

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2004/0529

BETWEEN:

DR. MATHURIN JURGENSEN

Claimant/Applicant

And

PUBLIC UTILITIES AUTHORITY

Defendant/Respondent

Appearances:

Mr. George Lake for the Claimant

Ms. Monique Francis-Gordon for the Defendant

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2010: October 24
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JUDGMENT

[1] **Blenman J:** This is a claim for trespass to land in which Dr.Mathurin Jurgensen seeks several reliefs including special damages and exemplary damages against the Public Utilities Authority (PUA). She also seeks a number of declarations against the PUA. In addition, she seeks an injunction to restrain PUA from trespassing on the property.

[2] Dr. Mathurin Jurgensen alleges that PUA trespassed on the property that was leased to her. She also complains that PUA unlawfully caused a cell tower to be erected on the property and in doing so, dug trenches and made other incursions unto the property in order to lay cable lines. As a consequence, she says that she has suffered substantial loses including the economic loss of business opportunity in the sum of \$9,810,246.15EC. She has also claimed the sum of \$10,709,166.60 in pre-arranged financing. As a result of the loss of use of the property, she says that she is entitled to be compensated in the sum of \$180,000.00EC. She seeks special damages in the sum of \$77,529.00EC. The total damages which Dr. Mathurin Jurgensen seeks amount to \$21,266,941.71EC (Twenty one million, two hundred and sixty six hundred thousand, nine hundred and forty one dollars and seventy one cents).

[3] **Background**

The Government of Antigua (GOA) on 30th June 1982, leased Dr. Mathurin Jurgensen a parcel of land situate at Villa, Block 62 1492A, Parcel 17 and known as Rat Island. The lease was valid for 25 years. The lease provided Dr. Mathurin Jurgensen with an option to renew for a further 25 years. Rat Island was a historic site and Dr. Mathurin Jurgensen hoped to use the leased land as a more sophisticated historic site and tourist attraction combined with a handicraft and industrial arts center.

[4] PUA is a statutory body that is governed by the Public Utility Act Cap 359 Laws of Antigua and Barbuda. It operates a wireless telephone service and desired to erect an antenna, run cable lines and other works on Rat Island in order to provide telephone services to its customers. Towards this end, it needed to obtain the greatest coverage and this necessitated the construction of a tower cell with antennae and cable lines. PUA needed to have specific levels of elevation and requested permission from Dr. Mathurin Jurgensen to erect the antennae and lay certain cable lines on the property in which Dr. Mathurin Jurgensen held the lease.

- [5] There were ongoing negotiations between the parties and a specific area was initially identified but no agreement was reached. Subsequently, the then manager of the PUA sought permission from Dr. Mathurin Jurgensen to erect the antennae on the summit of the property; the permission was refused.
- [6] Around the 2nd December 2005, PUA went on to the property, with backhoes and dug up the property, in order to lay cable lines. It also erected antennae. Despite Dr. Mathurin Jurgensen protestations, PUA refused to remove the antennae and cables that it had erected on the property. Dr. Mathurin Jurgensen complains that as a consequence of PUA's unlawful acts she has lost economic business opportunity and prearranged business financing.
- [7] Dr. Mathurin Jurgensen moved to the court and obtained an injunction to restrain PUA from continuing to occupy the leased property. Nevertheless, PUA officers persisted in their occupation of the leased property.
- [8] As a consequence, Dr. Mathurin Jurgensen filed this claim in which she seeks a number of reliefs including:
- (a) An injunction to restrain PUA from continuing to trespass on the property.
 - (b) A declaration that PUA has acted ultra vires the Public Utilities Act Cap 359 Laws of Antigua, in failing to give her reasonable notice or any notice at all before embarking on the construction.
 - (c) A declaration that PUA acted ultra vires the Public Utilities Act and the rules of natural justice.
 - (d) Special Damages in the sum of \$77,529.00EC.
 - (e) General Damages for trespass including that for loss of economic business opportunity.
 - (f) Exemplary Damages.
 - (g) Costs

- [9] It is noteworthy that by the conclusion of the trial, Dr. Mathurin Jurgensen was seeking to recover damages in excess of twenty million dollars.
- [10] PUA takes issue with Dr. Mathurin Jurgensen's claim. It says that if at all any damage to the property was done to the reversionary interest in the property, this lies in the Government. Further, PUA strongly resists Dr. Mathurin Jurgensen's claim and denies that it committed any trespass as alleged or at all. While originally, PUA denied that it has caused the damage that is alleged by Dr. Mathurin Jurgensen as the case concluded, it seemed to resiled from that position.
- [11] In addition, it disputes that Dr. Mathurin Jurgensen is entitled to the compensation claimed or to any compensation at all. It however does not deny that it entered on the leased property without first obtaining Dr. Mathurin Jurgensen's permission.
- [12] Further, PUA implores the court not to grant any of the declarations that Dr. Mathurin Jurgensen seeks.
- [13] PUA further states that Dr. Mathurin Jurgensen's lease expired in March 2007 and that the GOA was not likely to renew it. In any event, the property is owned by GOA therefore any damage that was done was to the reversionary interest which interest in GOA. PUA further complains that it has sought to remedy the trespass but was prevented from entering the property by Dr. Mathurin Jurgensen.
- [14] Accordingly, PUA says that Dr. Mathurin Jurgensen is not entitled to any of the reliefs claimed.

[15] **Issues**

The following issues arise for the court to resolve:

- (a) Whether PUA committed trespass to the property that was leased by Dr. Mathurin Jurgensen.
- (b) If so, the amount of compensation to which Dr. Mathurin Jurgensen is entitled.
- (c) Whether Dr. Mathurin Jurgensen is entitled to be compensated by PUA for loss of economic opportunity and the alleged prearranged financing of a project.
- (d) Whether PUA acted in breach of its statutory duty by entering the property and erecting the antennae on the property without giving any notice to Dr. Mathurin Jurgensen.
- (e) Whether Dr. Mathurin Jurgensen is entitled to the declarations sought.
- (f) Whether the court should grant Dr. Mathurin Jurgensen the injunctive relief that she seeks.

[16] **Evidence**

Dr. Mathurin Jurgensen, Ms. Loretta Sharpe, Mr. Nathaniel "Paddy" James, Dr. Reginald Murphy and Mr. Wilbur Harrigan filed witness summaries and testified on behalf of Dr. Mathurin Jurgensen.

For the defence, Mr. Esworth Martin, Mr. John Bradshaw, Mr. Alan Williams, Mr. Daryl Mathew, Mr. Julian Wilkins provided the Court with witness statements and were cross-examined.

[17] **Court's Analysis and Findings of Fact**

The Court has given deliberate consideration to the evidence adduced and the submissions of learned counsel. There were several factual matters that were not in dispute; however, there were many factual disagreements.

The court finds the following facts:

- [18] Dr. Mathurin Jurgensen leased property situate at Villa and known as Rat Island from GOA, for 25 years. The lease was granted in order for Dr. Mathurin Jurgensen to construct a Tourist Site and a handcraft centre and a historic site at Fort Saint John. The site has special features that qualify as a historic site. Once in possession of the leased property, Dr. Mathurin Jurgensen set about renovating it.
- [19] The lease gave Dr. Mathurin Jurgensen an option to renew it for another 25 years. Shortly before the expiration of the lease, she applied to have the lease renewed but the GOA did not accede to her request.
- [20] Dr. Mathurin Jurgensen intended to develop the land site at Fort Saint John and its central courtyard and was in discussion with investors in order to obtain an injection of funds into the project. The proposed project was named "Sun Park". These discussions were in their preliminary stages and not as advanced as Dr. Mathurin Jurgensen would have the court believe.
- [21] PUA is a statutory body that operates a wireless telephone service. It desired to erect antennae cable lines and other works on the property, in order to provide more efficient services to its customers. It was facing strong competition from its competitors. It sought the permission from Dr. Mathurin Jurgensen. There was

ongoing discussion with the previous board. Those discussions did not result in any agreement between Dr. Mathurin Jurgensen and PUA Board of Directors.

[22] PUA, nevertheless, entered the property without permission and conducted certain excavation works in order to erect cables, lines, antennae and other fixtures in the middle of the courtyard at Rat Island. In order to do this, they dug up a site at the summit of Rat Island. PUA went ahead and erected the antennae and lay cables in the summit of Rat Island, an area of the historic site. This was done despite the lack of permission from Dr. Mathurin Jurgensen and without her knowledge. Dr. Mathurin Jurgensen, on becoming aware of the actions of PUA sought to have it discontinue their actions, all to no avail. She was forced to move the court in order to restrain it from continuing to occupy the property.

[23] There is clear and uncontroverted evidence before the court, which indicate that PUA deliberately took the decision to remain on the property despite the protestations of Dr. Mathurin Jurgensen. The Court is convinced that the motivating factor for so doing was economic reasons and the need for PUA to obtain or maintain a competitive edge in relation to other service providers. In this regard, particular attention is given to the evidence elicited under the cross-examination of Mr. Esworth Martin who was the manager of PUA and Mr. Julian Wilkins is a former employee of PUA. There is no doubt that PUA, in trespassing on the property, made a deliberate and calculated decision to do so irrespective of the consequences of doing so. The court is fortified in this view, having taking into consideration the clear evidence which has not been contradicted, that PUA remained in occupation of the property even after Dr. Mathurin Jurgensen had instituted her claim. The PUA did all of these things despite of being aware that Dr. Mathurin Jurgensen was not in agreement, nor did she give permission for them to occupy the property. The land was damaged.

[24] Dr. Mathurin Jurgensen obtained an injunction which prevented PUA from continuing to occupy the property.

[25] Despite the fact that Dr. Mathurin Jurgensen led some evidence in an effort to establish that she had secured substantial investment in the proposed economic venture, the court is far from convinced that this was crystallised as Dr. Mathurin Jurgensen and her witnesses would have the court believe. The court notes that she seeks to recover the sum of \$9,810,246.25EC for loss of business opportunity. It is worth emphasising that due to the paucity of reliable and credible evidence in relation to the economic venture, the court is unable to hold that the investors had committed to investing any sums in the proposed project "Sun Park". There is compelling evidence which supports the conclusion that the parties were involved in very preliminary discussions, in that regard, as alluded to earlier. Yet Dr. Mathurin Jurgensen seeks to recover the sum of \$10,709,166.00EC as pre arranged financing. She says that as a consequence of PUA's conducting construction works on the site she has suffered substantial economic losses and seeks to recover millions of dollars.

[26] It is worth reiterating that the court is far from convinced that when PUA entered the property, Dr. Mathurin Jurgensen was in the advanced stages of implementing the plan for the construction of the tourism project. Neither is the court persuaded that the acts of PUA caused the financiers, if any, to discontinue their investments in the project.

[27] In elucidating, the court states that the witness Ms. Loretta Sharpe did not strike the court as a reliable witness. Most of her evidence was unconvincing insofar as the proposed project "Sun Park" was concerned and the financial commitment that she had secured in relation thereto. She also did not paint the picture of a person having firsthand knowledge of much of what she said. There is clear evidence that the parties had not reached any agreement. The court found most of the evidence that was provided by Mr. Harrigan to be highly speculative; this is in no way to question his professional capacity. The court is of the view that most of the information on which he relied in order to reach his conclusions was highly speculative. It is noteworthy that much of what he had to say was based on what

was told to him either by Dr. Mathurin Jurgensen, who has an interest to serve, or other persons who are clearly supportive of her position. The requisite objectivity was therefore lacking. Accordingly, the court is unable to find as a fact that Dr. Mathurin Jurgensen suffered any loss of economic opportunity as a consequence of PUA's act.

- [28] It is also noteworthy that by the time of the trespass the negotiations between Dr. Mathurin Jurgensen and the investors had not arrived at a conclusive position. The court is fortified in its view having examined the pleadings in the matter, in addition to closely analyzing the evidence that was adduced on behalf of the claimant.
- [29] The above findings in no way negate the fact that PUA in digging up the property has caused damage thereto. There is no doubt that Dr. Mathurin Jurgensen will have to expend monies in order to restore the property to its former state. There were discussions between the parties in relation to the restoration of the property but it appears that the parties have reached a stalemate in that regard.
- [30] As events unfolded, Dr. Mathurin Jurgensen, in accordance with the option to renew granted to her in the lease, wrote to the relevant public functionary indicating her intention to renew the lease and she has received no response in relation thereto.
- [31] Meanwhile, she has engaged the services of various professionals with a view to restoring the damaged property and has incurred expense.
- [32] It appeared that until 2008, PUA still occupied the property against the clear wishes of Dr. Mathurin Jurgensen. This is so, even though there was an interlocutory consent order in which they agreed to remove the cable lines, antennae and equipment which they had placed on the property.

[33] **Law**

Section 8(4) of the Public Utilities Act of the Laws of Antigua and Barbuda stipulates that:

“the Authority shall not, except with the consent of the occupier enter upon private lands until after the expiration of seven days notice of the intended entry to the occupier of such land.”

[34] It is clear that section 8 of the Public Utilities Act Cap Laws of Antigua and Barbuda enjoins PUA to give notice to persons before entering into their property. PUA has admitted that it failed to do so before erecting the antennae on the property. Accordingly, it acted clearly in breach of section 8 of the Public Utilities Act.

[35] In the circumstances, the court has no hesitation in making the declaration sought namely: PUA has acted in breach of section 8 of the Public Utilities Act, Laws of Antigua and Barbuda.

[36] **Option to Renew**

In the case at bar, the relevant lease contained the following option to renew clause, paragraph 1(c):

“If the lessee is desirous of taking a new lease of the leased premises after the expiration of the said term hereby granted and gives the lessor notice in writing not less than three months before the expiration of the said term of her desire to do so, then the lessor shall, at or before the expiration of the term hereby granted, at the cost to the lessee, grant to the lessee a new lease of the leased premises for a further term of twenty-five years, to commence from and after the expiration of the term hereby granted at the same rent and with and subject to the same covenants and conditions as in is this present lease reserved and contained PROVIDED THAT if the lessee is desirous of deterring such new lease at the end of the first five years of the term granted and gives the lessor not less than three months

notice in writing of her desire so to do, then and in such case immediately after the expiration of the said period of five years, the said lease shall cease to be void."

[37] There is the uncontroverted evidence that three months before the expiration of the lease, Dr. Mathurin Jurgensen, in accordance with clause 1(c) of the lease, gave the requisite notice of her intention to renew the lease. This was done by way of letter to the Governor General dated 23rd October 2006.

[38] The law is clear as to the consequences of Dr. Mathurin Jurgensen's action. An option to renew a lease constitutes an offer which the landlord is contractually precluded from withdrawing. See **Halsburys Law of England 4th Edition at paragraph 113**. This principle was judicially recognised in **Equipmental Rental and Services Ltd v Texaco (West Indies) Limited**, Civil Appeal No. 16 of 1997.

[39] The Court of Appeal held:

"that a lease which creates a tenancy for a term of years may confer on the tenant an option to take a lease for a further time. Such an option constitutes an offer which the landlord is contractually precluded from withdrawing so long as the option remains exercisable, and it may be possible to exercise the option by conduct."

Chief Justice Byron, as he then was, stated that:

"the legal effect of the exercise of the option is that it requires a new lease to come into effect. The new lease becomes indefeasible on registration. The rights that accrue under the exercise of the option are contractual and equitable giving the lessee a right to enforce the delivery of a new lease."

[40] It is the law that a lessee who holds an option to renew the lease is entitled to obtain the renewal of the lease, provided that the option is exercised in accordance with the terms of the lease.

[41] In the case at bar, the court is not of the considered view that it should attach any importance to the fact that up to the date of trial the lease had not been renewed.

Based on the court's findings of fact as stated earlier, namely, that Dr. Mathurin Jurgensen indicated her intention in compliance with the provisions of the lease to exercise the option to purchase, the relevant law is clear she is entitled, by law, to obtain a new lease for the property. As stated earlier, it is the law that once the option to renew is exercised in accordance with the terms of the lease, the lessee is entitled to receive a new lease upon the same terms and conditions.

[42] **Trespass**

Any unjustifiable intrusion by one person upon the land that is in possession of another amounts to a trespass. It is a trespass to place anything on or in the land which is in the possession of another. See **Simpson v Weber (1925) 41 TLR 302**. It does matter how trifling the nature of the action is, a suit in trespass will lie.

[43] Trespass is actionable at the suit of the person in possession of land. See **Patel v W H Smith Ltd (1987) 2 All ER 569**. It is the law that the lawful occupier or lease of a property can maintain a claim for trespass. Trespass to land speaks to affecting the rights of someone in a possession of the property. A lessor of land gives up possession of the land to his tenant so that the tenant alone can bring an action for trespass.

[44] There is no doubt that Dr. Mathurin Jurgensen is the lessor of the property. She could therefore successfully claim against PUA for trespassing on the property and the damage the property sustained. By way of emphasis, the damage is the construction of the tower and the laying of conduit pipes and other material associated with the tower, this together with the trenches that were dug around the 2nd day of December 2009. Trespass to a person's land gives rise to a continuing action (from day to day) for as long as the trespass lasts. Therefore Dr. Mathurin Jurgensen, based on the uncontroverted evidence, has established a cause of action against PUA for trespass for as long as it continued and is not abated.

[45] **Damages**

It is the law that a person whose property has been trespassed upon is entitled to be compensated by way of damages. The two bases for calculating a money remedy or mesne profits are: compensatory and restitutionary. The purpose of the award of damages is to place the Claimant in the position he would have been in had the trespass not been committed. Compensation refers to the cost of any work reasonably required in order to restore the claimant's use of the land. It is the cost of reinstating the land. See **AG v Blake (2001) 1 AC 268**.

[46] Regard is paid, in calculating the damages, to the benefit deemed to have been acquired by the trespasser by reason of the unauthorised use of land. The law does not require the Claimant to prove any loss; neither is it relevant that the trespasser obtained any actual benefit from his wrongful use of the land. It is the law that a successful Claimant in trespass is entitled to recover damages, even though he has sustained no actual loss. See **Stoke-on-Trent Council VW&J Wass Ltd (1989), WLR 1406**.

[47] A claimant who proves that he has suffered actual loss is entitled to recover for the loss suffered.

[48] In Civil Appeal No. 17 of 2004, Antigua and Barbuda, **Asot A. Michael v Astra Holdings Limited**, Rawlins JA (AG), as he then was, stated at paragraph 56 that:

“a claimant must set out in his pleadings the value by which his land was diminished and the expense of removing any debris left by the trespass, if any. On the other hand, he may set out the costs of correcting the damage and restoring the land to its original condition. Where there is continuing trespass, damages are usually measured by the worth of the use of the land. This would normally be the rental value.”

[49] The court has no doubt that Dr. Mathurin Jurgensen is entitled to damages which represent the cost to place the property in the state it was in before the trespass. In determining the quantum of special damages, the court pays regard to the

uncontroverted evidence that is provided by Dr. Murphy and Dr. Savory in relation to the costs of restoring the site. In the case at bar, Dr. Mathurin Jurgensen has quantified the cost of \$77,529.00EC remedial works to the property and also obtaining the assessment of the damage to the property. She has provided the court with a breakdown of the total figure of \$77,529.00EC which she claims. The court has no basis to reject her claim under this head.

[50] Accordingly, Dr. Mathurin Jurgensen is awarded the sum claimed of \$77,529.00EC as special damages.

[51] **Exemplary Damages**

This brings the court now to consider whether this is a fit case in which to make an award of exemplary damages. Dr. Mathurin Jurgensen asked the court to award her \$500,000EC as exemplary damages.

[52] Exemplary damages is a recognized head of damage. See **Rookes v Bernard (1964) 64 AC 1129** where Lord Devlin stated “where a defendant with a cynical disregard for a plaintiff’s rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense.”

[53] In **Drane v Evangelou (1978) 1 WLR 455** it was held that it was not necessary to make a calculation by the defendant of the actual monies which he hoped to make out of the conduct.

[54] The court accepts the submissions of Learned Counsel Mr. Lake and finds as a fact, that PUA sought Dr. Mathurin Jurgensen permission to enter onto the property and this was denied. It also sought to negotiate with her for a lease the terms of which could not be agreed upon. PUA in blatant disregard for Dr. Mathurin’s Jurgensen’s rights and being only concerned with the profits it stood to make by the increased coverage the use of the area would provide, trespassed

on the property and erected the cell site. Accordingly, the court has no doubt that PUA deliberately trespassed on the property even though it was aware that Dr. Mathurin Jurgensen was clearly objecting to its use of the leased property.

- [55] In **Rookes v Bernard** *ibid* it was held that exemplary damages could be awarded where the defendant's conduct would have been calculated to make a profit for himself which might well exceed the compensation payable.
- [56] The court has given very deliberate consideration to the evidence obtained under cross-examination of the senior officials of the PUA, together with the evidence in chief of Dr. Mathurin Jurgensen. There is no doubt that PUA deliberately decided to enter the property after being refused permission by Dr. Mathurin Jurgensen, as alluded to earlier. It is clear that the main motivating factor was PUA's desire to obtain an economic competitive edge over its rivals in the cell phone market in Antigua and Barbuda. In this regard, the court places reliance on Mr. Julian Wilkins' evidence in cross examination. He very candidly left the court in no doubt that PUA made a deliberate calculated decision to infringe on Dr. Mathurin Jurgensen's rights for its own economic benefit.
- [57] Having given deliberate consideration to the totality of the evidence, the court has no doubt that PUA deliberately went on to the property and placed the antennae and dug the holes for the laying of the cables without any regard to Dr. Mathurin Jurgensen's objection to the property being used.
- [58] What is worst is that even though the officials of PUA, on being confronted by Dr. Mathurin Jurgensen's then Attorney-at-Law about their unlawful conduct, despite indicating that they would have discontinued all construction work, nevertheless persisted with their construction work. This the court finds a deliberate disregard of Dr. Mathurin's Jurgensen's rights.
- [59] Applying the principles enunciated in **Rookes v Bernard** *ibid*, the court has no doubt that this is an appropriate case in which an award of exemplary damages should be made. PUA was still in unlawful occupation of the property 5 years later.

It is noteworthy that at no time in their evidence did the relevant officers of the PUA even attempt to give the court the impression that it was not a deliberate, willful act on the part of those persons with the requisite authority in going onto the property. Mr. Wilkins stated very clearly that he was instructed to go on to the property. The Court believes him.

[60] **Quantum of Damages**

This brings me now to determine the quantum of exemplary damages that Dr. Mathurin Jurgensen should be awarded.

[61] The law is clear. The Court in awarding exemplary damages should take into account the defendant's means and also the amount of money the defendant stood to make as a consequence of the unlawful acts. There is no evidence before the court on which it could be properly concluded, as urged by learned Counsel for Dr. Mathurin Jurgensen that PUA is a major commercial entity that earns millions of dollars. The court was provided with no evidence to substantiate this assertion. The court is cognizant of the fact that PUA is a major utility provider in Antigua and Barbuda but has no knowledge of its economic status.

[62] *In Asot Michael v Astra Limited* *ibid*, Rawlins JA, stated at paragraph 69 that "the conduct of the parties down to the time of the judgment is usually taken into account. An apology by the defendant could cause the court to reduce exemplary damages." See Singleton LJ in *Loudon v Ryder* (1953) 2 A B 202 at 207.

[63] In **Wason v California Standard Co (1964) 47 DLR(2d) 71** the defendant willfully, without obtaining the consent of the owner, cut a swath through the owner's property causing considerable damage. It was held that it was appropriate to award compensation for the pecuniary loss so suffered. In addition, an award of exemplary damages for the trespass in question was justified.

[64] *His Lordship Mr. Justice Rawlins JA, as he then was, said at paragraph 70 of Asot Michael v Astra Limited* *ibid* that "The size of the compensatory damage awarded is another factor that would affect the amount of exemplary damages.

Exemplary damages could be increased if the court is of the view that compensatory damages do not adequately punish the tortious conduct."

- [65] Learned Counsel Mr. Lake urged the court to award Dr. Mathurin Jurgensen exemplary damages in the sum of \$500,000EC. In so doing, he referred the court to the **Asot Michael** case, Rawlins JA, as he then was, in delivering the judgment of the court, reduced the trial judge's award of exemplary damages in the sum of \$250,000EC to \$60,000EC. At paragraph 60, Rawlins JA in **Asot Michael v Astra Holdings Ltd** stated that *"exemplary damages are awarded for conduct that deserves to be punished."*
- [66] It is the law that exemplary damages are awarded in order to punish conduct that is deliberate, cynical or outrageous. The award would be to show displeasure and disapprove of the conduct and to deter the Claimant from repeating it. See **Rookes v Bernard (1964) A.C 1129 at p1228 A v Bottrill (2003) 3 WLR 1406 PC**.
- [67] When the court examines the totality of circumstances under which the antennae was erected upon Dr. Mathurin Jurgensen's property and the trenches were dug, it is obvious that this was a deliberate, cynical act that was taken by the PUA in order to make profits, which should be punished.
- [68] Accordingly, there is overwhelming evidence to support the court's conclusion that PUA's trespass should attract a punitive award in the form of exemplary damages. The court is of the considered view that the principles that were enunciated in **Cassell v Broome (1972), ALL ER 801** are of direct relevance to the case at bar. The court can do no more than adopt those principles namely: knowledge that what was proposed to be done was against the law or a reckless disregard whether what was proposed to be done was illegal or legal; and (2) a decision to carry on doing it because the prospects of material advantage outweighed the prospects of material loss. These are the factors that are determinative of whether the court will award exemplary damages.

- [69] As stated earlier, there is clear evidence from Dr. Mathurin Jurgensen which is corroborated by that of Mr. Julian Wilkins which clearly shows that, even despite the strong objection from Dr. Mathurin Jurgensen nevertheless, the defendant unlawfully entered the property and dug up the land to construct the transmitter tower. They also erected the antennae.
- [70] The court has no doubt that the placement of the transmitter tower on Dr. Mathurin Jurgensen's property was for the purpose of enabling PUA to increase its revenue. In this regard, the court places significant weight on Mr. Wilkins evidence. The court is also equally satisfied that despite the defendants having indicated, through its attorney-at-Law its intention to discontinue the construction work on Dr. Mathurin Jurgensen's property, PUA nevertheless continued with the works. All of this high handed conduct must attract punishment. See Rawlins JA in **Asot Michael v Astra Holdings**, *ibid*.
- [71] It is regrettable that neither Counsel provided the court with any authority that is comparable to the case at bar in order to assist in the award of exemplary damages. Taking into account the totality of circumstances and being guided by what Rawlins JA said in **Asot Michael** *ibid*, the court is of the view that an award of \$100,000EC is appropriate as for exemplary damages.
- [72] **Loss of Use**
- In addition, Dr. Mathurin Jurgensen claims that as a consequence of being kept out of the property for 5 years she is entitled to receive the sum of \$180,000EC. This sum represents a monthly rental of \$3000EC. In this regard she has relied on the evidence of Mr. Nathaniel Paddy.
- [73] Mr. Wilkins, for the defendant, sought to persuade the court that Mr. Paddy's assessment of the rental value should not be accepted. It is too exorbitant. The court accepts the evidence of Mr. Paddy and awards Dr. Mathurin Jurgensen the sum of \$180,000EC.

[74] **Loss of Economic Opportunity**

Next, Dr. Mathurin Jurgensen alleges that she has suffered a loss of economic opportunity.

[75] While it is accepted that in trespass successful litigant is entitled to recover secondary loss, it is also a question of proof whether in a particular case that loss has been established.

[76] It bears stating that in the case at bar, Dr. Mathurin Jurgensen seeks to have the court award her secondary loss in the form of the value cost of the loss of the business opportunity in the sum of \$9,810,246.15EC. She says that as a consequence of PUA having erected the cell tower in the middle of the Fort Site it has thwarted the development plans that she had for Fort. Saint John and her financiers of the "Sun Park" project withdrew. This is a significant aspect of the case. The court proposes to pay more attention to this aspect of the claim.

[77] Dr. Mathurin Jurgensen has presented evidence through her witness Mr. Harrigan, the latter who provided the court with evidence in relation to the "Analytical Review of Probable Losses Due to Cancellation of the Sun Project at Rat Island." The effect of all of this is that Mr. Harrigan told the court in examination in chief, that as a consequence of PUA's trespass, Dr. Mathurin Jurgensen has suffered probable losses of \$3,246,116EC. However, it became very clear during cross examination that Mr. Harrigan's evidence was unreliable. In fact it must be underscored that most of the assumptions on which he based his conclusions were highly speculative. In addition, the court was not satisfied that he had seen the minimal supportive documents, necessary in order for him to have been able to arrive at the conclusions he did in the Sun Project.

[78] During the cross-examination of Mr. Harrigan, the court was driven to conclude that he gave evidence with the desire to serve Dr. Mathurin Jurgensen's interest.

- [79] The next witness, Ms. Loretta Sharpe's evidence in chief did not stand up to the vigorous cross-examination that sought to test it. Most of the evidence that she gave was not reliable, insofar as she seemed to know very little about the progress of the potential investment. In addition, much of what she told the court she did not have personal knowledge of. Further, she did not strike the court as a credible witness. In fact, under cross-examination it was clear that she was not as forthright as she ought to have been. While there is no doubt that there were some preliminary discussions in relation to the proposed project, there is no doubt that those discussions had not crystallised.
- [80] While the law recognizes that a Claimant who suffers a loss of opportunity is entitled to be compensated for having suffered, the evidential basis for arriving at that conclusion must be provided. The court is afraid that, in the case at bar, the evidence that was adduced on behalf of Dr. Mathurin Jurgensen is not of sufficient quality to persuade the court to find that there were development plans of such an advanced nature. The court has paid regard to the evidence that was adduced by Dr. Mathurin Jurgensen herself, in relation to the projected economic benefit, together with the discredited evidence of Ms. Loretta Sharpe and the unreliable evidence of Mr. Harrigan. The court attached very little weight to the evidence on this aspect of the claim.
- [81] Ms. Loretta Sharpe's evidence is powerful for what it omits to provide. One would have thought that had there been such a commitment from the investors, as Ms. Sharpe would have the court believe, at the very least, one of those persons would have been called to so testify.
- [82] Accordingly, the court is far from persuaded that the negotiations/discussions of the proposed project was sufficiently advanced in order to attract an award for loss of economic opportunity.
- [83] The court does not believe that Ms. Sharpe had been able to secure investment into the project in the sum claimed or any sum at all.

[84] Accordingly, the court is not of the view that Dr. Mathurin Jurgensen has made out this aspect of her claim.

[85] In passing, it is worth stating that the court is of the respectful view that while the parties were desirous of settling the claim, both parties took what the court regards as unreasonably entrenched positions in relation to the settlement figures. PUA grossly understated its proposal; whereas, Dr. Mathurin Jurgensen proposal was exorbitantly inflated. At this point it is worth stating that the court found Mr. Esworth Martin, who is the General Manager of PUA be a very forthright and honest witness.

[86] **Injunction**

The court now proposes to consider whether it should grant Dr. Mathurin Jurgensen the injunctive relief that she seeks.

[87] During the course of the trial, it was not very clear that PUA intended to continue the trespass unless further restrained by the court. The witnesses who testified on behalf of PUA clearly stated that it was their intention to settle the matter and that PUA had no intention in the future to trespass on the property. The court is of the view that while they may have no further intention, the court is not satisfied that PUA will not in the future commit some unlawful act if not restrained due to the way in which it persisted to occupy the property, even though an interlocutory injunction had been granted against it.

[88] In view of the totality of circumstances, including defendant's conduct before, during and after the institution of the claim, the court is satisfied that this is a proper case in which to exercise its discretion and grant the injunctive relief that is sought.

[89] For the sake of competences, it is worth stating that there have been cases in which the court, though finding that the trespass has been committed, did not think it was appropriate to grant injunctive relief. In those cases, there was clear and compelling evidence that the making of declarations coupled with an award of

damages would suffice. The court is afraid to say that it is of the view that in the present circumstances in the case at bar, PUA's conduct, even after Dr. Mathurin Jurgensen had instituted this claim, leaves much to be desired.

[90] The court therefore grants an injunction restraining PUA whether by itself, its servants or agents or whosoever from erecting, maintaining, or placing telephone equipment, the antennae, fixtures, apparatus, telephone, cable lines or anything whatsoever on the lease hold property.

[91] **Conclusion**

In the premises, there will be judgment in favour of Dr. Mathurin Jurgensen against the Public Utilities Authority as follows:

- (a) A declaration is hereby granted that Public Utilities Authority acted in breach of section 8 of the Public Utilities Act.
- (b) Damages are awarded to Dr. Mathurin Jurgensen in the sum of \$180,000EC for loss of use.
- (c) Special Damages are awarded to Dr. Mathurin Jurgensen in the sum of \$77,529.00EC.
- (d) Exemplary damages are awarded in favour of Dr. Mathurin Jurgensen against the Public Utilities Authority in the sum of \$100,000EC.
- (e) An injunction is granted restraining the Public Utilities Authority, whether by itself, its servants or agents whosoever from trespassing on the property of Dr. Mathurin Jurgensen.
- (f) Prescribed costs are awarded, unless otherwise agreed.
- (g) The Court gratefully acknowledges the assistance of both learned counsel and places on record its regret for the delay in the delivery of this judgment.

Louise Esther Blenman

High Court Judge

