

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 294 OF 2003



BETWEEN:

Richard Allan Gibson

- Claimant

and

Clint Hazell
Mildred Hazell
Theodora Medford

- Defendants

Appearances:

Ms. Nicole Sylvester and Ms. Rochell Forde for the Claimant.
Mr. Joseph Delves for the Defendants.

2004: November 11th
2005: September 28th

JUDGMENT

[1] **Bruce-Lyle, J:** By a claim form dated the 25th July 2003, the claimant Richard Gibson claimed against the named defendants

- (a) Damages occasioned by the unlawful withdrawal of support for the claimants land at Gunn Hill known as Lot Number 4 on Survey Plan Number A.215;
- (b) A declaration that the claimant is entitled to support for his land from the Defendants' adjacent land;

- (c) An injunction restraining the Defendants whether by themselves, their servants or agents or otherwise howsoever from doing the following acts or any of them that is to say excavating and/or carrying away any earth or soil from within and under the lands adjacent to and near to the boundary of claimants land;
- (d) A mandatory order that the defendants cause to be erected and constructed a wall of sufficient strength to permanently support the land immediately adjacent and along the boundary of the claimants land to permanently support the said land;
- (e) Costs and;
- (f) Such further or other relief as the court deems just.

[2] On the 31st July 2003 an interim injunction was granted to the claimant to restrain the defendants pursuant to clause (c) of the claim form.

[3] On the 12th November 2003 the defendants filed a defence and counterclaim. Their counterclaim was as follows –

- (a) A declaration that the claimant is not entitled to enter or use the said land;
- (b) An injunction to restrain the claimant by himself his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the said land;
- (c) An order that the claimant forthwith removes the gate and the position of the wall on the defendants' land; or alternatively that the defendants remove these said structures at the expenses of the claimant;

(d) Damages and;

(e) Costs.

- [4] On the 20th November 2003 the claimant filed a reply to the Defendants' defence and counterclaim.

FACTS

- [5] Briefly the facts as I found them are as follows – the claimant by way of Deed of Conveyance dated the 28th August 1986 and bearing registration number 2119 of 1986 became the fee simple owner in possession of premises known as Lot 4 at Gun Hill, Ottley Hall. The said Lot previously formed part of the Estate of the Late Erye Medford. The claimant and his wife reside at the said premises at Gun Hill.
- [6] The defendants reside on adjacent premises to that of the claimant and his wife. The claimant's property is at a higher elevation than the lands on which the defendants reside. On one side the premises of the claimant and the defendants are separated by a concrete wall.
- [7] During the months of February or March 2003, the defendants by themselves or their agents or servants excavated an area on their premises which they occupy; earth from their property which the claimant claims supported the earth of the claimants' property. The defendants excavation works stopped about 2 ft. to 3 ft. away from the foot of the said concrete wall. According to the claimant these works were done without leaving proper or sufficient support for the claimants

land. The claimant believes that the defendant cleared away the soil to make space for the construction of a parking garage on that portion of the premises which they occupy.

[8] As a result of the excavation done by the defendants, the claimant claims that the earth along the boundary has begun to shift, slide and subside as the vital support on the Defendants' premises has been removed, leaving the claimants wall and property with no underlying support. As a consequence the concrete wall has begun to crack. The claimant claims his house and water tank is about six feet away from the wall and both the wall and the house depend on the land near to the boundary for their support, causing the claimants land to diminish in value, as the wall and the house continue to lose this critical support, thereby compromising their structural integrity.

[9] The defendants on the other hand admits that they or more specifically the First Defendant conducted the subject excavation but deny that this excavation has endangered any structures on the claimants land and counterclaim that the claimants wall occupies 161 square feet of their property and seek an injunction restraining the claimant from entering or remaining on their land and an order that the claimant remove the structure on their land.

[10] As I said before the first defendant admitted excavating in rock on his side of the wall, but denies that he excavated without leaving proper support or that he has removed or lessened the support of the claimants land, wall or house. The third

defendant denied any excavation at all, but importantly all the defendants denied that the claimant was entitled to support for his land and structures as alleged by the claimant in paragraph 8 of his statement of claim.

[11] The first and second defendants counterclaim that some 161 square feet of the wall is on their land and seeks orders for the removal of the wall and damages for trespass. The claimant answers the counterclaim by alleging that the defendants predecessor gave permission for the building of the wall in 1994 and that the defendants were guilty of delay. No estoppels has however been pleaded by the claimant.

[12] Under cross-examination the claimant interestingly conceded that the wall was built on the land belonging to the First and Second defendant. This concession was made despite the claimants pleading that the wall was in the road – This is evident in paragraph fifteen of the claimants reply.

[13] Having laid that premise I ask myself whether the claimant had a right of support for this wall from the defendants. The defendants have denied that they owe the claimant this right in their Defence and counterclaim, and further submit that this entitlement has not been made out. The law is that although an owner of land may be entitled to support of his land from an adjacent owner as a natural incident to his property, this right is confined to such an extent of adjacent land as in its natural and undisturbed state was sufficient to afford the requisite support – see

Corporation of Birmingham v. Allen (1877) 6 Ch.D 284 and quoting Jessel M.R. giving the judgment of the Court below said –

“Now what is the right of the adjoining owner? As I said before it is to the support of his land in the natural state... .. As long as the land remain in its natural state, and it supports my land, I have no right beyond it But as long as you have enough land on your boundary which left untouched will support your land you have got your neighbours land whose support you are entitled to. Beyond that it would appear to me you have no rights”.

This decision and reasoning of Jessel MR was upheld on appeal. To go further Clerk and Linsell on Torts explains the point thus –

“If the adjacent or subjacent support is withdrawn so as to cause land to subside, and the subsidence has not been caused by the additional weight of the buildings or other erections on the land, the landowner is entitled to recover, in addition to damages for the subsidence of his land, damages for the injury to buildings or other erections although he has acquired no acquired right of support in respect of them” – 16th Edition at paragraph 24 – 56”.

To even go further an owner of land has no natural right to support from the adjacent land for buildings or structures erected on his land” and therefore a land owner may make an excavation on his own land notwithstanding that by doing so he may cause his neighbour's building to fall – Clerk and Linsell on Tort at Paragraph 24-59; Wyatt v. Harrison (1832) 3B + Ad.871; Partridge v. Scott (1838) 3 M + W at 229.

[14] In their Defence and Counterclaim and also in their witness statements the defendants have maintained that the Claimant backfilled the area between the wall

and his house to make his yard flat. This was admitted by the claimant in Cross-Examination. Then we have the affidavits of Mira Dosbi and Keith Fordy that establishes that the claimant dumped soil onto his property to such an extent that they had to seek injunctive relief to get the claimant to stop. This points to the undeniable fact that after 1999, the Claimants land was no longer in its undisturbed state. It had now become flat from the back filling. This is also borne out from the photographs attached to the witness statement of the First and Second defendant marked 'B'. From this premise and the law expounded on above, the claimant has no right to support of his land from the defendants because the Claimant had disturbed the land. The claimant has no right to support for his wall and house from the First and Second Defendants.

[15] Having dealt with the applicable law and the facts surrounding the law as expounded earlier in this judgment I again ask myself whether the Digging of the Defendants land caused the wall to crack or otherwise endangered the wall.

[16] In the claimants statement of claim, specifically Paragraph 6 he stated "Both the wall and the house depend on the land near to the boundary for this support. As the wall and the house continue to loose this critical support their structural integrity will be compromised and thy will (further) crack, break and collapse becoming ruinous, dilapidated and severely diminished in value".

[17] In their defence the defendants contend that the wall was cracking up long before any 2003 excavation. Specifically at Paragraph 7 and 8 of their defence and

counterclaim they state "Further, of greater importance is the fact that the claimants wall was cracking long before the defendants conducted any excavation on their property. In fact they took photographs of these cracks (they have been taking photos of the entire area as a result of their ongoing dispute with the claimant and David Bonadie, as outlined below).

"Before they begun excavating, the First and Second named Defendants showed the cracks to Mr. G.G. Bollers who acted as Legal Counsel for David Bonadie and the Claimant in the boundary road dispute and who visited the scene in numerable times. Those cracks were clearly there before they begun excavating".

[18] But initially in his statement of claim, the claimant said that the 2003 excavation caused the wall to begin to crack, and not that the defendants excavation caused existing cracks in the wall to continue or get longer. In his reply to the defence and counterclaim the claimant however accepted that what he said in paragraph 7 of the reply was correct, but went further to say that those cracks were the direct consequence of earlier excavation by the defendants in 2001. In my view the claimants' evidence in this area of the matter before me seems very convoluted. Which of his assertions is the court to accept as to the causes of the cracks in the wall? I find I do not believe the claimants version of events under this head. I believe that prior to the defendants' excavation in 2003 there were already cracks in the wall as stated in the evidence of Grahame Bollers. This is also borne out by the evidence of Brain Huggins an Engineer who also testified at the trial to the effect that the excavations had nothing to do with the cracks in the wall.

[19] As a consequence I reject the evidence on Mr. Glenford Stewart, an Engineer who testified on behalf of the claimant to the effect that the excavation had resulted in erosion of the top soil and in the undermining of the wall and as a consequence said that the wall was breaking up. I believe that the wall was cracking long before the excavation in 2003 and must have been cracking for other reasons other than the excavation by the defendants. Among these reasons advanced by the defendants and their witness Brian Huggins include –

- (a) that the wall was improperly built in that blocks were used rather than stone amongst other things
- (b) there are trees near to it
- (c) the claimant backfilled the area where the wall was located to make his yard flat
- (d) roof and household water was channelled to this backfilled area. Also that the wall was poorly designed and there were noticeable cracks at this juncture of the new subject wall and other older walls and this occurred because the "old wall" was moving at a different rate to the new; and also that there were insufficient weeper holes. Mr. Brian Huggins also contended that removal of topsoil with a pick as the first defendant did would have had no effect on the foundation of the wall.

[20] I also accept as a fact that the wall was built in two stages at different times and not even the claimant can satisfy me as to the exact time the wall was built and whether it was built as one homogenous wall. Having said this it is obvious that if two walls are joined together cracks will likely result. As I said earlier one or more

of the other reasons mentioned could have caused the damage to the wall and not necessarily the excavations in 2003. I find the defendants witness Brian Huggins' report more balanced and acceptable and of more assistance to the resolution of these issues than the other reports.

[21] The defendants contends that there is no case against the Third named defendant. The claimants' case is that all the defendants excavated and damaged or endangered his wall. The third named defendant denies that she has excavated at all. The claimant however never explained in his evidence just how he knew who ordered the excavation. However interestingly under cross-examination the claimant conceded that the excavation was conducted by the First and Second named defendants. It is my view that the claimant brought the third named defendant into this action simply because she lived on the premises with the other defendants. It is the defendants submission that there is no case against the third named defendant and I so hold. I dismiss the claimants case against her.

[22] I note with interest that the claimant contends as part of his case that the cause of action "vests in the execution to the Estate of Eyre Medford deceased and not in the defendants who have no authority to bring this action". I do not think it necessary to expound on the law surrounding this contention. I would only state that the first and second defendants counterclaim against the claimant is in trespass. There is no dispute that those defendants are in actual possession of their parcel of land as stated in the claimants pleadings. Bulleu and Leake, Principles of Pleadings 16th Edition at P. 880 states that in trespass, actual

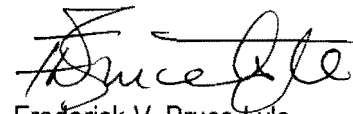
possession is presumptive proof of property and is sufficient against a mere wrong doer who cannot show any better title or authority. In this Case the defendants have exhibited their deed evidencing title and other documents showing ownership since January 2003, albeit beneficial. I fail therefore to agree with the claimant when he maligns an about turn to assert that the defendants are not the owners or occupiers and therefore do not have a cause of action. To my mind the claimant is attempting to have "his cake and eat it", if I may so proverbially. I really do not think this claim by the claimant merits any further consideration and is dismissed without further ado.

[23] There is no dispute that the wall in issue rests on the First and Second defendants land. The claimant has admitted to this in his viva voce evidence. This is a clear admission of trespass on the defendants land. It is the view of this court that in the light of this glaring admission by the claimant, the defendants would be entitled to the orders set out in their prayer for relief. What I ask myself is that

- (a) Would there be undue hardship to the claimant were I to order the removal of the said wall from the defendants land; or
- (b) Would it be more prudent on my part to order fair compensation based on the market value of the land where the trespass is occurring. Taking into consideration all the circumstances of this case and the conduct of the parties involved, I find for the defendants (First and Second), on their counterclaim. At paragraph 24 of the defendants witness statement they stated –

"it is clear that the claimant sought to gain an unfair advantage; he went to court exparte, gets a mandatory order to put up another wall behind the present wall, thus making the possibility that the Government of Saint Vincent and the Grenadines will order him to move the encroachment as difficult as it may not be practical".

There is also evidence of the acrimonious relationship between the claimant and the defendants. It is my view that to order the claimant to remove the wall from the defendants land would not only be impractical but would involve undue hardship on the claimant. I would rather think that the payment of damages would be a more appropriate method of resolution. I therefore order that the claimant pay the defendants the sum of \$10,000.00 as damages for trespass on the defendants land with costs in the sum of \$9,000.00. In this regard the claimant's case is dismissed in its entirety. The Interim injunction ordered by the Court against the defendants is hereby discharged.



Frederick V. Bruce-Lyle
High Court Judge