

IN THE SUPREME COURT OF BELIZE, A.D 2007

ACTION NO. 445 OF 2000

BETWEEN: 1.ORVILLE J. HOLDEN PLAINTIFFS
 2.PATRICIA HOLDEN
 AND

 RAMON REYES JR. DEFENDANT

Mr. Linbert Willis for the plaintiffs.
Mr. Rishi A. Mungal for the defendant.

AWICH J.

16.8.2007

J U D G M E N T

1. *Notes: Claim of trespass to land; counterclaim of trespass and nuisance; erecting or moving a fence beyond the boundary of one's land; soakpit built stretching across the boundary; sewage flowing from septic tank onto neighbouring land. Trespass is actionable without proof of damage occasioned, whereas in nuisance damage must be proved.*

2. This court action should have not proceeded as far as a trial in court. Had it come up after the advent of the Supreme Court (Civil Procedure) Rules, 2005, I might have done more to point out the way to settlement out of court. Pointing out by a judge, issues or lack of them, and encouraging settlement of a case out of court, are no longer regarded as improper descending in the arena by a judge, which act was a fundamental mistake in the English Common Law adversarial system. Case management powers of a judge under *rules 25.1 (a) (b) (c) and (e) of the Supreme Court (Civil Procedure) Rules 2005*, now firmly authorize a judge to “*identify issues at an early stage*” and even to “*deal with them summarily*” if need be, and to “*actively encourage and assist parties to settle cases on terms which are fair to each of them*”.

3. The claim of Mr. Orville Holden and Patricia Holden is in trespass, for the reliefs of: damages therefrom, delivering up of possession and an injunction order restraining the trespass. The act of trespass was that the defendant unlawfully “erected a fence on a portion of parcel 18A...”, occupied by the Holdens, instead of erecting the fence along

the boundary that separated that parcel of land and parcel 18B occupied and owned by Mr. Ramon Reyes Jr., the defendant.

4. The defence of Mr. Reyes Jr. was a denial of the trespass; and he counterclaimed alleging trespass; that the Holdens removed a fence erected by Mr. Reyes on his own land parcel 18B, and erected the fence further onto Reyes' land. He also counterclaimed nuisance, that sewage leaked and flowed over from the property occupied by the Holdens to the property owned and occupied by him and that fumes and fat were released from the exhaust pipe of a fan in the kitchen of a restaurant run by the Holdens, onto his land, and caused loss of revenue in his accommodation business. Mr. Reyes asked, in his counterclaim, for the reliefs of: delivering up of possession of that part of parcel 18B, the subject of the trespass, an injunction order against the plaintiffs, damages and a declaration as to the correct boundary.

5. When the matter came for trial, it was obvious that the crucial issue of fact was the correct boundary separating the two parcels of land. It was appropriate that expert evidence be obtained. I made a direction order requiring each party to nominate own surveyor, and that the two

surveyors do a resurvey together to re-establish the common boundary and file a common report of the resurvey. I hoped then, that once the surveyors jointly pointed out the boundary on the ground the parties would agree a settlement. The plaintiffs nominated Mr. Kenneth Gillet. The defendant nominated Mr. Gustavo Bautista, but Mr. Wilfredo Bautista who worked with Gustavo Bautista attended. It was conceded that Wilfredo Bautista, was a technician not a surveyor, he carried out survey work under supervision by a surveyor. Both Mr. Gillet and Mr. Wilfredo Bautista were professional in their attitude; they carried out the resurvey together, but Mr. Gillet the surveyor, alone prepared the report and signed it. Despite the resurvey and report which was clear, the parties still pursued the case in court.

6. After the joint resurvey, it was apparent that if there was any trespass, it would be limited to a part of an area measuring a mere 1 ½ feet wide and 13 feet long. The Holdens' case was that Mr. Reyes "erected a fence on a portion of lot 18A and refused to remove the fence". Parcel 18A is a very small land area. The widest end is a mere 16.01 feet (5.33 yards), the narrowest end is a mere 8.52 feet (3.56 yards), the longest side is 61.67 feet (30.56 yards). The other side was comprised of staggered lines. The dispute in the claim was

really about the correct boundary between the adjoining parcels of lands 18A occupied by the Holdens, and 18B occupied by Mr. Reyes. There has been subsequent testimony, regarding the counterclaim, that the sewage leak had been attended to and that the fan to which the exhaust pipe was attached was no longer in use. On those facts and the facts from the joint resurvey, and with a little more effort from both attorneys, a settlement out of court should have been reached. Terms of a settlement out of court if made orders of court, are as effective as terms of an order of court extracted from a judgment rendered following a full trial.

7. ***Determination (General).***

There has been bad blood between the neighbours, the Holdens and Mr. Reyes. It was not the case between their predecessors in titles. Mr. Reyes said that the fence complained about was erected by Mr. Belizario Martinez, the predecessor in title of Mr. Reyes. Mr. Holden said it was erected by Mr. Reyes. I believed Mr. Reyes about that because there has been a survey in 1998, when subdivision of parcel 18 was applied for, obtained and parcels 18A and 18B were created.

It was the responsibility of Mr. Martinez to effect the subdivision. On the plan showing the subdivision, filed at the Lands Registry, it was noted that the plan had been prepared at the request of Mr. Martinez. On the other hand, I accepted the testimony of Mr. Holden that the “soakaway” (soakpit) was not constructed by him. It may have been constructed by Mr. Perdomo, or Mr. Martinez, the predecessors in titles to parcels 19D and 18A of the Holdens, or even earlier. There seemed to have been no complaints between Mr. Perdomo and Mr. Martinez then.

8. The practical reason for the claim of the Holdens in trespass was that because there was a fence too close to their building on the north-eastern end of parcel 18A, they were unable to attend to maintenance work on their plumbing system, and they could not access and paint the outside of their building which then depreciated. Mr. Holden was keen to make that explanation to the court. He said that the fence was erected by Mr. Reyes, but I believed Mr. Reyes that it was erected by his predecessor in title. It is however, of no consequence in law because the trespass averred would be a continuing trespass, continuing to the time when Mr. Reyes acquired the authority to

decide where to put the fence; and if from that time he continued to keep his fence in the wrong place, he would be liable for the continuing trespass. Crossing a boundary by voluntary act, that is, by wilful act, even if one is unaware that a boundary has been crossed, is trespass – see *Basely v Clarkson* (1862) 3 Lev 37 and *Turver v Thorne and Thorne* (1959) 21 DLR 29. The Holdens thought the fence was on their land, parcel 18A, anyway, so they demanded of Mr. Reyes that the fence be removed. It was not removed so they brought this court action.

9. Mr. Reyes refuted that the fence was on parcel 18A. His testimony was as follows. Parcel 18A was originally part of a larger parcel 18; and parcel 19D was originally part of a larger parcel 19. Both parcels 18 and 19 were originally owned by Mr. Martinez. There was a building on the north-eastern part of parcel 19; it extended onto parcel 18, the boundary line ran across the building. When he decided to buy parcel 18, Mr. Reyes, the purchaser, and Mr. Martinez, the vendor, agreed to exclude the portion of parcel 18 onto which the building extended, from the rest of parcel 18 that Reyes would buy. They shifted the boundary by about 1 foot away from the building and

further onto parcel 18. Subdivision was done according to law; and parcel 18 was subdivided into parcel 18A and parcel 18B. Reyes bought parcel 18B, Martinez retained parcel 18A on which part of the building on parcel 19 extended, he subsequently sold it.

10. Parcel 19 must have also been subdivided. There are now parcels 19A, 19B, 19C, and 19D. Parcel 19D is adjacent to 18A, at the north-eastern part, and adjacent to 18B at the north-western part. Mr. Holden said that a company, Holden and Associates Ltd, bought 18A and 19D from Mr. Perdomo. The Holdens occupied the two parcels by the authority of the company. Mr. Martinez retained parcel 19C, other people own parcels 19A and 19B.

11. The trespass complained about in the claim, and the first trespass complained about in the counterclaim, would be in each case, the act of erecting a boundary fence only a very short distance from the correct boundary. The second trespass in the counterclaim was that sewage flowed over. The wrong of trespass to land is the unauthorized direct physical interference with or intrusion upon land in the possession of another. It is trespass to crossover or step over onto

another's land, however short the crossing, or however slight the stepping over may be – see *Ellis v Loftus Iron Co. (1874) 10 C.P. 10*. Minor acts such as; driving a nail into a neighbour's wall, growing a creeper plant against his wall and propping a ladder on his wall are all “*trespass quare clausum querentis fregit*” – see :*Westripp v Badlock [1939] 1All E.R. 279, Keynoch Ltd v Rowlands [1912] 1 Ch. 527 and Simpson v Webber 919250 41 T.L.R. 302*. In *Zazil Fuller Labhuk v Arun Hotchandani, Supreme Court of Belize Civil Action No. 157 of 2006*, the point was made that crossing over to a neighbour's land without permission, to be able to do maintenance work on one's land was trespass. However, the claim failed because the claimant was not in possession of the land, the subject of the claim of trespass. She represented the lessor. Trespass is a wrong against actual possession or the right to immediate possession, not a wrong against the right to ownership, unless the act complained about causes permanent or long lasting damage and affects the reversionary interest of the owner. The defendant was one of the lessees and had possession of a part of the commercial building leased out to him and other lessees. He carried out repair work on his own adjoining property and in the process allowed workmen to use the premises that he and others rented from

the claimant to access his property. Any claim in trespass could be brought by the other lessees, but they did not bring a claim.

12. In this case, if Reyes erected or maintained a fence on the land of the Holdens, however short the distance the fence was placed from the correct boundary, there would be trespass. Similarly if the Holdens moved the fence back beyond the correct boundary and onto Mr. Reyes' land, however short the distance may have been, there would be trespass.

13. ***Determination.*** *(The claim of trespass against Reyes).*

Have the holdens proved the trespass they pleaded? In my view the evidence does not prove that Mr. Reyes erected or left a fence on parcel 18A. He cannot be held liable for trespass grounded on the fence. The reasons are as follows.

14. The only survey plan available to court was that drawn by Mr. Gustavo Bautista, a licensed surveyor, on 8.7.1998, at the request of Mr. Martinez. It was authenticated and approved by the

Commissioner of Lands, and given entry No. 4314 on Land Register No. 8. Neither party challenged it. Subsequent to the drawing and registering the survey plan, another surveyor, Mr. Gillett, carried out a survey of the land in September 2000. He was hired by the Holdens to resurvey and re-establish the boundary. The purpose must have been to confirm the belief that Mr. Reyes trespassed onto parcel 18A by keeping his fence within parcel 18A instead of along the boundary. Mr. Gillett said that on that occasion he completed resurvey of parcel 19D, belonging to the Holdens, but could not carry out the resurvey of 18A; he had to discontinue the resurvey because Mr. Reyes told him that he would be crossing onto Mr. Reyes' property; and that Mr. Reyes refused to give permission. Mr. Gillett did not say that on that occasion he could tell that the fence was on 18A and not along the correct boundary. He was not asked about it in court. The aborted resurvey of September 2000, did not prove anything material, let alone that the fence was on parcel 18A and not along the boundary.

15. Then when this case progressed in court towards trial, the court made the direction order that a resurvey to re-establish the boundary be carried out jointly by surveyors nominated by the parties. Mr. Gillett

and Mr. Wilfredo Bautista, a survey technician, attended to the resurvey on 25.10.2004. Only Mr. Gillett testified and produced the report which he alone signed. He reported that the resurvey was carried out by him, assisted by Mr. Wilfredo Bautista. They used the approved plan drawn by Mr. Gustavo Bautista. Mr. Gillett said that at the north-western boundary they found, “one of the key points, a survey monument; it was the original concrete monument; it was a concrete monument, 6 inches in the ground”. In cross-examination he said that he reset the monument right under the fence. He went on to say: “The boundary lines were found to be outside the Holdens’ property by about 1 ½ feet at the nearest northern boundary”. The two descriptions by Mr. Gillett in his testimony about the position of the fence in relation to the boundary, proved unequivocally that the fence complained about by the Holdens was not within their land, parcel 18A. There was therefore no trespass occasioned by erecting the fence which remained in place on 25.10.2004, when the court ordered resurvey was carried out. I noted that Mr. Gillett commented that the fence he saw on 25.10.2004, looked different from that he had seen in September 2000. That was not enough to prove that the fence in place earlier in September 2000, was within parcel 18A. There has

been no proof that in September 2000, or earlier, there was trespass on land parcel 18A by Mr. Reyes or his predecessor in title.

16. Apart from the survey evidence regarding where the fence was, there were the testimony of Mr. Holden and the testimony of Mr. Reyes. Surprising, when Mr. Holden was asked to draw the fence in pencil on exhibit No. P(OH)4, the survey plan, he drew a line right along the survey line showing the boundary between 9D and 18B at the western end; he continued the line along the boundary line between 18A and 18B at the eastern end. According to his drawing the fence was along the southern boundary of 18B, not on 18A, the Holdens' land. There was therefore no trespass occasioned by the position of the fence, even according to illustration by Mr. Holden.
17. I have to conclude that the Holdens failed to prove the trespass they claimed was occasioned on parcel 18A by the position of the fence. They are not entitled to the reliefs they asked for. The claim by the Holdens is dismissed. They will pay costs to Mr. Ramon Reyes, arising from the claim lost.
18. *(The counterclaim).*

As far as the trespass counterclaimed by Mr. Reyes to have been occasioned by the Holdens moving the fence from the boundary further onto parcel 18B, Mr. Reyes' land is concerned, the best evidence was in the testimony of Mr. Gillett. He said that at the western end the survey stone marking the boundary was right under the fence; and at the eastern end, the boundary was about 1 ½ feet away from the building on the Holdens' land at the nearest point. That was really about the same distance that Mr. Reyes said he and Mr. Martinez shifted the boundary from across the building to. There was no evidence that the fence stood further onto Reyes' land, or that it was erected in that position by the Holdens. Mr. Reyes has failed to prove that the Holdens moved the fence further onto 18B. The counterclaim of trespass occasioned by moving the fence fails.

19. The evidence regarding the rest of the counterclaim was straight forward. Mr. Reyes said that the Hodens built their "soakaway" on his land. Mr. Holden marked on exhibit P (OH)4, the position of the soakpit stretching across the fence, thereby admitting what Mr. Reyes said. However, Mr. Holden said that the soakpit was not built by him,

and that he has since transferred it. Legally the Holdens were liable in trespass whether it was built by someone else, because the Holdens acquired possession and control of the soakpit and kept it in that trespassing position. There may have been a defence that at one point in time the Holdens were not aware of where the soakpit was and could not have wilfully kept it there. That was never raised. Once the Holdens were informed that the soakpit crossed the boundary, they became liable for trespass until they transferred it. There was a moment however short, when they allowed the trespass to continue.

20. The response by Mr. Holden to the testimony that sewage leaked and flowed was that he rectified it on receiving a complaint about it. By that he actually admitted that sewage flowed to Reyes' land before it was rectified. He admitted the trespass occasioned by the flowing sewage. The flowing was more of a nuisance in law. Nuisance in this case, private nuisance, is an act or omission on one's land, that substantially and unreasonably interferes with another's use and enjoyment of his land, in an indirect way. So in regard to the position of the septic tank and the flowing sewage, Mr. Reyes has proved

trespass and nuisance for which the Holdens are liable, and Mr. Reyes is entitled to relief.

21. *(Reliefs for the counterclaim).*

Maintaining, the septic tank for a while across the boundary over to Reyes' land was a physical direct intrusion to his land, it was trespass and warranted award of damages without necessarily proof of actual damage to the land. The flowing of the sewage was also a physical direct interference with the land of Mr. Reyes, it was also a trespass, although it was largely a nuisance because the greatly offensive smell caused inconvenience and discomfort on Reyes' land – see *Gibbings v Hingerford [1904] 1 Ir. R 211*. I shall award for the trespasses \$8,000.00 as damages without proof of actual damage. I award \$9,000.00 as damages arising from the damage occasioned by the smell of sewage causing discomfort and some loss of business. I accept the submission by learned counsel Mr. Willis that absence of record of revenue showing loss defeated the statement that up to \$500.00 was lost each day in the accommodation business, but I am persuaded that certainly there has been discomfort, inconvenience and

some loss of business. The court cannot decline to award damages because it is difficult to quantify in a given case. The total award of damages for the trespass and nuisance counterclaimed is \$17,000.00. Interest at 6% is chargeable from today, 16.8.2007. until payment in full.

22. The prayer for a declaration is granted. The court makes the declaration that: the boundary between the land of Mr. Reyes, parcel 18B on the one side, and parcels 18A and 19D, the lands of O. J. Holden and Associates Limited, occupied by the Holdens, on the other side, is as shown on the survey plan drawn by G. V. Bautista, licensed surveyor, dated 8th July 1998, given entry No. 4314 in Land Register No. 8; it is exhibit P (OH) 4. On the ground the boundary is as identified on 25.10.2004, by Mr. K. Gillett, a licensed surveyor assisted by Mr. Wilfredo Bautista.

23. There is presently no trespass on the three relevant land parcels, or nuisance affecting parcel 18B. An injunction order is declined.

24. Costs awarded to Mr. Reyes for proving the counterclaim of trespass based on, the septic tank built across the boundary and the physical flow of sewage; and for the nuisance is assessed at \$10,000.00 (ten thousand). From that I subtract \$3,000.00 (three thousand) for Mr. Reyes losing the counterclaim of trespass based on the allegation that the Holdens moved the fence further onto Reyes' land. The total costs awarded to Mr. Reyes is \$7,000.00 (seven thousand).

25. Delivered this Thursday the 16th day of August, 2007
At the Supreme Court
Belize City

Sam Lungole Awich
Judge