IN THE SUPREME COURT OF BELIZE A.D.2001

ACTION NO: 411 OF 2001

BETWEEN: EDUARDO CORTEZ CLAIMANT

AND

RODOLFO LARRIEU DEFENDANT

AND

ACTION NO. 421 OF 2001

BETWEEN: RODOLFO LARRIEU CLAIMANT

AND

EDUARDO CORTEZ DEFENDANT

Mr. M. Chebat for Eduardo Cortez.
Mr. H. Elrington for Rodolfo Larrieu.

AWICH J.

26.11.2009 **J U D G M E N T**

1. *Notes: Two actions consolidated for trial; claims based on the same facts and raised the same issues of trespass to land and private nuisance. In Action 411/2000 for trespass the defendant neighbour built a wall abutting a wall*

that had been built by the claimant one foot away from the common boundary, but on the claimant's land; the defendant raised the self-help defence of abatement of nuisance, by building the abutting wall to stop stench, smoke and vapours emitted from cooking tortilla for sale, on claimant's land; whether the defence was supported by evidence. Counterclaim of trespass into airspace above defendants land. Claim of statutory prescriptive right to light under Prescription Act, Cap 192; the claimant cut holes in the wall as a self-redress action against trespass.
In Action No. 421/2001 the claimant is defendant in Action No. 411/2001. It is a claim of private nuisance arising from stench, smoke, vapours transmitted onto the claimant's land from the neighbour's land where tortilla was cooked and sold as a business; whether supported by the evidence.

2. This is joint judgment in two claims, No. 411 of 2001 and No. 421 of 2001. The two claims go years back in time. On 23.11.2000, Dr. Rodolfo Larrieu, filed an action against Eduardo Cortez. The action was numbered 515 of 2000. The claim indorsed on the writ of summons was for damages for, "nuisance arising from the stench and other obnoxious vapour… emanating from the defendant's premises", transmitted to the claimant's premises. Dr. Larrieu lives at Lot 5, C Street, Kings Park, Belize City. Mr. Cortez lives at Lot 7, C Street, Kings Park, Belize City. The two lots are adjoining lots, so Dr. Larrieu and Mr. Cortez are immediate neighbours. After seven months on 12.6.2001, Dr. Larrieu filed a notice of discontinuance of the action. The writ of summons had been served, and Dr. Larrieu had changed attorneys. There was no demand by Mr. Cortez or his

attorneys for costs or other conditions to be imposed for the discontinuance.

3. On 6.8.2001, two months after Action No. 515 of 2000 had been withdrawn, Mr. Cortez filed his own action, numbered 411 of 2001. He claimed trespass by Dr. Larrieu for building a wall, "against [Cortez's] wall and on top of an existing concrete fence", on Cortez's land. He also claimed interference with his right to light in a room where he cooked tortilla for sale, on his property. He claimed that he had acquired the right by prescription under s: 4 of Prescription Act, Cap. 192, Laws of Belize. The reliefs claimed were damages for trespass and loss of right to light onto the property, and aggravated damges. Further reliefs as the court deemed meet were also claimed.

4. Then two weeks later, on 23.8.2001, in reaction to Mr. Cortez's action, Dr. Larrieu filed his own action numbered 421 of 2001. He indorsed the same claim as in Action, No. 515 of 2000 which he had discontinued, namely, "damages for nuisance arising from the stench and other obnoxious vapour... emanating from the defendant's premises…". He claimed the reliefs of special damages of $2,100.00

spent on building a wall to curtail the nuisance, general damages and an injunction order restraining Mr. Cortez from causing stench, smoke and obnoxious vapours to be transmitted to Dr. Larrieu's premises.

5. On 29.9.2001, learned judge, C. Blackman, made a direction order consolidating Action 411 of 2001 brought by Mr. Cortez, and Action 421 of 2001 brought by Dr. Larrieu. There is no doubt that the actions were based on the same facts, and raised the same issues. The latter claim could well have been made as a counterclaim.

6. The two cases were not ready for trial until about 3 ½ years later in early May 2004, when they were assigned 20.5.2004, as the date of hearing. Under the old Rules of Court progress of cases to trial depended very much on the parties. The cases were assigned to my court for trial.

7. When the trial commenced, both parties applied and obtained adjournments for good reasons on different occasions. Then in the course of trial parties expressed the desire to reach a settlement agreement for which they applied for adjournment. In the end they

did not agree. Then one of the parties applied for adjournment to allow time for an expert to prepare an environmental report regarding stench, smoke, vapours and noise, if any, in the area. Thereafter it became clear that a survey map showing the common boundary of the two lots and the two walls in issue was absolutely necessary. Court granted further adjournment to allow for the survey to be done and a report made. Both parties were granted leave to file own expert's reports. Only one party filed the reports and call the experts as witnesses. Then there was some difficulty in attendance of some witnesses. Regrettably I did not write the judgment early. For some time one of the case files could not be found in the Registry.

8. *The defence to claim 411/2001.*

To the claim of Mr. Cortez, the defence of Dr. Larrieu is that there were stench, smoke and vapours coming over to his land from Mr. Cortez's land. He built the wall, "in an effort to alleviate the nuisance"; and he had obtained the consent of Mr. Cortez. Dr. Larrieu proceeded to counterclaim that a portion of a roof on Mr. Cortez's house protruded into the airspace above the land of Dr. Larrieu, constituting trespass by Mr. Cortez. Dr. Larrieu counterclaimed the

relief of an injunction order to restrain Mr. Cortez from continuing to trespass in the airspace.

9. *The defence to claim 421/2001.*

To the claim of Dr. Larrieu, the defence of Mr. Cortez is a denial that stench, smoke and vapours were transmitted from his tortilla business on his land onto Dr. Larrieu's property. He then repeats the averment that, Dr. Larrieu, "unlawfully built a cement wall on and against [Cortez's] wall", within Cortez's land, "thereby depriving him of light onto his premises". Mr. Cortez also denies the counterclaim that there was trespass into the airspace above the land of Dr, Larrieu.

10. ***Determination***

The claim of trespass – Action 411/2001.

Dr. Larrieau admits that he built, "a wall fence". He states that it was built between his house and that of Mr. Cortez, not on Mr. Cortez's land; and Mr. Cortez had consented to Dr. Larrieu building the wall. I do not believe that Dr. Larrieu obtained the consent of Mr. Cortez. Dr. Larrieu indeed obtained authorization by Belize City Council,

which authorization was revoked when the Council got information that Mr. Cortez had objected to the building of the wall.

11. Trespass to land is any unjustifiable direct interference, that is, an intrusion upon the land(and the immediate airspace above) in the possession of another see – ***Southport Corporation v Esso Petroleum Ltd [1953] WLR 773, Conway v Wimpey & Co. (No.2) [1951] 2KB 266*** and ***Kelsen v Imperial Tobacco Co of Great Britain and Ireland [1957] 2 QB 334.*** So in Action No. 411 of 2001, two questions must be posed. 1. Has there been such an intrusion by Dr. Larrieu onto Mr. Cortez's land which in this case was in his possession? 2. In the counterclaim of Dr. Larrieu, has there been such an intrusion into airspace above his land by part of a roof on Mr. Cortez's land?

12. Dr. Larrieu testified that the common boundary of his land and Cortez's land starts at the wall that Cortez built. The evidence adduced from the surveyor proves otherwise. The surveyor's map shows that Cortez's land extends by one foot beyond the wall he built or found on the land. So there is one foot of Cortez's land beyond his wall. He does not actively use the strip of land, nor does Dr. Larrieu.

13. The court, in the company of the parties and their attorneys, visited the two lots on C Street. There was a single storey building on each lot. They were of the average height of about 7.5 metres. The roof of Dr. Cortez's building is flat. The roof of Mr. Cortez's building is the usual pitch and heap one; the pitch is about afoot higher than the flat top of the roof of Dr. Larrieu's building. Not even the eaves of the roof of Mr. Cortez's building overhanged by as much as one foot. An old wall runs between the two lots from the street infront to the back of the lots. A part of the wall forms part of the western end wall of the lower floor of Mr. Cortez's building. The western part of the lower floor was used for cooking tortilla for sale. Dr. Larrieu's building is to the west of Mr. Cortez's building. A more recent wall had been built abutting the old wall. The newer wall also added to the height of the old wall in one part. A small part of the newer wall filled up holes created by use of breeze blocks in the old wall. The newer wall was built within the one foot strip of land, and abutting the old wall.

14. When Dr. Larrieu built a wall abutting Cortez's wall, he had to enter, that is, intrude onto the one foot area of land beyond the common

boundary in order to reach Cortez's wall. That land area belongs to Mr. Cortez; so there would be trespass, unless Dr. Larrieu had justification. The act of building the wall abutting Mr. Cortez's wall also directly interfered with Mr. Cortez's wall, which is deemed by law to be part of the land, Mr. Cortez's land. Mr. Cortez had right to possession of the one foot strip of land and the wall without intrusion or other form of interference. He is entitled to claim trespass unless Dr. Larrieu provides justification.

15. *Justification and nuisance.*

Despite the testimony of Dr. Larrieu that, the common boundary was at the wall owned by Mr. Cortez, it was submitted by learned counsel Mr. Hubert Elrington, for Dr. Larrieu that, Dr. Larrieu does not deny that the one foot strip of land belongs to Mr. Cortez, and that Dr. Larrieu entered the strip of land. However, Mr. Elrington submitted further that, the claim of Mr. Cortez for trespass on the one foot strip of land could no longer be brought because under s: 12(2) of Limitation Act, Cap. 170, Mr. Cortez could not after twelve years from the time the cause of action first arose, bring a claim to recover

the strip of land; in this case Dr. Larrieu and his predecessor in title occupied the strip of land for seventeen years.

16. In my view, Limitation of action does not apply in this case. Dr. Larrieu was not aware that the strip of land belonged to Mr. Cortez, and Dr. Larrieu never openly laid claim of possessory right to it before he raised the claim as a defence to the claim of Mr. Cortez. There is no evidence to show that Dr. Larrieu ever used the strip of land for his own purpose.

17. For another justification, Dr. Larrieu says he built the wall, "in an effort to alleviate nuisance", caused by stench, smoke and vapours coming from Cortez's building. In other words, he raised the justification of 'abatement of nuisance', a self-help measure. His explanation would be justification if supported by evidence. He would be doing no more than protecting his property and his and his family's health from injury, or discomfort resulting from the stench, smoke and vapours. The law allows acts of abatement of nuisance; an example is the self-help act of entering land of another and removing the trouble at source, if necessary. In the old case of, ***Jones v***

Williams (1843) 11 M & W 176, it was held that one could enter the land of a neighbour and remove an accumulation of filth and offal which interfered with the use and enjoyment of one's land.

18. Private nuisance for which an individual may make a claim is based on ownership, occupation or other interests in land. It is founded on the common sense dogma in the ancient case, ***Aldred's Case (1611) 9 Rep. 58,*** that, a person must not make such use of his land as unreasonably and unnecessarily as to cause inconvenience to his neighbours. The statement is still a good guide. It has developed into, *"the principle of reasonable use- the principle of give and take"* – see ***Cambridge Water Co. v eastern Counties Leather Plc. [1994] 2. A.C. 264,*** a House of Lords appeal. In a recent judgment of the House of Lords in two appeals; ***Southwark LBC v Mills,*** and ***Baxter v Camden London Borough Council (no. 2), [2001] A.C1,*** their Lordships confirmed the principle in ***Cambridge Water Co***, and explained that, *"the governing principle is good neighbourliness, and this involves reciprocity"*.

19. Generally private nuisance arises from an act or omission of an owner or occupier of land, which is an interference, disturbance or annoyance to a person in the enjoyment of his ownership, occupation or some other interest in another land. The old cases of: ***Cunard v Antifyre [1933] 1KB.551; Thompson – Schwab v Costaki [1951] 1 WLR 335;*** and ***National Coal Board v Neath B.C. [1976] 2 All ER 478,*** do define private nuisance with the same characteristics.

20. The testimonies of Dr. Larrieu's, wife and daughter, support the explanation given by Dr. Larrieu in his testimony, to the effect that stench, smoke and vapours from the cooking of tortilla on Mr. Cortez's land were transmitted to their house and caused discomfort to them. Although the daughter said that the smoke caused a medical condition to her, she never attended any medical treatment for it. The testimony of Mr. Cortez is to the contrary effect.

21. The environmental report made by Beverly Vansen tends to support the testimony of Mr. Cortez. It concludes that the noise associated with the tortilla business was within the level permitted by law – the Second Schedule of Pollution Regulations, 1966, and that the foul

smell in the area did not emanate from the making of tortilla, rather from a public drain. The evidence is not conclusive proof of absence of the cause of the nuisance claimed, but tends to prove absence of it.

22. Health inspection report made by Mr. Bernaldo Bey, public health inspector, also tends to support the testimony of Mr. Cortez. The report concludes that, cooking gas was used to cook tortilla, and that no smoke was emitted.

23. Another independent piece of evidence that supports the testimony of Mr. Cortez is the testimony of Mr. Gerald Kelly, a witness called by Dr. Larrieu. He lived at lot No. 5 from 1984 to 1998, and sold it to Dr. Larrieu. He was not, "inconvenienced enough", by the tortilla business so as to complain, although he was not satisfied with living next door to a tortilla shop and with the environment.

24. If anybody is to blame for the environment, it would be the City Council, in my view. Mr. Bey testified that the Council did not zone the area exclusively residential. I have to mention however, that the claim of Dr. Larrieu does not mention the use of Mr. Cortez's land for

business, let alone tortilla business, *per se,* as a nuisance, he does not complain about customers gathering in the neighbourhood, even if he might have had that in mind. His complaint is that stench, smoke and vapours were the cause of nuisance.

25. I note that in his testimony, Dr. Larrieu said that the smoke and vapours had stopped coming to his house because Mr. Cortez had changed from using kerosene to using propane gas for cooking tortilla. I am inclined to the conclusion that the smoke and vapours, if any, had stopped latest by 12.6.2001, when Dr. Larrieu discontinued his first Court Action No. 515 of 2000.

26. On a balance of probabilities, Dr. Larrieu has not proved that stench, smoke and vapours were transmitted at all or above generally acceptable level from the tortilla business on Mr. Cortez's land to Dr. Larrieu land, so as to justify Dr. Larrieu's actions that he said were to alleviate nuisance. He has failed to prove that his actions were carried out in abatement of nuisance.

27. Because Dr. Larrieu has not proved that stench, smoke and vapours from Cortez's land were transmitted to Dr. Larrieu land, he has also failed to establish his claim of private nuisance in his Court Action No. 421 of 2001.

28. *The counterclaim of trespass.*

The counterclaim that a portion of the roof of Mr. Cortez's house protruded over Dr. Larrieu's land was based on the law that a landowner's right extends to the airspace above his land. It will be trespass to interfere with the airspace above the land of another, except where the interference is at such great height in the airspace that is not necessary for the ordinary use and enjoyment of the land and structures upon it – see ***Laigat v Majid and others [2005] All ER (D) 231,*** and ***Kelsen Case.***

29. The question that often arises is: upto what height does the right to the airspace above one's land extend? I think the answer depends on the particular circumstances of the case. In ***Laigat Case,*** an extractor fan protruded by a mere 750 millimeters over land belonging to the claimant, and at a height of 6 metres above the backyard; it was held

to be trespass. In ***Kelsen Case,*** an advertising sign projected only a few inches above the shop of a neighbour; it was held to be trespass. In ***Gifford v Dent [1926] WN.336,*** a sign which projected by 4 feet 8 inches above premises let to the claimant was held to be trespass. But in ***Bernstein v Skyviewers General Ltd. [1978 Q.B. 479,*** it was held that an aeroplane that flew low enough and took photographs of the claimants house did not cause nuisance.

30. The counterclaimed of Dr. Larrieu in Action No. 411/2001 fails simply on the basic fact that no part of the roof of Mr. Cortez's house protruded beyond one foot of the wall. Mr. Cortez's land extends to one foot beyond the wall. The eaves overhanged within his own land. The counterclaim of trespass into the airspace above Dr. Larrieu's land has not been proved; it is dismissed.

31. I observe here that Mr. Cortez was entitled to cut a hole in the new wall built by Dr. Larrieu because the new wall is on Mr. Cortez's land. He would also have been entitled to do so, had the wall not been an object of trespass. It would be self-redress action against interference with his right to light to his property. However, such an

action must be avoided where resistance and violence is likely to result.

32. In claim No. 411 of 2001, I enter judgment for Mr. Eduardo Cortez against Dr. Rodolfo Larrieu for trespass. Mr. Cortez did not present evidence of any pecuniary loss that resulted from the trespass; the court proceeds on the basis that trespass is actionable even without proof of special damages. It is noted that ventilation in Mr. Cortez's building has been interfered with, and his statutory prescriptive right to light has been interfered with. However, I do not see grounds for aggravated damages. I award damages of $15,000.00 to Mr. Cortez.

33. Again judgment is entered for Mr. Eduardo Cortez in Action No 421 of 2001. The claim of Dr. Larrieu for damages for nuisance, and for an injunction order is dismissed. Admittedly there was no longer any nuisance by the time of the trial of the cases.

34. Costs in both actions including costs of adjournments are awarded to Mr. Cortez.

35. Pronounced this Thursday the 26th day of November 2009
At the Supreme Court
Belize City

Sam L. Awich
Judge
Supreme Court