IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION
2006: No. 49

BETWEEN:

CARL PAIVA

Plaintiff

-and-

HAMILTONIAN HOTEL & ISLAND CLUB LTD.

Defendant

EX- TEMPORE RULING

Date of Ruling: October 16, 2007

Mr. Mark Diel, Marshall, Diel & Myers, for the Plaintiff
Defendant does not appear

Introductory

1. In this case the Plaintiff seeks an injunction on the grounds of public nuisance and issued proceedings against the Defendant on the 17th February 2006. The Statement of Claim alleges that the Plaintiff is and was at all material times a co-owner and occupier of the properties of 12 Ocean Lane, Pembroke Parish and 14 Ocean Lane, Pembroke Parish, and that the Defendant is a limited liability company and the owner of property opposite the Plaintiff's property, running adjacent to Ocean Lane.

2. The evidence adduced by the Plaintiff proves, on a balance of probabilities, that the retaining wall which forms part of the Defendant's property is unsafe and constitutes a hazard to any persons using the public roadway known as Ocean Lane to gain access to either of the two opposite properties owned by the Plaintiff.

3. Having regard to the expert evidence of Mr. Crisson, which I accept, the wall is structurally unsafe and is at risk of imminent collapse, due to either roots from plants on the Defendant's land growing and/or rotting, and causing the wall to collapse. Alternatively, there is a risk of collapse on the grounds of water damage

which would create pressure in the soil adjacent to the wall, which could also be a cause of the wall collapsing.

4. It seems obvious, having regard to the evidence of Mr. Paiva, that not only is the roadway adjacent to the wall an area where it is necessary on occasion for cars to be parked. It is also the case that the roadway is quite frequently used by children living in the opposite properties as an area to, in particular, use their wagons and ride their bicycles. I asked Mr. Paiva whether it was not possible to avoid these hazards, and he explained that the areas for both parking and playing for children were limited. The yard spaces were not expansive and the roadway in question is obviously an attractive place for children to use their vehicles.

5. The Defendant in this case was previously represented but on the 23rd August of this year, after this matter was set down for trial, the Chief Justice ordered that Wakefield Quin be removed as attorneys of record[1]. At the hearing of the application for their removal, the Chief Justice specifically requested counsel to convey to the Defendant the fact that the trial was likely to proceed in any event, whether or not the Defendant was represented. In any event, I am satisfied that the Defendant had notice of today's trial, and has elected not to attend.

6. The law relating to public nuisance is not well-known to this Court, but having regard to the essentially uncontested facts, I am satisfied, referring to paragraph 18-03 of "*Clerk and Lindsell on Torts*"[2], that it is a public nuisance to allow a ruinous building or structure adjacent to a public roadway to remain un-repaired. In the present case, it is quite clear from all the evidence that the Defendant has never disputed its obligation to repair the wall but has simply, for reasons best known to itself, failed to actually carry out the necessary repairs.

7. In these circumstances I find that the Plaintiff's case has been proved and the Plaintiff is entitled to the injunction that he seeks.

Dated this 16th day of October, 2007

KAWALEY J

[1] This Order was made on the firm's own application.
[2] 17th Edition (Sweet & Maxwell: London, 1995)