[2012] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' COURT CIVIL APPEAL NO 8/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**PAMELA DAVIS**	**APPELLANT**
AND	**McQUINEY CARD**	**1ST RESPONDENT**
AND	**MRS CARD**	**2nd RESPONDENT**
AND	**AL CARD**	**3rd RESPONDENT**
AND	**ERROL DAVIS**	**4th RESPONDENT**
AND	**MARK DAVIS**	**5th RESPONDENT**
AND	**SHELDON GABRIEL**	**6th RESPONDENT**
AND	**PETER LETTMAN**	**7th RESPONDENT**
AND	**DENISE BAXTER**	**8th RESPONDENT**
AND	**DON ANDERSON**	**9th RESPONDENT**
AND	**Mr. REID**	**10th RESPONDENT**
AND	**MRS REID**	**11th RESPONDENT**

AND

BETWEEN	**SHERWIN McWHINNIE CARD (SUED AS McQUINEY CARD)**	**APPELLANT**

AND **PAMELA DAVIS** **RESPONDENT**

Lord Gifford QC and Dwight Reece instructed by Reece and Reece for the appellant Pamela Davis

Debayo Adedipe for the respondents

13 October 2011 and 31 July 2012

HARRIS JA

[1] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] These appeals are against the judgment of the learned Resident Magistrate, Her Honour Mrs Desiree Alleyne, given on 26 October 2009 wherein she dismissed the claim by the appellant against the several respondents for a perpetual injunction and awarded costs against her. The learned Resident Magistrate entered judgment for the 1st, 4th and 8th respondents for a perpetual injunction restraining the appellant from obstructing their right of way and awarded the 4th and 8th respondents damages in the sum of $250,000.00 each on their counterclaims. She did not make any monetary award to the 1st respondent on his claim for damages for nuisance/obstruction.

[3] The appellant filed notice of appeal on 2 November 2009, wherein she relied on three grounds of appeal as set out below:

> "(a) The Learned Resident Magistrate erred in law in finding that the Respondents were entitled to an easement over the Appellant's property.
>
> (b) The Learned Resident Magistrate's judgment in favour of the 4th and 8th Respondents is inconsistent with her not granting judgment in favour of the other Respondents.
>
> (c) The Learned Resident Magistrate's judgment is inconsistent with the evidence at trial in particular, the evidence of the Surveyors who all presented similar findings and the particulars of the Registered Titles of the Appellant and the 1st Respondent."

She sought orders setting aside the judgment in favour of the respondents, and a perpetual injunction against the respondents restraining them from trespassing on her property.

[4] The 1st respondent McWhinnie Card filed an appeal on 9 November 2009 seeking an order that damages be awarded to him.

[5] At the hearing of the appeals, counsel for the appellant indicated that, having reviewed the record of appeal and the thoroughness with which the learned Resident Magistrate dealt with the issue of liability, the appellant would no longer be challenging the findings of the learned Resident Magistrate on that issue. However, he submitted that her approach to the issue of liability was not matched by her approach to the issue of damages. Counsel therefore sought permission, which was granted, to limit the appeal to the issue of damages and to argue the following ground:

> "(1) There was no or no adequate evidence on which the learned Resident Magistrate could find that the 4th and 8th respondents had suffered damages in the sum of $250,000.00 each. Additionally the learned Resident Magistrate in her reasons for judgment has not demonstrated how she assessed and arrived at damages in the amount of $250,000.00."

The background facts

[6] The appellant filed Plaint No 1191 of 2006 and particulars of claim on 4 December 2006, in the Resident Magistrate's Court in the parish of Clarendon, claiming against the respondents jointly and severally, the sum of $250,000.00 in damages, for trespass and malicious damage to her property situated at Waterworks, Frankfield in the parish of Clarendon, registered at Volume 1162 Folio 385 of the Register Book of Titles. She claimed that the respondents had trespassed on her property and damaged the concrete fence there. She also claimed an injunction against the respondents to restrain them from trespassing on her property in the future, and from constructing any road, building or wall on the same.

[7] The 1st, 4th and 8th respondents all filed notices of counterclaim on 11 April 2007, wherein they counterclaimed for damages for "nuisance/obstruction of a right of way", on the basis that on divers days the appellant had "wrongfully blocked/obstructed the road/right of way" that runs from the Frankfield main road at Waterworks, Clarendon between her land and the land owned by the 1st respondent and registered at Volume 1333 Folio 290 of the Register Book of Titles, which continued beyond the appellant's

and the 1st respondent's property, and passes the property of the 4th and 8th respondents.

[8] With regard to the 1st respondent, he claimed that the said road led to and beyond an alternative entrance to his property at the back of his house, which entrance was used often by his household and himself. In respect of the 4th respondent, he claimed that whenever the appellant, obstructed the road or right of way, he had to park his motor vehicle on the main road and walk to his home as that road was his only means of gaining access to his home. With regard to the 8th respondent, she claimed as one of the executors of the estate of her late father, Samuel Baxter, who, by way of an agreement with the appellant had purchased 1/4 acre of land with a dwelling house thereon, part of the appellant's land, in respect of which he had paid the purchase price in full. The 8th respondent lived on that part of the property, and by virtue of the provisions of her father's will, she was her father's successor in title. She also claimed, as did the 4th respondent, that the road or right of way was the only means of access to her home and whenever the appellant blocked the same, she also had to park on the main road and walk to her home.

[9] All three respondents claimed that the appellant had blocked the road or right of way with the construction of a concrete wall, by planting light posts and by depositing concrete blocks in, and by parking a truck across, the roadway. They stated that the appellant's actions had caused them considerable inconvenience, hardship, distress and embarrassment and had materially disturbed and affected the enjoyment of their

respective properties. The 1st respondent indicated that he was unable to use the road without moving the obstructions.

[10] At the trial before the learned Resident Magistrate, the appellant gave evidence and called one witness, a commissioned land surveyor, Ivanhoe Kennedy. The appellant gave evidence that the 1st respondent was her neighbour who occupied land to the north of her property. She testified that between her fence and his fence there was a 6 feet reserved road, which was on the certificate of title for her property, and which ran the entire length of her property along the boundary. She said that the 4th respondent had a house beyond her boundaries, and the 8th respondent lived on her (the appellant's) property "in the back". She stated that Samuel Baxter had purchased by way of an agreement for sale in April 1994, "2 bedrooms, ¼ acre of land with access road of 6 feet from me". She had given him a diagram but no title, as that was the arrangement, she said, and she was not sure if she was ever going to provide any title for that part of the land.

[11] The appellant gave further evidence that on Sunday, 3 December 2006, she saw several of the respondents using sledge hammers and knocking down the concrete fence, and electric post on her property, over a period of two hours. The respondents proceeded to widen the road, throw bagasse there, and then used sand and concrete blocks to keep the road open. It was also her evidence that she constructed the wall in 2002, when the 1st respondent was putting up his fence, as he encroached on some of the road, which was on her property. She therefore constructed the wall to prevent persons from trespassing on her property. She quite candidly indicated to the court

that she did not know if she intended to do an official subdivision of the land and maintained that she was unaware that in applying for subdivision of the property she would have to provide driving access to the rear of the property. It was her evidence that she had known the 4th respondent for many years and he always used to access his home through the 1st respondent's property and by way of a parochial road. She insisted that the reserved road was not used for vehicular traffic.

[12] Mr Kennedy testified that the existing roadway was not in accordance with the certificates of title in respect of both the appellant's and the 1st respondent's properties, and that where it was currently situated was in breach of the appellant's property rights. He stated that the wall on the 1st respondent's property had encroached on the roadway. However, in his opinion, a 6 foot road could be created along the boundary as both titles reflected a 6 foot road thereon. He confirmed that a subdivision would not be approved if there was no driving access to the premises.

[13] The 1st respondent gave evidence that he owned registered land separated from the appellant's land by a reserved road. He had known his property since 1962. He was familiar with the reserved road and knew that vehicles used to drive on it. In later years he used the road himself often and he was aware that it was used as a road. He was clear that the road led to the 8th respondent's house and that the 4th respondent's house was beyond the 8th respondent's house. He was insistent that "there was no other road". He said:

> "I know of a parochial road to the north of the property. It leads to [sic] gentleman by the name of Mr Lynch. It is a

> dead-end road. If you are going to use that road to get to Mr. Davis' house you have to go through bushes and cane field, walking, one cannot drive. There is no other road to get to Mr. Davis' property. This road has been in the same position since 1962."

[14] He further asserted that he did not know about a wall being constructed by the appellant, but of a gate which consisted of "2 blocks up, 2 blocks across". It was this gate that he said blocked access to the roadway, and he readily agreed that he had participated in its demolition. He knew of the light post which, he said, the appellant had removed from the 8th respondent's property and placed beside the gate, which was 6 blocks high. He also confirmed that there was a truck parked blocking the road. He was only prepared to accept that the wall which he built "along his line to the road" encroached about 4 inches into the road, and not 1.83 metres or 3.4 feet as the report of Mr Kennedy, had disclosed.

[15] The 4th respondent in his testimony confirmed the layout of the respective lands. He was familiar with all the properties: the appellant's property was to the front of the entrance to the main road, the 1st respondent was to the front also but to the right, the 8th respondent was to the rear of the appellant's property, and by the use of the reserved road one could get to his house, which was to the rear of the 8th respondent's property. He was accustomed to driving across the reserved road, which, he said, had always been there, in excess of 20 years. He said from 2000 he would specifically drive his Hilux Toyota pick-up truck, on the reserved road, after turning off the main road. He had been able to drive to his home along that road, while building

his home and carrying materials there in that way. He indicated that he had only started living at the rear of the appellant's property since 2003. He had seen vehicles driving on the road since then, and he knew of no other reserved road that could be used to get to his house. He testified that he knew of the parochial road, which goes from the main road to one Lynch's property, but it does not go to his property. He deposed further that once the appellant parked a truck across the reserved road and "started planting some poles" in the middle of the road, so that only 3 feet remained of the width of the road, and constructed the wall with about six to seven blocks along and across the reserved road, he could no longer drive on the road, and had to walk to get access to his home. He indicated that his house was about 500 feet from the main road, and he had to walk to his house, whether he was transporting a freezer, bed, stove or cooking gas. From about 2002, he had been unable to drive to his house. In fact, he used to trespass through the 1st respondent's property but as he had put up a gate, he could no longer do that.

[16] The 4th respondent pointed out that he too participated in the efforts to knock down the wall, as it blocked the access to his home and he therefore needed to clear the road.

[17] He claimed that these access problems only began when the appellant asked him if he had purchased material from her hardware store for the construction of his house, and when he answered in the negative, she indicated that he could no longer use the road.

[18] The 8th respondent also gave evidence. She said that her father bought the property where she resided from the appellant in 1995, and he had paid the full purchase therefor. He subsequently died in 2003. However, up to the time of trial, the appellant had not provided her with title for the land purchased, which belonged to her as her father had left a will and though she had many siblings, she was the sole beneficiary. The will, she said, had not been probated. She deposed that she went to live on the property in 1999 and when she went there her furniture had been delivered by truck. She confirmed that there was no means other than the reserved road between the 1st respondent's property and the appellant' property to gain access to her home. She had not been able to do so by motor vehicle since the appellant had blocked the road.

[19] The 8th respondent went on to state that, initially, she had resided with her uncle, her husband, and her three children. Her uncle was elderly, 78 years old, of ill-health, and required medical attention every month. On some occasions he had been able to walk to the main road unaided, on others he had to be assisted. On those latter occasions, as the road was blocked, and no vehicle could drive up to her house, she had to obtain assistance from neighbours to carry him to the main road. The 8th respondent told the poignant story of her uncle falling ill, in the pendency of the trial, and needing to go to the hospital, but as it was raining, they could not set out to meet the waiting taxi and were only able to do so after ¾ hour, when her husband carried her uncle to the waiting taxi on his back. Unfortunately, her uncle was pronounced dead on arrival at the hospital. At the trial, his funeral was yet to take place, and the

8th respondent's concern was that blocks, steel and other materials had to be transported to her home from the main road without the use of the roadway, as it had been blocked, and the construction of the vault required 150 blocks.

[20] Mr John Mais, an experienced commissioned land surveyor, testified that in 2007 he did professional work on the contiguous boundaries of the 1st respondent's property and that of the appellant. He observed the reserved road on ground which, he said, was not in exactly the same place as depicted on the title of the appellant. It seemed, in his view, "a well travelled road with vehicles". He indicated that it was a dirt road with stones, which the people in the area said had been a right of way in excess of 30 years. In his opinion, the right of way was located on the appellant's property. He stated that he observed no other means of access to the land occupied by the 8th respondent and confirmed that subdivision approval would not be granted without that access roadway. It was suggested to him that the work that he did "was to clearly identify and explain the roadway on the respective titles". His answer in evidence was, "The road runs alongside the boundary of each. I set out the road as stated on the title. The effect of setting out the registered boundaries between the 2 properties had the effect of delineating the roadway as stated on the registered title which measured 6 feet".

Findings of the learned Resident Magistrate

[21] The learned Resident Magistrate found that the roadway had existed and had been traversed by vehicular traffic for over 50 years. She also found that the appellant

had constructed a wall because the 1st respondent had also erected one, but that the appellant was determined to block the roadway and prevent access by the respondents to their respective homes. She found, having visited the locus in quo, that the 4th and 8th respondents could not use the parochial road to gain access to their respective homes as they would have to travel through property owned by someone else, which would definitely be acts of trespass. In any event, at the said visit, she found that there was a barbed wire erected to fence off that particular property. She therefore found that an easement of necessity existed as there was no other way to obtain vehicular access to the properties of the 4th and 8th respondents. She therefore made the orders referred to herein and directed that the appellant remove the truck which was blocking the roadway. She also observed that the 1st respondent, as against the 4th and the 8th respondents, would not be prejudiced by not being able to drive his vehicle to the back of his premises.

The appeal

[22] As indicated, the issue on the appeal in respect of the appellant was limited to a complaint that the learned Resident Magistrate had given no indication as to the basis of her award in respect of damages for the 4th and 8th respondents in the amount of $250,000.00 each. The appeal of the 1st respondent was based on the fact that no award for damages had been made to him, in circumstances where the genesis and persistence of his complaint were similar to that of the 4th and 8th respondents.

The submissions

[23] Counsel for the appellant said that the evidence required to prove a case in nuisance is specific and very little had been put before the court, in this case, in that regard. He referred to the evidence set out herein and submitted that the learned Resident Magistrate should, in the circumstances, only have made a nominal award of damages, if at all. He asked this court to find that the awards made were substantial, being the maximum amount that could be awarded by the magistrate, in nuisance. Having been made without any significant basis therefor, and without any reasons having been given made the awards to the respondents eminently challengeable.

[24] Counsel for the respondents, however, submitted that the awards made to the 4th and 8th respondents were correct. The issue before the court, he argued, was not how much damage had been suffered by the respondents, but how best the court could compensate them for the infringements of their respective rights. He canvassed the evidence and pointed out the severe transgressions of the appellant as the 4th and 8th respondents were forced to walk to and from their homes every day regardless of the weather because of the recalcitrance of the appellant. There was no basis for her actions, he submitted, and the appellant had always known that the road that she had blocked was a right of way that she was preventing the respondents from enjoying the use of their respective properties. What she had done represented a gross and grave breach of the respondents' property rights.

[25] In respect of the 8th respondent, counsel submitted that the situation was even more egregious, and the resultant consequences showed that the appellant's actions could not be considered a trifling infringement of one's rights. In the 8th respondent's case, the appellant had sold a piece of her (the appellant's) land to the 8th respondent's father, and was readily aware of her obligations to provide access to the rear of her premises, yet even in the circumstances of an ill relative residing there, she persisted with her obdurate position. One can, he submitted, without much difficulty, imagine the gravity of the situation, and the severe frustration that she must have experienced. It was manifest, he argued, once the evidence put before the court was accepted, nothing short of a substantial award of damages in her favour would suffice. It was clear, he submitted, that the learned Resident Magistrate found it to be a glaring breach and the court therefore ought not to disturb the award made.

[26] With regard to the appeal of the 1st respondent, counsel submitted that he also had a right to the roadway and the finding of the learned Resident Magistrate that there was an easement of necessity ought to redound to him. His rights were also infringed and so damages should, counsel submitted, follow. He said that perhaps in the case of the 1st respondent, his rights had not been as seriously affected, but some award should have been made and the learned Resident Magistrate therefore erred in not doing so, and he asked the court to put it right.

[27] Lord Gifford QC in response, submitted that the arguments of counsel for the respondents were misconceived, as there are several instances where persons' rights have been infringed but they have suffered no damage and therefore are not entitled to

an award in respect of damages. The respondents were entitled to a perpetual injunction and the learned Resident Magistrate, after a reasoned judgment, based on her appreciation of the facts of the case, granted the injunction as prayed. However, she found in respect of the 1st respondent that he had suffered no prejudice, and there is no evidence to contradict that finding. He submitted that that finding was not inconsistent with her granting an injunction. The front entrance to the 1st respondent's home had not been blocked, so he had had normal access to his property. Counsel reminded the court that, in respect of the other respondents, there had been no specific time frame throughout which the nuisance had occurred. The evidence was unclear, he submitted, as to when the obstruction or the wall had been erected, but even if the respondents had been prevented from accessing their homes for a period of five years, the awards would represent $1,000.00 a week, to each respondent, which he said, in the circumstances of this case, is excessive, and those amount should be rejected by this court.

Analysis

[28] The learned Resident Magistrate's award of damages was based on her finding that there existed an easement of necessity in favour of the 4th and 8th respondents and that the appellant's action had been a wrongful interference with this right. The wrongful interference with an easement constitutes a private nuisance (Halsbury's Laws Vol 87 (2012) 5th edn para 935). Lord Lloyd in **Hunter and Others v Canary Wharf** [1997] 2 All ER 426 identified private nuisance as being of three kinds: nuisance by encroachment; nuisance by direct physical injury; and nuisance by interference with a

person's quiet enjoyment of the land. Where the first two types are concerned, the measure of damages is diminution in value, that is, the difference between the money value of the claimant's interest in the property before the damage and the value after the damage. In the case of the third type, there may be no diminution in value as there may not be physical damage, but there will be loss of amenity value so long as the nuisance continues (per Lord Lloyd at page 443). Lord Hoffmann in his judgment in **Hunter** explained the basis of an award of damages for loss of amenity value, thus (at page 451):

> "… it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property and an action brought for nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort…. In the case of nuisances 'productive of sensible personal discomfort', the action is not for causing discomfort to the person but, … for causing injury to the land. True it is that the land has not suffered 'sensible' injury, but its utility has been diminished by the existence of the nuisance. It is for an unlawful threat to the utility of his land that the possessor or occupier is entitled to an injunction and it is for the diminution in such utility that he is entitled to be compensated….
>
> Diminution in capital value is not the only measure of loss. It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not… the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted. To some extent, this involves placing a value on intangibles. But estate agents do this all the time. The law of damages is sufficiently flexible to be able to do justice in such a case."

[29] It is to be noted from the above that the damages to be awarded are not for any inconvenience suffered by the claimant, nor, as stated by Lord Lloyd in **Hunter**, are damages to be awarded for personal injury, although they may be recoverable in an action for public nuisance. It is to be noted too that, unlike damages which are awarded for diminution in value, damages for loss of amenity are not capable of mathematical calculation, with the result that assessment is a very difficult exercise. That such damages are incapable of mathematical assessment is borne out by **Carr-Saunders v Dick McNeil Associates Ltd and Others** [1986] 2 All ER 888. In that case, Millett J (as he then was) was faced with the task of compensating the plaintiff for loss of his easement of light. The defendant's expert had suggested an amount which was calculated by extracting that part of the rental value attributable to light from the residual value [and] capitalizing the loss of the rental value attributable to the loss of light". After considering these figures, which suggested that the award should be £2900, Millett J said:

> "If these were special damages which could be precisely calculated in this way, I should have no hesitation in preferring Mr Anstey's [the defendant's expert] evidence…But I have to award general damages, and in my judgment, on the authorities …I am entitled to take into account not only the loss of light but the loss of amenity generally, due to such factors as loss of sky visibility … the loss of sunlight in short, the general deteriorating quality of the environment."

Using £3000 as "the absolute minimum figure" and with "little material" to guide him, the learned judge in "doing the best [he could]", taking into account all the

considerations pressed upon him including the fact that damages were being awarded in lieu of an injunction, awarded a figure of £8000 per square foot. No indication was given as to how he arrived at the figure for loss of amenity value.

[30] Damages for this type of nuisance may therefore be said to be at large. Consequently, in order to arrive at an appropriate figure, the court may take into account the "defendant's motives, conduct and manner of committing" the tort which may have aggravated the commission of the wrongdoing. The court is entitled to take into account any malevolence or spite or high-handed behavior of the defendant. In my view, it is reasonable to conclude from all of this, that in awarding damages for the loss of amenity value during the period of the nuisance, the court is involved in a highly imprecise exercise in which it must take into account a number of considerations, including the behaviour of the defendant, and endeavor to place a monetary value on things for which there can be no real value.

[31] From the above, it may be said that the learned magistrate was faced with the unenviable task of compensating the plaintiffs in money's worth for the loss in amenity value of their properties during the time that there their access was interference with. This had to be done in circumstances where it appears that there was not much assistance provided in the way of authorities as to actual awards made in cases of this nature. Indeed, there appears to be a dearth of authorities, particularly from our local courts, in this area of the law. Nonetheless, the magistrate was, without doubt, obliged to consider the evidence in deciding the amount to award. There was no evidence as to the monetary value of the lands in question and there is nothing to say that such

evidence would have been of assistance; it was of little, if any, benefit to the judge in **Carr-Saunders v Dick McNeil Associates Ltd and Others**. The learned magistrate did not outline the evidence which she took into account in making her award, but she had considered the evidence adduced by all the respondents in determining liability. She noted that there was no other way for the respondents to have vehicular access to their properties as the alternative route suggested by the appellant could only be accessed by trespassing on a neighbouring property.

[32] The learned magistrate found that the "defendants and their witnesses were forthright and honest [but] Pamela Davis appeared to be evasive and was not a credible witness". It is not unreasonable therefore to conclude that the magistrate had accepted the evidence of the respondents. The evidence of all the respondents showed that the appellant had used several means to prevent their use of the reserved road. The appellant obstructed use of the road by digging holes in the road, erecting posts and columns, depositing marl, erecting a light post in the road, parking a truck and building a wall. Her actions, which appeared petty and vindictive, had prevented vehicular access to the respondents' premises resulting in much inconvenience and hardship, not the least of which, was making the last moments of the life of the 8th respondent's uncle unnecessarily extremely uncomfortable.

[33] While the magistrate was not entitled to compensate for the inconvenience and hardship the respondents suffered, she was entitled to take them into account, as they gave an indication of the way in which the utility of the property would have been affected during the period of the obstruction. Certainly, a house to which direct access

can be obtained from the roadway is far better than one to which there is no vehicular access to the road other than trespassing through another's property. The learned magistrate would also have had in mind the appellant's actions which demonstrated a high degree of high-handedness calculated to oppress the respondents. There was also the fact that the appellant's behavior had lasted for several years, certainly not an insignificant duration of time. I therefore do not agree that there was no or no adequate evidence upon which the learned magistrate could base her assessment. In my view, the above evidence was adequate and would no doubt have been foremost in her mind when she made her assessment. She did the best that she could in what was a highly inexact exercise, and while it may be that this court cannot say that it would have awarded $250,000.00, it equally cannot say that the learned magistrate was obviously and palpably wrong in making that award in those circumstances.

[34] In relation to the 1st respondent's appeal, his counter claim was not advanced on the basis that he had an easement of necessity. His particulars pleaded that the road which had been blocked led beyond an alternative entrance to his property and that the said road was often used by his household. The learned magistrate's finding as to the existence of an easement was confined to an easement of necessity only, and while she mentioned the prescriptive easement in passing, she made no finding in relation to that type of easement. Having found that the easement of necessity existed for the benefit of the 4th and 8th respondents, and not for the 1st respondent, there is no basis on which she could have made an award to the 1st respondent.

Conclusion

[35] In the light of the above, I would dismiss the appeal of the appellant, and similarly, I would dismiss the appeal of McWhinnie Card. In the circumstances, I would make no order as to costs.

McINTOSH JA

[36] I too have read the draft judgment of Phillips JA and agree with her reasoning and conclusion.

HARRIS JA

ORDER

The appeal of the appellant Pamela Davis is dismissed as also that of McWhinnie Card. There shall be no order as to costs.