

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SKBHCV2017/0188

BETWEEN:

ESTHER WILKINSON-HARRIS

Claimant

and

LAWSON ARCHIBALD

Defendant

APPEARANCES:

Mr. Jason Hamilton for the Claimant
Ms. Camilla Cato for the Defendant

2020: January 29
February 26

JUDGMENT

GILL, M. (Ag.):

[1] The matter before the Court is for the assessment of damages owed to the claimant as a result of a judgment handed down in her favour against the defendant for trespassing on her land at Lime Kiln Housing Extension Development, Basseterre, St. Kitts. This assessment follows written and oral submissions by Counsel for the parties.

The Facts

- [2] The claimant's lot of land comprises 4,101.84 square feet. The property was allotted to her on or about January 31, 2002 by the National Housing Corporation. The purchase price for the land was \$13,095 for which she paid a deposit and other payments at intervals. Her final payment for the property was made on June 15, 2015.
- [3] Subsequently, she commissioned a construction company to clear the land to prepare to have a building erected thereon. It was then she became aware of the defendant's trespass on her property. It was found that the defendant had encroached on 1951.01 square feet, amounting to almost half of the claimant's lot of land. The trespass consisted of an erected concrete fence with concrete upright columns and a concrete foundation structure. Further, there were fruit trees, small crops and herbs planted on the encroached area.
- [4] On July 5, 2017 the claimant filed a fixed date claim form with statement of claim against the defendant. She claimed the following relief:
- I. A declaration that the claimant is the legal owner of property situated at Lot No. 51 Lime Kiln Housing Extension Development, Basseterre, St. Kitts;
 - II. A declaration that the defendant has committed and continues to commit a trespass to the claimant's property at Lot No. 51 Lime Kiln Housing Extension Development, Basseterre, St. Kitts;
 - III. Damages for trespass to the claimant's property;
 - IV. An injunction mandating the defendant to dismantle the structure and other items and objects erected and placed onto the claimant's property;
 - V. An injunction precluding the defendant, his servants and/or agents from entering on the claimant's property;
 - VI. Possession of the entire property situate at Lot. No. 51 Lime Kiln Housing Extension, Basseterre, St. Kitts;
 - VII. Costs; and
 - VIII. Any other relief the Court deems just.
- [5] On November 23, 2017 the defendant filed a defence and thereafter, the matter proceeded to case management.
- [6] Notwithstanding the filing of the defence, there was a turn of events when the matter came on for pre-trial review before Lanns J. on May 3, 2018. The relevant part of Her Ladyship's order reads:

“AND UPON hearing Counsel for the Defendant that the Defendant accepts that the land which is the subject of dispute belongs to the Claimant, and that there is no need for the matter to go to trial as the Defendant has already removed some of the structures;

AND WHEREAS the Defendant has indicated that he would be willing to leave the wall fence so long as the Claimant agrees;

AND UPON it appearing that a settlement of this matter is imminent;

IT IS HEREBY ORDERED THAT

1. The Defendant must within 7 days hereof completely remove whatever structure he has erected on the subject property save and except the wall fence which the Defendant is willing to leave once the Claimant consents. In this regard, the parties are required to engage in discussions and report to the Court on the adjournment date.
2. The matter is adjourned to 7th June 2018 for reporting and for possible further Pre-Trial Review.”

[7] On June 7, 2018 the Court made the following consent order:

“UPON this matter coming up for further Pre-Trial Review;

AND UPON hearing Counsel for the Parties;

AND UPON it appearing that all encroachments and nuisances on the Claimant’s property have been abated, and the only outstanding issue is that of damages;

IT IS HEREBY ORDERED BY CONSENT that

Judgment be and is hereby entered for the Claimant for damages to be assessed and costs upon application before the Master.”

[8] That application was filed on September 21, 2018.

[9] Notwithstanding the foregoing, in her witness summary filed on June 21, 2019, the claimant avers at paragraph 21:

“By his actions, I am precluded and excluded from accessing the entirety [sic] of Lot. No. 51 and the Defendant continues to date to trespass on the property as the concrete and other structures and trees erected on the property are still present.”

[10] The claimant is asking the Court to award her \$35,000.00 for damages for trespass and an additional sum as mesne profits.

Issue

[11] The Court has to determine the quantum of damages to be awarded to the claimant for the trespass to her property by the defendant.

The Law

[12] In Halsbury's Laws of England, trespass to land is defined as follows:

"Every unlawful entry by one person on land in the possession of another is a trespass for which a claim may be brought even though no actual damage is done."¹

[13] Commentary on damages for trespass to land by David Wright in the Australian text **Remedies** was quoted by Lanns M. in **Hugh Charles v Lyndis Wattley**.² The relevant passage reads:

"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 not merely to compensate the plaintiff for damage to land. That action also serves the purpose of vindicating the plaintiff's right to exclusive use and occupation of his or her land."³

[14] The law in relation to damages for trespass to land is explored in Halsbury's Laws where it is stated:

"In an action of trespass, if the plaintiff proves the trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the plaintiff 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 plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as should reasonably be paid for that use."⁴

[15] In summarising noteworthy authorities on the subject of damage to land as a result of a trespass, Lanns M. in the **Hugh Charles** case explained:

"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. 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.

¹ 4th Ed. Vol. 45 at paragraph 1384

² NEVHCV2012/0015, delivered June 19, 2013

³ Ibid at paragraph 13

⁴ Halsbury's Laws of England, 4th Ed. Vol. 45 at paragraph 1403

Where actual 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

[16] In claiming damages for trespass where there is physical damage to the property, the onus is on the claimant to prove that entitlement. In **Asot A. Michael v Astra Holdings Limited**, Rawlins J.A.(Ag.) had this to say:

“A claimant who suffers actual damage as a result of a trespass is entitled to be compensated with substantial damages, which he must prove. He must set out in his pleadings the value by which his land is 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 a continuing trespass, damages are usually measured by the worth of the use of the land. This would normally be the rental value.”⁶

Claimant's Submissions

[17] Learned Counsel for the claimant, Mr. Hamilton, submitted that the sum of \$35,000 is a proper amount to place the claimant in the position she would have been in had the interference to her property rights not occurred. The defendant took up almost half of her property. The fence prevented her from going onto her land.

[18] Mr. Hamilton cited the case of **Leonora Jean Jacques v Leon Gumbs**⁷ in which the defendant filed a counterclaim for damages for trespass involving the erection of a wire fence on his property and trespass to a stone wall which formed part of his property. He was awarded \$13,000, \$8000 for the trespass committed on his property and \$5000 for the trespass to the stone wall. At paragraph 85 of the judgment Williams J. (Ag.) stated:

“In calculating Damages, consideration is to be given to the benefit deemed to have been acquired by the Trespasser by reason of the unauthorised use of the land. As already stated, 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.”

[19] Counsel also relied on the celebrated case of **Horsford v Bird**⁸ to highlight an award of \$27,300, increased from \$13,650 by the Privy Council for damages for trespass which involved the erection of a boundary wall and fencing which created an encroachment of 455 square feet of the

⁵ Supra at note 2, at paragraphs 15 and 16

⁶ Civil Appeal No. 17 of 2004 at paragraph 56, (Antigua & Barbuda)

⁷ NEVHCV2009/0091, delivered September 24, 2014

⁸ [2006] UKPC 3, (Antigua & Barbuda)

appellant's land to form part of the respondent's garden. The appellant was awarded an additional sum of \$16,892 as damages for mesne profits.

Defendant's Submissions

[20] Learned Counsel for the defendant, Ms. Cato, while accepting that the claimant is entitled to damages for trespass to her land, argued that the claimant is not entitled to two separate awards. She posited that the sum awarded to the appellant in **Horsford v Bird** in addition to the sum for mesne profits was *in lieu of* an injunction which the Board felt the learned trial judge had erred in refusing.

[21] Counsel also distinguished the **Hugh Charles** case⁹ from the case at bar. In that case, the defendant trespassed on the claimant's land by fencing it and constructing a two-storey concrete apartment complex thereon which she rented mainly to medical students. The trespass consumed the entire parcel of land owned by the claimant. He claimed and was awarded \$326,700, the market value of the land. He did not seek to have the land returned. He was also awarded damages for trespass in the form of mesne profits for the use of the land made by the defendant, and special damages for expenses incurred for the services of a land surveyor and quantity surveyor.

[22] Ms. Cato submitted that there is no reason to pay the claimant any amount for her land as she has obtained judgment giving her possession of the portion of land encroached upon. The trespass was partial and there is no evidence of any pecuniary benefit enjoyed by the defendant as a result of the trespass. Whereas the claimant states that the defendant planted fruit trees and small crops on the land, she has provided no evidence of how this benefitted the defendant. She maintained that the claimant should be awarded one sum for damages for trespass in the form of mesne profits.

[23] Counsel pointed out that the claimant has not pleaded any loss occurring to her nor has she pleaded or stated in her witness summary any physical destruction to the land or any evidence of depreciation in value of the property as a result of the trespass. She stressed that there was no quantification of damage. Therefore, she submitted that the claimant is entitled to nominal

⁹ Supra at note 2

damages as in **Maria Thorne-Bramble v Lauriston “Yankee” Primus**¹⁰, a case in which no evidence was led by the claimant of loss suffered as a result of the defendant’s trespass which involved damage to a galvanize fence the claimant had erected. Thom J. quoted the learning in Halsbury’s at paragraph 52 of the judgment which reads:

“[52] The quantum of damages to be awarded in such cases is stated in Halsbury’s Laws 4th Edition Volume 12 paragraph 1170 as follows:

‘A plaintiff is entitled to nominal damages for trespass even if no damage or loss is caused: if damage or loss is caused, he is entitled to recover in respect of his loss according to general principles... Where the defendant has by trespass made use of the plaintiff’s land the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use. It is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for some other reason.’ ”

The claimant was awarded \$1000 as damages for trespass.

Analysis

[24] In the case at bar, the claimant has presented evidence of physical damage or injury to her property occasioned by the trespass in terms of the concrete and other structures and fruit trees and based on her witness summary that the concrete and other structures and trees remain on the land. At the assessment, the claimant said on oath that her witness summary was true and correct. She was not cross-examined and the defendant did not file a witness summary on the assessment of damages. This demonstrates a level of inconsistency with the preamble by Lanns J. in her order of June 7, 2018 that it appeared that all encroachments and nuisances on the claimant’s property had been abated. In oral submissions, both Counsel clarified that only the wall fence remains on the land. Mr. Hamilton advanced that the claimant must remove it as it is inconsistent with her building plans.

[25] Subsequent to final payment for the property, the claimant engaged the services of Pemmers Construction to clear the land “for the purposes of conducting an assessment of the land to begin to make preparations to ultimately construct a dwelling house thereon”. As a result of the trespass, she was kept out of a substantial portion, amounting to almost half of her property. This must be reflected in the award.

¹⁰ High Court Civil Claim No. 162 of 2002, delivered February 8, 2006 (St. Vincent and the Grenadines)

[26] The claimant is entitled to an award that would put her in the position she would have been in had the trespass not occurred. She has shown actual physical damage to her land. As stated earlier, in such a case, the normal measure of damages to be awarded is the diminution in value of the land or the cost of reasonable reinstatement. No evidence has been led of diminution or depreciation in the value of the claimant's property. Neither is there any evidence of any costs involved in restoring the property to, or close to, its original state. At this point, the wall fence is the only remaining structure to be removed. All other structures have been removed by the defendant. Its presence constitutes a continuing trespass for which the measure of damages would normally be the rental value of the land. Again, no evidence on this was led.

[27] Taking into consideration all the circumstances of this case, the Court considers the sum of \$8000 to be an appropriate award for damages for trespass to the claimant's property.

[28] Relevant to these proceedings is a receipt dated April 18, 2017 exhibited to the claimant's witness summary evidencing payment of \$350 to a licensed land surveyor whose services she retained to determine the extent of the encroachment by the defendant. Although open to the claimant to do so, this was not pleaded in the claim filed on July 5, 2017. On the well-established principle that special damages must be pleaded, particularised and proved,¹¹ the claimant is unable to recover this amount.

[29] The Court is of the view that this is an appropriate case for an additional award for damages for trespass in the form of mesne profits. The claimant is entitled to this award for the defendant's unlawful occupation of her property. A formula for the calculation of mesne profits was advanced in **Horsford v Bird**,¹² being an annual rate of 7.5 per cent of the capital value of the property. As the exact date for the commencement of the trespass cannot be ascertained, Mr. Hamilton submitted that given the cultivation observed on the land, an appropriate date for the assessment is February 1, 2015. He used this formula in claiming a sum for mesne profits. Ms. Cato had no issue with this formulation as to the issue of mesne profits. The Court accepts this approach. The capital value is taken as the purchase price of \$13,095. Using this formula, the calculation brings the sum to \$4910.63.

¹¹ Per Lord Diplock in *Ilkiw v Samuels* [1963] 2 All ER 879 at 890

¹² *Supra* at note 8

ORDER

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

- (1) The defendant shall pay to the claimant the sum of \$8000 for damages for trespass to her property.
- (2) The defendant shall pay to the claimant a further sum of \$4910.63 as mesne profits.
- (3) The claimant is awarded prescribed costs of \$1452.45 in accordance with Part 65.5 of the Civil Procedure Rules 2000 as amended.

[31] I am grateful to both learned Counsel for their assistance in this matter.

Tamara Gill
Master (Ag.)

BY THE COURT

REGISTRAR