COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/00287

BETWEEN

BRIGITTA SEYMOUR
KENDRA SEYMOUR
JEANNE SWANN

Plaintiffs

-AND-

KAREN G. RIGBY

Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Glenn Curry of Glinton Sweeting O'Brien for the Plaintiffs
Mr. Shadrach Morris for the Defendant

Hearing Dates: 5 May 2021, 31 August 2021

Trespass – Boundary dispute – Whether either party trespassed on the other party's land – Nuisance

By Specially Indorsed Writ of Summons filed on 28 February 2020, the Plaintiffs commenced this action against the Defendant, alleging that the Defendant trespassed and caused nuisance on their land when she (i) removed a portion of the fence separating their properties and erected a cement boundary, (ii) removed a portion of the Plaintiffs' east west wall and (iii) constructed a stonewall on the northeastern side of the Plaintiffs' property. As a result of the Defendant's alleged actions, the Plaintiffs asserted that the trellis located along the northern boundary of the property collapsed. The Plaintiffs also claimed that the Defendant's damage and destruction to their property amounted to nuisance.

In her Defence and Counterclaim filed on 2 June 2020, the Defendant denied having trespassed on the Plaintiffs' land and/or causing nuisance. She asserted that the land is hers and she was therefore lawfully removing the fence and wall which encroached on her property. Further, the Defendant asserted that the Plaintiffs were wrong to prevent

her from constructing the stonewall on the northwestern side of her property. She counterclaimed for damages for the costs associated with removing the fence and wall which she claims were unlawfully there.

The matter first came before me for injunctive relief. Having heard both parties, the Court granted an injunction for the status quo to be maintained pending the hearing of the central issue which was a boundary dispute between two neighbours. It was also agreed that an independent surveyor be appointed to conduct a survey, establish the boundary between the properties in question and to provide a report to the Court. It was further agreed that both parties will be able to cross-examine the surveyor.

HELD: The Defendant did not trespass and/or cause nuisance when she removed the fence separating the properties and created her own boundary nor when she commenced construction of the stonewall on the northwestern side of her property. However, she trespassed and caused nuisance when she destroyed the Plaintiffs' northern/east-west wall.

1. The proper boundary between the parties' properties is 5 feet 5 inches further in the direction of the Plaintiffs than the Plaintiffs' fence, which was removed by the Defendant.

2. There was no encroachment by the Plaintiffs' east west wall. The Defendant was therefore not entitled to remove the east west wall.

3. The Defendant's construction of the stonewall was within the northwestern boundary of her property.

4. He who asserts, must prove. The Defendant failed to prove that the Poinciana tree encroached on her land and that the Plaintiffs' hedge obstructed the sidewalk of the Subdivision.

JUDGMENT

Charles Sr. J:

Introduction

[1] This is an unfortunate boundary dispute between two neighbours. Numerous efforts by the Court to assist them to resolve their dispute amicably failed.

The pleadings in a nutshell

[2] By Specially Indorsed Writ of Summons filed on 28 February 2020, the Plaintiffs ("the Seymours") commenced this action against the Defendant ("Ms. Rigby") alleging that she trespassed and caused nuisance on their land when she (i)

removed a portion of the fence separating their properties and erected a cement boundary, (ii) removed a portion of their east west wall and (iii) constructed a stonewall on the northeastern side of their property. As a result of Ms. Rigby's alleged actions, the Seymours asserted that the trellis located along the northern boundary of the property collapsed. The Seymours also claimed that Ms. Rigby committed a nuisance when she damaged and destroyed their property.

[3] In her Defence and Counterclaim filed on 2 June 2020, Ms. Rigby denied having trespassed on the Seymours' property and/or having committed a nuisance. Instead, she asserted that the Seymours were encroaching on her property, thereby entitling her to undertake the construction complained of by them. Ms. Rigby then counterclaimed for the costs incurred as a result of the construction which she undertook. She also sought an injunction to restrain the Seymours from interfering with her construction work. Ms. Rigby further asserted that the Poinciana tree belonging to the Seymours encroaches on her property and she sought an order for its removal. She also averred that the Seymours have obstructed the easements over the sidewalk and the road by having a hedge and a derelict car in the road.

Procedural history

[4] This matter first came before me for injunctive relief on 4 June 2020. Having heard both parties, the Court granted an interim injunction ordering that the status quo be maintained until further order. It was also evident that the central issue between these neighbours was a boundary dispute and the Court urged the parties to settle their dispute amicably. That failed. With the consent of both parties, the Court ordered that an independent expert surveyor in the person of the Surveyor General conduct a survey, establish the boundary between the properties and furnish a report to the Court and to the parties. It was further ordered that both parties would be at liberty to cross-examine the Surveyor General.

[5] The 4 June 2020 Order was made during the peak of the Covid-19 pandemic. The Surveyor General's Report was not forthcoming and, some months later, the Court made another order for another independent surveyor, to be agreed upon by both

parties, to carry out the survey and furnish his report to the Court. Mr. Donald Thompson was engaged to conduct that survey but his Report dated 30 October 2020 was incomplete. The parties reverted to the Surveyor General who was then assigned to another Government Ministry. That contributed to some delay. In the end, the current Surveyor General, Brian Bynoe, produced a Report and he was the only witness who testified at this hearing.

Brief background

[6] The parties own adjacent properties. The Seymours are the owners of Lot 3, Block 7 Westward Villas in the Island of New Providence. Ms. Rigby is the owner of Lot 8, Block 7 Westward Villas. The Seymours' Lot is west of Ms. Rigby's Lot.

[7] Ms. Rigby purchased Lot 8 by Conveyance dated 28 September 1993 from Katherine Papastavrou.

[8] On 20 March 2019, the Seymours acquired Lot 3 by Deed of Assent to the Will of Kenneth Aaron Seymour.

[9] After the land was conveyed to Ms. Rigby, a conveyance which seeks to confirm the property conveyed to Katherine Papastavrou was executed ("the Confirmatory Conveyance"). The description of the land conveyed was stated to be coloured green on the annexed plan. The Plan annexed shows a 5-foot strip of land between the parties' lots that is not coloured.

The issues

[10] The following issues arise for determination:

a. Whether Ms. Rigby was entitled to and was trespassing and/or caused nuisance to the Seymours when she removed a portion of the Seymours' fence separating the properties and constructed her own cement boundary;

b. Whether Ms. Rigby was entitled to or was trespassing and/or caused nuisance to the Seymours when she removed a portion of their (the Seymours) east west wall in the front of their property;

c. Whether Ms. Rigby was entitled to or was trespassing and/or causing nuisance when she commenced construction of the stonewall;

d. Whether the Poinciana tree was encroaching on Ms. Rigby's property, thereby entitling her to remove it; and

e. Whether the Seymours breached the easements over the sidewalk and road by obstructing same with a hedge and derelict car respectively.

The evidence

[11] As indicated, Brian Bynoe was the only witness who testified at this hearing. Mr. Bynoe's evidence in chief is contained in his Witness Statement filed on 27 April 2021. He was the Surveyor General of the Commonwealth of The Bahamas with the Department of Lands & Surveys from 2009 to 2015. He returned to the position in December 2020. Mr. Bynoe was deemed an expert in land registration/cadastre mapping and surveying. He also holds a post graduate diploma in Geographic Information System ("GIS").

[12] Mr. Bynoe referred to a map of lots 8 and 3 of the revised layout of Block No. 7. He asserted that, after careful measurement, he found that the northeastern boundary marker was misplaced by approximately 1 foot and 5 inches or thereabouts from the original placement and the southeastern boundary marker was misplaced by approximately 5 feet and 5 inches from the original placement. A chain link fence occupies the southeastern boundary line.

[13] Under cross-examination by learned Counsel Mr. Curry, who appeared as Counsel for the Seymours, Mr. Bynoe clarified that the boundary between the parties' lots ought to be 5 feet 5 inches further west (in the direction of the Seymours' lot). However, the boundary of Ms. Rigby's fence is also too far in the direction of lot 9. The eastern boundary of Ms. Rigby's lot ought to be 8.33 feet further west.

[14] Under cross-examination by learned Counsel Mr. Morris, who appeared as Counsel for Ms. Rigby, Mr. Bynoe stated that the northeastern boundary of the Seymours' property is "in general" correct. He added that it might be inches off. He

stated that the margin for rounding up to a foot must be within decimals of a foot. Mr. Bynoe further stated that the northeastern boundary between lots 8 and 9 is reasonably consistent with the 1989 plan. He explained that, in surveying, there are no two surveys that would get exactly the same point. He asserted that the Seymours' east west (on the northern side of the property) wall along lot 3 is consistent (within inches) with the boundary up to a certain distance and then it moves away. He said the wall is on the boundary line and he believes they share the wall.

[15] Under further cross-examination by Mr. Curry, Mr. Bynoe explained that, in determining whether the original placement of the marker was misplaced, he tried to do a check independent of surveys by other surveyors by coming from control station along Skyline. He established the values using control stations.

[16] When he was referred to the 29 March 1993 Conveyance made between Westcott Investments Limited and Katherine Papastavrou (Ms. Rigby's predecessor in title), Mr. Bynoe agreed that there is a small strip of land (5-foot) which is not coloured and was therefore not conveyed, as the coloured areas were the parts to be conveyed. However, Mr. Bynoe said that he was asked by the Court to establish the boundary of the plan and not the ownership, which is a different question. He recalled that the Poinciana tree is on lot 3.

Law on trespass

[17] In **Montague Investments Limited v Westminster College Ltd. and another** [2020] 1 BHS J No 11, this Court set out the law on trespass as follows:

> **"[21] The law relating to trespass [21] Trespass to land is a medieval concept, much developed by the common law. Any unjustifiable intrusion by one person upon land that is in possession of another amounts to a trespass. It is a trespass to place anything on or in the land which is in the possession of another: Simpson v Weber (1925) 41 TLR 302. It matters not how trifling the nature of the action is, a suit in trespass will lie.**
>
> **[22] In Robert Addie and Sons (Collieries), Limited v Dumbreck [1929] A.C. 358 Asquith LJ defined a trespasser at page 371 as:**

> **"The trespasser is he who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to."**

[23] In Macnab and another v Richardson and another [2008] EWCA Civ 1631, at paragraph 19, Lloyd LJ defined trespass as follows:

> **"… the slightest encroachment on another's land is a trespass. So even if the extent of the encroachment in this case is that the mesh, which constitutes the fence in this present case, was over the Richardsons' land but the fence posts were still on the Macnabs' land then the mesh of the fence was an encroachment and a trespass."**

[24] Similarly, in the Bahamian case of Paradise Island Ltd. v. El Condor Enterprises Ltd. [1992] BHS J. No. 133, Thorne J held that the encroachment of a wall on the plaintiff's property was a trespass by the defendant."

Law on nuisance

[18] The law on nuisance was most succinctly stated by Small J in **Hinsey v Bahamas Electricity Corp.** [2001] BHS J No 95 at para 42 as:

> **"The essence of nuisance is activity, whether by 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."**

[19] The principles of nuisance were neatly set out by Sir Terence Etherton MR in **Williams v Network Rail Infrastructure Ltd; Waistell v Network Rail Infrastructure Ltd** [2019] QB 601 at paras 39 and 40:

> **"39 I would summarise as follows the present principles of the cause of action of nuisance.**
>
> **40 First, a private nuisance is a violation of real property rights. That means that it involves either an interference with the legal rights of an owner of land, including a legal interest in land such as an easement and a profit a prendre, or interference with the amenity of the land, that is to say the right to use and enjoy it, which is an inherent facet of a right of exclusive possession: *Hunter v Canary Wharf Ltd* [1997] AC 655, 687G–688E (Lord Goff citing FH Newark, "The Boundaries of Nuisance" 65 LQR 480), 696B (Lord Lloyd of Berwick), pp 706B, p 707c (Lord Hoffmann) and p 723D—E (Lord Hope of Craighead). It has been described as a property tort: Dolan Nolan, " 'A Tort Against Land': Private Nuisance as a Property Tort" in *Rights and Private Law,* Dolan Nolan & Andrew Robertson (eds) (2011)."**

[20] Nuisance by encroachment on a neighbour's land is one of three kinds of nuisance. At para 41, Sir Terence stated:

> **41 Secondly, although nuisance is sometimes broken down into different categories, these are merely examples of a violation of property rights as I have described them. In *Hunter's* case at p 695c, for example, Lord Lloyd said that nuisances are of three kinds:**
>
> > **"(1) nuisance by encroachment on a neighbour's land, (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land."**

[21] Nuisance is actionable in some instances without proof of damage. The question depends on the nature of the nuisance. Sir Terence continued at para 42:

> **42 Thirdly, the frequently stated proposition that damage is always an essential requirement of the cause of action for nuisance because nuisance is derived from the old form of action on the case must be treated with considerable caution. As to the proposition, see, for example, *Lemmon v Webb* [1894] 3 Ch 1, 11, 21, 24; *Davey v Harrow Corpn* [1958] 1 QB 60, 71*; Hunter's* case at p 69 5D; and *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321, paras 15, 33. It is clear both that this proposition is not entirely correct and also that the concept of damage in this context is a highly elastic one. In particular, interference with an easement or a profit a prendre is actionable as a nuisance without the need to prove specific damage: *Harrop v Hirst* (1868) LR 4 Ex 43, 46–47, 48; *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343, 349–350. Furthermore, in the case of an artificial object protruding into a claimant's property from the neighbouring land, Mr David Hart QC, for NR, accepted that the claimant has a cause of action in nuisance without proof of damage. Although McNair J said in *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334 that an advertising sign erected by the defendant which projected into the airspace above the plaintiff's shop was a trespass and was not capable of constituting a nuisance, he so held without any reference to the previous authority to the contrary in *Baten's Case* (1610) 9 Co Rep 53b and *Fay v Prentice* (1845) 1 CB 828 and so *Kelsen's* case must be considered per incuriam in relation to that issue. So far as concerns such nuisance from encroachment by an artificial object, the better view may actually be that damage is formally required but damage is always presumed: *Baten's Case; Fay v Prentice* at p 841. That, in itself, shows both the artificiality and elasticity of any requirement of damage for the purpose of establishing nuisance".**

Discussion

[22] The principal dispute is the location of the boundary between the lots. Mr. Bynoe's evidence was that the true boundary is further west than the 1989 plan indicated. Put differently, he said that the fence between the parties' lots was not the actual boundary.

Removal of fence separating the properties and construction of new cement boundary

[23] Relying on Mr. Bynoe's evidence, Mr. Morris submitted that Ms. Rigby was not trespassing on the Seymours' land when she removed portions of their eastern and northeastern fence and constructed a cement boundary, as it was actually within the boundary of her land. According to Mr. Morris, Mr. Bynoe's evidence supports Ms. Rigby's position that her construction work was done on her own property and that the Seymours were the ones who were trespassing. He argued that Ms. Rigby was therefore within her rights to remove the chain link fence and cut the offending portion of the Seymours' east wall which encroached on her property.

[24] I accept Mr. Bynoe's evidence on the boundary between the properties: that the proper boundary is 5 feet 5 inches feet further west from the fence separating the properties that Ms. Rigby caused to be destroyed. As such, Ms. Rigby was not trespassing when she removed portions of the fence and erected her own cement boundary between their properties. However, Mr. Bynoe's evidence was also that Ms. Rigby's eastern boundary is 8.33 feet from the original marker.

[25] Mr. Curry did not accept the boundaries as asserted by Mr. Bynoe. Even if his boundaries are correct, says Mr. Curry, there is a 5-foot strip of land between the lots that is not owned by Ms. Rigby. He relied on the Confirmatory Conveyance dated 16 March 1994 between Westcott Investments Limited and Katherine Papastavrou. According to him, that Conveyance confirms that there has been no encroachment on Ms. Rigby's property since she cannot claim what she does not own.

[26] Mr. Morris intimated that the boundary is not affected by the strip of land referred to by Mr. Curry. He contended that the strip is outlaid and located on the southern portion of lots 8, 9 and 10. Further, says Mr. Morris, the Confirmatory Conveyance was made after Ms. Rigby purchased her lot and she was never a party to it.

[27] The strip lies between the parties' lots. As such, if it were in fact not conveyed to Ms. Rigby, then her assertion as to her ownership of 5 feet 5 inches of land west of the fence fails. I agree that the purported effect of the Confirmatory Conveyance is to "confirm" that the strip of land between the parties' lots was not to be conveyed to Katherine Papastavrou. However, I agree with Mr. Morris that Ms. Rigby cannot be bound by the Confirmatory Conveyance since it was executed after she purchased her lot and she was not a party to it.

[28] The question then is whether the strip of land was conveyed to Ms. Rigby by her title documents (less the Confirmatory Conveyance). Since I accepted the boundaries as set out by Mr. Bynoe, Ms. Rigby's title documents must have conveyed the strip of land to her. The purported effect of the Confirmatory Conveyance is to take that strip back, which is not possible because it was executed after Ms. Rigby's Conveyance and she was not a party to the Confirmatory Conveyance.

[29] The boundary between the properties being further to the Seymours' side than originally drawn, Ms. Rigby was entitled to remove the fence between the properties and erect her own cement boundary to the extent that the cement boundary is within the boundary as expressed by Mr. Bynoe. It follows that no trespass or nuisance can be said to have arisen from these acts, as Ms. Rigby's presence was not unlawful.

[30] Ms. Rigby claims damages for the costs of all of the construction which she undertook. In respect of the separating boundary construction, she claimed the following:

a. Labour and materials costs of remedial work (approx. 32 ft., trenching, footing and laying blocks - $392
b. Material costs (cement, lime, steel, sand, nails) - $240
c. Cost to remove approx. 32 ft. of fence off boundary - $60

[31] Given that the Court was concerned only with the establishment of the boundary between the lots, the issue of damages was not ventilated. That said, special damages are quantified damages which a plaintiff has already spent as a result of the damage and loss suffered. This type of damages must therefore be pleaded for, particularized and proved: **Ilkew v Samuels** [1963] 1 WLR 991 at 1006: per Lord Diplock. The Court will have to give some further directions on this issue.

Construction of Ms. Rigby's stonewall

[32] With respect to Ms. Rigby's construction of a stonewall on the north end boundary marker of the Seymours' property, Mr. Curry asserted that the stonewall was unlawfully constructed on the Seymours' driveway. He contended that Ms. Rigby's markers within which she constructed the stonewall were inaccurate. On the other hand, Mr. Morris submitted that Ms. Rigby was entitled to construct it where she did and the Seymours had no right to prevent the construction. He relied on Mr. Bynoe's evidence that the markers erected by Ms. Rigby fell within the northeast boundary of her property.

[33] I agree with Mr. Morris that Ms. Rigby was entitled to construct the stonewall where she did. Mr. Bynoe's clear evidence was that Ms. Rigby's northwestern boundary marker was accurate. Accordingly, such construction did not amount to trespass or nuisance as asserted by the Seymours.

Removal of the Seymours' east west wall

[34] The Seymours asserted that Ms. Rigby's removal of their east-west wall (on the northern side of their property) was unlawful. Ms. Rigby contended that she was entitled to do so because it encroached on her land but Mr. Bynoe's evidence confirmed that the Seymours' east-west wall did not encroach on Ms. Rigby's

property. Accordingly, Ms. Rigby's removal of this wall amounted to trespass and nuisance, as she was not authorised to be present on or interfere with the wall.

[35] Since Ms. Rigby was not entitled to remove this wall, the Seymours are entitled to the costs of repairing same. In their Statement of Claim, the Plaintiffs claim generally for the cost to repair their property in the sum of $5,000.

[36] It is well established that the objective of an award of damages is to put the plaintiff "*in the same position that he would have been in had he not sustained the wrong for which he is now getting compensation or reparation*": See **Livingstone v Raywards Coal Company** (1880) 5 App Cas 25.

[37] Accordingly, the appropriate measure of damages to which the Seymours are entitled in respect of the wrongful removal of the east-west wall is the market cost of restoring the wall once they can prove that the cost of repairing the wall is $5,000. Again, this has to be properly addressed by the Court.

Poinciana tree

[38] With respect to the Poinciana tree, Mr. Morris submitted that the roots of the Seymours' Poinciana tree encroached on Ms. Rigby's land. On the other hand, Mr. Curry argued that the tree did not encroach on her land. He relied on Mr. Bynoe's evidence that he recalled the tree and its root being on the Seymours' lot. Although I found Mr. Bynoe to be a very credible and impartial witness, I am reluctant to accept his evidence with respect to the location of the Poinciana tree. He seemed unsure on this particular issue. He first said that it was on lot 3 "*from my [his] information*" and then said "*From my estimate I think it was on lot number 3, but I would have to actually turn the angle to make sure. From my recollection it appeared to be on lot 3.*" Ms. Rigby proffered no other evidence to prove that the tree encroached on her land and, since this is her assertion in her Counterclaim against the Seymours', the onus is on her to prove her assertion.

[39] Accordingly, I find that Ms. Rigby has not proven that the Poinciana tree encroached on her land.

Obstruction of sidewalk and road

[40] With respect to the Seymours' obstruction of the sidewalk and roadway as asserted by Ms. Rigby, she proved that the derelict car obstructs the road but she failed to prove that the hedge obstructs either the sidewalk or the road.

Costs

[41] Both parties were divided in their success. Accordingly, an appropriate order is for each party to bear their own costs.

Conclusion

[42] In light of the foregoing, the Court makes the following orders:

1. A Declaration that Ms. Rigby was not trespassing or causing nuisance when she destroyed the fence separating the properties and constructed her own cement boundary;

2. A Declaration that Ms. Rigby was trespassing and causing nuisance when she destroyed the Seymours' east west wall;

3. A Declaration that Ms. Rigby is entitled to build the stonewall on the northwest side of her property and an injunction is granted to restrain the Seymours from interfering with the construction of same; and

4. An order that the Seymours remove the derelict car in the front of their lot.

5. The Court will hear the parties on the issue of damages now or as soon as practicable.

Dated this 26th day of May 2022

Indra H. Charles
Senior Justice