

**EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO.: SVGHCV2005/0352

BETWEEN:

**Kennie Tannis
(appointed Legal Personal Representative
of the Estate of Maurice Tannis, deceased)**

Claimant

and

Patrick Bunyan

Defendant

Appearances:

Ms. Suzanne Commissiong of Counsel for the Claimant
Mr. Emery Robertson of Counsel for the Defendant

**2018: March, 19th
June 29th**

JUDGMENT

- [1] **MOISE, M.:** This is an application for an assessment of damages pursuant to judgment dated 10th June, 2015. On 21st July, 2005, the claimant filed an action against the defendant for a declaration that he was the owner of a parcel of land situated in Bequia. He also claimed damages for trespass and destruction of property against the defendant. On 21st July, 2005, the claimant also filed an application for an interim injunction restraining the defendant from entering on the land. It appears that this application was not contested, as the defendant acquiesced and in his affidavit dated 28th July, 2005, undertook not to enter or deal with the property until the determination of the matter. The defendant however, indicated that he had obtained planning approval for the construction of a commercial building on the land and that a delay in the trial would place this project on hold. He also noted that his preparations for the commencement of the project were already at an advanced stage. The defendant filed a defense and counterclaim on 5th April, 2006, claiming to be the true owner of the property in question. On 10th June, 2015 Henry J delivered her judgment after the

matter went through the trial process. The claimant's claim was dismissed with costs to the defendant. The defendant was also successful in his counterclaim, that he was in fact the rightful owner of the property. The defendant was awarded damages to be assessed.

- [2] The defendant filed his application for an assessment of damages on 11th August, 2016 and both parties have filed affidavit evidence as well as written submissions. However, the submissions filed on behalf of both parties have addressed the issue of damages for trespass to land. It is important to outline the express wording of the trial judge in order to appreciate the order for damages to be assessed. At paragraph 11 of her judgment Henry J stated:

"During the course of these proceedings, Mr. Tannis applied to the court for an interim injunction to restrain Mr. Bunyan from trespassing on the subject land. Mr. Bunyan gave an undertaking to the court not to do anything on the land unless the court gives him permission to do so. Usually the applicant for an interlocutory injunction provides an undertaking in damages to indemnify the respondent for any losses he may incur if the applicant is unsuccessful in the substantive claim. Mr. Tannis would in the normal course of events have had to provide such an undertaking if the interim injunction was granted. He was not required to give such an undertaking because the application was not heard. However, his lawsuit had the effect of interfering with Mr. Bunyan's enjoyment and use of his property. Therefore, the absence of such an undertaking does not absolve him from liability for Mr. Bunyan's losses which reasonably and foreseeably arose from the Tannis' interference with this enjoyment and use of the subject land."

- [3] Essentially, the trial judge found that although an interim injunction was not formally granted, the defendant's undertaking entitled him to damages for the financial loss he suffered as a result of the claim against him. Her Ladyship went on to state at paragraph 12 of her judgment that **"Mr. Bunyan would have suffered consequential financial losses arising from the delayed start of his project. As the owner of the land, he is entitled so far as achievable monetarily, to be restored to the position he would have been in if this suit had not been initiated. He is entitled to recover an amount representing general damages for the losses reasonably incurred by the delay occasioned by this claim and which hindered the commencement of his project."**

- [4] The award of damages is therefore not that of damages for trespass, but rather the consequential loss suffered as a result the claimant commencing this claim against the defendant as well as his own acquiescence upon being served with an application by the claimant for an interim injunction.

The Damages Claimed

- [5] The defendant claims, firstly, damages for the difference in the cost of construction of his commercial building. In his affidavit dated 18th August, 2016 he states that in 2005 he obtained planning permission for the construction of a commercial building on the property. According to documentary evidence filed by the defendant, the cost estimate which he obtained for the construction of the building in 2005 was the sum of \$330,057.95. He has attached to his affidavit of 18th August, 2016 a letter from Fraser Construction Company Limited, along with a detailed breakdown of the costs of construction amounting to \$676,578.39. In essence, he argues that it now costs him \$354,520.44 more to construct this building than it would have in 2005 and requested this sum in damages. At the hearing of the assessment, counsel for the defendant accepted that had this building been constructed in 2005, the defendant would have naturally incurred expenses for maintenance based on the natural wear and tear of the building. These he has not had to incur given his undertaking not to pursue this project until the outcome of the trial.
- [6] The claimant, on the other hand, argues that the defendant should be awarded no more than \$15,000.00 to \$20,000.00 in damages. However, as I have indicated earlier, the claimant grounds this submission on the premise that the award of damages granted to the defendant was due to the claimant's trespass on the property. This is not the case. The defendant never claimed for damages in trespass. As the trial judge noted in her judgment, the purpose of this award of damages, is to ensure that the defendant, is as ***"far as achievable monetarily ... restored to the position he would have been in if this suit had not been initiated."*** In my view therefore, the defendant is entitled to damages for the fact that it would now cost him more to have this building constructed than it would at the time of the filing of the claim. I would award the defendant the sum claimed but make a 10% deduction based on the concession made at the hearing that there would have been expenses occasioned due to natural wear and tear over a period of 10 years which the defendant has not had to incur. I will award the sum of \$319,068.00 in damages for the difference in construction costs of the defendant's commercial building.
- [7] The defendant also claims damages for loss of rental income. He states that prior to the filing of the claim, he had in his possession, a lease agreement in which he had agreed to lease one office within the building for the sum of \$1000.00 monthly. The lease agreement was presented in

evidence and I observe that it was signed on 14th January, 2004 and covered a lease for a period of 5 years commencing in January, 2004 to January, 2009. He states that the building would accommodate 8 offices and claims loss of rental income at \$8,000.00 monthly for a period of 10 years. However, I must express some difficulty in relying on the lease agreement as proof that the defendant would have earned the amount of money he claims in rental income. The defendant presents evidence of the building plans which were not approved until October, 2004 and states that he was to commence construction of this building in 2005. The evidence does not provide an estimated time for completion of the construction. I do not accept that someone had in fact agreed to pay \$1000.00 monthly for a period during which construction of the building had not even commenced.

[8] In my view the amount claimed in loss of rental income is somewhat remote. I do not doubt that the defendant is entitled to compensation for the fact that he was unable to derive a benefit from the use of his land; especially given the fact that he had clear plans to construct a commercial building as far back as 2005. However, there are too many variables in the issue of rent to ascertain, even on the balance of probabilities that the defendant would have earned the amount of money in rent that he has claimed.

[9] In his submissions, the defendant relies on the case of **Richard Williams et al v. Oline Dennie et al**¹ for the proposition that he is entitled to the sums claimed in loss of rental income. In particular, the defendant draws the court's attention to paragraph 48 of the judgment of master Pearletta Lanns (as she then was). Master Lanns referenced the privy council decision of **Inverugie Investments Ltd. V. Hackett**² where it was determined that the claimant was entitled to recover reasonable rent for the period in which he was deprived of possession of an apartment complex which was owned by him. However, one of the main distinctions between the case referred to by the defendant, as well as the decision of the privy council referenced by the master, is that in these cases the subject matter of the claim was possession of a building which was already constructed. In the present case, construction of the building had not commenced when the action was filed and the interim injunction was applied for. In my view, this makes it difficult for the court to ascertain, as

¹ SVGHCV2006/0244

² [1995] 1 WLR 713

a matter of fact, that the defendant would have collected \$8000.00 monthly in rent for the entire period in which the matter was before the court.

[10] I note however, in following the decision of Master Lanns, that what the defendant is entitled to is damages which are reasonable in the circumstances. He does not have to prove actual loss. In my view, I must consider the following facts:

- (a) That the construction of the building had not yet commenced when the action was brought by the claimant. Even if the defendant was likely to have rented the building upon completion, a reasonable period of time for completion of such a project must be taken into consideration;
- (b) That the lease agreement presented in evidence is questionable given that the dates covered in this rental agreement commenced even prior to the grant of planning permission to construct the building.
- (c) That there is no guarantee that all 8 offices would have been rented for the entire period. He is however entitled to argue that he has lost the opportunity to do so;
- (d) That had the building been constructed, there would have been certain expenses which would have to be met out of the proceeds of rent. The defendant is therefore claiming gross rental income which in itself is variable and to some extent remote.

[11] Taking these factors into consideration, I am not of the view that the defendant is entitled to the amount of damages he claims. What must be considered is what is reasonable in the circumstances. Despite the distinctions, the approach of master Lanns in ***Richard Williams et al*** is also instructive. She noted at paragraph 50 of her judgment that there is a need to avoid a windfall and despite the fact that rent for a 9 year period was claimed she awarded damages for loss of rent for a period of 3 years. In the present case, as I have already observed, the building was not yet under construction. I would award damages at the monthly sum of \$3000.00 for a period of 3 years. I would therefore award damages in the sum of \$108,000.00 for the fact that the defendant

was deprived on the use of his property as a result of the commencement of this action against him.

[12] The claimant also states that he paid an additional sum of \$1200.00 to Fraser Construction Company Limited for the revised estimates which he presented to the court. I am of the view that he has established this claim and would therefore award him this amount. There is however, a claim for \$10,000.00EC for the storage of a container on the premises. The defendant asserts that the claimant rented this container out for the sum of \$1000.00 per year. I note, however, that the claimant passed away long before the trial took place. I am not of the view that the defendant has presented sufficient evidence to substantiate this claim. I would therefore deny this request.

[13] Finally, the defendant claims the sum of \$10,000.00 in general damages. The defendant relies on the case of **Lorenze AD Williams v. Hestina Edwards**³ to substantiate this claim. This case however dealt with damages for trespass to land. In the present case Henry J, in awarding damages to the defendant, stated that he ***“is entitled to recover an amount representing general damages for the losses reasonably incurred by the delay occasioned by this claim and which hindered the commencement of his project.”*** In my view, although the term “general damages” was used, the award of damages relates to actual financial loss. This has been adequately provided for in the award of damages already made and I would deny a claim for any further damages.

[14] In the circumstances the defendant is awarded the following in damages:

- (a) \$319,068.00 in damages for the difference in construction costs of the defendant's commercial building;
- (b) \$108,000.00 for being deprived of the use of his property during the existence of the claim;
- (c) \$1,200.00 representing the amount paid for the cost estimate from Fraser Construction Limited.

³ SVGCVAP2000/0020

- (d) Interest at a rate of 3% per annum from 21st July, 2005.
- (e) Costs on this application in the sum of \$2,500.00.

**Ermin Moise
Master**

By the Court

Registrar