

EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

DOMHCV2013 OF 0297

BETWEEN:

[1] WALTER HEITZ
(by his duly appointed Attorney Susanne Heitz)

Claimant

And

[1] ROSEMARY BUNCHE
[2] REYNOLD BUNCHE

Defendants

Appearances:

Mrs. Dawn Yearwood Stewart of Dawn Yearwood Chambers for the
Claimant

Ms. Hazel Johnson of de Freitas, de Freitas and Johnson for the
Defendants

2013: October 23rd

2014: February 10th

JUDGMENT ON ASSESSMENT OF DAMAGES

- [1] THOMAS, J.: (Ag.) In a Fixed Date Claim filed on the 14th January 2013 the claimant, Walter Heitz, is seeking various reliefs against the defendants, Rosemary Bunche and Reynold Bunche. The basic issue as pleaded in the claimant's Re-Amended Statement of Claim filed on 13th March 2013 is that of trespass.
- [2] The claimant's case is that in or about 19th December 2012 in pursuance of the development of a portion of land adjoining the claimant's property, the defendants and their agents excavated deeply on the claimant's land, removed substantial amounts of soil to facilitate access to their land development, without the consent of the claimant. And it is further contended that the claimant suffered damage by reason of the defendant's conduct.
- [3] It is the further contention of the claimant that damages will not suffice in the circumstances. In the premises a number of reliefs are sought.
- [4] Ultimately the defendants admitted liability and on 15th April 2013 judgment was entered for the claimant for damages to be assessed, if mediation failed.
- [5] Consideration must now be given to the constituents of the assessment of damages. The claimant's prayer is for damages including aggravated and exemplary damages for trespass.

Special Damages

- [6] The assessment proper must now begin with a consideration of special damages, which rest on the simple but fundamental proposition that they must be specifically pleaded and proved¹. Further, it is said that:

"Some losses are susceptible of exact quantification, for example, medical expenses or loss of earnings incurred up to the date of the trial.

¹ The right to property is now an entrenched fundamental right by virtue of section 6 of the Constitution of the Commonwealth of Dominica.
See: *Ratcliffe v Evans* [1892] 2QB 524; *The Susquehama*[1926] AC 655; *Parestrello E. Companies v United Paint Company* [1969] 3 ALL ER 478

Compensation for such loss, known as 'special damages', must be specifically pleaded and proved. Other losses either have no pecuniary equivalent, as for example, pain and suffering or their quantification involves a substantial amount of guess work, as with future pecuniary losses²

Submissions

- [7] On behalf of the claimant it is submitted that the expenses incurred by the claimant in sending his daughter to address the trespass issue involve: flight expenses, caregiver for disabled child expenses, hotel expenses, vehicle rental expenses, surveyor fees, legal fees and loss of earnings.

Flight expenses

- [8] The submissions continue by giving a lump sum total of EC \$21, 691.91³. For the avoidance of doubt; the court must reproduce the items pleaded in the Re-Amended Statements of Claim. They are as follows: cost of flight from Hanover Germany to Frankfurt Germany- Euro \$210.00; from Frankfurt Germany to Barbados-Euro \$5000.00; overnight in Barbados \$250 (B'ds); caretaker wages for disabled child Euro \$500.00; car rental- US \$700.00.

Other expenses

- [9] The first expenses identified are: airfare Barbados to Dominica US \$146.93. Surveyor fee- EC \$977.50; legal fees EC \$10,750.00. In this regard the submissions on behalf of the defendants are that these expenses have not been pleaded in the Re-Amended Statement of Claim. On these premises it is submitted that this expenses should not be allowed.

² A.I. Ogus, *The Law of Damages* (1973) p.4

³ Also given are the exchange rates of the EC dollar to the Euro and the EC dollar. to the EC dollar, being \$340 and EC \$1,343 respectively

[10] The court agrees that the pleadings do not exist; and the court also restates the principle that that the purpose of pleadings is to mark out the parameters of the case that is being advanced by each party.⁴

[11] The next expense identified by learned counsel for the defendant is the cost of airfare: Frankfurt, Germany to Barbados Euro \$5000.00. The submissions go on to say that: "the document relating to this expense is found at pg. 51 of the trial bundle and gives a total of Euro \$82498. The claimant's claim as set in the witness statement is therefore grossly overstated and should not be allowed."

[12] Contrary to the submissions, the airfare between Frankfurt, Germany and Barbados is pleaded in the defence to Re-Amended Statement of Claim. The total pleaded is Euro \$5000.00 but the document relied on at page 51 of the trial bundle is Euro \$834.98. Therefore, using the conversation rate of 1 Euro to EC\$3.40, the total allowed is EC\$2804.93. To this must be awarded US \$205.51 for overnight accommodations in Barbados on 31st December, 2012. The conversion yields EC \$277.44. The total awarded is therefore EC \$3,082.37

Caretaker wages for disabled child: Euro \$1000.00.

[13] The defendants' submission is that whilst the sum of Euro\$500 is pleaded it has "mysteriously doubled." The further submission is that this expense is such that one would have expected it to have been completed on January 2013; and further that there has been a total failure to prove this expense.

[14] The court agrees since, as noted before, it is not merely pleading that item of special damage but it must also be proven. This matter is considered further under nominal damages

⁴ Per Lord Wolf, *Mc Philemy v The Times Newspaper* [1999] 3 ALL ER 775, 792-793

Car rental: EC\$700.00

- [15] The amount pleaded for this expenditure is US\$700.00.
- [16] With respect to this item, learned counsel for the defendants, makes a number of propositions: the conduct of the defendants in halting the works, removing the equipment and agreeing not to resume the work until the matter was resolved; having received the defendants proposal by email on 12th January, 2013 it was unnecessary to file proceedings at that stage on 14th January; the premature filing of the suit caused Ms. Hertz to extend her stay and consequently the extension of the car rental to 24th January, 2013. The submissions continue in this way:
- “The Claim in this matter was justified on 14 January 2013 and the inter partes hearing of the application took place January 18, 2013. Suzanne Heitz admitted that under cross examination that she was aware on January 18, 2013 that the Defendants had in fact signed the undertaking and she was also aware that the case was to take its usual course through the court system. Notwithstanding those facts, Ms. Heitz chose to remain on Dominica for a further two weeks and to rent the car for a further 1 week. There is no evidence that her remaining here had anything to do with this case.
- In the circumstances we ask the court not to allow recovery of the full amount claimed as car rental fees but to apply a discounted figure disallowing the fees attributable to the additional week.”
- [17] Having regard to the evidence relating to the claimant's activities in Dominica, the court concludes that the period of the car rental is excessive and agrees that the quantum should be reduced. This takes into account the question of re-confirmation and related matters which are normal in the circumstances.
- [18] Accordingly, an amount of US\$500.00/EC\$1335.00 is awarded with respect to this item.

Nominal damages

- [19] Learned counsel for the claimant is asking the Court to award nominal damages with respect to surveyor's fees and caretaker wages. In this regard the cases of **Greer v Alston Engineering Sales and Services**⁵ and **Williams v Comptroller of Customs and the Attorney General**⁶. But this is not the whole equation.
- [20] The fact is that both items are items of special damages, by definition, since they are quantifiable expenses. However, the fundamental rule is that special damages must be pleaded and proven.
- [21] In respect of the pleadings the item of caretaker wages is pleaded as part of the particulars of special damages. However, surveyor fees are not so pleaded, and as such are ruled out immediately.
- [22] The document which counsel submits represents as a receipt for the care taker wages is written in a language not used in this court. And the fact that the document bears the claimant's name is, in a real sense, at large. The court regards this as insufficient proof.
- [23] The rule is that nominal damages may be awarded when the fact of loss is shown but there is an insufficiency of evidence. This is the present case so that instead of the Euro \$500.00 as pleaded the court awards Euro \$100 of EC \$340.00 as nominal damages.

Trespass to land

- [24] In **Elements of Land Law**⁷ the fundamental nature of trespass is stated thus:

"The roots of trespass to realty lie in the medieval action of trespass *quare clausum fregit*. The inviolability of land from the physical incursion of strangers is a principle deeply grounded in the common law, as fundamental to the concept of property as it is to basic notions of individual freedoms and personal privacy. Laws relating to trespass have been described as an important feature of any government dedicated to

⁵ [2003] 63 WIR 388

⁶ SLUHCV259/2006

⁷ (5th ed.) by Kevin Gray and Susan Francis Gray at para. 10.1.2.

the rule of law. The common law, therefore, it is virtually axiomatic that any entry upon land unsupported by consent or other authorization or justification is a trespass. The right to exclude unwanted strangers has been described as one of the essential sticks in the bundle of property rights and it is the fundamental right of the owner of land ... to object to trespass. It is in this area that property and privacy concerns most obviously coalesce and the common law tradition has long endorsed the right of the citizen to the control of and enjoyment of his own property, including the right to determine who shall and who shall not be permitted to invade it."

Damages for trespass to land

[25] As noted before, trespass to land involves entry upon land unsupported by consent or other authorization. In this context a claimant is entitled to nominal damages for trespass even if no loss or damage is caused. On the other hand, where damage is caused the damages recoverable may be greater. In all of this, the underlying principle being that a landowner is entitled to be placed, by way of damages, in the same position he would have been in but for the trespass.⁸

[26] In **Attorney General v. Blake**⁹ Lord Nicholls for the Board expressed the principles in a different way. This is what his Lordship said:

"Damages are measured by the plaintiff's cost, not by the defendant's gain. But the common law, pragmatic as ever, has long recognized that there are many commonplace situations in where a strict application of this principle would not do justice between the parties. The compensation for the wrong done to the plaintiff is measured by a different yardstick. A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely by the use of the land. The same principle is applied where the wrong consists of the use of another's land by depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user."

[27] Reduced to essentials, the normal measure of damages is the amount of the diminution in the value of the land on the cost of the reinstatement but not both¹⁰.

⁸ see: Halsbury's Laws of England, Vol. 5 (4th ed), at para. 1170

⁹ [2001] 1 A.C. 268, 278.

Diminution in value

- [28] Learned Counsel for the claimant makes the general point on the recovery of damages¹¹, and goes on to submit that in calculating the damages regard must be had to benefit derived by the trespasser by reason of his unauthorised use of the land¹². The submission goes on to say that “the value of the land damaged by reason of the trespass is \$22,500.00 being 141 feet at \$8.00 per square [foot] (see page 40 of the Trial Bundle
- [29] The evidence revealed and accepted by the court is that the area of the claimant’s land measuring 141 feet by 20 feet was bulldozed by the defendant in preparation for the building of a road to their land so as to provide easier access to their proposed development.
- [30] The foregoing rests on the survey report by GS Surveys Ltd which indicates, inter alia, that the “the sales comparable approach is the most reliable method of site valuation and has been utilized in arriving to¹³ and opinion of market value. The report goes on to state that a value of \$8.00 per square foot has been applied to the land area. On that basis the following results are given: land area 2,820 sq. ft; rate per square foot \$ 8.00; land value \$22,560.80.
- [31] In the case of **Joseph W. Horsford v Lester B. Bird and others** ¹⁴ the Board examined the methodology applied where there was an encroachment on some 455 square feet of the appellant’s land; and in the respect of which the High Court Judge awarded EC \$13,650.00 being 455 square feet at EC \$3.00. The Board, after referring to the reasoning in **Wrotham Park Estate Co. Ltd v Parkside Homes Ltd** said this:

¹⁰ See: Mc Gregor on Damages (1st ed) at para 1392

¹¹ The case of *Stoke-on-Trent Council v W & J Wess Ltd* [1989] WLR 1406 is cited

¹² At paragraph 12 of the Submissions on Behalf of the Claimant

¹³ Sic

¹⁴ [2006] UK PC 3

“In the present case the comparable question would have been how much the appellant could reasonably have sought from the respondent in November 2000 as the price of the appellant’s land that the respondent had incorporated into his garden. On the basis that the value of the piece of land as part of an undeveloped plot was \$13,560.00 their Lordships think that its value to the respondent as part of the garden of his new house would have been at least double that figure. Their Lordships would therefore substitute the sum of EC \$27,300.00 for the sum of EC \$13,560.00 as the value of the land.”

[32] The principle restated by the Board is that the measure of damages is the area of the land encroached, times the value of the land. In this regard it is to be noted that the value took into account the use to which the land was put in relation to the respondent’s new house with a swimming pool.

[33] In this case the defendants had not reached that stage beyond encroachment or trespass and as such there exists no basis to go beyond the value of \$8.00 per square foot, the purpose of the encroachment, notwithstanding.

[34] Accordingly, the court awards damages for trespass in the amount of \$22,560.00.

Exemplary damages

[35] In the **Law of Damages**¹⁵ the following learning is to be found:

“The fundamental principle emerging from both **Rookes v Barnard** and **Cassel & Co v Browne** is that in general exemplary damages should not be awarded; the object of a damages award is to compensate the plaintiff. In order to assess the merits of this principle, it is first necessary to discover what objects an exemplary award is supposed to pursue. Like other forms of punishment, it may be said that the award has a threefold purpose to punish, deter and prevent. The defendant has committed a wrong in an unconscionable manner and for this he should be made to suffer by punishment. At the same time this should both deter him from repeating his conduct, and deter others from acting in a similar way. Lastly it is preventative in two senses: it should prevent the plaintiff from resorting to self-help, and it should prevent the defendant from deriving a profit from the commission of a tort, where the material he procures exceeds the compensation payable to the plaintiff.”

¹⁵ A.I. Ogus, at page 32

Submissions

[36] In making a case for the award of exemplary damages, the submissions may be summarised thus:

1. The defendants had scant regard for the rights of the claimant in that no permission was sought to enter upon the land.
2. The defendants were presumptuous.
3. The defendant's was calculated to make a profit based on the evidence of their witness, Felix Thomas, who testified under cross-examination that an alternative route would be tedious the claimant's land was in an upscale area, and the intention was to sell the land at \$10.00 per square foot, to maintain the ambiance and keep the area nice.
4. No regard must be had from the defendants' protest that searches and inquiries were made concerning the claimant.
5. The defendant's contention that they were of the view that in the course of developments where the owners could not be located they can swap the land, should be disregarded.
6. The defendant's contention that the approval of the plan by the relevant authority gave them the green light should also be disregarded.

[37] There are no submissions on behalf of the defendant with respect to the award of exemplary damages. But there can hardly be any debate as to the award of such damages in this context, as it must be that the conduct of the defendant should be deterred in view of a stated profit motive, trespass on land based, inter alia, on a customary land swap in such circumstances. But while there may be such a custom, it must be that an agreement must underline such a transaction between the relevant parties or authorized persons in this connection. This is clearly absent in this case and the fact that inquiries were made cannot to negate trespass.

[38] Learned counsel for the claimant had no hesitation in seeking to rely on the case of **Jurgenson v Public Utilities Authority**¹⁶ in which the learned trial judge made an award of EC \$100,000.00 in exemplary damages, but learned counsel for the defendants in making submissions on aggravated damages did comment on this case, and which the court find relevant in this context. The submission, in part is as follows:

"We respectfully submit that the case can be distinguished from the case at bar in very significant aspects. In the Jergenson case the defendant had acted in a most high-handed manner, notwithstanding that their request for permission had been denied, notwithstanding the grant of an injunction against them, were reckless as to whether their actions were legal or not and had done substantial works on the land."

[39] To the foregoing must be added the fact that the claimant had a 25 year lease with an option to renew and defendant had installed heavy equipment and laid cables concerned with the provision of public utilities, including telecommunications for the entirety of Antigua and Barbuda. And despite an injunction, work continued unabated. It is that context that the quantum of exemplary damages must be understood in that case.

[40] There can be no doubt that the actions of the defendants fall with the ambit that needs to be punished and deterred. There can be no excuse for their action in the quest for profit and provide easier access to their lots. And to hide behind the purported approval of the plan, showing the trespass, by the relevant authority makes bad matters worse. The defendants infringed a fundamental rule that only the landowner who agrees to the swap can approve.

[41] The defendant's conduct falls within category of intention to profit therefrom. This is placed in context Lord Devlin in **Rookes v Bernard**¹⁷ thus:

¹⁶ ANUHCV 2004/0529

¹⁷ [1964] AC 1129,1127

“Where a defendant with a cynical disregard for the plaintiff’s right has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. The category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object perhaps some property which he covets- which he either could not obtain at all or not obtain except at a price greater than he wants to put down.”

[42] In the premises the court awards exemplary damages in the amount of \$15,000.00.

Aggravated damages

[43] Aggravated damages have been explained by the simple proposition that where the defendant’s conduct adds insult to the basic injury to property, the plaintiff may be awarded a sum for his justifiable grievance.¹⁸ But the law has since developed, and in the **Joseph Horsford**¹⁹ case Lord Scott of Foscote gave this concise ruling on the award of aggravated damages: “It is well established that trespass to land accompanied by high handed, insulting or oppressive conduct may warrant an award of aggravated damages. The award in such a case is to compensate the plaintiff for the distress and injury to his feelings caused by the conduct in question.”

Submissions

[44] Submissions on behalf of the claimant based on the following: the defendants ignored the claimant’s proposal to settle; after the trespass but before the filing of the proceedings; the defendant’s refused to speak to the claimant’s attorney; the injured feeling of the claimant’s attorney – in fact; and the claimant being treated contemptuously by the defendants.

¹⁸ Davis v Bromley Urban District Council [1903] 67JP 275

¹⁹ Loc-cit, at para 14

- [45] For the defendants the submissions seek to urge the court to resist such an award. In this connection the **Joseph Horsford** case and **Clarabell Investments Ltd v Antigua Isle Company** were cited in order to make the point that in both instances the holding was that the threshold was not met.
- [46] The further submissions are that the defendants made every effort to locate the claimant; based on advice from “experts” who relied on the common practice in Dominica, they made allocation to swap land on the subdivision plan which was approved; the cessation of works by the defendants as soon as they had knowledge of the objection; the defendants unhesitatingly gave an undertaking when the interim injunction was sought; and the defendants’ conduct was far from high-handed, insulting and oppressive.
- [47] The court notes that in the **Joseph W. Horsford** case, Lester B. Bird was at the material time a senior minister in the Government of Antigua and Barbuda and the letters written to him by the appellant were simply ignored and the encroachment continued. In all the encroachment lasted some 8 years and three months.
- [48] Upon consideration of the submissions on both sides, the court agrees with those on behalf of the defendants that the conduct in issue was not high-handed insulting or oppressive and as such does not reach the threshold to warrant an award of aggravated damages.

Costs

- [49] The claimant is entitled to costs and unless otherwise agreed, prescribed costs are hereby awarded.

ORDER

IT IS HEREBY ORDERED as follows:

1. The following amounts are awarded as special damages
 - a) Flight expenses and overnight expenses in Barbados is EC \$3,082.37

- b) Car Rental US \$500.00/ EC \$1,335.00,
2. Nominal damages of Euro \$100.00/ EC \$340.00 is made in respect of caretaker wages for disabled child as this was not pleaded and proven as required by law.
 3. EC \$22,560.00 is awarded as damages for trespass
 4. EC \$15,000.00 is awarded as exemplary damages
 5. No award is made for aggravated damages as the defendants' conduct does not meet the legal threshold of being high-handed, insulting or oppressive
 6. Unless otherwise agreed, the claimant is entitled to prescribed costs.

Errol L. Thomas
High Court Judge (Ag)