

FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO NEVHCV2012/0015

BETWEEN:

HUGH CHARLES

Claimant

AND

LYNDIS WATTLEY

Defendant

Appearances:

Ms Midge Morton holding for Ms Kurlyn Merchant for the Applicant/Claimant
No appearance of or for the Defendant despite given notice of delivery of the decision

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2013: February 4; April 8; June 19
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JUDGMENT ON ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

- [1] **LANNS, M:** The Claimant, Hugh Charles is the owner and registered proprietor of 21, 780 sq ft or 0.5 acres of land known as Lot #4 situate at Round Hill Estate Housing Development, Shaw's Road, St James Parish, which is registered in Book 37, Folio 12 of the Register of Titles in the Nevis Circuit.
- [2] A reading of the description area of the Claimant's Certificate of Title (dated 25th January 1999) reveals that there are three owners of lands adjoining the Claimant's land, namely, Clive Anthony Ambrister, (whose land is Bounded on or towards the South East); Vera Boylan (whose land is Bounded on or towards the South West); and Dahlia-Claxton-Morris (whose land is Bounded on or towards the North West).

- [3] It is not inconceivable that Mr Ambrister sold his lot of land to the Defendant in the year 2005, and that the Defendant and or her agents or otherwise, acting on the advice of Mr Ambrister, (as vendor), and Mr Steel Douglas, Licensed Land Surveyor, mistakenly erected a structure on the Claimant's lot of land.
- [4] Indeed, between the years 2006 and 2008, the Defendant committed trespass by fencing the Claimant's land and by constructing a two storey concrete apartment complex thereon. It is not disputed that since the completion of apartment complex, the Defendant has been renting the complex primarily to medical students.
- [5] The Claimant, who apparently resided in the United States of America for some twenty nine years, stated that he discovered the trespass sometime in the year 2009. He stated that after discovering the trespass, he contacted the Defendant advising her that she had trespassed on lands belonging to him. He subsequently wrote a letter to the Claimant complaining of the unlawful occupation of his property, and seeking an amicable resolution of the problem. The parties thereafter entered into face to face discussions with a view to settlement, but all to no avail.
- [6] After efforts to reach a negotiated settlement failed, the Claimant commenced an action against the Defendant alleging trespass by way of building of a fence and construction of an apartment complex on his land. He prayed for payment of the sum of \$326,700, being the alleged market value of the subject land. The Claimant also prayed for damages for trespass in the form of mesne profits and for deprivation of use and enjoyment; as well as interest and costs.
- [7] The Defendant, in her Defence, did not deny erecting a fence and constructing an apartment complex on the Claimant's land without the Claimant's consent or permission, but she took issue with the amount of \$326,700.00 claimed as the market value of the land, comparing it with the price of \$70,000.00 that she allegedly paid for her adjacent lot of land in the year 2005. However, her main defence was that "the lands on which she

constructed a structure were the said lands as pointed out to her by the vendor from whom she bought the lands, and by a licensed land surveyor who was contracted to identify the lands owned by the Defendant to the person contracted to construct the said structure”.

[8] On the 30th July 2012, on application by the Claimant, summary judgment was entered up against the Defendant for damages to be assessed.

[9] On 12th October 2012, the Claimant filed an application supported by affidavit for damages to be assessed. This is the assessment.

NO SUBMISSIONS BY DEFENDANT

[10] Before I proceed with the assessment, I think it is worth noting that the Defendant has failed to file any submissions in respect of the assessment despite her being given an opportunity to do so. Consequently, the assessment is being considered on the affidavit of the Claimant filed 12th October 2012, and the documents exhibited thereto, as well as the written submissions of Counsel for the Claimant.

ISSUES

[11] The main issues to be determined are (1) what is the proper method of assessing damages in a case of this nature and (2) what quantum of damages is the Claimant entitled to recover.

[12] The first issue calls for an examination of the law on damages for trespass to land.

THE LAW ON DAMAGES FOR TRESPASS TO LAND

[13] In the Australian text **Remedies**,¹ David Wright provided the following commentary:

“The tort of trespass to land is actionable per se. This means that damages can be recovered without proof of loss. This is very different from the tort of negligence which requires loss. ... The purpose of an action in trespass to land is

¹ The Federation Press, 2010, page, 48.

not merely to compensate the plaintiff for damage to land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land.

[14] And in **Halsbury's Laws of England**, 4th Ed., Vol. 45(2)² the law on damages for trespass to land is addressed thus:

"526. Damages. In a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use. ... Where the defendant cynically disregards the rights of the claimant in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded if the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased."

[15] The fundamental rule on recovery for damage to land is that the owner of the land is entitled to be restored, as far as money can do it, to the position he would have been in had the wrong not been suffered.³ Put another way, the successful claimant in a trespass action is entitled to that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting compensation or reparation.⁴

[16] Where actual physical damage to the land can be proved, the normal measure of damages is the diminution in value of the land as a result of the trespass or the cost of reasonable reinstatement.⁵

² London: Butterworth's, 1999, at paragraph 526

³ *Livingston v Rawyards Coal Co* (1880) 5 Appeal Cas 25

⁴ *Ryan v White* (2012) Canlii 13805 (NLPC); *McGregor on Damages*, 12 ed., p. 6

⁵ *McGregor on Damages*, 15th ed., paragraphs 1392 to 1397.

DISCUSSION AND AWARDS

- [17] Unlike most cases of trespass to land, the instant case is not one of partial trespass. The trespass was extensive. It is a trespass on the entire parcel of land belonging to the Claimant. It involved erecting a concrete and wire fence and the permanent placement of a two-storey apartment complex from which a rental income is derived. The trespass continues unabated. This continued trespass gives rise to a continuing action for as long as the trespass lasts. However, there is no evidence of the value of the land being depreciated by the trespass. Indeed, the value of the land has increased, despite the trespass.
- [18] As previously indicated, the Claimant in his Statement of Claim prayed for payment of the sum of \$326,700.00 being the alleged current market value of his land. The Claimant has repeated the claim in his supporting affidavit filed on the 12th October 2012. I consider that having regard to the circumstances of this case, it is appropriate and reasonable for the Claimant to claim the current market value of the land. I am fortified in this view by the authority of **Waters and ors v Welsh Development Agency**⁶ in which Lord Nicholls espoused an “open market value” approach where compensation would be assessed by reference to the price a willing seller might reasonably expect to obtain from a willing buyer and consideration given to the enhanced value of the land because of its location or attraction to a particular buyer or class of buyers or its value to an adjoining landowner or that it might be particularly adaptable for a certain purpose.
- [19] In the instant case, it is important to consider how the current market value of the Claimant’s land was determined. Is it overstated or acceptable?
- [20] The Claimant deposed that he engaged the services of Mr George Gilbert, a quantitative surveyor to prepare a valuation report to determine the current market value of his land. I have seen the report and I propose to highlight the salient parts.

⁶ [2004] UKHL 19; [2004] 1 WLR 1304

The Evaluation Report

[21] Mr Gilbert's report gave an overview of the location of the property as follows:

"The property is located in 'Shaw's Road in the general vicinity of the Mount Nevis Hotel. From the property, one could view the lush green Tower Hill in the Southwest and the Caribbean Sea and Cockleshell Beach in St Kitts in the Northwest."

"There are a number of prominent developments approximately one mile away. Some of these developments include but are not limited to:

- i. Mount Nevis Hotel
- ii. Cottle Church
- iii. Vance Amory International Airport
- iv. The Medical University of the Americas
- v. Nisbett Plantation Inn
- vi. New Castle Police Station & Pottery
- vii. Violet Nicholls Primary School
- viii. Sunrise Shopping Supermarket
- ix. Combermere Health Centre
- x. Combermere Churches."

"The Four Seasons Hotel and Charlestown, the Capital City are about five miles by road from the property."

"The area has large expanse of undeveloped land but some modern and upscale houses are in the area. There is great potential for further high end development in the general area. The property in question is situated in a conspicuous location in Nevis."

- [22] The report describes the land as comprising 0.5 acres or 21,780 square feet. The lot sizes in the immediate area are also 0.5 acres. With respect to the trespass, the report noted "There is a two-storey dwelling house on the land and the other area is covered with grass. The property is fenced at the front with masonry block while the other sides are enclosed with chain link fence wire. ... The two storey concrete masonry dwelling structure was constructed on Lot #4 which belongs to Mr Charles."
- [23] As to the method of valuation of the property, the report indicated that the property was valued based on current values and on market trends. The Report noted that the property is superior both in location and ambience. Its location is considered to be high end development which could only enhance its market value. According to the report, land prices in the area are generally high. Lands in the area are currently sold at EC\$10.00 per square foot, therefore, properties closer to the hotel (as is the case with the Claimant's land), have the potential to fetch a higher price.
- [24] In his approach at arriving at a value for the Claimant's lot of land, Mr Gilbert considered the demand to purchase land in the area so as to take advantage of the rental income that is envisaged. The cumulative result, according to Mr Gilbert's Report is a surge in such land prices. The Report concluded that the parcel of land currently has a value of EC\$15.00 per square foot.
- [25] The property was valued as at 16th July 2011 and the valuation report date was 27th July 2011. There has been no update. The Claimant's Learned Counsel invited the Court to award the market value of the entire property as given in Mr Gilbert's Report.
- [26] It is noteworthy that the Report is silent as to the pre-trespass value of the undeveloped land and there is no direct comparable sales prices ranging from the period 1998 (the date of issue of the Claimant's Certificate of Title) to July 2011 (the date of appraisal of the property).

[27] Nevertheless, I am satisfied that Mr Gilbert's valuation should be accepted. It stands unchallenged. I accordingly assess compensation for the Claimant's 21,780 square feet or 0.50 acres of land at \$15.00 per square foot. This computes to \$326,700.00. I award the Claimant that sum.

[28] I consider this to be a reasonable sum given that the entire land has been trespassed upon; (2) there is a continuous trespassing upon the Claimant's property and (3) the potential for upward movement in prices for land in the area.

Mesne Profits

[29] The Claimant seeks an additional award of EC\$136,805.00 as damages for trespass to his land in the form of mesne profits for the use made of his land by the Defendant. Ms Merchant cites the Antigua case of **Horsford v Bird**⁷ as authority for the Claimant's entitlement to that award.⁸ Counsel also relies on **Horsford v Bird** for the formula for calculating the award. In **Horsford v Bird** the respondent built a boundary wall and fence which encroached to a considerable extent on the appellant's land, and the expropriated land became part of the respondent's garden. In awarding judgment to the appellant, the Privy Counsel opined that the appellant was entitled to recover damages representing not only the value of the undeveloped land but also the value of the expropriated land to the respondent. The Privy Council concluded that an award limited to the bare value of the expropriated land does not represent due compensation to the appellant.

[30] Ms Merchant also cited the case of *Clarabelle Investments Limited et al v Antigua Island Company Limited et al*⁹ as justification for an award of damages for trespass in the form of mesne profits.

⁷ [2006] UKPC 3; Privy Council Appeal No 43 of 2004

⁸ See paragraph 15 of the Judgment where the Privy Counsel stated " But in their Lordships' view, the appellant has a clear claim to damages in the form of mesne profits for the use made of his land by the respondent.

⁹ ANUHCV2006/0326, judgment delivered on the 8th October 2008 [unreported]

[31] Although the cases cited by the Claimant are not exactly on all fours with the case at bar, I am satisfied that this is an appropriate case for the award of damages for trespass in the form of mesne profits.

[32] The Claimant's evidence is that when he visited his property in 2009 he discovered that a two storey apartment complex had been constructed on his land and there were several tenants occupying the apartments, and the entire property was completely fenced off. This evidence is uncontroverted. In fact, by the Defendant's own admission, construction on the site commenced in or about the year 2006 and ended in the year 2008. So ever since 2006 to present, the Defendant has been trespassing upon the Claimant's land and has had exclusive use and benefit thereof.

[33] The formula for calculating mesne profits was set out by Lord Scott in **Horsford v Bird** supra. His Lordship opined that mesne profits should be assessed on a yearly basis as a percentage of the capital value of the piece of land in question. In His Lordship's opinion, an annual rate of 7.5 per cent of the capital value would represent reasonable mesne profits.

[34] Ms Merchant urged the court to take the 1st of January 2007 as the date for calculation of the award for mesne profits since the exact date of the commencement of the trespass has not been ascertained. I can see no reason not to accede to this suggestion. The total period of trespass up to the time of summary judgment is therefore assessed to be 5 years and 7 months.

[35] Adopting the formula used by the Privy Council in **Horsford v Bird**, mesne profits are assessed and awarded in the sum of \$136,805.66, calculated as follows:

Annual mesne profits	= (7.5% x \$326,700.00)	= \$	24,502.50	
5 years x \$24,502.50	= \$122,512.50			\$ 122,512.50
Monthly mesne profits	= \$24,502.50 ÷ 12	= \$	2,041.88	
7 months x \$2,041.88	= \$ 14,293.16			<u>\$ 14,293.16</u>

Total mesne profits

\$ 136,805.66

Loss of use and enjoyment

- [36] The Claimant claims the sum of \$15,000.00 for loss of use and enjoyment of his land. Counsel cites the case of **Clarabelle Investments Limited**, supra as authority for this claim. In that case, the High Court of Antigua and Barbuda, in 2008, awarded the Claimant \$4,000.00 for being kept out of the use and enjoyment of part of his land for approximately eight years, as a result of the trespass.
- [37] The Court is unable to agree with the Claimant's contention that he is entitled to an additional amount for loss of use and enjoyment separate and apart from the amount awarded for the value of the land and for trespass in the form of mesne profits.
- [38] This is not a case like **Clarabelle Investments Limited**, where a fence and garage encroached on part of the land, and where an injunction was granted for the removal of the encroachments. Here, the whole parcel of land was affected by the trespass and, to my mind, the ambience; its proximity to various sights and buildings; and any other benefits associated with it is reflected in the market value of the land. Mr Gilbert's valuation and the court's award recognized the potential of the property. To award, in addition to the market value and mesne profits for the same factors would, in my view amount to double benefit and or unjust enrichment.
- [39] I bear in mind too that there is no evidence that the Claimant had intentions of developing his own property. He led no evidence as to what precisely he would have done with the property if the Defendant had not been in occupation. The evidence merely suggests that he was inclined to sell the property. He deposed that he had good offers for sale and had already commenced negotiations to sell the property. He said that when he visited the land in 2007, it was an unfenced vacant lot covered with overgrown shrubs. He did not even maintain it. This is not to say that it matters that the lot was vacant and undeveloped, for the Claimant has a legal right to immediate occupancy of his land in whatever state it is.

The reality is that the claimant's rights have been invaded and he has been deprived the use and enjoyment of his property.

- [40] Nevertheless, as I have indicated, I am not satisfied that this is a case which warrants an additional award of damages for loss of use and enjoyment. I am of the opinion that recognition of the infraction of the Claimant's legal rights or loss of use and enjoyment is reflected and subsumed in the amount awarded as the market value of the land, if not in the amount awarded as damages for trespass in the form of mesne profits. In the premises, the claim for loss of use and enjoyment is disallowed.

Special damages

- [41] .The Claimant seeks to recover the sum of \$2,404.00 as special damages for the services provided by the land surveyor and the quantity surveyor. He has presented invoices from Mr Dave Simon (\$1404.00) and Mr George Gilbert (\$1000.00). These invoices relate to the identification and survey of the land as well as the appraisal of the land. I find these amounts to be reasonable and recoverable due to the trespass by the Defendant.

Interest

- [42] The Claimant's statement of claim prayed for interest. I take that to mean post judgment interest.
- [43] CPR 8.6 (4) provides that a Claimant who is seeking interest must say so expressly in the Claim Form and must include in the Claim Form or Statement of Claim details of the basis of entitlement, rate and period for which it is claimed. The Claimant has run afoul of this rule and thus, he is only entitled to post judgment interest.

Costs

- [44] Given the amount awarded as to the market value of the land, and for damages for trespass, the Claimant is entitled to his costs incurred in asserting his claim for damages for trespass to the land. This is provided for under rule 65.5.

TRANSFER OF LAND

[45] The Claimant has asked for an order that upon payment of the sums awarded to him, his Certificate of Title to his property be canceled and a new Certificate of Title be issued to the Defendant at the Defendant's expense. I can see no reason not to grant this order. This approach results in the Claimant's receiving all that he could ever have received. At the same time the Defendant receives title to the land and its lucrative and aesthetic values. The equities are equal.

CONCLUSION

[46] For all the forgoing reasons, Judgment is entered for the Claimant in the following terms:

- (1) The Defendant Lyndis Wattley shall pay to the Claimant Hugh Charles the sum of EC\$326,700.00 being the market value of the subject land;
- (2) The Defendant Lyndis Wattley shall pay to the Claimant Hugh Charles the sum of \$136, 805.88 as damages for trespass in the form of mesne profits.
- (3) Upon the payment of these two sums, the Claimant shall be entitled to have the subject land transferred to her at the cost of the Claimant; and the parties are at liberty to apply to the court for directions in the event that an issue arises concerning the transfer of the property.
- (4) The Defendant Lyndis Wattley shall pay to the Claimant Hugh Charles the sum of \$2,404.00 as special damages.
- (5) The Defendant Lyndis Wattley shall pay to the Claimant Hugh Charles post judgment interest on the sum of \$465,909.88 at the statutory rate of 5

per cent per annum from the date of the assessment to date of final payment.

- (6) The Claimant is awarded costs as prescribed by Rule 65.5 Appendices B and C unless otherwise agreed.

[47] I am grateful to Learned Counsel for the Claimant for her assistance and I commend her for her industry.

PEARLETTA E. LANNS
MASTER

