

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

**SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

SKBHCV2021/0085

BETWEEN:

EUSTACE HOBSON

Claimant

and

DDM PROPERTIES LIMITED

1st Defendant/1st Ancillary Claimant

TERNION ST. KITTS LIMITED

2nd Defendant/1st Ancillary Defendant

RODNEY FLEMMING

3rd Defendant/2nd Ancillary Claimant

and

THE DEVELOPMENT CONTROL AND PLANNING BOARD

2nd Ancillary Defendant

THE MINISTER WITH RESPONSIBILITY FOR SUSTAINABLE DEVELOPMENT

3rd Ancillary Defendant

THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS

4th Ancillary Defendant

Appearances:

Damian Kelsick KC with him Hadya Dolphin for the Claimant

E. Anthony Ross KC with him Midge Morton, Nadia Chiesa and Errol Williams for the 1st and 3rd Defendants/1st and 2nd Ancillary Claimants

Christiane Prowell and Derriann P. Charles for the 2nd Defendant/1st Ancillary Defendant

Simone Bullen-Thompson and Sasha Lloyd for the 2nd, 3rd and 4th Ancillary Defendants

2024: November 18, 19 and 20;
December 13 and 16;
2025: February 7, 10, 12, 21 (written submissions);
March 14 (closing arguments);
June 13.

JUDGMENT

- [1] **GILL, J:** A landowner alleges that the construction of a resort resulted in major trespass to his property. He seeks redress from the court.
- [2] On May 7, 2021, the claimant Eustace Hobson (“Hobson”) filed a claim form and statement of claim in trespass alleging four instances of trespass on his property situate at Trinity Palmetto Point in the island of St. Christopher. The property in issue consists of two contiguous parcels of land referred to in the proceedings as the “Lamp Shade Lot” and the “L-Shaped Lot”. The claim was brought against the following three defendants:
- i. DDM Properties Limited (“DDM”) – a company incorporated under the Laws of St. Christopher and Nevis and the owner and possessor of land neighbouring and abutting Hobson’s property;
 - ii. Ternion St. Kitts Limited (“Ternion”) – a company incorporated under the Laws of St. Christopher and Nevis, a well-known construction/contractor business; and
 - iii. Rodney Flemming (“Flemming”) – a person who operates a well-known construction/contractor/landscaping/plant nursery business as RBM Nursery and Landscaping Services in Nevis.
- [3] On June 4, 2021, Ternion filed its defence. Ternion is involved in only one of the alleged trespasses, which it denied.
- [4] DDM and Flemming, represented by the same Counsel, filed their defence on June 7, 2021.

- [5] On October 28, 2021, Hobson obtained an interim injunction which prohibited DDM and Flemming from accessing DDM's property, halting its coastal and marine works. The application for the injunction alleged a further trespass, that is, occurring after the filing of the original claim.
- [6] Therefore, on May 4, 2022, Hobson filed an amended claim to include the additional alleged trespass.
- [7] Hobson claimed the following:
- "1) General damages in a sum to be determined by this Honourable Court for trespass and resultant damage caused by the Defendants' trespass on the Claimant's property (except General Damages related to the coastal trespass).
 - 2) General Damages in a sum to be determined by this Honourable Court for the cost to have an independent professional prepare a report to determine the damage caused by the 1st and 3rd Defendants' coastal trespass on the Claimant's property and the estimated cost of rectification of same.
 - 3) An Order that General Damages related to the coastal trespass be assessed by this Honourable Court after the said report of an independent professional is filed with this Honourable Court.
 - 4) Aggravated damages in a sum to be determined by this Honourable Court.
 - 5) Special Damages in the sum of EC\$31,093.58 paid to James R. Buchanan for a survey report to determine the extent of the trespass.
 - 6) Interest continuing at the commercial overdraft rate of interest in St. Kitts and Nevis of 10% per annum from April 4, 2019 to the date of judgment in this claim on all General Damages, Aggravated Damages and Special Damages.
 - 7) Court fees on issue and Cost of service on issue, in the total sum of EC\$354.00.
 - 8) Prescribed Costs."

- [8] On September 15, 2022, DDM and Flemming filed a defence to the amended claim and made an ancillary claim against Ternion and the Development Control and Planning Board, the Minister with Responsibility for Sustainable Development and the Attorney General of St Kitts and Nevis (“the Government defendants”), claiming indemnity for any liability arising from the allegations of trespass made by Hobson.
- [9] On December 21, 2022, the Government defendants’ filed a defence to the ancillary claim.
- [10] On January 4, 2023, DDM and Flemming filed a reply to defence to the ancillary claim.
- [11] On May 4, 2024, the interim injunction was discharged. Hobson consented to the discharge of the injunction on terms agreed with DDM.
- [12] The trial took place over five days - November 18, 19 and 20, and December 13 and 16, 2024. This was preceded by a visit to the locus in quo on November 15, 2024. The court heard from several witnesses.
- [13] At the end of the trial, the court ordered written post-trial submissions and the parties were at liberty to file reply submissions. The various parties filed submissions on February 7, 10, 12 and 21, 2025.
- [14] The court heard closing arguments on March 14, 2025.

The Alleged Trespasses

- [15] It was settled between the court and counsel for the parties that the alleged trespasses would be referred to as follows:
- Trespass #1 (T1) - excavation of soil from the north-east section of Hobson’s property, removal of guinep trees, depositing of soil excavated from the swimming pool area of DDM’s property, equipment, a container and construction materials placed on Hobson’s property without his consent

- Trespass #2 (T2) – excavating soil at the west end of the property, removal of coconut, manchineel and guinep trees and cutting a road (approximately 15 feet wide) through the property (obviously to serve as an access road to DDM's property)
- Trespass #3 (T3) – construction of part of a soakaway/sewage system for DDM on Hobson's property, and pipes leading from DDM's property directed unto Hobson's property
- Trespass #4 (T4) – the construction of concrete/stone steps encroaching on the property
- Trespass #5 (T5) – coastal and marine works, including the creation of a temporary road.

Claimant not pursuing Alleged Trespasses 3, 4, and 5 (T3, T4 and T5) – Claimant pursuing Alleged Trespasses 1 and 2 only (T1 and T2)

[16] In relation to T3 and T4, in Hobson's post-trial submissions, it is stated:

"As set out in paragraph 18(c) of the Amended Statement of Claim, the concrete steps have been removed. The other two items are of minimal importance or impact, particularly as the evidence has established that the soakaway/sewage system is not operational."

In relation to T5, (referred to as Trespass #4 in Hobson's submissions), it is stated:

"With respect to Trespass No. 4 [T5 as agreed], in answer to the Court in the course of cross-examination, Mr. Buchanan, being referred to the plan at TB2/50 confirmed that the newly constructed road along the seaward boundary of the L-Shaped Lot did not encroach on that lot."

[17] DDM and Flemming make a case for costs against Hobson for abandonment of the claims in respect of T3, T4 and T5. They submit that costs must be awarded against Hobson for abandoning these claims after causing DDM and Flemming to incur significant costs defending these claims, including through the trial. In closing arguments, learned King's Counsel for DDM and Flemming asserted that these claims could have been abandoned before. Learned King's Counsel for Hobson

retorted that this looks good on paper but is devoid of practicality, and pointed out that there were no offers to settle pursuant to Part 35 of the CPR.

[18] In relation to T5, the Government defendants submit the following:

“The 1st and 3rd Defendants assert that they sought indemnification from the Government Defendants (the 2nd – 4th Ancillary Defendants) only in relation to the coastal trespass [T5]. This is not one of the trespasses in relation to which the Claimant seeks damages. Since the Claimant seeks no damages in relation to the coastal trespass, contribution and/or indemnity by the 2nd - 4th Ancillary Defendants no longer arise. The 1st and 3rd Defendants claim against the 2nd – 4th Ancillary Defendants ought to be dismissed.”

Issues

[19] The claimant has abandoned alleged Trespasses 3, 4 and 5, so that these claims must be dismissed. The court is left to determine the issues relating to alleged Trespasses 1 and 2. Further, the ancillary claim against the Government ancillary defendants is rendered nugatory since the ancillary claim against them was in respect of alleged T5 only.

[20] In relation to T1 and T2, the court must determine:

- 1) Whether any of the defendants trespassed on the claimant's property;
- 2) If so, the quantum of damages to be awarded to the claimant.

Trespass #1 – T1

The evidence

[21] Hobson stated that on or about April 4, 2019, he visited his property and observed that renovations were being carried out on DDM's property. At the north-east section of his L-Shaped property, adjacent to DDM's property, he observed that sections of the soil and earth had been excavated (approximately 120 cubic yards), guinep trees had been removed, soil excavated from the swimming pool area of DDM's property had been deposited, and equipment, a container and construction materials had been placed there.

- [22] While there, on the said April 4, 2019, Hobson stated that David Fletcher (Fletcher”), a director of DDM introduced himself and Matt Hooley (“Hooley”), a director and contractor of Ternion to him. His evidence is that he expressed extreme displeasure at the unauthorised use of his property by them and the damage and excavation to it. He then stated, *“Mr. Fletcher admitted to and acknowledged the Ternion Phase Trespass and promised that it would be restored to its original and natural state. His explanation to me was that they had nowhere else to store the excavated soil to construct the Resort’s swimming pool.”*
- [23] Hobson went on to state that he took Fletcher at his word and left the matter there. However, he alleged that DDM never restored his property from the damage caused by the Ternion Phase Trespass. It should be noted that Ternion’s services were terminated in December 2019, and replaced by Flemming.
- [24] Fletcher stated that neither he nor DDM had any knowledge of the alleged incidents in T1. Fletcher averred that he did not observe any excavated material on Hobson’s property during his trip to St Kitts from February 17 to March 1, 2019. He was off island until he returned between March 30, and April 6, 2019, at which time he noticed there was a pile of excavated soil on Hobson’s property. Fletcher’s evidence is that he asked Hooley about it; Hooley told him that he had piled the excavated soil on Hobson’s property.
- [25] Fletcher admitted that he met with Hobson and Hooley on April 4, 2019. He stated that during that conversation, Hobson did not seriously object to storage of the soil on his land and casually agreed that Hooley could give him a good bottle of rum in exchange for using his property.
- [26] In respect of the meeting on April 4 2019, Hooley stated that Hobson said soil could be stored on his property as long as the plot was left in the same position that it was found. It is Hooley’s evidence that Hobson did not at any time complain to him about trespassing on his property.

- [27] Hooley admitted that Ternion stored soil on Hobson's property. In cross-examination by Hobson's counsel and DDM and Flemming's counsel, Hooley again admitted that Ternion stockpiled material on Hobson's property but said that he met with Hobson when they started to use his property, and Hobson seemed okay with it.
- [28] Ternion was terminated by DDM effective December 6, 2019.
- [29] It was DDM and Flemming's evidence that Ternion did not completely clean up the property when its contract ended in December 2019. Following receipt of a cease-and-desist letter from Hobson's counsel sent to Fletcher on May 13, 2020, both Fletcher and Flemming testified that DDM directed Flemming to make sure the portion of Hobson's property where Ternion had stored soil was cleaned up and any garbage was removed. Flemming did so.
- [30] In cross-examination by Hobson's counsel, it was suggested that DDM did not take any action to clean up Hobson's property until legal action was threatened in May 2020. Fletcher responded that that was not correct; the construction project was not yet completed, which is why the clean-up was not done earlier.

Hobson's submissions on T1

- [31] Hobson submits that there is no dispute that T1 occurred. The only sub-issues are:
- a) Who is responsible for it, DDM and/or Ternion?
 - b) What is the extent of the damage suffered by Hobson as a result?
- [32] As to who is responsible, Hobson submits that this issue is one of mixed law and fact. His position is that DDM as owner and Ternion as independent contractor were joint tortfeasors in T1. Hobson contends that the evidence establishes that DDM participated in the commission of the trespass by Ternion. Hobson contends that his conversation with Hooley and Fletcher on April 4, 2019 is clear evidence that T1 was a joint enterprise between DDM and Ternion. Mr. Kelsick KC highlights the evidence of Fletcher's explanation to Hobson, that "they" had nowhere else to store

the excavated soil to construct the swimming pool, and submits that the natural meaning of “they” in this evidence is DDM and Ternion.

[33] Further, in cross-examination, Fletcher, in response to a question as to why he did not remove the material stored unlawfully on Hobson’s land, months after Ternion had been terminated, answered that Hobson gave “us” permission to store it, including DDM and Ternion. Learned King’s Counsel points out that Fletcher gave no evidence of any conversation between himself and Hobson after Ternion was terminated by DDM.

[34] Hooley admitted to having discussions with Hobson about rectification of T1.

[35] As regards damage to his property arising from T1, Hobson refers to the evidence of the expert James Buchanan (“Buchanan”), licensed land surveyor. Buchanan’s evidence is that there was significant excavation involved in T1 to the extent of 120 cubic yards. Hooley denied that any excavation work was done by Ternion. However, in cross-examination, it was put to him that the soakaway/sewage comprised in T3 was subterranean and was only revealed through excavation of Hobson’s property. Hobson submits that there is no evidence to challenge Buchanan’s report and there was no application to strike out the report. Quantity surveyor Douglas Gillanders (“Gillanders”), called as a witness for Hobson, gave evidence of the cost of top soil in the Palmetto Point area - inclusive of delivery, \$70 to \$75 per cubic yard. Hobson claims \$9,000.00 (120 x \$75.00) with delivery for the loss involving T1.

[36] There is no evidence before the court as to how many hours it would take a backhoe to spread the soil so Hobson makes no claim for this.

Ternion’s submissions on T1

[37] Ternion admits to placing the stockpiled dirt on Hobson’s land. However, Ternion submits that Hobson has failed to establish trespass in relation to the stockpiled soil as pleaded or at all. This is contrary to Hobson’s assertion that there is no dispute that T1 occurred.

- [38] Ternion submits that permission was sought from Hobson which said permission was granted during his visit to the site, as per Hobson's own evidence. Having granted the requested permission, Ternion posits that it cannot thereafter be deemed to have trespassed onto Hobson's land.
- [39] Hobson pleaded that the soil was stockpiled on his land without his consent. At trial, he confirmed that he granted permission to Fletcher and Hooley to temporarily stockpile the soil, on the agreement that it be removed by the defendants.
- [40] Ternion highlights the undisputed fact that the stockpiled soil was removed from Hobson's property before the filing of the claim. After completion of the works the stockpiled dirt was removed from Hobson's property and the property cleaned up and/or restored by Flemming before May 2020. The property returned to its original state. Therefore, Ternion submits that there was no basis for Hobson to allege any continuing trespass in respect of T1 when the claim was filed in 2021.
- [41] Ternion reiterates that it did not trespass onto Hobson's property, having operated with his consent and in so doing cannot be deemed to have done so alone or in concert with any other person.
- [42] As to damage, Ternion submits that no injury or damages have been pleaded by the claimant in relation to the stockpiled soil. No pictures were exhibited and there is no evidence in respect of the cost of remedying the damage alleged to have occurred during T1. Ternion argues that the March 2020 report of Buchanan (for the period March 19 to 25, 2020) cannot form the basis for the extent of damage for T1, or any assessment of Gillanders, as at that time, Ternion was no longer on site.
- [43] In the event the court finds that Hobson has proved T1 against Ternion, it submits that compensation ought to be limited to the extent of the maximum quantifiable damages of 120 excavated cubic yards as pleaded by Hobson and quantified by him at \$9,000.00.

[44] In relation to the ancillary claim against Ternion by DDM and Flemming, Ternion contends that when Hobson met with Fletcher and Hooley on April 4, 2019, it was Fletcher, and not Hooley, who gave an undertaking to return the property to its original and natural state.

[45] DDM and Flemming alleged that Ternion left materials on the site. Ternion asserts that by the Agreement between DDM and Ternion, the materials belonged to DDM. Therefore, Ternion could not have reasonably left the site (after December 2019) with any materials or be expected to be responsible for them after its departure.

Submissions of DDM and Flemming on T1

[46] Flemming was not involved in T1 so that the submissions on T1 are in respect of DDM.

[47] It is submitted that there is no evidence that DDM was involved in any of the acts alleged to comprise T1, or that DDM instructed Ternion to carry out any of those acts.

[48] DDM argues that at its highest, Hobson may have had a promise that his property would be restored. However, to date DDM's construction has not been completed. In any event, DDM submits that the interim injunction prohibited DDM and Flemming from entering Hobson's property, and they would not have been able to clean up or restore the property.

[49] On damages, DDM submits that if the court finds that T1 and/or T2 have been proved by Hobson, at its highest, Hobson would be entitled to damages representing the cost of reinstating the land to its original condition and that he should not be entitled to any additional amounts.

Trespass #2 - T2

The evidence

- [50] In his witness statement, Hobson stated that in March 2020, he again visited his property and observed that construction on DDM's property was continuing. At the west end of his property, adjacent to the coast, he observed:
- a) sections of the soil had been excavated and removed (approximately 5,770 cubic yards)
 - b) large coconut, manchineel and guinep trees had been bulldozed and removed from his property; and
 - c) a road – approximately 15 feet wide – was cut through his property obviously to serve as an access road to the DDM property.
- [51] As highlighted by DDM and Flemming, it was Flemming's evidence that when he began working on DDM's property in or around November 2019, he was informed by Terry Boddie of Ternion that they had been authorised by Hobson to use a pre-existing road on Hobson's property to access DDM's property. Based on Terry Boddie's representations, Flemming cut and cleared a 7 to 8 foot-wide path on the existing road to provide access to DDM's property to carry out landscaping work; he did not clear a 15-foot path. Flemming's evidence was corroborated by Chester Marshall, a driver who provided transportation for Flemming to DDM's property and who was present when Terry Boddie told Flemming that they had permission to use the pre-existing road on Hobson's property. Terry Boddie was not called as a witness.
- [52] Flemming testified that while he cleared some new growth trees and brush from the pre-existing path, he did not excavate soil to clear a path. He contends that the soil on the path was compacted as heavy equipment traversed the path to reach DDM's property. Hobson did not give any evidence that he saw an excavator clearing his land. Flemming also testified that soil excavated from DDM's property (from the pool and kitchen projects) by Ternion and stored on the northeastern portion of Hobson's L-Shaped Lot was used to rehabilitate this path, which became compacted when

heavy equipment traversed across it. DDM points out that this was done in May 2020, after Buchanan's first visit and Buchanan has failed to advert to it in his addendum and before the claim was filed.

- [53] Buchanan's evidence is that there was significant excavation involved in T2, to the extent of 5,770 cubic yards.

Hobson's submissions on T2

- [54] Similarly as for T1, Hobson submits that there is no dispute that the trespass T2 occurred, the only issues being who are responsible, and the extent of the damage.
- [55] Hobson attacks Flemming's evidence, that Terry Boddie (of Ternion) told him they got permission from the owner to use the Lot to clear the brush and excavate to build the road, as spurious. This is because there is no evidence that the road was cleared in October 2019.
- [56] Further, Flemming in cross-examination accepted full responsibility for this trespass.

Extent of the damage

- [57] Hobson asserts that there is no evidence before the court to challenge Buchanan's evidence of the extent of the excavation of 5,770 cubic yards.
- [58] The quantity surveyor Gillanders' evidence (also used by Hobson for T1) is that in his experience, the price for top soil (exclusive of delivery), is \$60.00 per cubic yard; inclusive of delivery to the Palmetto Point area, the price would be at least \$70.00 per cubic yard and as high as \$75.00 per cubic yard. Taking into account Gillanders' evidence, Hobson contends that the cost of this soil in T2 is \$432,750.00 (5,770 x \$75.00).

DDM and Flemming's' submissions on T2

- [59] DDM and Flemming rely heavily on Flemming's evidence. They argue that Hobson's evidence of seeing "excavator" tire tracks on his land is consistent with Flemming's evidence that heavy equipment traversed the area to access DDM's property. Invoices from JW Trucking confirmed the period of time (November 2019 to

February 2020) when the heavy equipment traversed the area and they submit that this is a reasonable explanation for compaction of the soil/pathway.

[60] DDM and Flemming contend that Hobson's evidence that about 5,770 cubic yards of soil being excavated from his property, suggesting that it was done and used for the benefit of DDM's construction activity, does not hold up against the evidence – that is, that DDM actually brought in soil to complete its projects.

[61] They strenuously argue that Buchanan's calculation of 5,770 cubic yards cannot possibly be correct based on simple arithmetic. In support of this contention, learned counsel for DDM took the court through the following illustration:

“Based on the invoice from Elco Ltd attached to JRB2 in Buchanan's Report, the access across Hobson's property to DDM's property was approximately 200 feet. The L-Shaped Lot has a 76-foot frontage, so the remaining 124 feet would be across the Lamp-Shade Lot (which DDM and Flemming do not protest). Flemming confirmed the width of the path that he cleared was 7 to 8 feet wide, and that there was no cutting or excavation, just compaction of the original soil which he later filled in using the excavated material from DDM's property and which was stored on the northeast corner of Hobson's L-shaped Lot. The calculation would then be as follows: the area that is 200 feet long and 7 to 8 feet wide would have a maximum surface area of 1600 square feet or 178 square yards and would have required a depth of 31 yards or 93 feet deep to be equal to Buchanan's 5,770 cubic yards.”

[62] DDM and Flemming submit that this simple arithmetic does not support Buchanan's evidence, and invite the court to reject it outright.

[63] Further, DDM and Flemming allege that the “cut areas” reflected on the Buchanan survey are clearly wrong in that they show from inland on Hobson's Lamp-Shade Lot and L-Shaped Lot to the shoreline. Buchanan later confirmed that the boundaries of Hobson's lots were a substantial distance away from the shoreline. They posit that the obvious conclusion is that Buchanan's evidence of the volume of earth that was removed is based upon an estimate from ELCO Ltd addressed to Hobson which reads:

“As per our site visit and your recommendation to secure approximately 200 feet of your shoreline from any further erosion, after some excavation was done on your property.”

[64] In addition, DDM and Flemming posit that Gillanders purported to give expert evidence, but no leave was granted to call him as an expert witness, nor did he file a report in compliance with the Civil Procedure Rules 2023. Under cross-examination by counsel for DDM and Flemming, Gillanders admitted that he had no involvement whatsoever with Hobson’s property or the alleged T2. For these reasons, DDM and Flemming urge the court not to accept Gillanders’ evidence.

[65] DDM and Flemming allege that Hobson’s evidence of the cost to restore his property to its original condition does not withstand scrutiny and he has not led any evidence as to the diminution in value suffered as a result of T2. If the court is inclined to award any damages, they submit that they should be nominal as a consequence.

Law and analysis

[66] In Halsbury’s Laws of England,¹ trespass to land is defined as follows:

“A person’s unlawful presence on land in the possession of another is a trespass for which a claim may be brought, even though no actual damage is done. A person trespasses upon land if he wrongfully 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 to 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. He also commits a trespass to land if, having entered lawfully, he unlawfully remains after his authority to be there expires.”

[67] In **Rolston Michael v Jo Hutchens**,² Blenman J (as she then was) stated:

“It is the law that any unjustifiable intrusion by one person upon land in the possession of another amounts to a trespass to land. The slightest crossing of the boundary is sufficient. It is a trespass to remove any part of the land

¹ Tort (Volume 97A (2021)) at para. 161

² [2007] ECSCJ No. 73; ANUHCv2004/0298 at para. 74

in the possession of another. ... It is also a trespass to place anything on or in the land in the possession of another..."

Trespass #1 – T1

- [68] Hobson's allegations, that without his consent, sections of the soil and earth had been excavated and guinep trees had been removed from his property, and soil excavated from DDM's property and equipment, a container and construction materials were placed on the land, constitute trespass. Relevant here is the issue as to whether Hobson consented to the acts complained of. Lack of consent is essential to constitute trespass.
- [69] The evidence reveals that Hobson first observed T1 on April 4, 2019. On that same day, he spoke with Fletcher and Hooley about his observations. During that conversation he gave conditional consent to the storage of the excavated soil on his property, that is, on the condition that his property be restored to its original state. At that time, the trespass had already occurred. Hobson determined that he would not pursue the trespass if his property was restored. The trespass was committed before he gave his consent.
- [70] Therefore, I do not accept the submission by Ternion that there was no trespass because Hobson consented. During closing arguments, learned counsel for Ternion, in answer to the court, confirmed that Ternion's submission was based on the consent date of April 4, 2019. In my respectful view, the consent given on April 4, 2019 cannot be deemed to be retroactive. It was Hobson's choice whether to bring an action in trespass for the occurrences on his property before he gave his conditional consent. Whether the property was restored before the filing of the claim may be a mitigating factor, but not a liability issue. Notwithstanding submissions as to the continuation of the trespass after Ternion was terminated in December 2019, there was clearly a trespass on Hobson's property up to the time he consented on April 4, 2019.

Who is Responsible for Trespass #1? DDM and/or Ternion?

[71] Ternion admitted to stockpiling dirt on Hobson's land during excavation for the swimming pool being constructed on DDM's property. DDM denied knowledge of this and contended that if there was a trespass, then Ternion is responsible.

[72] DDM contracted Ternion to carry out construction of work, including the swimming pool. Learned King's Counsel for Hobson explains that contractors typically operate as independent contractors. The relevance of an independent contractor in the context of this case is explained in Halsbury's Laws of England³ where it is stated:

"If the person employed to do particular work is not an employee but is an independent contractor the employer is not as a rule liable for any tort committed by him in the course of his employment, and any person injured thereby must look to the independent contractor for compensation."

[73] Learned King's Counsel uses the following paragraph in Halsbury's⁴ to submit that both DDM and Ternion are liable for T1. The learned authors state:

"Each of two or more joint tortfeasors is liable for the entire damage resulting from the tort. The following are joint tortfeasors:

- (1) employer and employee where the employer is vicariously liable for the tort of the employee;*
- (2) partners where they are liable for torts committed by any one of them while acting in the partnership's ordinary course of the business, or with the authority of his co-partners;*
- (3) principal and agent where the principal is liable for the tort of the agent;*
- (4) employer and independent contractor where the employer is liable for the tort of his independent contractor;*
- (5) a person who instigates another to commit a tort and the person who then commits the tort;*
- (6) persons who take concerted action to a common end and in the course of executing that joint purpose commit a tort."*

³ Volume 97A (2021) at para. 29

⁴ Ibid at para. 46

- [74] In this case, Counsel asserts that (5) and (6) are relevant and submits that the evidence clearly establishes that DDM participated in the commission of the trespass by Ternion.
- [75] The court's record (in its notes) is that in cross-examination by learned King's Counsel for Hobson, Fletcher said, "We had permission to use the property from Mr. Hobson." He clarified that "we" meant DDM and Ternion, "mainly Ternion".
- [76] In countering Hobson's submission on joint enterprise, learned King's Counsel for DDM and Flemming argues that it is not appropriate to go outside the contract.
- [77] I accept that Fletcher only became aware of T1 after Ternion stockpiled the dirt on Hobson's property. Therefore, in my view, the issue of DDM being involved or participating in T1 arises in what occurred after Hobson gave his conditional consent on April 4, 2019, and not before. Hobson's position is that his condition that the land be restored was not complied with and so, he pursued his claim. DDM's position is that the reason that Hobson's property was not cleared before DDM received a cease and desist letter was because the construction project was not yet completed.
- [78] It appears that Fletcher's understanding of Hobson's consent was for his property to be cleared after the completion of the project. By the cease and desist letter, it seems that Hobson anticipated that the land would be cleared sooner. There is no evidence that leads the court to conclude either way. Up until the cease and desist letter, there is nothing to show that Hobson placed a time limit to remove the excavated soil from his property. In these circumstances, I cannot conclude that Ternion's trespass continued after April 4, 2019 or that DDM participated in T1. The evidence of Hobson's lack of consent, after April 4, 2019 and before the letter, is inconclusive. I rule that the responsibility for T1, that is, before consent was given on April 4, 2019, lies solely with Ternion.

Trespass #2 – T2

- [79] T2 concerns the excavating of soil, removal of trees from and the cutting of a road through Hobson's property to access DDM's property.
- [80] There is no dispute that T2 occurred, and Flemming has taken full responsibility for it. Flemming was engaged by DDM as an independent contractor as a substitute for Ternion whose contract ended in December 2019. Accordingly, I rule that Flemming only is liable for T2.
- [81] The contention arises as to the extent of the damage caused by the trespass.
- [82] Learned King's Counsel for Hobson objects to the attempt to impeach Buchanan's expert report after trial, and submits that this is impermissible. No questions were put to Buchanan on his report pursuant to CPR 32.8. All of DDM and Flemming's challenges could have been put to Buchanan as questions under CPR 32.8. The report was never challenged until closing submissions. Further, Mr. Kelsick KC submits that in order for Mr. Ross KC to make the assumptions in his calculations, one must know what was there before. There is no evidence of this.
- [83] While Buchanan's expert report was not challenged by written questions in accordance with CPR 32.8, the court is not bound to accept it wholeheartedly. The court is required to examine an expert report for assistance in resolving the issues, and the court may accept the report, reject it in its entirety or parts of it.
- [84] However, in my respectful view, in this case, it is improper to challenge the expert report at this stage, after trial. If the defendants were of the view that the report/s contained inaccuracies or obvious errors or unfounded conclusions, it was open to the defence to utilise CPR 32.8 and seek answers or explanations from the expert. That is the purpose of the rule. I agree that the court ought not to blindly and totally accept an expert's report, but must be satisfied that the report adequately assists the court in resolving the issues justly. However, the court cannot allow the expert

to be impeached as a result of what appears to be an omission by Counsel to follow the Rules.

[85] Notwithstanding Flemming's evidence, there is no other expert witness instructed by the defence to enable the court to come up with a determination of the extent of the damage other than that presented by Buchanan. In the circumstances of this case, the court is constrained to accept the only expert evidence before it on the volume of the excavated material. Accordingly, I rule that the extent of the damage in T2 is 5,770 cubic yards of soil.

[86] In relation to the quantity surveyor Gillanders, Mr. Kelsick KC insists that Gillanders did not give expert evidence. His evidence in his witness statement is that in his experience, the price of top soil in the Palmetto Point area, inclusive of delivery, is \$70.00 to \$75.00 per cubic yard. King's Counsel submits that the price of soil is not expert evidence, and Gillanders' evidence of the price of the top soil was not challenged.

[87] I am in total agreement with this submission. Gillanders gave a witness statement providing the cost of soil. This is not an expert opinion. Gillanders falls squarely outside the definition of an expert witness under CPR 32.1(2) which excludes as an expert witness "a person with expertise who is giving evidence as a witness of fact".

[88] Instead of challenging Gillanders on his evidence on the cost of the soil, Counsel chose to cross-examine him as an improperly brought expert, giving evidence in non-compliance with the CPR. Therefore, Gillanders' evidence for the purpose for which he was brought remains unchallenged.

[89] During closing arguments, there was a tussle between King's Counsel as to what was top soil and what was fill, and the difference in cost for the different types. In the absence of cogent evidence to make a distinction in this matter, the court will not speculate.

[90] Given the unchallenged evidence of Buchanan and Gillanders on this aspect of the case, I rule that the damage to T2 amounts to \$432,750.00.

Special damages

[91] Hobson claimed special damages in the sum of \$31,093.58 paid to Buchanan for a survey report to determine the extent of the trespass.

[92] As pointed out by DDM and Flemming, there is no evidence before the court as to any amounts paid by Hobson to Buchanan. There is no invoice, receipt, cancelled cheque or other document to substantiate the claim. There is not even a reference to any amounts paid in the evidence from Hobson or Buchanan. Hobson has not proved these damages. Therefore, Hobson's claim for special damages is refused.

Aggravated damages

[93] During closing arguments, learned King's Counsel for Hobson indicated that Hobson is not pursuing aggravated damages as pleaded.

Interest

[94] Hobson claimed interest continuing at the commercial overdraft rate of interest in St. Kitts and Nevis of 10% per annum from April 4, 2019 to the date of judgment in this claim on all general damages, aggravated damages and special damages awarded. However, he failed to set out the basis of entitlement to this rate of interest, as required by CPR 8.6(4).⁵

[95] Hobson has not pleaded why interest should accrue from April 4, 2019 rather than from the date the claim was issued.

⁵ See *Javier Smith and another v Lorrel Sullivan and another* BVIHCV2020/0200, delivered January 28, 2022, at para. 27 and *The Attorney General of the Federation of St. Christopher and Nevis v SKN Choice Times Limited* SKBHCVAP2019/0045, delivered May 27, 2022

[96] Section 7 of the Judgments Act⁶ provides:

Interest on judgments.

7. Every judgment debt shall carry interest at the rate of five per centum per annum from the time of the entering up of such judgment, or from the time of the commencement of this Act in cases of judgments then entered upon and not carrying interest, until the same shall be satisfied, and such interest may be recovered in the same manner as the amount of such judgment.

[97] In this case, there is no reason to depart from the statutory interest rate of 5% on judgments.

Conduct of the Government defendants

[98] DDM and Flemming issued an ancillary claim against the Government defendants for indemnification for any damages arising from T5. That claim falls away as Hobson abandoned his claim in respect of T5. Nevertheless, DDM and Flemming submit that if the Government defendants had taken the position at any point in the litigation and made it clear to Hobson that DDM was using public land to access its property – and therefore not encroaching on Hobson’s land – it is likely that T5 would not have had to be litigated. They argue that the Government defendants should be held to account for their conduct, which resulted in, among other things, a longer trial than necessary.

[99] DDM and Flemming allege against the Government defendants as follows:

- 1) The Government defendants’ failure to clarify their position on the land at T5 is tantamount to tacit approval of Hobson’s improperly obtained injunction.
- 2) They are the statutory bodies vested with the authority to approve development activities and, when necessary, to issue stop orders to halt development activities that are not authorised or exceed the scope of approval granted.

⁶ Cap. 3.14 of the Laws of Saint Christopher and Nevis

- 3) No stop orders were issued. At all material times, the Government defendants did not even suggest that the coastal and marine works were unauthorised or were being carried out in contravention of the approval granted. At the material times, the Government defendants never took the position that the coastal and marine works trespassed on Crown land, let alone Hobson's property.
- 4) It was incumbent on the Government defendants to speak up or take action if the coastal and marine works offended the relevant legislation or otherwise constituted an unauthorised or unlawful activity.
- 5) They did nothing – including after the litigation was commenced by Hobson. Of particular note is the fact that the Government defendants took no position on the ownership of the land at issue in T5.
- 6) The Government defendants must be held accountable for their silence and the serious consequences that it caused to DDM and Flemming in this litigation.

[100] The Government defendants respond, summarised as follows:

- 1) Due consideration ought to be given to the parties' pleadings. Hobson claimed that there was no public road and that the constructed road passed through his property. DDM and Hobson joined issue with Hobson that the area was not on Hobson's property, but was subject to public access. The pleadings put in issue the extent of Hobson's boundaries and whether a road existed as alleged.
- 2) This led to the deployment of expert witnesses and reports by Hobson, and DDM and Flemming.
- 3) The issues were put to rest when Hobson's evidence indicated that the extension of the public road was not on his property.

- 4) Further, the amended claim indicated that T5 was not limited to the constructed road, but included other coastal work.
- 5) In their defence (to the amended claim), DDM and Flemming indicated that any coastal work conducted was carried out pursuant to approvals granted by the Development Control and Planning Board (the 2nd ancillary defendant). Therefore, the question posed to the Government defendants pertained to whether authorisation was granted for certain coastal works, and not whether the land is public land as averred by DDM and Flemming in their submissions.
- 6) DDM and Flemming pleaded their case in that manner with the full knowledge that at the material time when they are alleged to have been conducting the coastal works, no permission had in fact been granted by the Planning Board.
- 7) Further, the Government defendants, in as early as their strike out application filed on October 19, 2022, indicated that no authorisation was sought or granted in respect of the coastal road. Had DDM and Flemming conducted their defence differently, and had not brought an ancillary claim against the Government defendants, the litigation would have proceeded differently, utilising less of the court's resources and saving costs incurred by the parties.
- 8) The length of the trial of this matter is attributable to the conduct of DDM and Flemming.

[101] DDM and Flemming's position on this matter is somewhat confusing. In effect, they are submitting that the Government defendants are to blame for, among other things, the length of the trial because the Planning Board did not stop their unlawful actions. DDM and Flemming pleaded that any coastal work done by them was done "pursuant to approvals obtained by the Board and the Ministry of Sustainable Development". It is on this basis that they brought the ancillary claim against the Government defendants. On the pleadings and the evidence before the court, I find

no merit in DDM and Flemming's submissions that the Government defendants should be held accountable for their conduct in this matter.

Costs

[102] The court having ruled in Hobson's favour for T1 and T2, Ternion and Flemming are liable to pay costs for the respective trespasses. All claims being dismissed against DDM, Hobson is liable to pay DDM's costs.

[103] In his claim, Hobson sought prescribed costs. Prescribed costs on damages for T1 in the sum of \$9,000.00 amounts to \$1800.00. The sum of \$432,750.00 (damages for T2) attracts prescribed costs of \$59,525.00. In his claim, apart from special damages, Hobson sought damages to be determined by the court. For an unvalued claim, using the prescribed costs regime, DDM would be entitled to costs in the sum of \$10,000.00 for dismissal of the entire claim against it. In the circumstances of this case, the question arises as to whether this is the appropriate regime to be applied.

[104] On this issue, the court draws guidance from the Privy Council judgment in **Bertrand and others v Elias**.⁷ A court may, in its discretion, properly depart from the general rule and order costs to be assessed in an exceptional case as "where the reasonable estimate of the actual costs is hugely disproportionate to the likely amount of prescribed costs".⁸

[105] DDM and Flemming submit that the court must order costs against Hobson for abandoning the claims for T3, T4, and T5. DDM and Flemming make this submission to the court for the following reasons:

- i. With respect to T3, Hobson has had the statements of Fletcher, Flemming and the Government defendants since August and September 2023, which established that the

⁷ [2023] UKPC 34; see also *Rampersad and another v Ramlal and others* [2022] UKPC 50

⁸ *Ibid* at para. 64

septic tank system was not operational and pre-dated DDM's ownership of its lands.

- ii. With respect to T4, Hobson himself pleaded that the concrete steps had been removed. The alleged trespass was therefore abated.
- iii. These claims could have been withdrawn at any point before the trial, and there was no new or additional evidence at trial to justify abandoning these claims after the conclusion of the trial.
- iv. With respect to T5, Hobson submitted that it was his own expert's evidence in cross-examination that DDM's coastal and marine works did not encroach on his property.

[106] Other reasons submitted by DDM and Flemming for the award of costs against Hobson concern allegations of facts not in evidence before the court, and which the court ought not to consider.

[107] In the exercise of the court's discretion, the complexity of the case is a factor to be taken into consideration. In addition to a visit to the locus in quo, the trial took 5 days with an additional day for closing arguments. The expert reports required explanation and clarification in relation to the five instances of trespass. Whereas trespass to land is a straightforward matter in many cases, the evidence in this case gave rise to relatively complex issues, including the examination of numerous documents. The original claim was filed in May 2021 followed by almost four years of active litigation. Hobson and DDM and Flemming engaged King's Counsel.

[108] In all the circumstances of this case, I am of the view that actual costs are hugely disproportionate to the amount of prescribed costs likely to be awarded. Therefore, I will exercise my discretion to depart from the prescribed costs regime and order that costs be assessed, that is, if not agreed.

[109] When the court ordered closing submissions after trial, Hobson gave no indication that he was no longer pursuing T3, T4 and T5. The other parties involved in those instances of trespass proceeded to make submissions on them, it turns out, unnecessarily. Hobson is entitled to costs for T1 and T2, which are to be assessed also (especially in light of the prescribed costs of \$1,800.00 for T1). At the assessment, I will consider the appropriateness of a reduction in any award to Hobson in light of the late abandonment of the claims for T3, T4 and T5. Considering the various costs entitlements, the parties are strongly urged to negotiate and come to a compromise.

[110] As regards DDM's ancillary claim against the Government defendants, as a result of Hobson's abandonment of T5, it was not necessary for the court to resolve that ancillary claim. In these circumstances, in my view, a fair disposition would be to order each party to bear its/their own costs.

[111] Likewise, Ternion being liable for T1, DDM's ancillary claim against Ternion falls away and the court was not required to determine that claim. Each party is to bear its own costs of this ancillary claim.

Inquiry into damages resulting from the interim injunction

[112] On September 26, 2024, DDM applied to the court for an inquiry into damages resulting from the interim injunction. On October 4, 2024, the court ordered that the application be adjourned to a date to be fixed.

[113] In Hobson's closing submissions, under the heading "Ancillary Matters", Counsel for Hobson asks the court to make the following findings which Counsel asserts will be relevant to any claim by DDM for damages pursuant to the injunction:

- a) DDM and/or Flemming had no authority to build the Constructed Strip;
- b) DDM and/or Flemming had no authority or permission to use the Constructed Strip;
- c) The Constructed Strip was not a road, public or otherwise;

- d) In crossing the Constructed Strip, DDM and/or Flemming committed acts of trespass; and
- e) In constructing the Constructed Strip, DDM and/or Flemming acted unlawfully, in particular:
 - i. in breach of section 20(1) of the Development Control and Planning Act;⁹
 - ii. by committing acts of trespass contrary to common law.

[114] DDM and Flemming respond to these submissions as follows:

- 1) Hobson's interim injunction, in place from October 28, 2021 to May 2, 2024, was improperly obtained.
- 2) To obtain such draconian relief, Hobson had to give an undertaking that he would be responsible for any damages the court may find were caused by the injunction. He is now seeking to evade such responsibility.
- 3) Hobson's submissions (under "Ancillary Matters") are an attempt to distract and mislead the court from how Hobson's actions have caused significant financial damage to DDM.
- 4) Hobson obtained - and maintained – the interim injunction on the ground that the coastal and marine works encroached on his property. The evidence of Buchanan, Hobson's expert, unequivocally established this to be false; there was no encroachment.
- 5) Whether there was a public way across the seaward boundary of Hobson's property or whether DDM and Flemming had the necessary approvals to carry out the coastal and marine works have no bearing on Hobson's action or his liability for damages arising from the interim injunction.

⁹ Cap. 20.07 of the Laws of Saint Christopher and Nevis

- 6) Hobson had no standing to claim against DDM and Flemming for alleged trespass on Crown land or unapproved construction and development work. It is only the Government defendants who could bring such claims, and they have not done so.
- 7) Hobson's submissions on the so-called "Ancillary Matters" should be disregarded and the court is asked to order an inquiry into damages of the interim injunction.

[115] I am persuaded by the submissions of DDM and Flemming on this matter. I am of the view that the issue can be properly dealt with in the proceedings for the inquiry into damages. In particular, it appears that Hobson is raising the issue as to whether unlawful conduct of applicants would have any bearing on the damages claimed as a result of an injunction. The court will hear submissions at the appropriate time, and I respectfully decline to make the requested findings in this case.

Conclusion

[116] The claim for five instances of trespass (originally four) was reduced to two by virtue of Hobson's abandonment of three of them in his closing submissions. The claims in relation to those three instances of trespass are to be dismissed. I have ruled that Ternion is liable for Trespass #1 (T1), owing damages to Hobson in the sum of \$9,000.00, and liability for Trespass #2 (T2) lies with Flemming for damages in the sum of \$432,750.00. All claims against DDM must be dismissed. The ancillary claim against Ternion falls away as no liability for T1 was placed on DDM. The ancillary claim against the Government defendants also falls away because Hobson did not pursue the claim for T5. DDM's ancillary claims are to be dismissed. The prescribed costs regime is not appropriate in this case and costs will be assessed, if not agreed. DDM's application for an inquiry into damages resulting from the interim injunction will be scheduled for hearing.

Order

[117] Based on all the foregoing, it is hereby ordered as follows:

- 1) Judgment is entered for the claimant Eustace Hobson in respect of Trespass #1 (excavation of soil, removal of trees and depositing of soil, equipment, a container and construction materials) against Ternion St. Kitts Limited.
- 2) Judgment is entered for the claimant Eustace Hobson in respect of Trespass #2 (excavation of soil, removal of trees and the cutting of a road) against Rodney Flemming.
- 3) The claim against DDM Properties Limited is dismissed in its entirety.
- 4) The claims for Trespass #3, Trespass #4 and Trespass #5 are dismissed against Rodney Flemming.
- 5) The ancillary claim by DDM Properties Limited against the Development Control and Planning Board, the Minister with Responsibility for Sustainable Development and the Attorney General of St. Kitts and Nevis is dismissed.
- 6) The ancillary claim by DDM Properties Limited against Ternion St. Kitts Limited is dismissed.
- 7) Ternion St. Kitts Limited shall pay the claimant Eustace Hobson damages for resultant damage caused by Ternion's trespass to Hobson's property in the sum of \$9,000.00 with interest at the rate of 5% per annum from the date of entering of the judgment to the date of payment in full.
- 8) Rodney Flemming shall pay the claimant Eustace Hobson damages for resultant damage caused by Flemming's trespass to Hobson's property in the sum of \$432,750.00 with interest at the rate of 5% per annum from the date of entering of the judgment to the date of payment in full.
- 9) Save for (10) below, in the circumstances of this case, costs will be assessed by this court, if not agreed.
- 10) In relation to the ancillary claim, each party is to bear its own costs.

11) DDM's application for inquiry into damages resulting from the interim injunction is to be heard on a date to be fixed by the Court Office.

[118] I thank Counsel for all the parties for their useful submissions.

Tamara Gill
High Court Judge

By the Court

Registrar