JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 48/2002

BEFORE:	THE HON. MR. JUSTICE PANTON, J.A. THE HON. MRS. JUSTICE HARRIS, J.A. THE HON. MR. JUSTICE MARSH, J.A. (AG.)	
BETWEEN	ARCHIBALD McINTYRE	APPELLANT
A N D	DELROY GREENWOOD REVOLENE GREENWOOD	RESPONDENTS

Ms. Carol Davis for the appellant

Dr. Lloyd Barnett and Ms. Leila Parker for the respondents

November 15, 2006, and October 26, 2007

PANTON, P.

1. The fundamental point in this appeal is a determination as to whether the owner of number 211 Keswick Track, Cumberland Gardens, Gregory Park, Saint Catherine, has the right to build atop the house that he bought from the National Housing Trust. On April 14, 2000, Theobalds, J. gave judgment saying that the appellant was wrong to have so done. Nearly two years later, that is, on March 12, 2002, the learned judge delivered his reasons for judgment. He also gave reasons for the delay in bringing the matter to a conclusion. Restrictive covenant number 7 on the certificate of title featured in the reasons for the decision. That covenant reads:

> "No fence hedge or other construction of any kind nor any tree or plant of a height of more than four feet six inches above road level shall be erected, grown or permitted along the boundaries of the said land and three feet six inches high within fifteen feet of any road intersection".

The pleadings

2. The appellant and the respondents own adjoining single storey houses in Cumberland Gardens, Gregory Park in the parish of St. Catherine that share a common wall. According to the pleadings filed by the respondents, the appellant "by himself his servant and/or agent ... entered the (respondents') land and ...stood on the roof of the (respondents') house in order to erect a structure on the (appellant's) roof". The respondents also alleged that the construction of the structure has resulted in their being deprived of "light and ... air space" which they claim is their ordinary right and entitlement. The respondents alleged that the aforesaid actions on the part of the appellant amount to nuisance and/or trespass. The respondents sought an order to restrain the appellant's construction process, and for damages for trespass, nuisance and breach of restrictive covenant.

3. The appellant filed a defence in which he denied the allegations, and counterclaimed for trespass on the basis of the respondents having

constructed a concrete wall upon his land without permission. The appellant also sought damages for trespass, and an order to restrain the continuing encroachment. The respondents did not file a reply to the counterclaim.

The evidence

4. The male respondent (Mr. Greenwood) testified that, as a result of a wall built by the appellant, water had entered their house and damaged the carpets. He admitted that he and Mrs. Greenwood had built a verandah without the necessary permission from the authorities. He denied that the problems being experienced at his house were the result of the unauthorized construction. He rather strangely said that they had not suffered any loss from the water which comes from a "joint". There is no dripping, just seeping through the wall.

5. Mrs. Greenwood said that since the appellant's construction she had become very ill with asthma and sinusitis. According to her, water flows from the top, across the living room, down the side, and the house had become damp. A foul odour associated with the dampness had resulted. She said that she has had to clear the area and remove the carpet several times at a cost of one thousand dollars or five hundred dollars each time. She has had to seek medical attention for her two daughters. She failed to give an amount as to the cost incurred. So far as

the cost of such medical attention is concerned, she said: "Have to get medical report and ask doctor". Further, she could not remember how much she spent for filling prescriptions and visiting the doctor. At page 25 of the record, her evidence is recorded thus:

> "My daughter and I – asthma. Whenever it rains and I in my house I get a cough – not asthma. Nobody in my family has asthma. After I dry out carpet I have cough but no asthma. Daughter has not gone to doctor for asthma in last four weeks. I don't agree I making up a story. Not so seepage of water has nothing to do with asthma."

This passage clearly shows that there was conflicting inexpert evidence as to whether Mrs. Greenwood and her daughter had been suffering from asthma.

6. The respondents called a witness, Major Patrick Aitken, a certified land surveyor, who said that the buildings occupied by the parties deviated from the deposited plan, in that half of the bedrooms on each lot encroached on the other lot. The parties are agreed that that is indeed the position. This was confirmed by Mr. Duel Thomas, a certified surveyor, called on behalf of the appellant. Major Aitken also said, while being cross-examined, that the common wall is not regarded as a boundary for the purpose of covenant number seven.

7. The appellant testified that he had received permission from the St. Catherine Parish Council for the construction that he had undertaken. He called the Superintendent of Roads and Works for St. Catherine, Mr. Tubal Brown, who said that he had visited the site during the construction, and that the Council does not "enforce setbacks in relation to common boundary".

The Judge's decision

8. The learned judge awarded judgment as follows:

> "On claim: judgment for plaintiff for $20,000 damages for trespass nuisance and a breach of the Restrictive Covenant. Claim for Special Damages rejected as not proven on the evidence. Costs on claim to be taxed or agreed to plaintiff.
>
> On Counter Claim: judgment for defendant for $2000 damages for trespass to land. Order made restraining the plaintiff from remaining on and/or continuing to encroach upon the defendants' land. Defendant also gets his costs on his counterclaim to be agreed or taxed.
>
> An order is also made in terms of paragraphs (i) and (ii) of the Amended Statement of Claim dated the 15th day of April 1998 filed on behalf of the plaintiff. Written judgment to follow at a later date".

Paragraphs i and ii of the amended Statement of Claim state as follows:

> "(i) No bath water or any water except storm water shall be permitted or allowed to flow from the said land or any part thereof onto

any portion of any road street or land adjacent to the said land.

(ii) No fence hedge or other construction of any kind nor any tree or plant of a height of more than four feet six inches above road level shall be erected grown or permitted along the boundaries of the said land and three feet six inches high within fifteen feet of any road intersection."

There has been no counter notice of appeal, so the order on the counterclaim does not concern us in these proceedings. So far as the claim is concerned, that which is under challenge is his finding that trespass, nuisance and a breach of the restrictive covenant have all been proven.

9. In making his findings, the learned judge said:

(i) "Without the advantage of visiting the locus, it can be clearly seen by any tribunal of fact from the photographs exhibits 8, 8A, 9 and 10 that the structure being erected by the defendant is in breach of the covenant as to height and must result in a loss of light and air to the plaintiffs building;"

and

(ii) "In the absence of an express covenant as to light and air to deprive a neighbour of these two essentials to decent living is clearly a nuisance. There can be no defence to assert that Parish Council Approval has been obtained."

10. The learned judge further said that he accepted that the respondents had complained to the National Housing Trust and to the St. Catherine Parish Council about the appellant's extension but no action had been taken by those entities. He accepted that the verandah built to the front of the appellant's premises by the respondents encroached on the appellant's premises, but that had been acquiesced in and only became an issue after the filing of the instant suit. He found that the proposed extension by the appellant was an "overwhelming monstrosity". Finally, he said that had the respondents quantified in monetary terms the extent of the damage to the carpet, walls and the children's health, the award of damages would have been substantially higher.

11. In making his findings, the learned judge failed to specifically identify the acts of trespass or nuisance. He clearly regarded clause seven of the restrictive covenants as having been breached with the consequence, it is assumed, that the breach was a trespass as well as a nuisance.

The grounds of appeal

12. The following grounds of appeal were filed:

> "(i) That the inordinate delay in delivering firstly, the Oral Judgment on the 14th April, 2000, and the Reasons for Judgment on the 12th March, 2002, would have made it difficult, if not impossible for the Learned Trial Judge to accurately recall the evidence, properly assess the demeanor and credibility of the witnesses or effectively

evaluate the oral and documentary evidence presented and thereby render questionable and unsafe his adjudication of the issues in the case and his conclusions thereon; and

(ii) The Learned Trial Judge has erred in Law in failing to state the findings on which he based his Reasons for Judgment, thereby rendering his determination of the issues and his conclusions thereon questionable;

(iii) ...

(iv) That the Learned Trial Judge erred in holding that there was a breach of the restrictive covenant, since this finding was not supported by the evidence and/or the findings of the Trial Judge;

(v) That the learned Trial Judge erred in awarding damages for Trespass, as there was no evidence and/or finding in the judgment of the Honourable Trial Judge which supported trespass by the Appellant on the Respondent's land.

(vi) That the Learned Trial Judge erred in awarding damages for nuisance, as there was no evidence before the Court on which a finding that the Appellant had committed nuisance could properly be made; and

(vii) The Learned Trial Judge erred in ordering that the Appellant be restrained whether by himself or his servants or agents or otherwise from continuing to build upon the top of his house at Lot 211 Cumberland Housing Scheme otherwise known as 211 Keswick Track, Cumberland Gardens, Gregory Park in the parish of St. Catherine".

Nuisance – deprivation of light and air

13. Miss Davis contended that the judge erred in finding that nuisance had been proven as a result of the alleged deprivation of light and air. She is clearly right in this regard as it has long been settled that no one has

a natural right to light, but such may be acquired by grant or prescription. It is also not a nuisance to block the free access of air to someone else's property. As in the case of light, a right to air may be acquired as an easement by grant or prescription. In the context of this case, the relevant conditions do not obtain, so ground (v) is well founded.

Delay in delivering judgment

14. In respect of the first ground, the appellant pointed to two undisputed facts –

(i) the decision of the tribunal of fact was sixteen months after the trial had ended;

(ii) the reasons for the decision came twenty-two months later.

Based on these facts, it was submitted by Ms. Davis for the appellant that the decision was flawed by the lapse of time. She relied on a case from the former Court of Appeal – **Mair v Jamaica Utilities, Ltd.** (1941-1945) 4 J.L.R. 7. The panel comprised Furness, C.J., Savary, J. and Carberry, J.(Acting). That was a case that occupied just one day before an Assistant Resident Magistrate who took nineteen months for the delivery of the judgment. The Court of Appeal, understandably, frowned on the situation for which no explanation had been offered. A new trial was ordered seeing that the judgment depended on the credibility of the witnesses, and it was likely that after the long delay that had been experienced there might have remained in the magistrate's mind no

distinct recollection of incidents at the trial and the many details which help to "estimate" that credibility (see page 8 of the judgment).

15. It is observed that in the instant case the total time between completion of the trial and delivery of the reasons for judgment was thirty-eight months (not "over four years" as submitted on behalf of the appellant). The learned judge took the first page of his seven-page judgment to set out his reasons for this unacceptable delay. He cited confusion in the listing arrangements by the Registrar of the Supreme Court as well as the temporary loss of his notebook containing the notes of evidence. Without ascribing blame to any particular individual, it seems apt to comment that this type of situation gives support to the thinking that the administration of the activities of the Supreme Court needs radical overhauling. It should not be possible for such reasons to be advanced for delay of this magnitude. Having said that, however, I hasten to state that I am of the view that the instant case is of such a nature that the delay complained of has not affected the outcome of the suit.

16. I agree with Dr. Barnett that there is no indication that the judge erred in his recollection of the evidence. Not only did the judge have the oral testimony, but he also visited the locus in quo and had documentary exhibits. Further, the notes of evidence that were recorded had very little

to do with the credibility and demeanour of the witnesses, as much of the evidence was not in dispute. It is my conclusion that the delay is not such that would by itself vitiate the reasons and conclusions. This ground of appeal therefore fails, in my view.

Did the judge fail to state the basis of his reasons for judgment?

17. It cannot be disputed that the learned judge did not make a specific finding in respect of the allegation that the appellant "by himself his servant and or agent entered the (respondents') land and ...stood on the roof of the (respondents') house...thereby constituting a trespass". The nature of the allegation was such that it required a finding. It is not surprising that no finding was made in this regard as there was no evidence to support it. There being no evidence, there was therefore no basis for a finding that the appellant had trespassed in this way. The learned judge concentrated his reasons for judgment on the alleged breach of covenant number seven. Hence, any trespass that he may have found as having occurred would have, impliedly, been the result of the breach that he accepted as having been proven.

Was there a breach of covenant number seven?

18. For ease of consideration, the words of the covenant are repeated:

> "No fence hedge or other construction of any kind nor any tree or plant of a height of more than four feet six inches above road level shall be erected grown or permitted along the boundaries

> of the said land and three feet six inches high within fifteen feet of any road intersection".

The learned judge construed the boundaries being referred to in the covenant as including the common boundary. Ms. Davis submitted that he was in error in so doing. She said that he had "failed to consider whether the construction was 'along the boundaries of the said land' and made no findings with regard to this". Dr. Barnett, on the other hand, submitted that whatever boundary is taken, the registered boundary or the boundary of the existing buildings, the appellant is in breach of the covenant.

19. I am of the view that there had been a misunderstanding on the part of the learned judge as to the meaning of covenant number seven. It has been assumed that the addition of the upper floor is within the meaning of the words "or other construction"; but, is this really so? It is well settled that words are to be given their literal and natural meaning. However, that general rule of construction is tempered when, for example, absurd and unintended results stare us in the face. At that stage, other rules of interpretation come to the fore. There is the principle "noscitur a sociis", that is to say, the meaning of a word may be gathered from the context. The correct meaning of a word is influenced by the words associated with it. In **Bourne v Norwich Crematorium Ltd.** (1967) 2 All E.R.576, Stamp, J. said:

> "English words derive colour from those which Surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words..."

Then, there is the *ejusdem generis* rule, which is that "general words may be restricted to the same genus as the specific words that precede them": Lord Halsbury in **Thames & Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.** (1887) 12 A.C. 484 at 490.

20. It seems to me that the words "or other construction" are governed and controlled by the preceding words, "fence" and "hedge". I am even more convinced that that is the correct approach when the further words "nor any tree or plant...erected grown or permitted" are considered, in the full context of the covenant. It is clear to me that what the covenant is seeking to prevent is the erection of hedges and fence-like structures as well as the planting and maintenance of trees above a certain height. The mere mention of "trees" in this covenant should immediately result in the elimination of the common boundary from consideration, as it could not have been in the contemplation of the makers of the covenant that persons were likely to be building hedges and fences as well as planting trees in a general way atop the structure originally built.

21. I note that the amended statement of claim quoted covenant number four. Dr. Barnett, in his written submissions, gave a reminder that that covenant had also been breached. It is clear that the learned judge did not deal with the matter. It falls to us therefore to deal with it.

Covenant four reads:

> "All buildings to be erected shall not be less than Fifty feet from the centre of adjoining main road, or thirty feet from the centre of adjoining parochial roads and streets and not less than five feet from adjoining fences".

I have combed the evidence that was recorded, and found no reference to any measurements having been put forward by the respondents to satisfy a claim for a breach of this covenant.

22. In order to bring the issue to a finality, it seems sufficient to say that if it were intended that there should be no construction atop an existing house in this housing scheme, surely this would have been expressly recited in the context of a restrictive covenant. This not having been done, points to the hopelessness of the respondents' cause in this suit. In view of the above expressions, I would allow the appeal by setting aside the orders made by the learned judge on the claim, and enter judgment in favour of the appellant thereon, with costs here as well as in the Court below to be agreed or taxed.

HARRIS, J.A.

I fully agree.

MARSH, J.A. (Ag.)

I agree.

ORDER

PANTON, P.

Appeal allowed. Orders made on the claim set aside. Judgment entered in favour of the appellant on the claim. Costs here and in the Court below to the appellant, such costs to be agreed or taxed.