[2019] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 31/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**TREVOR BUCKNOR**	**APPELLANT**
AND	**NOEL WASHINGTON**	**RESPONDENT**

Mrs Amal Dockery Martin for the appellant

Chumu Paris for the respondent

26 and 28 June 2019

MORRISON P

[1] The appellant and the respondent are neighbours in the community of Look Out District, Hopewell in the parish of Hanover. At the date of the trial in this matter, the appellant was 65 years of age and the respondent was 85. The property occupied by the appellant was originally owned by his father, the late Mr James Bucknor, who died many years before the current dispute arose.

[2] In the court below, the respondent claimed against the appellant for damages for trespass to his property in the following terms:

> "The Plaintiff claims against the Defendant the sum of TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($250,000.00) as damages for trespass for that on divers days between the 4th November 2010 and the 11th April 2011 the Defendant and/or his servants/agents unlawfully entered upon the Plaintiff's property known as Rosemount part of Look Out District in the Parish of Hanover registered at Certificate of Title Volume 1325 Folio 609 of the Register Book of Titles and destroyed the Plaintiff's concrete water tank and concrete column."

[3] On the morning of the trial before Her Honour Miss Winsome Henry, Parish Judge for the parish of Hanover ('the judge'), the respondent's counsel stated his defence as follows:

> "The defendant did not trespass on the plaintiff's property and if any damage was done he did not do it."

[4] On 14 September 2017, after hearing evidence from the appellant and the respondent, the judge found for the respondent. The appellant was accordingly ordered to pay damages to the respondent in the sum of $250,000.00, the surveyor's fee of $67,500.00 and the respondent's costs, to be agreed or taxed.

[5] This is the appellant's appeal against the judge's judgment. The two issues which arise in the appeal are (i) whether, as a matter of law, the respondent was entitled to

maintain an action in trespass to land; and (ii) whether, on the facts, the judge's conclusion was justified in the light of the evidence in the case.

[6] Mrs Dockery Martin, for the appellant, relies heavily on two surveyor's identification reports which were admitted as exhibits at the trial. The first is a report dated 22 July 2008 prepared by Messrs Grantley Kindness & Associates (before this round of litigation between the parties commenced); and the second is a report dated 13 February 2013 prepared by Mr Brian M Alexander (by order of the court in this matter).

[7] Both reports show that the boundaries on the earth between the appellant's and the respondent's properties are in accordance with the registered boundaries. However, they also show that a part of a water tank and a part of a chain link fence on the respondent's property encroaches on to the reserved road leading to the appellant's adjoining property. According to Mr Kindness' measurements, the extent of the encroachment in the case of the tank is, at its greatest, 0.52 metres into the reserved road; while, in the case of the chain link fence, it is 1.0 metre. According to Mr Alexander's measurements, the equivalent figures are 0.75 metres and 1.3 metres respectively.

[8] The respondent's case was to the following effect. He built the tank and the fence, to which a concrete column was attached, in 1969. At that time, the appellant would have been quite young, but the appellant's father, with whom the respondent enjoyed a good relationship, was still alive. The appellant's father made no objection to the location of either the tank or the fence. Indeed, he collaborated with the respondent in the laying out of the reserved road. Neither the fence nor the tank impeded access along the

reserved road, which was approximately 10 feet in width, to the appellant's property. He saw the appellant use a chisel and a hammer to "lick down" the column which was connected to the fence. He also saw the appellant use the same chisel and hammer to "bust" the tank, then told his friend who was with him to urinate into it. The estimated cost of repairing the tank and rebuilding the column was $192,920.00 and he also paid the full cost of Mr Alexander's surveyor's identification report of $67,570.00.

[9] Somewhat at variance with his stated defence, the appellant readily admitted at the trial that he caused damage to the respondent's column and part of the fence, though he denied damaging the tank. He said that he was justified in knocking down the column and damaging the fence because they impeded his access to his own property. He had told the appellant not to put the column where he did and, as a result of an earlier survey by a Mr Bloomfield, he had "removed the obstruction", because "the property was on the road and was obstructing me". However, the appellant accepted that vehicles had in the past driven up past both the respondent's and his properties, transporting materials for improvements to his house, and also up to his sister's house which was built over 20 years before.

[10] In addition to hearing the evidence of the parties and considering the surveyors' reports and the accompanying photographs of the area, the judge also had the advantage of a visit to the locus in the presence of both parties.

[11] At the outset of her detailed analysis of the evidence, the judge observed that, "[t]he [appellant] having admitted he destroyed the fence and the column, the main

issues in the case are, was he justified in doing so, and when he carried out this action was he a trespasser". Based on the surveyors' reports, the judge accepted that the respondent had breached the boundary lines with the reserved road. However, she pointed out that "the breach is on the reserved road not between the [respondent's] property and the [appellant's] father's property". As regards the status of the reserved road, the judge found that "it does not belong to either party and it is for both parties to access their property".

[12] The judge then went on to prefer the respondent's evidence over the appellant's in virtually every significant aspect of the case, observing, somewhat mildly, that "I do not find the [appellant] to be a credible witness in certain areas". She accepted that the respondent constructed the tank, fence and column in 1969. She rejected the appellant's evidence that he had raised an objection when they were being built, pointing out that the appellant would have been a teenager at that time and that his father, as the owner of the property, was the person with whom the respondent would have interacted. The judge accepted the respondent's evidence that he and the appellant's father had a good relationship and that they had carried out work on the reserved road together. Indeed, the judge observed, "[i]t could be argued that [the appellant's father] had acquiesce [sic] to it". The judge found as a fact that there was nothing on the reserved road leading up to the appellant's property to prevent access to and egress from it. The judge observed that the surveyor's report and the photographs both indicated that "the encroachment is minor … no wider than a building block". On the question of what caused the damage to the respondent's property, the judge pointed out that, having stated in his defence given

at the beginning of the trial that "if any damage was done he did not do it", the appellant had changed his position in his evidence-in-chief, in which he admitted that he was the one who knocked down the concrete column. But, in any event, the judge also accepted the respondent's evidence that the appellant had caused the damage to the tank as well.

[13] On the basis of these findings, the judge concluded as follows:

> "The encroachment was not on the [appellant's] property, therefore he had no justification in knocking it down. The land on which the minor encroachment to [sic] place, did not belong to the [appellant]. He was told by Mr. Kindness that the encroachment was on the reserved road. There was no impending nuisance that the [appellant] had to abate by self remedy. The fence, column and wall had been there for forty six years. Mr. Bloomfield didn't instruct the [appellant] to knock down the wall.
>
> The [appellant] trespassed on both the [respondent's] land and property. The debris from the damaged tank and the urination, committed by the [appellant's] servant or agent, would have entered into the water tank and caused damage to its contents. The gate that was attached to the column, … was on the [respondent's] property. A tall and sturdy concrete column. The [appellant] had to go on to the [respondent's] property in order to knock it down.
>
> I do find that the [appellant] trespassed on the [respondent's] land and property. He had no justification to damage the fence, column and tank. Therefore, judgment to the [respondent] in the sum of $250,000. The [appellant] to pay the surveyor's fee of $67,500. Costs to be agreed or taxed."

[14] In the notice of appeal filed on 27 September 2017, the appellant challenged the judge's conclusions on three grounds:

> "1. The learned Judge failed to take into consideration the fact of the Respondent's breach of the boundary lines as indicated in the Surveyor's identification report.
>
> 2. The Learned Judge wrongfully found the Appellant to have trespassed unto [sic] the property of the Respondent.
>
> 3. There was no registered grant of easement which entitled the Respondent to erect a wall on the property of the Appellant."

[15] At the hearing before this court, Mrs Dockery Martin indicated that ground 3 would not be pursued. However, taking grounds 1 and 2 together, she submitted as follows.

[16] First, as a matter of law, a claim for trespass must be founded on exclusive possession by the plaintiff of the land allegedly trespassed upon by the defendant: in this case, in the light of the judge's finding that neither the appellant nor the respondent owned the reserved road, the ingredient of exclusive possession by the appellant was not made out. For this submission, Mrs Dockery Martin relied on the decision of this court in **George Rowe v Robin Rowe** [2014] JMCA Civ 46. In that case, Brooks JA spoke (at para. [15]) to the significance of possession in the context of a claim for trespass to land in the following terms:

> "The law regarding trespass to land does not require a person complaining of a trespass to be the owner of that land. Trespass to land consists of interference with possession. The person claiming possession may be mistaken as to his ownership of the property but would still be entitled to maintain an action for trespass against another. In **Toolsie Persaud Ltd v Andrew James Investments Ltd and Others** [2008] CCJ 5 (AJ), the Caribbean Court of Justice

> opined that a defect in the paper title does not nullify the intention to possess. The court stated at paragraph [29]:
>
> > '…Intention to possess thus extends to a person intending to make full use of the land in the way in which an owner would, whether he knows he is not the owner or mistakenly believes himself to be the owner eg due to a misleading plan or a forged document.'
>
> Although the court made its observations in a case dealing with adverse possession, the principle is applicable to the issue of possession as an element for founding a claim in trespass."

[17] Second, in the absence of any evidence that the appellant's father acquiesced in the respondent's encroachment on to the reserved road, the judge ought not to have so found, given that an "implied acquiescence" does not run with the land.

[18] And third, the judge erred in concluding that the appellant was not a credible witness.

[19] Mr Paris submitted that the judge's decision was correct and ought not to be disturbed. On the question of the sufficiency of the acts of trespass found by the judge, Mr Paris referred us to, among other authorities, the following passage from Salmond and Heuston on the Law of Torts (19th edn, page 46):

> "The commonest form of trespass consists in a personal entry by the defendant, or by some other person or animal, through his procurement, into land or buildings occupied by the plaintiff. The slightest crossing of the boundary is sufficient – e.g. to put one's hand through a window, or to sit upon a fence. Nor, indeed, does it seem essential that there should

> be any crossing of the boundary at all, provided that there is some physical contact with the plaintiff's property."

[20] And on the credibility question, Mr Paris submitted that no basis had been shown for this court to interfere with the judge's findings of fact. In this regard, Mr Paris referred us to the decision of this court in **Frederick Eccleston v Francella Eccleston and Others** [2017] JMCA Civ 20. In my judgment in that case, I referred to Lord Hodge's observation in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, para. [12] that, in order to disturb the findings of fact by a trial judge on appeal, "[t]he court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions".

[21] On the issue of whether the respondent had satisfied the legal requirements to maintain an action for trespass, Mrs Dockery Martin's point was that since, as the judge found, neither the respondent nor the appellant could claim property in the reserved road, it was not possible for the former to maintain an action for trespass against the latter in respect of his interference with the fence and the tank. One problem with this approach, it seems to me, is that it appears to conflate the distinct concepts of possession and ownership. By doing so, it therefore runs contrary to the very point which Mrs Dockery Martin sought to make by her reference to **George Rowe v Robin Rowe** and to Brooks JA's statement that "[t]he person claiming possession may be mistaken as to his ownership of the property but would still be entitled to maintain an action for trespass against another".

[22] But in any event, this was not the basis on which the judge decided the case in the respondent's favour. What she found was that, in the act of causing damage to the respondent's tank, the column and the fence connected to it, the appellant "trespassed on both the [respondent's] land and property". In addition to the damage caused to the tank, which was in large part situated on the respondent's property, with regard to the column, she found that "[t]he [appellant] had to go on to the [respondent's] property in order to knock it down".

[23] As has been seen, the learned authors of Salmond and Heuston take the view that "[t]he slightest crossing of the boundary is sufficient" to amount to a trespass. Further, that it is not even essential "that there should be any crossing of the boundary at all, provided that there is some physical contact with the plaintiff's property". Accordingly, it seems to me that, on the evidence in this case, the judge's finding that the appellant's actions resulted in a physical interference with the respondent's possession of his own property, was one which she was fully entitled to make on a balance of probabilities.

[24] As regards the judge's remark that the appellant's father could be said to have acquiesced in the respondent's placement of the fence and the tank, I again think that this was a conclusion that was plainly open to her on the basis of the respondent's evidence. In any event, nothing in particular turned on it, save as an aspect of the factual matrix of the case.

[25] And lastly, in relation to Mrs Dockery Martin's invitation to us to revisit and upset the judge's findings of fact, I think that it suffices to say that absolutely no basis has been

shown for this court to do so. The principal acts of trespass of which the respondent complained, that is, the destruction of the concrete column and the damage to the fence, were admitted by the appellant. As the photographs which were in evidence demonstrated, the damage to the tank was integrally connected to the damage to the fence, thereby making the judge's finding in this regard equally unexceptionable. In these circumstances, it seems to me that the judge's finding that the appellant was responsible for the damage to the column, the fence and the tank was in fact the only one which was reasonably open to her on the evidence.

[26] I would therefore dismiss the appeal and affirm the judge's decision, with costs to the respondent. Having heard counsel's submissions on the amount of the costs, I would propose that the court should fix the costs of the appeal at $100,000.00.

STRAW JA

[27] I agree.

FRASER JA (AG)

[28] I also agree.

MORRISON P

ORDER

1. The appeal is dismissed.
2. Judgment of the Parish Judge is affirmed.
3. There will be costs to the respondent in the sum of $100,000.00.