

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. E 015/2001

BETWEEN	ROBERT EVANS	1 ST CLAIMANT
AND	MARJORIE EVANS	2 ND CLAIMANT
AND	CABLE AND WIRELESS JAMAICA LIMITED	DEFENDANT

Paul Beswick and Terrence Ballantyne instructed by Ballantyne
Beswick & Co. for the Claimant

Dave Garcia and Nigel Jones instructed by Myers, Fletcher
& Gordon for the Defendant

Heard 22nd March, 2004 and 28th February, 2005

DUKHARAN J

In an amended Statement of Claim the Claimants' claim is against the Defendant to recover damages for trespass to land. They also seek an order for an assessment of aggravated and exemplary damages from the Defendant as well as the removal of the Defendant's telephone access line on the Claimants' land.

The Claimants are the joint owners of land situated at No. 1 Aylsham Heights, Kingston 8, in the parish of St. Andrew. Sometime in January 2000 they discovered a telephone line originating from the bottom of Eman Avenue, Kingston 8 and crossing the boundary of their property. This telephone line terminated into several squatter houses on the Claimants' land. This line was installed by the Defendant on the Claimants' land for the purpose of providing commercial telephone served to squatters on the Claimants' land and was done without consent or approval of the Claimants.

The Claimants communicated with the Defendant with a view to having the said telephone line removed from their premises. The defendant admitted that they had provided service to subscribers on the Claimants' land since 1996. However the Claimants claim that the Defendant continues to trespass by refusing or neglecting to remove the said telephone line.

The Defence of the Defendant is that at all material times it had an express or alternatively and implied permission pursuant to the Telephone Act and the All Island Telephone Licence 1988 to erect and maintain wires across property such as that of the Claimants' where necessary. They further contend that such permission has been retained by the Telecommunications Act 2000, its obligations thereunder as Universal Service Provider and the Carrier (Cable and Wireless Jamaica Ltd.) 2000.

The Defendant also contends that they are not required to enquire into the status of customers who request telephone service and in particular, the extent of their interest in premises at which service is to be provided.

The issues to be determined by the Court are (1) whether the running of telephone wires over the Claimants' premises constitutes a trespass to their land (2) whether the defendant's licenses and the legislation under which such licences were issued gave the Defendant permission to erect and maintain telephone wires across the Claimants' land (3) whether in the circumstances the Defendant has trespassed on the land of the Claimants'. (4) If the Court finds that there had been a trespass, what damages should be paid to the Claimants by the Defendant, and whether or not they are entitled to aggravated and/or exemplary damages.

The 1st Claimant Robert Evans said in his witness statements that the land in question is owned by himself and his wife (2nd Claimant) as their residential premises. (There is no challenge as to ownership). He said the land is over two acres and is plagued by squatters and in late 1999 noticed several squatter dwellings which appeared to be supplied with utilities including telephone service. He wrote to the Defendant Company advising them of his observation and requesting them to remove the connection.

Photographs were tendered in evidence showing a portion of the property where lines were connected to squatter dwellings.

In cross-examination he said since then more structures were constructed by squatters. He was able to identify in the photographs the Defendant's wires.

Mrs. Joyce Hewett a former Project Manager with the Defendant Company said in her witness statement that it was her understanding that in implementing projects on land not owned by the Defendant, Officers of the Company should neither enter private property, nor run cables through or over it without getting permission from the owners.

Mr. Courtney Jackson the Deputy Director General of the Office of Utilities Regulations (OUR) with responsibility for telecommunications indicated, (witness statement) that from his knowledge, information and belief the OUR has never communicated to the Defendant the grant of any right or permission, express or implied, to run wires over private property in furtherance of any its obligations as a telecommunications service provider. He also said that since the inception of the OUR (in 1995) there has never been any formal or other request from the Defendant directed to the OUR to clarify the issue of whether the Defendant is authorised pursuant to its

telecommunications licence, to access private land without the consent of the owners in order to run wires to provide telecommunications services to squatters on such land.

Mr. Brian Chin a former Customer Services Manager for the Defendants Kingston North Branch admitted receiving a complaint from the 1st Claimant concerning providing telephone services to persons squatting on his land. He said an attempt was made to accommodate his complaints by inviting the Claimants to provide the names of the persons who were allegedly squatting on his premises with a view to bringing the matter to an expeditious conclusion.

In cross examination he said he was aware of the complaint from August of 2000 and that the complaint was being investigated. He said he was aware of a policy that an applicant for service did not have to have an interest in the property. He said he did authorise the wire to remain after August 2000 not to remove it.

Mr. Carlton Knight a Customer Service Manager for the Defendant indicated that the records show that telephone service was provided to five residents at the Claimants' land beginning in May 1996. However service has been disconnected in four and there is only one remaining customer. He said that prior to the complaint made by the Claimants, Cable and Wireless was not aware of the status of the Applicants for telephone service at 1 Aylsham Heights. He indicated that with regards to residential phone service that requires the running of lines from the external distribution point to the customer's premises does not usually involve issues such as land ownership. He said that it was the Defendant's understanding that it was obliged to meet the expectations of each applicant for service, having regard to its treatment as universal service provider. Also, that the Telecommunications Act, its predecessors and the licenses issued to the Defendant would

have required that customers have any particular interest in property before service was supplied to them.

In cross-examination, Mr. Knight said that the Defendant don't normally seek permission to install drop wires such as on the Claimants' land as there was a policy that applicants for service don't necessarily have to own property. He agreed that the Defendant continues to keep the lines on the Claimants land as they have never been asked by the contract customers to remove them. He admitted that the Defendant expected to get revenues from these lines.

It is quite clear and unchallenged that the Claimants are the legal owners of the land in question. The Defendant has refused to remove the wires in question asserting that they are under no obligation to obtain the consent of the Claimants to use their land for the purposes of their business. They claim that it has an express or an implied permission pursuant to the Telephone Act and the All Island Telephone Licence 1988 to erect and maintain its wires across property. They also contend that such permission has been retained by the Telecommunications Act 2000, the obligations of the Defendant as a Universal Service Provider (USP) under this statute and the Carrier (Cable & Wireless Jamaica Ltd.) Licence 2000.

So then, has the Defendant trespassed on the land of the Claimants? Halsbury's Laws of England 4th ed. Vol. 45 gives a definition under the head Wrongs to Property at Para. 1384 at page 63.

"Unlawful Entry. Entry unlawful entry by one person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses on land if he wrongly sets foot on it, rides or drives over it, or takes possession of it, or expels the person in possession or

pulls down or destroys anything permanently fixed on it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water upon another's land or sends filth or any injurious substance which has been collected by him on his own land onto another's land."

The Claimant in an action for trespass against a person in possession of land need only to prove his title and if admitted by the Defendant the burden falls to the Defendant to confess and avoid by setting up a right of possession consent with the Claimant's ownership.

Mr. Beswick for the Claimants submitted that the Defendant's reliance on the statutory instruments and licences is completely unfounded and without merit and that at no time has the Defendant honestly believed that these provisions authorised it to commit acts of trespass by placing drop wires for telephone service on the premises belonging to 3rd Parties who have refused to consent to such action.

One must therefore peruse these statutory instruments and licences to see whether or not the Defendant is under no obligation to obtain consent to wire land for the purposes of their business.

A perusal of the Telephone Act (now repealed by the Telecommunications Act) Section 11 states:

"Every person having a residence or place of business within the area shall be entitled on complying with the conditions stated in the licence, to require the licensee to supply him with a telephone at such residence or place of business, and to connect such telephone with the telephone exchange: and thereupon, within one calendar month thereafter, the licensee shall so long as such person shall

continue to comply with the said conditions maintain it continually in good working order, and in telephone communication with the telephone exchange, and shall at all times when required forthwith connect such telephone with any other telephone with any other telephone in the area and similarly disconnect it when required."

Mr. Beswick further submitted that this section cannot be seen as a general exclusion to the law of ownership and the exercise of the rights of possession of real property. Nothing in the remainder of this Act conferred any general right of access to the holder of a telephone provider licence, nor provided a defence to the general principle that the unauthorised entry upon 3rd party or placing of anything on such property without the consent of the owner constitutes a trespass.

In relation to the All Island Telephone Licence 1988 two sections deals with entry. Clause 21 states:

"The Company may exercise such rights and shall observe such conditions relating to way-leavers, entry of private property and the construction of lines above or below ground as the relevant law may prescribe."

Clause 23 (a)

"Subject to the provisions of this Licence and of the Telephone Act and subject to the consent of any authority, company or person whose authority, is necessary under the Act, the Company may from time to time and at all times for the purposes of this License lay and maintain cables and erect and maintain poles, wires and mechanical appliances under, along, over or across any public street, lane, road or open space with the licenced area."

These clauses deals with entry on to property and Clause 21 entry of private property. Mr. Beswick submitted that the Defendant must be deemed therefore to have known all along at least from the 1988 licence was issued that it did not have the right to lay wires or cable on private property without the consent of the owners.

The Telecommunications Act 2002 Section 55 appears to be the only section which deals with entry on land owned by a third party. Section 55 (1) states:

"where a carrier is denied permission to enter on any land or the permission for such entry is unreasonably delayed, the carrier may make an application to the Court for an order permitting such entry."

Sub-section (2) sets out the procedure for an application under subsection (1). There is no evidence that the Defendant made any application under this Section when the matter became contested. It was submitted on behalf of the Claimants that Section 55 was never intended to provide any proprietary rights of access to a telephone carrier licence holder as against 3rd parties who are not in the special classes of owners or occupiers of Crown lands or other carrier licence holders. Section 53 authorises only entry to Crown lands and provides for notification of intent to enter on the Minister. It was further submitted that no portion of these sections intended or could be reasonably construed as providing for a generalized right of access to the Defendant or others in its class, over private property.

In relation to the Telecommunications Act Carrier (Cable and Wireless Jamaica Ltd.) Licence 2000 this was a licence granted under the Telecommunications Act 2000. The relevant clauses as it affects the right of access to land are Clause 9 which reads:

"The licensee may exercise all rights and shall observe such conditions relating to access to land and facilities."

as the Telecommunications Act and any other relevant laws may prescribe."

Clause 10 reads:

"Without limiting Clause 8 above, the Licensee shall have the right to exercise any right in relation to land, rights of way and easements, (including but not limited to this construction of facilities above or below ground, and the right to be compensated for moving existing facilities in accordance with the request of any Government or any Government agency) as were granted under the Previous Licences, as if the relevant terms of the Previous Licences were set out in his Licence."

It was submitted by the Claimant that the Telecommunications Act Carrier (Cable & Wireless Jamaica Limited) Licence 2000 could in no way grant the right as asserted by the Defendant or provide any general defence to the trespass created by its erection of drop wires over land owned by a third party without that party's consent.

The Court also notes the view of Mr. Courtney Jackson, the Deputy Director General of the OUR (in his witness statement) that the agreement with the Government of Jamaica and the Carrier Licence issued to the Defendant in 2000 grant no proprietary right to entry or access to third party land. Mr. Jackson also indicated that at no time since the inception of the OUR has the Defendant sought its assistance or advice in relation to trespass on the Claimants' land.

It is the submission of Mr. Beswick that the failure of the Defendant to seek a resolution of the issue with the assistance of the OUR or to make any other application to the Court under the Telecommunications Act 200 is evidence of the Defendant's intention to trespass upon land owned by the Claimants with contumelious disregard for the Claimants' rights.

The Defendant has submitted that when telephone service was first provided to the occupants (squatters) of the Claimants' property (i.e. other than the Claimants themselves) permission was granted by the combined effect of the Telephone Act (now repealed) and the All Island Telephone Licence 1938 Section 11 of the Telephone Act provides,

"Every person having a residence or place of business within the area shall be entitled, on complying with the conditions stated in the licence, to require the licensee to supply him with a telephone at such residence or place of business, and to connect such telephone with the telephone exchange, and thereupon, and within one calendar month thereafter, the licensee shall supply such telephone and shall, so long as such person shall continue to comply with the said conditions, maintain it continually in good working order, and in telephonic communication with the telephone exchange, and shall at all times when required forthwith connect such telephone with any other telephone in the area and similarly disconnect it when required."

The Defendant contends that nowhere in either the Act or the Licence is there a duty placed on the Defendant to enquire into the legitimacy of the status of the residents and that by residence legitimate or not, a person could require the Defendant as a licensee to provide telephone service. Also Clause 21 of Licence provides;

"The Company may exercise such rights and shall observe such conditions relating to way-leaves, entry of private property and the construction of lines above or below ground, as the relevant laws may prescribe. In addition, the Company shall have the right to trim trees or shrubbery which may overhang any public way and may interfere with telephone lines or cables constructed by the Company."

It is the contention of the Defendant that incorporated in the Licence is a statutory implication that the Defendant was permitted to install necessary equipment with a view to fulfilling its obligation to provide telephone service.

In **Re Dudley Corporation** 1881 Q.B.D – 86 the Court of Appeal held that a statute which imposed a duty on local authorities to lay sewers by necessary implication confers upon them that right of support which under ordinary circumstances is necessary.

As Cotton L.J. stated at page 95:

“I think that the legislature, in requiring the local authority to make and maintain sewers, by necessary implication confers upon them that right of support which under ordinary circumstances is necessary. It is impossible to suppose that the duty to maintain the sewers was imposed without the local authority being able to prevent a landowner from rendering them useless.”

In **Birkenhead Corporation vs London and North Western Railway Co.** 1885 15 Q.B.D. 572 the issue of right of way was considered. In this case the relevant legislation authorised the Plaintiffs to make the sewer and imposed a duty to repair it, but did not give them any express right of access to it. It was held that a right of access to the sewer had not been expressly given by the local Act, but ought to be implied so far as was reasonably necessary for enabling the repair of the sewer to be done.

Based on this the Defendant contends that if the approach taken by the Courts in **Re Dudley Corp.** and in **Birkenhead Corp.** is to be followed, the Defendant was entitled by law to effect telephone lines over the Claimants' property (in 1996) in order to provide the required service. They further contend that the Telephone Act and the All Island Telephone Licence impose a duty upon the Defendant to supply telephone services and to maintain such services in good working order. Therefore by necessary implication the Act and the Licence also confer upon the Defendant the rights connected with the land which under ordinary circumstances are necessary to comply with the obligations.

The Defendant also submitted that despite the fact that the Telephone Act was repealed and replaced by the Telecommunications act 2000 it did not mean that the Defendant ought to have removed its lines from the Claimants' premises. The Defendant claims that the lines in question were installed in 1996 when the Act and Licence were applicable, and authorised and obliged the licensee (Defendant) to install the wires in question. This they say had been installed long before the Telecommunications Act of 2000 came into force. The Defendant argues that they are not required to remove the existing line unless there were requests from the occupants for it do so.

In relation to the Telecommunications Act Carrier (Cable & Wireless Jamaica Ltd.) Licence 2000 this was granted pursuant to section 13 of the Telecommunications Act 2000. It appears that Clause 10 of the Carrier Licence has preserved rights which were granted under previous All Island Telephone Licence, 1988.

Clause 10 reads;

"... the licensee shall have the right to exercise any right to exercise any right in relation to land, rights of way and easements (including), but not limited to, the construction of facilities above or below ground, and the right to be compensated for moving existing facilities in accordance with the request of any Government or any Government agency) as were granted under the Previous Licences, as if the relevant terms of the Previous Licences were set out in this Licence."

In assessing the evidence given by the Claimants' witnesses, Miss Joyce Hewett a former employee of the Defendant, said that she was Project Manager in the Project Management Department and her responsibilities included planning, development and implementation of projects. She said many of which necessitated approval for access to land which was not owned by the Defendant. She said it was her obligation to identify

these and report this to others within the department who would take the necessary steps to negotiate easements or seek to lease or acquire the property or properties in question. She said in implementing projects on land not owned by the Defendant officers of the Company should neither enter private property nor run cables through or over the said property without making some appropriate arrangement and gaining written permission or authority with the owner or owners thereof.

In my view the "implementation of projects" would not include the installation of residential service and would come under negotiating easements or acquiring or leasing properties. This view is supported by the evidence of Mr. Carlton Knight for the Defendant who said (at Page 36 of the Witness Statement bundle) that the External Plant and Maintenance Department is responsible for negotiating leases/easements for the purpose of providing "plant", meaning poles and other works such as infrastructures and cell sites. He said the department does not normally negotiate leases for the provision of drop wires to provide regular phone service that requires the running of lines from the external distribution point to the customer's premises does not usually involve issues such as land ownership.

With regards to the evidence of Mr. Courtney Jackson of the OUR he gives a view as to the right of access to land. However if one examines the Telecommunications Act only sections 53 – 55 deals with access and this is in relation to Crown lands or to land or facilities of another carrier. The views of Mr. Jackson does not assist the Court in any way as it relates to privately owned land such as that of the Claimants'.

The Claimants also rely on section 18 of the Constitution of Jamaica as it relates to the compulsory acquisition of property. I agree with Counsel for the Defendant that it

would not be appropriate for this Court to make a finding on the constitutionality of the legislation without the Attorney General having an opportunity to respond to it.

I am of the view and so find that the running of telephone wires over the Claimants' premises does not constitute a trespass to their land. The Telephone Act and the All Island Telephone Licence were applicable when the lines were installed in 1996. This authorised the Defendant to install the wires. There was a service obligation which was imposed on it, based on the legislation under which such licences and the legislation under which such licences were issued gave the Defendant permission to erect and maintain telephone wires across the Claimants' land. The Defendants supplied a service which they were entitled to supply based on an application for service by the occupants to the land albeit that there are squatters.

I therefore find that there has been no actionable trespass to the Claimants' land.

There shall be judgment for the Defendant with Costs to be taxed if not agreed.