proposed drain was to replace the actual area where the water flowed which was more or less down the middle of the gutter. The proposed gutter will also assist the drainage of the road to be constructed to access his lands to the west. He said that in order to have access to these lands a proper drainage system was inevitable.
- [46] He met with the Claimant and notified her that he had intentions of backfilling the ravine and that he was going to do a gutter along the water path. At the time, the Claimant's boundary walls were beginning to fall and she was quite receptive to the idea.
- [47] The Claimant stated that he also had intentions of building a fence around his property in order to prevent animals which prior to the backfilling, frequently roam the area via the gutter.
- [48] In 2005, the Defendant constructed a gutter to aid in saving lands from completely washing away. This gutter was in no way attached to the Claimant's boundary wall. The drain that he constructed carried water to its capacity and there was no more erosion of lands.
- [49] On 13<sup>th</sup> and 14<sup>th</sup> July 2008, he presented himself at the property and saw free flow of water coming from the main road into the drain which he had constructed and there was no overflow or erosion forming lakes on the Claimant's property or any sizable debris being brought down to the newly constructed drain. When he constructed the new gutter, he went further and even assisted the Claimant in plastering her wall so as to aid and strengthen it from falling.
- [50] After all the constructing, the Defendant met with the Claimant and discussed his intentions to develop the lands to the West of his existing lands. He told her that potential residents would be using the road to access the said lands to the West. He expressed that he had already gained planning approval for constructing the road with the newly constructed gutter as having adequate drainage for the land and water flowed there.
- [51] The Claimant was not pleased with his intentions to construct a road; she complained that the noise from the vehicles would affect her. However, she had no objection to him constructing the gutter. He suggested to her that he will construct a wall on the south side to minimise noise and she was receptive and suggested that he get speed bumps in place on the slope.
- [52] In 2005, when he was about to commence construction of the road with her recommendations in mind, he was informed that the Claimant had filed an injunction to prevent any further construction until the High Court case is heard. During the years the injunction has been in place, he has been unable to entertain offers for land which he was selling to the West which needed the road to be in place to allow access to it.

[53] He did not go on the Claimant's land nor has construction of the new drain caused that which the Claimant has claimed. The construction of the drain has actually supported the Claimant's land and has prevented any further erosion. In the absence of a fence around the Claimant's property, access by animals is inevitable.

[54] In cross-examination, the Defendant accepted that the ravine was not on his land. He also accepted that the ravine separates both lands. And he accepted that he backfilled the ravine. He maintained that he did so because of the erosion it was causing to both lands. Shown Plan G 13/53, Mr Ollivierre pointed out a dotted line thereon and said that it is the edge of a gully which is his northern boundary. Asked whether he received planning permission to backfill the gully that did not belong to him, Mr Ollivierre said that he had planning permission and approval to construct a road to get access to lands to the West that were landlocked, but the planning permission and approval did not say anything about building a road in the gully. He maintained that the gully was approximately six ft by six feet and not 5 ft wide and 10 ft deep. Asked to comment on the Claimant's claim of flooding on her land, Mr Ollivierre replied, "It cannot happen."

Mr Glenford Stewart

[55] By his witness statement, Mr Stewart describes himself as a consultant and managing director of Stewart Engineering Limited in the State of Saint Vincent and the Grenadines. He stated that in October 2008, at the instance of Mr Steve Ollivierre, he surveyed the area between the properties in question which are owned by Mr Ollivierre and Ms Grant. While conducting the survey, it was revealed that Mr Ollivierre's property was bounded on the North by lands of the Claimant, and on the East by Sion Hill/Dorsetshire Hill Road. It was also discovered that a gully which lies between the two properties had been formed by storm water erosion. He stated that water flows from a drain along the Eastern boundary of the Claimant's property at the Western edge of Sion Hill/Dorsetshire Hill road and turns Westward along the Southern boundary of Ms Grant's property, along the Northern boundary of Mr Ollivierre's property. A property wall reportedly owned by Mrs Grant was built along the Eastern and southern boundaries of Mrs Grant's property. He was informed by Mr Ollivierre that he had constructed a concrete box drain approximately 2 feet six inches wide and two feet deep along the Northern boundary of his property within the said gully to prevent storm water and to prevent further erosion of lands on both sides of the gully. Mr Stewart stated that in his expert opinion, there is absolutely no possibility of the Claimant's property ever being flooded by storm water even if the box drain and gully are blocked. According to Mr Stewart, the construction of the concrete box drain in the gully and on the lands owned by Mr Ollivierre, prevents further erosion and widening of the main gully, and reduces the threat of collapse of the Claimant's boundary wall.

[56] In cross examination, Mr Stewart confirmed that the gully lies between the two properties.,, He acknowledged that when he did his survey, the gully had already been filled in, but he explained that even though it had been filled in, he was able to estimate where the original contour was. Asked what the water flow was, Mr Ollivierre said that at any given point, the flow is never constant.

### Evidence at the locus

- [57] The court visited the locus. The Defendant was present and his witness Mr Stewart was also present. Evidently, neither the Claimant nor her witnesses were present. There was vegetation on both sides of the gutter. We were forced to stay at a distance and could not go the full length of the ravine. In response to a question posed by the court, the Defendant pointed out his boundaries. And he pointed out where he did the plastering on the Claimant's wall. He said the plastered part was falling in. He also pointed out the new gutter which he claimed on his land. *At the locus*, Mr Delves asked Mr Stewart if the new gutter was built right in the center of where the ravine was. He answered, "No, where it said - dotted at the boundary line." The Defendant pointed out the area that he backfilled. He said it is south of the new gutter that he constructed, on his land. Mr Delves asked the Defendant where he was proposing the road should go. His response was "On my land." "The injunction is not stopping you from putting the road on your land." Mr Delves countered.

### **SUBMISSIONS**

#### Claimant

- [58] In his closing submissions, learned Counsel for the Claimant submitted that on matters of credibility, the Defendant ought not to be believed; that he sought to mislead the court by saying that the ravine was always his and that it was only when shown the Plan that he conceded that his Northern boundary was the ravine and that it was never part of his land. Mr Delves pointed to the Deed numbered 3156 of 1994 which shows that title in the land which he said he bought in 1994, shows the land being vested in favour of Sylvester Arthur Ollivierre. He submitted that the Defendant also sought to mislead the court when he said that he filled in the ravine to protect the land from erosion. He developed that submission by pointing out that the Defendant bought the land in 1994 but did nothing for ten years stating that he was not ready for the land. Mr Delves submitted that the true reason was that the Defendant bought other lands to the back of his land, and the other lands were landlocked. At the time he filled in the ravine, he was about to cut up these lands into lots and sell them. He wanted the ravine to put his road, Mr Delves submitted.
- [59] Mr Delves also suggested that the Defendant also sought to mislead the court when he sought to allege that he had planning permission to build the road where the ravine was, and for the construction of the gutter. Counsel formed the view that there was enough space between his house and the northern edge to accommodate the road without interfering with the ravine. He reverted to the Defendant's contention that the injunction has prevented him from building the road but said that is completely untrue since the injunction did not restrain any activity on his land, but only from constructing on the ravine. As far as counsel was concerned, the fact that the Defendant has not built the road as yet means that he did not, and still does not intend to build on his land.
- [60] Mr. Delves next cited and discussed several authorities that he suggested supports the Claimant's case and he concluded his submissions by submitting that based on the

evidence and the documents, the trespass stemming from the cutting off of the Claimant's land has proven far above the requisite standard of proof, and thus, he urged the court to grant the reliefs sought by the Claimant. Counsel also urged the court to make permanent the interlocutory injunction granted in 2005, pursuant to the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act Cap 18, s 20.

### Defendant

- [61] Mr Connell, for the Defendant, prefaced his closing submissions by recapping in summary form the averments contained in the statements of case of both sides, as well as the case as put forward by them. He then examined the evidence given in court and at the locus. He next looked at the law pertaining to sufficiency of pleadings, trespass to land and in the end, Counsel submitted that the pleadings fail to establish a factual basis on which all of the causes of action which she alleges arise. Further, Mr Grant submitted that even if the court were to determine that any of the cause of action has been properly pleaded, the elements of those cause of action are not satisfied on the facts alleged in the Statement of Claim, nor does the evidence adduced make out these facts on a balance of probabilities. In those circumstances, Mr Grant urged that the injunction and the claim be dismissed in their entirety.

### **DISCUSSION AND DECISION**

- [62] The pleaded case of the Claimant centred on trespass to land and wrongful interference with support to land. And the reliefs sought were damages for trespass to land; damages for wrongful interference with support for land; a declaration that the Defendant is not entitled to use, occupy or construct any structure in that area of land shown on Survey Plan G/10 as the ravine; an order that the Defendant return the said ravine to its original state and dimensions being 8-10 feet deep and 8-10 feet wide for the entire length of the Claimant's southern boundary; and costs.
- [63] Trespass to land has been defined to mean 'every lawful entry by one person on the land in possession of another if he wrongly sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another; or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land onto another's land<sup>4</sup>. Did the Defendant trespass on the land of the Claimant?
- [64] In so far as the plastering of the Claimant's boundary wall is concerned, there is no dispute that the Defendant did trespass on the Claimant's land when he plastered her wall which he said, and which I accept, was falling apart. The court saw the area that was plastered.

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<sup>4</sup> Halsbury's Laws of England 4<sup>th</sup> Ed. Volume 45 (2) Pg. 518

The Defendant pointed it out to the court. However, there is no evidence that the Defendant sought the consent of the Claimant to plaster her wall; so from that standpoint, I find and hold that the claim for trespass to the Claimant's land has been made out.

- [65] Did the Defendant wrongfully interfere with support for the Claimant's land? The Claimant has not proven any actual interference with support of her land. In fact, the Defendant testified that the construction of the drain has actually supported the Claimant's land and has prevented any further erosion. This bit of evidence was not challenged. Similarly, Mr Stewart, testified that the construction of the concrete box drain in the gully and on the lands owned by Mr Ollivierre, prevents further erosion and widening of the main gully. That said, it appears, based on the case of **Birkett v Morris**<sup>5</sup> that it matters not that there is no proof of interference or encroachment. In **Birkett**, the Lord Chancellor found it necessary to state at page 55:

"The result of the opinions of the Judges of the Second Division appear to be, that a riparian proprietor has not right to erect any building alvea fluminis; and if he does, so, although the opposite proprietor may be unable to prove that any damage has actually happened to him by the erection, yet, if the encroachment, is not slight and trivial but of a substantial description, it must always involve some risk of injury. Lord Benholman said: "Without *my* consent" (that is the consent of the proprietor of the other side of the river), "you are notto put up your building in the channel of the river, for that in some degree must affect the natural flow of thee water. What may be the result, no human being with certainty knows, but it is my right to prevent your doing it; and when you do it, you do me any injury; whether I can qualify damage or not." And Lord Neaves said, "Neither can any of the proprietors occupy the alveus with solid erections without the consent of the other, because he thereby affects the course of the whole stream. The idea of compelling a party to define how it will operate upon him, or what damage or injury it will produce, is out of the question."

- [66] To the same effect is Lord Cransworth's opinion:

"When the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is prima facie owner of the soil of the alveus or bed of the river, ad medium filum aquae. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him severally, so that if, from any cause, the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus, each of them up to the medium filum aquae, in the same way as they were entitled to the adjoining land. The appellant contended that, as a consequence of this right, every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the alveus, so long as

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<sup>5</sup> (1886) LR 1 Sc. App 47

other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think that this is the true exposition of the law."

"Rivers are liable at times, to swell enormously, from sudden floods and rain, and in these cases there is danger to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting any building in the stream, so as to divert or obstruct its natural course. If a building should be erected out to middle of the stream, that is, to the whole extent of the proprietor's right in the alveus, no one can fail to see that there might be grave danger in case of floods. If the proprietor on one side can make an erection far into the stream, what is there to prevent his opposite neighbour from doing the same?"

- [67] What emerges from the authorities is that even though immediate damage cannot be described, or ascertained; even though the actual loss cannot be predicated yet, if an obstruction be made to the current of the flow of water, that obstruction is one which constitutes an injury which the court will take notice of, as an encroachment which adjacent proprietors have a right to have removed. As in the case of **Birkett**, the following maxim seems to apply in the instant case: "melio est condition prohibentis" that is to say "Where you have an interest in preserving a certain state of things, in common with others, and one of the persons who have the interest in common with you desires to alter it, "melior est condition prohibentis" that is to say "you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest"<sup>6</sup>.
- [68] Where does all this leave the Defendant? He has denied any wrongful interference with the Claimant's land, and has argued that constructing a drain to control the flow of water from the main road did not interfere with the Claimant's land. The construction of the drain, he asserts, has benefitted the Claimant for the past nine years in that any erosion which existed prior to building the gutter has subsided, and allowed the growth of vegetation between the ravine and the Claimant's boundary, including coconut trees which have grown beneath the existing trees on the Claimant's land. All this may be true, but the authorities are still against the Defendant. Indeed, added to the authorities cited above, Mr Delves has drawn to the attention of the court the provisions of the **Central Water and Sewage Authority Act, 1991**, ss. 11 and 13. Bys. 11 every body of water is vested in the Government in trust for the people; and by s 13, persons cannot acquire any rights to water, or to construct any works in or adjacent to any water, or bore otherwise than by virtue of that Act.
- [69] Section 2 defines a body of water as follows: 'Ground water and water contained and flowing in a spring, stream, river, natural lake, or swamp table where the interstices are filled with ground water, diverted or abstracted from any of the foregoing, or stored therein by means of works, but does not include the water from any spring which is situated wholly within the boundaries of land owned by any land owner and which does not

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<sup>6</sup> Birkett, *ibid*, at page 62

naturally discharge into a watercourse extending beyond the boundaries of such land or abutting on the boundaries of such land.

- [70] The ravine was/is a water course. By his own admission, the Defendant tampered with it by backfilling it and diverting the watercourse, and by building a box drain. By so doing, he interfered with the Claimant's right and or interest in the 'alveus'. Significantly, apart from his mere say so, he has provided no proof of planning permission to construct a road in the ravine. As to the Claimant's boundary wall, although the plastering of part of that wall benefitted the Claimant, by altering the gully or ravine, the Defendant put the Claimant's entire boundary wall at risk, and created a danger to both the Claimant's and the Defendant's properties in case of floods etc<sup>7</sup>. The Defendant's witness Mr Glen Stewart has stated in his witness statement that in his expert opinion, there is absolutely no possibility of the Claimant's property ever being flooded by storm water even if the box drain and gully are blocked. According to Mr Stewart, the construction of the concrete box drain in the gully and on the lands owned by Mr Ollivierre, prevents further erosion and widening of the main gully, and reduces the threat of collapse of the Claimant's boundary wall.
- [71] Mr Delves has not seriously challenged Mr Stewart's expert opinion evidence, and understandably so, because, in the words of Lord Cransworth in **Birkett**,<sup>8</sup> "The owners of land are not bound to obtain or be guided by the opinions of engineers or other scientific persons, as to what is likely to be the consequence of any obstruction set up in the waters in which they all have a common interest. There is ... and in all such cases, there ever must be, a conflict of evidence, as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say, "We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it". This is a plain intelligible rule easily understood, and easily followed, and from which I think Your Lordship ought not to allow departure."
- [72] Without attempting to impugn Mr Stewart's opinion, his opinion is simply what it is - an opinion. The court is not bound by it. The reality is, as articulated in **Birkett**, it is impossible to calculate or ascertain beforehand what may be the effect of erecting any building [or gutter or box drain] in the stream [or ravine], so as to divert or obstruct its natural course. What may be the result, no one knows for sure, but in some degree it must affect the natural flow of the water. It is the right of the owner on the side to prevent it from happening without his or her consent.
- [73] In the light of the foregoing authorities, and there being no dispute that the Defendant has, without the requisite consent, or permission, backfilled the ravine, (which had developed over a period of time because of the water running from Dorsetshire Hill onto it) and built a concrete box drain diverting the flow of water, I am satisfied that the Claimant has, on a balance of probabilities, made out its case of interference with support of her land.

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<sup>7</sup> Although the Defendant's property would be more at risk because it is lower than the Claimant's property.

<sup>8</sup> Ibid, page 59

## WHAT IS A JUST ORDER TO MAKE

- [74] The Claimant has asked for an order that the Defendant remove all works constructed in the ravine; and an order that the Defendant return the ravine to its original state. In my judgment, that would not be reasonably practicable. And in any event, I am not of the view that it would be a just order to make. I am of the view, based on the totality of the evidence, and based on the authorities, that removal of the erections will cause interference with the support of lands of both lands, and it would cause further erosion. In relation to the box drain, or the "new gutter", it is to be remembered that the unchallenged evidence is that it is placed on the Defendant's land (on the dotted line) and not in the ravine, *per se*.
- [75] The Claimant has also asked for a declaration that the Defendant is not entitled to use or occupy or construct any structure in the area of land shown on Plan G/10.
- [76] All in all, I think a just order would be to permanently restrain the Defendant, his agents, his servants, or howsoever otherwise from constructing a road, or any structure upon the piece or parcel of land described as a ravine, and which divides the Claimant's land from the lands owned or occupied by the Defendant. I propose to make such an order.
- [77] I am also of the view that the Claimant is also entitled to the declaration sought in her claim which I propose to grant.

## DAMAGES

- [78] There is no plausible evidence that the Claimant has sustained any damages as a consequence of the defendant's trespass to her land by his wrongful plastering of her boundary wall without her consent. In fact, the plastering, I accept, supported her wall thereby preventing it from collapsing. In those circumstances, I make no award of damages for trespass.
- [79] As regards the claim for damages for loss arising from praedial larceny, animal destruction of crops and loss of vegetation there is no proof of any loss or damage arising therefrom; hence, no award is made.
- [80] As to damages for wrongful interference with support for the Claimant's land, the Claimant has not shown or proven that any actual damage has resulted from the Defendant's tampering with the ravine. However, as the authorities show, though the damage cannot be discerned as yet, there is grave danger in case of floods. It is impossible, as the authorities show, to calculate or ascertain beforehand what may be the effect of erecting any building in "the stream" - in this case, the *ravine*. Ordinarily, in a situation such as this, where the Claimant is unable to prove any actual, or immediate damage or loss, the

Claimant would be entitled to nominal damages only. I am content, based on the concession of Mr Connell, to award nominal damage in the sum of \$5000.00.

- [81] The Claimant is entitled to costs in accordance with CPR 65.5 (2) (b), where the claim is treated as a claim for \$50,000.00. Under that provision, costs compute to \$7,500.00.

## **CONCLUSION**

- [82] In the foregoing premises, I give judgment for the Claimant, and I grant the following reliefs and orders:

1. A declaration that the Defendant Steve Ollivierre is not entitled to use, occupy, or construct any structure in that area of the land shown on Survey Plans G/10; and G13/53 as the ravine.
2. An order that the Defendant, Steve Ollivierre his servants, agents, or howsoever otherwise, be, and the same are, permanently restrained from further constructing a road, or any structure upon the parcel of land described as a ravine, and which divides the Claimant's land from the lands owned or occupied by the Defendant, and more particularly shown on registered survey Plan G8/10 in favour of the Claimant, and Plan bearing registration number G13/53 in favour of the Defendant.
3. The Defendant Steve Ollivierre do pay the Claimant Carmen Grant Costs as prescribed in the sum of \$7500.00.

- [83] I am grateful for the assistance of Counsel for the parties.

**/2**  
High Court Judge [Ag]