IN THE SUPREME COURT OF BELIZE, A.D. 2014
(CIVIL)

CLAIM NO. 307 of 2014
BETWEEN:

MICHAEL MODIRI	**Claimant**
AND	
BRADLEY PAUMEN	**1st Defendant**
ATTORNEY GENERAL OF BELIZE	**2nd Defendant**
MINISTER OF NATURAL RESOURCES	**3rd Defendant**
COMMISSIONER OF LANDS	**4th Defendant**
SIBUN GRAIN AND CATTLE LTD	**5th Defendant**
DAYLIGHT & DARKNIGHT CAVES ADVENTURES LTD.	**6th Defendant**

Before:	**Hon. Madam Justice Shona Griffith**
Dates of Hearing:	**9th, 10th & 11th December, 2015; 20th & 26th January, 2016 on written submissions; Oral Decision – 5th February, 2016.**
Appearances:	**Ms. Nazira Uc Myles for the Claimant; Ms. Stevanni Duncan, Barrow & Williams LLP for the 1st, 5th & 6th Defendants; Ms. Marcia Mohabir Crown Counsel for the 2nd, 3rd and 4th Defendants.**

DECISION

Easement of necessity – creation of easement by implication – relationship of dominant and servient tenement - severance of common ownership.
Trespass to land – measure of damages – diminution in value versus cost of reinstatement –– damages for user of property.
Exemplary damages – rationale for award – factors to be considered – quantum of award.

Introduction

1. This is a claim for an easement of necessity, declarations and orders regarding the existence of a public road, and damages for trespass to land. The Claimant, Michael Modiri, is an owner of land located in the area called Frank's Eddy Agricultural Layout in Cayo, Belize.

The 1st Defendant Bradley Paumen is the director of the 5th and 6th Defendant companies, the first of which owns lands abutting the Sibun River which was being utilised to get to the Claimant's land. The 6th Defendant carries on tourism business, mainly offering organized tours and activities to visitors and residents of Belize. The 2nd Defendant, the Attorney-General is sued in the usual capacity of legal representative of the Government of Belize, whilst the 3rd and 4th Defendants are those officials alleged to be charged with responsibility for the land issues raised in the claim. The specific relief claimed is set out with particularity as follows:-

(i) A declaration that a six (6) feet easement of necessity exists which runs along the south end of the 5th Defendant's property to the Claimant's property;

(ii) An order that the Registrar of Lands take notice of the easement of necessity and make necessary notation on the respective titles of the Claimant and the 5th Defendant;

(iii) Further or in the alternative a declaration that a sixty-six (66) feet road reserve exists between the Sibun River and the Claimant's property;

(iv) An order that the sixty-six (66) feet road reserve between the Sibun River and the Claimant's property be declared a public road by the 3rd Defendant pursuant to section 6 of the Public Roads Act, Cap. 232 of the Laws of Belize;

(v) An order that the Registrar of Lands take notice of the road reserve and make necessary notation and alteration to the boundaries on the respective titles of the Claimant and Defendant and/or any other title holder affected by the road reserve;

(vi) Additionally, damages for unlawful trespass by the 1st Defendant, 5th Defendant and the 6th Defendant on the Claimant's property.

(vii) Interest

(viii) Costs.

2. The 1st, 5th and 6th Defendants ('the main Defendants') resist the claim as is applicable to them in its entirety, contending that no easement of necessity arises as the Claimant has available to him other means of accessing his property, albeit to be made up at his cost.

With respect to the issue of trespass by the 1st and 6th Defendants, the initial defence was that the Claimant had consented to the Defendants' use of his land, so that there was no trespass. By the conclusion of the trial however, the 1st and 6th Defendants had conceded the trespass to the Claimant's property and disputed only the quantum of damages to be awarded. With respect to the 2nd to 4th defendants, save for an affidavit filed by the Commissioner of Lands, there were no submissions made by the Government in answer to the claims for declarations or orders for a public road or for the corresponding adjustments to be made on the registers of the land concerned.

Issues

3. The issues which arise for determination in this claim are as follows:-

(i) Is the Claimant entitled to an easement of necessity over the 5th Defendant's land?

(ii) Can the Court declare that a road reserve of sixty-six feet (66) exists between the Sibun River and the Claimant's property and order the Minister to declare same a public road?

(iii) Did the 1st and 6th Defendants trespass upon the Claimant's land?

(iv) If yes to (iii) above, what damage was caused to the land and what damages are to be awarded to the Claimant?

(v) Should the Claimant be awarded exemplary damages?

Background and Chronology of Court Proceedings

Background

4. Most of the circumstances leading up to these proceedings are not critical to the resolution of the main issue, which is the finding or not of an easement of necessity over the 5th Defendant's property. Some insight into the background however, is nonetheless necessary in order to understand the context of the claim. This background is told primarily from the position of the Claimant. The events which occurred shortly before and after the proceedings were instituted, become relevant when addressing the question of damages for trespass.

5. Mr. Modiri's land is situated in Frank's Eddy Agricultural Layout in Cayo, Western Belize. Frank's Eddy Agricultural Layout is an area of previously owned national lands which was subdivided and at least in relation to the immediate location of Mr. Modiri's land, now rests mostly in private hands. The Sibun River runs through the subdivision so that there are portions of subdivided lands above (west) and below (east) the river. Mr. Modiri's land comprises two parcels containing 208.65 acres and 91.8 acres which he purchased from Mr. George Belisle in December, 2008. The conveyance by which the Claimant purchased the land recites the Minister's Fiat to the previous owner and refers to a plan attached to that Fiat. This plan is referred to as 'Entry Plan No. 10684 Reg. No. 18' but was not produced in evidence. The land belonging to Sibun Grain - two parcels comprising in total 616.12 acres - was purchased from previous owner Mr. Paul Bradley, in January, 2012 and November of 2012. This conveyance also recited the previous owner's Minister's Fiats with plans referred to as 'Entry No. 2460 Register No. 2' and 'Entry No. 3951 Register No. 18'. These plans were also not produced in evidence but several other maps were provided by the various parties in the claim, which are consistent which each other and when taken and compared together, provide useful illustrations of different vantages of the disputed properties and surrounding area.
6. The first plan produced by the Claimant early in the proceedings is attached hereto and designated 'Map 1'. This is a rough un-authored map but illustrates the relevant points of the route of the dispute without the distraction of more formal map features. A key was provided by the Claimant to the following effect:-

   A – Turnoff towards Jaguar Paw off the George Price Highway;

   B – Left turn at T Junction on road towards Jaguar Paw, turning off paved road onto dirt road, towards the disputed properties (route marked in yellow);

   C – Location of a gravel pit business where dirt road continues to the Sibun River (marked in blue; route continues in yellow) to bridge;

   D – Two parcels of land abutting the Sibun River after crossing bridge, which belong to Sibun Grain, through which the dirt road continues;

   E&F – Continuation on the route (marked in yellow) to Mr. Modiri's two parcels of land.

7. Another plan is annexed hereto as Map 2, which is a map of a survey of Government Roads in the Frank's Eddy Agricultural Layout. This map was compiled by the Government's Lands and Survey Department and the respective properties of Sibun Grain and Mr. Modiri can be identified by comparison to Map 1 and also by the reference numbers of the plans in the Minister's Fiats. The respective locations on this Map 2 are thus E10684, Mr. Modiri's two parcels and E3951 and E2460, Sibun Grain's properties by the river. There is further annexed hereto, Map 3 which is a different presentation of the Lands and Survey Department's map of Government roads to the area. This map is larger to scale and excludes the plan entry numbers and depicts an 85 foot existing road easement that leads to Mr. Modiri's property from a further point above Sibun Grain's land along the river, as well as an access road to the west of the Sibun River shown as a 30 foot existing right of way. This map was produced into evidence by the Claimant's surveyor Mr. Kenroy Gillette as that which was provided by the 1st Defendant to show alternative means of access, thus rebutting the claim for the easement of necessity.
8. According to Mr. Modiri, his land is landlocked, being bordered to the East by lands of the 5th Defendant, Sibun Grain and Cattle Ltd; to the South and West by private landowners and to the North by the Manatee Forest Reserve. (According to this Court's limited map reading skills however, when looking at Map 1, if the Manatee Forest Reserve is to the north, which indeed it is, and the Sibun Grain lands are marked D, these lands are not to the east of Mr. Modiri's lands which are E&F, they are to the west and abut the Sibun River. It is also described by Mr. Modiri that Sibun Grain's land is adjacent to his but again according to the limited map reading skills of the Court, Sibun Grain's land is not adjacent to Mr. Modiri's, there are several parcels in between the two, both to the west and northwest. All this aside however, the source of the dispute in this claim is the issue of access to Mr. Modiri's property from the public roads in the area after crossing the Sibun River.
9. Mr. Modiri's and Sibun Grain's properties are situated below (to the east of) the Sibun River so that one must cross the river in order to get to them. The crossing of the river in that area is facilitated by a wooden bridge ('the bridge') and thereafter one has to travel

just over 3 miles over both private land and public road to get to Mr. Modiri's property. At the time of purchase, Mr. Modiri accessed his property after crossing the bridge, by travelling approximately 0.4 miles over the riverside property now belonging to Sibun Grain, before rejoining public road to get to his property. This route had been used by Mr. Modiri's predecessor in title, with the permission of Sibun Grain's predecessor in title. An important point to note regarding the layout of the area, is that the existing easements shown on Map 3 which had been supplied to the Claimant by the 1st Defendant, were found by the Claimant's surveyor, not to exist on the ground. Instead, the built roads (dirt roads) in the area, were found by the Claimant's surveyor as shown on the attached map showing a GPS survey, superimposed on Google Earth map. This is annexed as Map 4 and the existing roads are depicted by small circles. Mr. Modiri's property is outlined in yellow.

10. In addition to the river side property owned by Sibun Grain just after the bridge, another company owned by Mr. Paumen (Indian Creek Equestrian Center), owned property further inland adjoining Mr. Modiri's, to the east, which did not have built public road access. Mr. Paumen thus used Mr. Modiri's property to get to that adjoining property. There are caves situated both on Mr. Modiri's property and on the adjoining Indian Creek Equestrian Center property which both gentlemen wanted to use and develop for tourism purposes. Mr. Modiri claims that he purchased the land with the intention of carrying on tourism business including constructing a resort and offering tourist adventure activities and eco tours to the caves located on his property. Then resident overseas, he began laying the groundwork for his business sometime in 2009 when according to him, he made contracts with investors, contractors and engineers and continued through to 2014 conducting site visits and doing design plans.
11. In late 2012 into 2013 Mr. Modiri says he began discussing partnerships with several investors who were interested in joining his venture. The discussions were promising and covered budget, design plans and intended location for the hotel. In preparation for the start of his project Mr. Modiri says he employed workers on his property to start clearing and preparing the land for the hotel site.

All these plans came to a halt however when Mr. Paumen started to prevent Mr. Modiri and his workers from going across his (Sibun Grain's) property in order to access Mr. Modiri's property. By that time Mr. Modiri says he had by email withdrawn his permission for Mr. Paumen to use his land to access Indian Creek Equestrian Center's land.

12. Prior to the problem that arose in relation to access to his land, Mr. Modiri says that he and Mr. Paumen, who at the time used his land only for farming, had had discussions on their developing their respective properties for tourism purposes as a joint venture. In furtherance of these discussions, they had a verbal agreement for Mr. Modiri and his workers to pass over Sibun Grain's property to get to his and likewise for Mr. Paumen and his workers to access Indian Creek Equestrian's adjoining land via Mr. Modiri's land. Mr. Modiri says his permission to Mr. Paumen was specifically for the purposes of allowing workers to use existing pathways on his property to access the adjoining Indian Creek Equestrian land. The gentlemen were never able to come to any agreement regarding the joint development thus Mr. Modiri says they went their separate ways from early 2013. It is against this backdrop that Mr. Modiri says the problems with access began and in March, 2013 Mr. Modiri in trying to access his property, found that a gate had been constructed on Sibun Grain's riverside land, which was locked and manned by a security guard. Mr. Modiri's workers would then require permission to get to or from his property.
13. In April 2013, having travelled to Belize to meet with investors, Mr. Modiri says he was prevented from passing through Sibun Grain's property when he went to show the investors his property and was instead presented with an agreement to sign, by a security guard on the property. The agreement was essentially to grant Mr. Paumen the right to pass over his (Mr. Modiri's land) and the reciprocal right for Mr. Modiri to pass over Sibun Grain's land to get to his own. The agreement had been sent via email to Mr. Modiri by Mr. Paumen prior to that day, but Mr. Modiri had refused to sign it. Having refused to sign the agreement presented to him, Mr. Modiri said he was therefore forced to leave without being able to access his property and show the investors who were along with him. The potential investors thus suspended their interest in the project until Mr. Modiri was able to resolve the issue of access to his land.

In May, 2013 Mr. Modiri says he was once again denied access gate to pass through Sibun Grain's land to get to his own by a security guard at the locked gate who told him that Mr. Paumen had instructed that he would be allowed access if he signed the agreement allowing the reciprocal use of each other's land. Mr. Modiri again refused to sign the proffered agreement and so was not allowed to pass through to get to his property.

14. At some point before the problems with access began, Mr. Modiri says that whilst he was overseas, Mr. Paumen had contacted him for permission to build a road through his (Mr. Modiri's) property over which to pass his (6th Defendant, Daylight and Darknight) tours to the caves on Indian Creek Equestrian's adjoining land. Mr. Modiri says he responded that he would be in Belize within the next two months and he would have discussions with respect to Mr. Paumen's proposed road at that time. When Mr. Modiri came to Belize however, he discovered that Mr. Paumen had knocked down and destroyed several trees on his property, removed several large rocks and a nearly ¾ mile road had been constructed on his property, all without his permission. The dispute as to access then degenerated to the point where in July, 2014 Mr. Modiri instituted the current proceedings before the Court.
15. When the problems with access first became serious, Mr. Modiri says that he approached the Commissioner of Lands (by letter) appealing for a resolution and that the Lands Department conducted a visit to his property where certain findings and recommendations were made which were put in a report. Although he was not allowed a copy of that report, Mr. Modiri was made to understand that a road reserve ought to have been set aside in the conveyance to Sibun Grain and several other parcels of land in the area, but this had not been done. According to what Mr. Modiri was made aware, it was recommended that Government re-purchase the land which ought to have been reserved from Sibun Grain and other private owners, so as to enable Government to construct a public road for access to the properties in the area.

Court Proceedings

16. With respect to the Court proceedings, the Claimant was in July, 2014, granted an injunction, ex parte, restraining the Defendant from denying the Claimant access to his property via the road which passed through the Defendant's property. That injunction also restrained trespass to the Claimant's land by the 1st Defendant, or any person acting through him. The injunction was extended again ex parte due to the absence of the 1st Defendant from Belize and in November, 2014, following an inter partes hearing, the injunction was continued - restraining the main Defendants from denying the Claimant access to his property, but discharging the injunction restraining trespass due to undertakings given by the 1st Defendant. The injunction as varied, was extended to January, 2015 and thereafter extended to the trial date, by then scheduled for the 25th February, 2015. By this further extension, the restraint against trespass was once again renewed due to complaints by the Claimant that the 1st Defendant failed to abide by his undertakings and was once again trespassing on the Claimant's property by conducting the 6th Defendants' tours passing over the Claimant's land.
17. When the matter came up for trial in February, 2015 the parties were attempting settlement of the matter and agreed to undergo mediation to assist their attempts at settlement. The mediation was unsuccessful and by this time, the Government had compulsorily acquired a portion of the Claimant's land on which the 1st Defendant had constructed his road for an alleged public purpose and this acquisition facilitated access to the 6th Defendant, to Indian Creek Equestrian's adjoining land. The Claimant challenged this acquisition in separate proceedings which resulted in the acquisition being quashed by the Court and the land taken returned to the Claimant. No further action was entertained with respect to further injunctions then requested even though the 1st Defendant continued to deny access to the Claimant through Sibun Grain's riverside property and the 1st Defendant through Daylight and Darknight Tours continued to trespass on the Claimant's property by conducting tours via the road built without the Claimant's consent.

Issue (i) – Easement of Necessity.

The Law

18. The argument re the easement of necessity is that the Claimant has no other means by which to access his land. The evidence produced by the Claimant is that investigation by survey revealed that there are no other trails or roads which exist other than the way through Sibun Grain's river side land and the alternative old access road which does exist but is blocked, still requires passing over private property and did not provide an alternative access across the Sibun River. The main defendants contend that the way through Sibun Grain's river side land is not of necessity and that the Claimant would simply be required to put expense to constructing an alternative way to his property. In order to determine whether or not an easement of necessity exists, one must first understand the fundamental principles of the law relating to easements. Gale on Easements is instructive[1] insofar as it introduces the subject by acknowledging the right of a landowner, incident to such ownership, to use his or her land as desired. This right however, is restricted by statute and common law against causing disturbance (e.g. nuisance) or injury (e.g. trespass) to surrounding neighbours' land. This restriction on a landowner's right on the user of his property is complemented by his protection (referred to as 'immunity') in the same regard, vis-à-vis his neighbouring landowners' use or enjoyment of their land.

19. More particularly, Gale on Easements[2] (emphasis mine) states:-

> *"The law recognizes a situation in which <u>some natural right incident to the ownership of a piece of land</u> (the servient tenement) <u>is, quoad other land</u> (the dominant tenement) <u>curtailed</u> and, as a result, <u>a corresponding artificial right is added to the rights naturally incident to the dominant tenement</u>. This situation may come about in three classes of case. First, the natural right of the servient owner to exclude others from the use of his land may, in some respect be curtailed giving place to a corresponding right in the dominant owner to invade, or encroach on, the servient tenement.*

[1] Gale on Easements 15th Ed. Pg 3 et seq.
[2] Ibid

Secondly, the natural right of the servient tenement to immunity may, in some respect, be curtailed in favour of a corresponding increase in the limited rights of user naturally incident to the dominant tenement…"

This curtailment of a landowner's natural right to use, or from immunity from use of his property, along with the artificial increase in the right of user of the other land owner, is what is termed an easement.

With reference to the instant case, the easement being sought is the curtailment of Sibun Grain's right to exclude the Claimant, as a stranger, from having passage over its land. The conversely created right is then for the addition to the Claimant's rights as a neighbouring land owner to have passage through Sibun Grain's land, in order to access his own. The issue of whether an easement exists or was granted or not, most generally arises as the subject matter of a dispute, when land (the dominant or servient tenement or both) changes hands[3] and the respective rights of the landowners vis-à-vis the use of each other's land, then fall to be determined.

20. Gale's discussion[4] then goes on to describe the four characteristics of an easement, which were explained and examined (in part) by Sir Raymond Evershed MR, in **Re Ellenborough Park**.[5] Citing Cheshire's Modern Real Property, Evershed MR listed the characteristics of an easement as (i) there must be a dominant and a servient tenement; (ii) an easement must accommodate the dominant tenement; (iii) the dominant and servient owners must be different persons; and (iv) in order to amount to an easement the right (being claimed) must be capable of forming the subject matter of a grant. Insofar as this case is concerned, there is no doubt that it is an easement that is disputed, as all of the above characteristics are satisfied. The issue in this case however is whether the easement claimed exists or should exist, and to determine this issue, consideration must first be had of the varying ways in which an easement can be created.

[3] Gale on Easements, supra, pg 6 et seq.
[4] Ibid
[5] [1955] 3 All ER 667

An easement can be created in four broadly defined ways[6] - (i) by statute; (ii) inter partes by deed (an easement not created by deed would be equitable); (iii) by implication in a number of ways; or (iv) by virtue of general words in a conveyance by which existing easements are transferred[7] (in this category there will be some overlap with category (iii)).

21. The manner of creation which concerns us in this case is by implication. This being said, it is noted that the other modes of creation of easements can be ruled out as there is no creation by statute and the transfers of the respective properties which are before the Courts make no express grant of any easement, nor was there any other deed creating an easement, thus there was no inter partes creation. There are also no general words in the conveyances before the Court, so as to bring into operation section 47 of the LPA. With respect to implication, Halsbury's Laws of England[8] says as follows in relation to the creation of an implied easement:-

> *"The doctrine of the creation of easements by implication of law is founded upon an implied grant which arises in connection with some express grant or disposition of the servient or dominant tenement. Such a grant can only be implied where both the dominant and servient tenements have been in common ownership* ***so that the creation of an easement by implication of law may be said to be the outcome of the former relationship between the two tenements****. The disposition which causes a cessation of the common ownership and thus gives rise to the implication of an easement may be of either tenement, or a simultaneous disposition of both tenements."*

There are four points which can be observed from above statement of law. First, is that there must be an express disposition or transfer of land; second, is that both tenements must come from common ownership which must be severed; and third is the disposition can be of either the dominant or servient tenement or both. Lastly, the implication of an easement arises out of *the relationship* between the two tenements, having come out of the same grant.

[6] Gale on Easements, supra, pg 85 et seq
[7] In Belize - Law of Property Act, Cap. 190, section 47.
[8] 5th Ed. Vol 87 Para 863

22. Aside from this statement, further reading[9] indicates, that easements can be implied in a number of different ways and that the implication arises usually for reasons derived from the principle of non-derogation from grant. This principle dictates that a landowner should not give a grant of land that is then frustrated because the land cannot be used by the grantee in the manner or for the purpose granted. The implication of an easement thus usually occurs in circumstances where the use of the land *at the time of* transfer, allows for a common intention on its continued use, to be implied in favour of a grantee and less readily, in favour of a grantor. For example in **Stafford v Lee**[10], where a portion of land conveyed by a defendant to a plaintiff with a view of construction of a residence had a way over the defendant's land as its only means of access, an easement of that way was implied upon conveyance to the plaintiff, for the purpose of the construction, as otherwise the land conveyed could not be used according to its known intended purpose.
23. Further, in **Boreman v Griffith**[11]property was leased to the plaintiff and at the time of the lease was accessed by a drive off the main road, to the front of the property. The drive was on property owned by the grantor who subsequently conveyed his retained property to the defendant. The plaintiff had made up a track which led to and from the rear of his property but continued to access the front of his property by the drive. The defendant in subsequent ownership sought to block the plaintiff's access to the drive, thus blocking access from the main road to the front of the plaintiff's property. An easement was found implied on the basis that at the time of the transfer of the lease to the plaintiff, the grantor himself had used the drive to benefit the property, which he then leased to the plaintiff. The use of the drive was thus presumed to have been implied on conveyance as part of the grantor's rights at the time of transfer.
24. Another form of implication, which is said to be wider than the rule as to presumed common intention, is the rule in **Wheeldon v Burrows.**[12]

[9] Gale on Easements, supra, pg 94 et seq.
[10] Stafford v Lee
[11] [1930]
[12] [1874-80] All ER 669

This rule speaks to the transfer by implication, of '*continuous and apparent easements necessary to the reasonable enjoyment of the land*' which are at the time of transfer used by the grantor for the benefit of the part granted. This rule is subject to the exception that save for an easement of necessity, the rule does not apply in relation to an easement reserved by the grantor. By way of explanation – where the benefit of an easement is for the grantee of land, the easement is *granted*. Where the benefit of an easement is to be for the grantor in relation to the land he retains, the easement is *reserved* to the grantor. The rule in ***Wheeldon*** operates to pass by implication, grants of easements and not reservations, for reason of the principle of non-derogation from grant so that if a grantor wishes to restrict the use of the land he grants, he must do so by express reservation. Save for necessity, the rule in ***Wheeldon*** thus does not apply to easements sought to be reserved by a grantor.

25. Having some idea of the implied easement, we can now examine the easement of necessity, which is a category of implied easement. Whereas those above are implied by reason of words used in a transfer, a presumed common intention, or the rule in ***Wheeldon v Burrows***, the easement of necessity arises (the existence of the bases for implication being equal), in answer to the capacity for use of the dominant tenement, vis-à-vis, the servient tenement. With respect to a right of way - which is relevant to this case, Gale on Easements[13] states (emphasis mine):-

> *"A way of necessity, strictly so called, arises where <u>on a disposition by a common owner of part of his land</u>, <u>either the part disposed of or the part retained is left without any legally enforceable means of access</u>. In such a case, the part so left inaccessible is entitled, as of necessity, to a way over the other part.*

26. Gale then goes on to cite two ancient authorities as follows[14]:-

> *"If I have a field <u>enclosed by my land on all sides</u>, and I alien this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit from the grant…."*

[13] Gale, supra @ 131

[14] Ibid, citing in the first instance *Rolle's Abridgment, tit Graunt, pl. 17* and *Pinnington v Galland (1853) 9 Exch. 1, 12*.

"Where a man having a close surrounded with his own land grants the close to another in fee, for life or for years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land, and reserves the close to himself."

Halsbury's Laws states[15]:-

A way of necessity is a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted to him, or over the land of the grantee where the land retained by the grantor is land-locked. Such a way cannot exist over the land of a stranger. It is an easement without which it is impossible to make any use of the dominant tenement… A way of necessity can only exist where the implied grantee of the easement has no other means of reaching his land. If there is any other means of access to the land so granted, no matter how inconvenient, no way of necessity can arise, for the mere inconvenience of an alternative way will not of itself give rise to a way of necessity[9]. Accordingly a way of necessity will not be implied where access can be obtained on foot, though not by car, or by water."

27. According to all the above, in order for the easement of necessity to be implied, we must have a disposition of a portion of land from a common owner, that has no means of access other than over the retained portion of the grantor's land. The reverse also holds true, in respect of the disposition from the common owner where the grantor's retained portion has no access to it, other than through the grantee's land. In the instant case, it is clear that the current relationship between the two tenements - Modiri's and Sibun Grain's riverside properties - is not that of grantor and grantee. Instead, as is evidenced by the Minister's Fiats recited in their respective transfers, they were sold by Government, at different times. As will be shown from the upcoming examination of authorities, there must be an investigation into what situation existed at the time when those parcels were sold by the original common owner in order to determine whether an easement of necessity can be implied. As will be illustrated, the existence of a previous common owner at some point does not automatically give rise to implication of an easement.

[15] Ibid @ Para 953

The Authorities

28. With respect to the authorities now examined, it is necessary to give some insight into the facts of the cases in order for the application of the respective dicta to be appreciated. After the facts of each case are outlined, a brief commentary is offered in order to illustrate its relevance to this case.

(i) **Barry v Hasseldine**[16] - The plaintiff purchased from the defendant, a triangular portion of land to the northernmost corner of the defendant's land. The plaintiff's triangular portion was separated from the balance of the defendant's property by a short concrete road over which the plaintiff had a right of way. To the west, northeast and northwest, the plaintiff's triangular portion was bordered by lands of strangers. To the east of the plaintiff's portion was an old runway situated on land of a stranger, which gave access to a public road further to the east. The plaintiff was actually allowed to pass over the runway to access his property from the public road to the east. The defendant's remaining property to the south after the concrete road separating the two properties, abutted a public road.

Access to the plaintiff's triangular portion was to be had either from the public road to the east, over the abandoned runway situated on the land of the stranger; or from the public road to the south, through the defendant's remaining property. The plaintiff claimed an easement of necessity through the defendant's remaining land in order to access the public road to the south. As claimed, an easement of necessity was found in favour of the claimant, over the land retained by the defendant in order for the claimant to access his land from the public road.

Commentary

The decision in this case centered on the fact that the plaintiff's land was not completely enclosed by the grantor's land and there was alternative access albeit through the land of a stranger. Neither the fact of the alternative access nor the fact that the grantor's land did not entirely surround the plaintiff's property affected the finding of an easement of necessity.

[16] [1952] 2 All ER 317

The court found that the alternative access existed at the time of the transfer by way of permission granted to use the abandoned runway which could be withdrawn at any time. If that permission was withdrawn the plaintiff would be surrounded by land over which he had no means to legally compel access, thus necessity demanded that he be given a way over the defendant's property. It seems clear that the basis of the compulsion of access against the defendant arose by virtue of the relationship of the defendant as grantor and the plaintiff as grantee. The fact that the plaintiff was also surrounded by land of strangers was immaterial because his grant derived from the defendant who had an obligation to ensure access. The illustration of this case is mainly that the derivation of operative grant derives from a common owner is at the foundation of finding an easement of necessity. The case at bar is not one in which the intended dominant tenement has been granted for a portion of the land comprising the intended servient tenement.

(ii) **Nickerson v Barraclough et al**[17] - The plaintiff herein was in 1979 granted a right of way over a lane (called 'Scouts Lane') which ran along the eastern boundary of the plaintiff's land (a field), towards a highway to the north of the plaintiff's land. Scouts Lane was situate on land owned by the defendants and was the means used by the plaintiff to gain access to his field from the public highway to its north. The defendants did not dispute the right of way to their lane, but sought to restrict its use to access to the plaintiff's field in connection with agricultural and recreational sports use only. Brightman LJ, examined the history of the conveyances of the land and surrounding land. In 1900 X purchased five lots (for ease of reference lots 1-5) out of a building estate sold on auction. The plan attached to the auction particulars showed the estate being intersected by several roads then unmade, but intended to be made up in the future. The lots in question fell to the south of the public highway which was already then in existence.

[17] [1981] 2 All ER 369 (CA); the facts are taken from the judgment of Brightman LJ @ pg 373 et seq

The conveyance granted a right of way over proposed roads adjoining the lots conveyed and one such proposed road was shown on the plan accompanying the sale of the 5 lots and referred to as the 'north south road'. (Scouts Lane was not shown on that plan.) In 1901, X purchased two additional lots (for ease of reference called lots 6-7) in the estate with a similarly worded right of way over proposed roads adjoining the lots, but with the further words 'when and so soon as the same shall have been made'. Because of the physical layout of the lots, the effect of these further words was to have left lots 6 and 7 without access to the public highway, except via permissive use over two of lots 1-5, which permissive use existed at the time by virtue of the common ownership of those lots. The next significant conveyance took place in 1906, but in between this, and the conveyance in 1901, what was proposed as the 'north south road' on the plans on those two prior conveyances, shifted its location to what did not then exist but is now known as 'Scouts Lane'. Scouts Lane became a properly made up road only in 1963 and existed as a track prior.

By the conveyance in 1906 the field now owned by the plaintiff was sold to X as lot 78A and it was sold without any right of way giving access to it. To the contrary, lot 78A was sold with the exception that no right of way was granted to it, unless and until a way became made. In the earlier conveyances, in addition to the proposed 'north south' road, there was also shown a proposed 'east west road' which was situated to the north of lot 78A.

Through several subsequent conveyances (in 1922 and 1935) lot 78A was sold with a right of way over the proposed 'east west road' but omitted other then available means of access. The owner of lot 78A died in 1944 and the lot passed to his widow who conveyed most of that plot to another in 1973, who simultaneously then conveyed that portion to the plaintiff. The last two conveyances were said to have been conveyed with a right of way over Scouts Lane which was disputed, giving rise to the action and appeal under consideration.

The plaintiff's claim to a right of way over Scouts Lane was hinged on four propositions, including a right of way implied with the 1906 conveyance. An easement of necessity was not claimed as it was at no time alleged that the field was landlocked. In considering the claim of an implied easement passing with the 1906 conveyance, Brightman LJ found that given that the lot was intended from the transfer to be used for building purposes, and given the existence of proposed estate roads, it would be properly implied that both parties must have intended access to be provided to lot 78A. In that respect, it was found that there were at least 5 possible routes that could be implied and it was more a matter of ascertaining what implication should be made in order to resolve the question of access. Of the five routes, two of such routes included a right of way over Scout's Lane, which was being disputed. Of the five routes, it was decided that given the stipulations in the conveyances and the plans and the history of the matter, a right of way of Scout's Lane was not properly implied, but an alternative way (which had not been in dispute) would be implied to resolve the issue of access.

Commentary

On a short note, with respect to the ruling out of an easement of necessity, Brightman LJ stated[18] that an easement of necessity is never found to exist except in association with a grant of land. The situation in that case was not a grant of land from the original owner from whom the right of way was claimed. With respect to the way to be ultimately found by implication into the 1906 grant, the utility of this case is that in considering which way of access was to be implied, Brightman LJ stated:-

"I return to the real problem which at the end of the day strikes me as being a relatively short question of construction. On the basis of the terms of the 1906 conveyance and the previous history, and bearing in mind the indisputable fact that some implication has to be made into the conveyance, what implication ought to be made in order to resolve the question of access"

[18] Nicholas v Barraclough supra @ 379

In carrying out this deliberation, Brightman LJ further said[19]

"It is legitimate to look at the auction plan to construe the 1906 conveyance, because the parties show in the conveyance that they have the auction particulars and conditions in mind, and the auction is an integral part of the auction particulars. If a conveyance of a building plot is silent about any easement of way, it is easy to imply the grant of an easement over all the strips which are shown on the plan of as the proposed new roads. The obvious inference is that the purchaser of a plot is to have access to the proposed road on to which his house fronts and is to be allowed to proceed along any of the proposed road until he reaches a highway over which all have a right of way."

Of course, it is not the actual facts and outcome of this case which the Court finds applicable to the instant case. Rather, it is the manner in which the dispute was approached, and that is by reference to originating transfers which revealed the intended use of the property, as well as the plans showing the schemes laid for access in the estate, which then led the court to a determination of what could be implied and what could not. It is considered that the parallel to this case is the estate scheme in which multiple lots were sold from a single common owner, so that the possibility for multiple solutions to access most probably existed at the time of sale. Such a case would clearly affect a claim for necessity raised by successors in title. For necessity to be implied, this case assists us by illustrating that the scheme of the subdivision and intended access as evidenced by original transfers and plans, has to be examined before any implication even by necessity, can be inferred.

(iii) **Adealon International Proprietary Ltd v Merton London Borough Council**[20] - The facts of this matter do not require discussion except to state that under consideration was a claim for an easement of necessity over the defendant's land in circumstances associated with a reservation (the retention by the grantor of the

[19] Ibid @ 380

[20] [2007] EWCA 362

dominant tenement). In considering the claim, Carnath LJ made reference to what he described as the classic case of an easement of necessity, as:--

"where the land of one party of a grant is entirely surrounded by that of the other. As between the two of them, it is not difficult to infer that the landlocked property, whether of the grantor or the grantee, was intended to have some form of access over the surrounding land…"[21]

But as the learned Justice continued

"So much is uncontroversial. But as one moves away from that simple bipartite model, to one in which the surrounding land is shared with strangers to the grant, the issues become more complex. Where there is a realistic possibility of alternative access over the land of third parties, the case for easement of necessity is much less clear."

Cornath LJ's review of authorities on the issue of an easement of necessity where there was alternative access by way of land of strangers concluded that in relation to a grant, the way was easily implied but in relation to a reservation, *"the existence of other realistic possibilities of access, even if not legally enforceable at the time of the grant, is clearly relevant".*

Commentary

This decision underscores the relevance of the relationship between the two parcels of land from which an easement is claimed to arise. At paragraphs 4 – 9 of this judgment, the history of the lands including the original conveyances severing the common ownership was examined. The user of the land at the time of sale and/or retention along with the intended user upon the sale was also examined. Although a way of necessity will nonetheless be implied in the case of a reservation versus a grant, the finding of such necessity was said to be more difficult in the former case, especially where there is land of strangers providing possible alternative access.

[21] Adealon supra @ paras 12 - 13

In this case it can be noted, that even though the conveyances from the Government were recited in the parties' respective grants, the plans accompanying those transfers were not produced with the result that not much relevant information on access at the time of the respective transfers was put before the Court.

(iv) **Manjang v Drammeh**[22] - This is a Privy Council appeal from The Gambia, in which the issue of an easement of necessity claimed by the Respondent in the appeal was under consideration arising from proceedings of trespass. The history of the parties' acquisitions of title and dealings with their properties was detailed. The dominant tenement was a portion of land which the appellant used to carry on business with the public, that was parallel to a river. The following were identified as essentials for an easement of necessity to be found[23]:-

There has to be found, first a common owner of a legal estate in two plots of land. It has, secondly, to be established that access between one of those plots and the public highway can be obtained only over the other plot. Thirdly, there has to be found a disposition of one of the lots without any specific grant or reservation of a right of access. Thereafter, his Lordship Oliver of Alymerton continued[24] –

"*Given these conditions, it may be possible as a matter of construction of the relevant grant to imply reservation of an easement of necessity*". With respect to the case before them, the Board concluded "*there was nothing at all from which a way of necessity in favour of the river strip could reasonably be implied and the Court of Appeal quite plainly had not, as the majority seemed to have thought they had, any jurisdiction to 'grant' a right of way across a litigant's land simply because they considered, as they evidently did, that it would be convenient and was not 'inequitable or unreasonable in all the circumstances'*."

[22] Privy Council App. No. 10 of 1989
[23] Ibid @ pg 4
[24] Ibid

Commentary

This case, again establishes that an easement of necessity must come from a common grant and an implication must be possible based on the prior history and use of the land. Further, that alternative access even by way of water, is sufficient to negative an easement of necessity so that the question of the convenience or otherwise of that alternative access is irrelevant in considering the issue of necessity.

(v) **Glen Brand v Doris Creasey**[25] - This is a decision in which an easement of necessity was claimed over the land of the defendant as well as a right of way owned by the defendant. In concluding that an easement of necessity had not been established Legall J examined the evidence provided which traced the origin of title of the two properties (by means of going back four predecessors in title) to the time of common ownership of the land in question. The easements claimed had not existed at the time of cessation of common ownership, nor had the ownership of the claimant and defendant's properties arisen out of a sale to either or their predecessors in title. It was found that on this basis there was no easement of necessity. Even if this view was incorrect, it was also found that there was alternative access to the claimant's land, which therefore precluded a finding of necessity.

Commentary

The facts of this decision are perhaps closest to the case at bar and once more, the methodology employed in considering the question of implication of an easement whether by necessity or otherwise, was to trace the title back to common ownership and examine the dealings and interests conveyed between the parties coming forward to present ownership.

[25] Supreme Court of Belize No. 156 of 2012

> The existence or otherwise of an easement of necessity or on broader implication always arises from the terms and conditions of the grants of the dominant and servient tenements and their user at the time of disposal.

The Court's Consideration

29. The above authorities having been illustrated, we now consider the case at bar. As has been mentioned, in this case Mr. Modiri's property is advanced as the dominant tenement and Sibun Grain's river side property, the servient tenement. They do not abut each other and in between and surrounding them are several other lots of land belonging third parties. This absence of contiguity does not preclude an easement but some reasonable connection must exist and it is found that sufficient connection exists so as to ground consideration of finding an easement. With respect to the physical locale of the properties, the evidence of the Commissioner of Lands is to the effect that the area Frank's Eddy Agricultural Layout is an area formerly of national lands, thus owned by the Government and it is clear through the recitals in the transfers of title to the respective parties, that the previous common owner was not one or the other land owner, but the Government.
30. In the absence of the relationship of grantor and grantee as between the two parties, the primary finding in order to imply an easement of necessity, according to the principles stated above, would have to be a simultaneous disposition of both tenements. According to the Minister's Fiats of the properties, the sale of Mr. Modiri's land was made by Government to his predecessor in title in 2007. First title for Sibun Grain's two parcels of land was made in October, 2011 and May, 2012. From that fact alone, it can be found that no easement of necessity can be implied, for as was the case in ***Glen v Creasey***, at the relevant time of transfers to the two current owners, the lands were not sold from a common owner.
31. Even if this approach is too narrow, the Court nonetheless considers the situation from the position of the physical access that existed at the time of the transfer to the Claimant. The current access utilized by the Claimant after crossing the Sibun River, of travelling one quarter mile over the 5th Defendant's property back onto a public road to his land was

that utilized by both predecessors in title and permissive. Additionally, the Commissioner of Lands' evidence (as was the evidence of the Claimant and 1st Defendant), was that the Ministry's inspection revealed an alternative access road over private lands which was treated as a private road and no survey was done on that road. That road is referred to by the parties as 'the old access road', which had at one time been in use, but for some time had been blocked by the landowners over whose land it travelled. There was also the evidence of the Claimant's surveyor, who confirmed the route through the 5th Defendant's property as the only 'built' access in existence, but in cross examination accepted that there would be other possibilities of access to the Claimant's property, which were unbuilt or not constructed.

32. Within the context of the circumstances which give rise to an implied easement and more particularly an easement of necessity, it is clear, that the finding of an easement does not arise merely by consideration of a landowner's physical restrictions to access. In the instant case, there is evidence that there is an old access road in existence if not in use which goes to the Sibun River intending to be linked to those portion of public roads in the area. Additionally, on the evidence provided by Map 2 - at the very worst, at the time Mr. Modiri's land was conveyed to his predecessor in title by Government, there were and today remain many other plots which can be charged as servient tenements to get to Mr. Modiri's land from across the Sibun River. The physical situation is that the way from the only bridge in the area which crosses the Sibun River leading to the other half of the sub-division, passes through private land. The evidence was that the bridge was not constructed by Government and its origins are unknown but believed to be constructed by private individuals to get to their agricultural land. Insofar as the subdivision was sold by Government, a way of necessity cannot be insisted upon from the way after that bridge, as it was not Government as grantor obliged to provide access to lands sold, who put the bridge in place.

33. With respect to the 0.4 mile way leading from the bridge across Sibun Grain's land, the existence of that way as the only built way at present, does not give rise to an implication of necessity in respect of its use.

At this point it is useful to recall the statements taken from Gale and Halsbury's[26] - that the way of necessity is not a way of convenience, thus where other modes of access are available, the easement of necessity will not be implied. Finally, even though not argued, the question of the implication by common intention or by the rule in ***Wheeldon v Burrows*** is considered from the standpoint of Government as grantor, being obliged to provide some means of access upon disposition of the parcels of land in the sub-division. When considering Map 2, there are some public roads outlined. No part of the roads that are outlined as public roads pass through the land of Sibun Grain at the river side. In the circumstances, even if one were to consider other means of implication outside of necessity, given that there has not been produced any plan which shows a way through the land of Sibun Grain (made or unmade) at the time of the Government's transfer to the Claimant's predecessor, and given that the Claimant's transfer does not make reference to any existing rights of way, there can be no finding of a right of way passing to the Claimant upon his acquisition of his land.

34. In overall consideration of the matter therefore, the following is determined:-

(i) The Claimant's and 5th Defendant's properties form part of a subdivision formerly held by the Government as common owner;

(ii) The Claimant's property was first disposed of by Government in 2007. Neither that transfer nor the plan attached to that transfer were produced in evidence thus there is no basis from which to draw an implication of what right of access can be implied from that transfer in 2007.

(iii) The 5th Defendant's property was severed from Government's remaining ownership in October, 2011 and May, 2012. Those transfers and plans were not produced in evidence either so as to ground any implication that by that time the properties were sold subject to a right of way over them.

(iv) With respect to the plans which were produced in evidence, in considering Map 2 hereto, even if that survey pre-dated the sale of the Claimant's and 5th Defendant's properties, no way over the 5th Defendant's properties is shown so as

[26] Supra, para. 24

to give rise to an implication which could have passed with transfers of either properties.

(v) On further consideration of Map 2, it is clear that albeit unbuilt, there are several other ways to the Claimant's property over lands which would similarly have been in the hands of Government, as common owner. In other words, as at the time of the transfer to the Claimant or his predecessor on first title, no question of necessity can arise as the 5th Defendant's property would not have been the only means of access available to the Claimant upon his transfer of land;

(vi) The evidence of the Claimant of his predecessor having utilized the disputed way through the 5th Defendant's property is accepted, but this use was permissive and cannot form the sole basis of implication of an easement in the circumstances of this case;

(vii) The fact that the only built way to the Claimant's land which exists at the current time is that which passes over the 5th Defendant's property does not give rise to a finding of an easement of necessity, especially since even the Claimant's surveyor accepted that there were other possible means of access, but which would need to be constructed;

(viii) Aside from the issue of convenience, there is authority[27] that even where access exists by means of water (as it does in this case), that suffices as alternative access thus ruling out necessity.

In the circumstances of all authorities and principles considered and conclusions stated above, the claim for an easement of necessity over the 5th Defendant's river side property is not made out and is accordingly dismissed.

Issue (ii) - Relief against the Government

35. The alternative relief claimed against the Government is for a declaration that a sixty-six feet road reserve exists between the Sibun River and the Claimant's property and for an order that the 3rd Defendant (the Minister of Natural Resources) pursuant to section 6 of

[27] Manjang v Drammeh, supra.

the Public Roads Act, declare that road reserve a public road. The effect of granting the relief sought would be that the resulting public road would effectively encompass that portion of the 5th Defendant's land over which the easement of necessity is sought by the Claimant. The argument in support of this relief sought against the Government is that the Government failed to provide proper road access in the area upon distribution of the lands and should accordingly be required to remedy the situation. As recognized in the claim for relief, the regime for providing road access is statutory thus the terms of the statute fall to be examined. The relevant statutes are the Public Roads Act[28] and the National Lands Act of Belize[29].

36. Section 3 of Public Roads Act firstly charges a designated Chief Engineer with the authority to construct, alter, maintain and supervise all public roads in Belize. This authority is subject to the direction and control of the relevant Minister, (who would be the Minister of Works, not of Lands). Thereafter, section 6 grants the Minister power to declare any existing road a public road and section 7 empowers the Minister inter alia, upon the application of the Chief Engineer, to declare any new road open and a public road. The effect of these provisions, is that the process laid out for the declaration of public roads in Belize is entirely statutory and lies within the purview of the responsible Minister and Chief Engineer. Short of an appropriate remedy following upon an action in public law, the Court cannot affect these statutory duties. Where therefore the relief seeks declarations by the court directed towards the Minister's exercise of statutory powers, such relief does not lie in this case, which was a claim in private law. Even more so, the order sought for the Minister to declare a public road pursuant to section 6, is essentially an order of mandamus, which can only lie out of proceedings for judicial review, which these proceedings were not.

37. For completeness, the provisions of the National Lands Act are also examined. Firstly, section 6(1) of this Act empowers the Government to except from any sale, land required for reserves, public roads, internal communications and the like.

[28] Cap. 232, Vol. 11 Revised Laws of Belize, 2011.
[29] Cap. 191, Vol. 9 Revised Laws of Belize, 2011.

By section 6(3), the reservation of land is effected by publication three times in the Gazette and recorded on a plan in the office of the Commissioner of Lands. More particularly, section 29(2) of this Act, specifies the broad right to the Government to make a reservation from land granted or leased under the Act, for purposes of laying out or declaring a public road for temporary or permanent use. This right afforded to the Government complements sections 6 and 7 of Public Roads Act and whereas it can be said that the reservation from land sold for purposes of a road reserve would be effected by three publications in a gazette and demarcation on a plan, it is clear that the reservation is to be made at the time of sale or lease which was not done in the case of the transfers of the Sibun Grain river side land. The Commissioner of Lands confirms that no reserves were made for roads in the area, thus the provisions for reserving land under the National Lands Act are of no assistance in the instant case. Provision of access would have to be made by Government acquiring land for roads compulsorily or by private treaty. In the final analysis, the private law action brought by the Claimant against the 2nd, 3rd and 4th Defendants fails on the basis that the failures or omissions of the responsibilities of the Government in providing access for the area were to be addressed by a claim in public law.

Issue (iii) - Trespass

38. The 1st Defendant under cross examination at the trial admitted trespassing on the Claimant's property (thereby admitting the trespass of the 6th Defendant which conducted the tour business). Further to that admission it is found that the defendant trespassed by carrying out the following specified actions - building a road over a portion of the Claimant's property; constructing parking lots; removing vegetation and rocks for the purposes of constructing the road and parking lots; and passing his tour buses over the Claimant's property without permission – via the road that was built without permission. The trespass of the use of the road was continuing, short of three months (March to June, 2015) when the Government acquired the Claimant's land.

The evidence of Mr. Jose Garcia is accepted in part as it relates to the degree and positions of encroachment on the Claimant's property. This is as provided by the map entitled 'Figure 4' of Mr. Garcia's evidence. The evidence accepted is of a 1.75 kilometer road, for which 3.95 acres of vegetation was cleared and a total of 4.3 acres of vegetation which was cleared for parking lots of the 6th Defendant's tour buses. The question which now ensues is that of damages arising from the trespass.

Issue (iv) – Assessment of Damages for Trespass.

39. The position of the main Defendants is that the measure of assessment for the damage caused by the trespass should be the diminution in value of the land as opposed to the cost of its re-instatement. The position of the Claimant is in the first instance the reverse. McGregor on Damages, as helpfully extracted by learned counsel for the main Defendants describes the normal measure of damages for trespass as the diminution in value of the land.[30] McGregor goes on to discuss that the usual measure of diminution in value versus cost of reinstatement takes on more relevance when the cost of re-instatement will far outstrip the original value of the land. It is then said, that the appropriate test for whether to award diminution in value as opposed to the cost of reinstatement, is the reasonableness of the plaintiff's desire to reinstate. This reasonableness is then measured against the advantages of reinstatement to the plaintiff versus additional cost to the defendant, as compared to diminution in value.[31]The application of these principles is illustrated by then Rawlings JA in OECS Court of Appeal authority **Asot A. Michael v Astra Holdings Ltd**[32] where he states that damages for trespass to land, being a tort, are based on *restitutio in integrum*; further, that the claimant may by setting out in his pleadings, claim either the value by which his land is diminished or the cost of restoring the land to its previous condition prior to the trespass.
40. In the instant case the original value of the land is eighty thousand dollars ($80,000.00) and the cost of re-instatement claimed is shortly in excess of one million dollars (S1m).

[30] McGregor on Damages, 14th Ed. para 1118 as extracted in submissions on behalf of 1st, 5th and 6th Defendants.
[31] Ibid. para 1121
[32] Antigua & Barbuda Civ App. No. 17 of 2004 @ paras 55 et seq.

With respect to this amount claimed, the evidence upon which the Claimant relies is that of Mr. Jose Garcia. This evidence is not satisfactory to the Court. As rightly submitted by learned counsel for the main Defendants, no application was made for and Mr. Garcia was not appointed by the Court as an expert in accordance with Part 32 of the Civil Procedure Rules, 2005. Aside from identifying what physical damage was done to the property in terms of acreages cleared, length of road constructed and other physical alterations, Mr. Garcia's evidence also sought to identify the nature of the vegetation affected by the trespass and assess the effects of removal of the vegetation on the surrounding environment. The evidence sought to give a scientific assessment of the effects of the trespass which the Court finds to be a specialist area and expert area of environmental science. The assessment of the effects of the trespass is therefore not accepted from Mr. Garcia's evidence in light of the absence of him having been appointed an expert under Part 32 of the Rules.

41. Additionally, Mr. Garcia's evidence sought to assess what would be required to reinstate the damage done to Mr. Modiri's property in terms of replacing the particular vegetation in the affected areas, re-filling the areas cleared for the road and parking lots. The total cost of refilling the areas disturbed by the road and other construction along with replacement of trees and removal of debris was estimated at approximately $1.2 million. There was no specific classification of costs or breakdown of work according to industry rate on materials or labour and this lack of detail characterized all amounts advanced by Mr. Garcia in respect of the items listed for reinstatement. In the final analysis, the figures advanced by Mr. Garcia in support of his assessment of the damage and cost for reinstatement of Mr. Modiri's property are found entirely unreliable as they are unacceptable both from the standpoint of requiring expert evidence in some aspects and otherwise, having failed to show any foundation or basis for the quantification. The 1st and 6th Defendants did not accept or otherwise admit the Claimant's quantification.

42. However, as stated before, the evidence of the physical assessment of the damage done to the land (which does not require being appointed as an expert), is accepted from Mr. Garcia to the extent of the acres cleared, the length of road constructed, the removal of

rocks and vegetation and the construction of and structures built in the parking lots. Even without the quantification of the cost of reinstatement before the Court, it is easily inferred, that the cost of such reinstatement will be greater than the original value of the land. As a first consideration therefore, it is found that the usual measure of diminution in value would all things being equal, be more appropriately awarded in this case, instead of the cost of reinstatement. In terms of the assessment of damages based on the diminution in value, learned counsel for the main defendant submits that damages for the trespass should be nominal based on the fact that the Claimant can be said to have benefited from the construction of the road on his property, thus there would be very little loss in value of the land. The Defendants did not proffer any quantification of the alleged improvement in value to the Claimant's land, thus the Court is unable to countenance such a submission.

43. On the other hand, the construction of the road of ¾ mile and the destruction of and disturbance to the land in order to construct that road clearly resulted in real damage and injury to the Claimant's property. It was stated above, that all things being equal, the measure of the diminution in value versus cost of reinstatement is the more appropriate measure in this case. That was so put however, for within the circumstances of this case, all things are not equal. It is considered that the actual diminution in value of the land, will not adequately compensate the degree of injury caused to the Claimant. In this regard, the Claimant has claimed an additional amount of approximately one point five million dollars $1.5m on account of the 6th Defendant's use of his property to conduct his tour business. There is authority for compensation to be awarded based on an assessment of the cost that can be attributed to a defendants' user of a claimant's land. Counsel for the Claimant alluded to this method of assessment, but perhaps muddled it with the concept of restitutionary damages, insofar as the damages claimed sought to bear reference to the professed profit of the Defendants.

44. Restitutionary damages however, arises out of the law of unjust enrichment where gains by a defendant are reversed, because they were unjustly acquired by tort or breach of contract[33]. An award of restitutionary damages by which a defendant is held to account for his ill-gotten profits, is an alternative measure to compensatory damages, in which the object is *restitutio in integrum*. Learned Counsel for the Claimant, mentioned several cases known as the 'way leaver' cases in support of her argument for compensation based on the value of the main Defendants' user of the Claimant's property. Firstly, there was reference to the case of **Whitwham v. Westminster Brymbo Coal and Coke Co.**[34] in which it was said in relation to a trespass of deposit of materials from a colliery on the Plaintiff's land:-

> "*that the amount of damages was not to be assessed by ascertaining merely the diminution in value of plaintiffs' land, but the principle of the wayleave cases…applied; namely, that if one person without leave of another uses the other's land for his own purposes he ought to pay for such user;…*"

45. Reference was also made by learned Counsel for the Claimant to the decision of **Attorney-General v Blake (Jonathan Cape Ltd Third Party)**[35] in support of the application of the user principle in an assessment of damages for trespass to land. This House of Lords decision concerned the application of restitutionary damages (in the form of an account of profits) to contract and in the course of its examination of this issue, affirmed the application of the user principle as a departure from the usual measure of compensatory damages. In relation to trespass to land, this case therefore added nothing new. By way of further examination of the application of the user principle, the Court considers the authority **Stoke-on-Trent City Council V. W. & J. Wass Ltd**[36] which states as follows on the measure of damages for trespass to land:-

> "*the general rule is that a successful plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages.*

[33] Halsbury's Laws of England 5th Ed, Vol 88 para 425
[34] [1896] 2 Ch. 538
[35]
[36] [1988] 1 WLR 1406

A second general rule is that where the plaintiff has suffered loss to his property or some proprietary right, he recovers damages equivalent to the diminution in value of the property or right. The authorities establish that both these rules are subject to exceptions. These must be closely examined, in order to see whether a further exception ought to be made in this case. The first and best established exception is in trespass to land."

"…exceptionally, in cases of trespass to land, patent infringement and some cases of detinue and nuisance, the "user principle" applied to enable a plaintiff to recover as damages a reasonable sum for the wrongful use made of his property;"

46. It was further stated in ***Stoke on Trent***, that for the most part, the user principle is applied where the plaintiff suffers no financial loss, but at the end of the day, the principle was meant to be applied where an award for diminution in value would be insufficient. The Court is mindful that in this case, a dollar amount of injury to the Claimant has not been established (by reason of the Court's declining to accept the evidence put forward by the Claimant). Additionally, the Court is also mindful that even without such an amount, it is reasonable to conclude in these circumstances where the Defendant has caused physical injury to the Claimant's land and gained from his unlawful use of it - that any amount for diminution in value would not adequately compensate the Claimant. By the same token however, the cost of reinstatement would most likely outstrip the original $80,000 value of the land. Taking all these factors into consideration the Court concludes that an assessment of damages according to the user principle is in order in this case.
47. To be clear however, insofar as the Claimant appears to have sought assessment based on user as an addition to his claim for reinstatement, the award is to be made as an alternative to the usual election of diminution in value or cost of reinstatement. In this regard the Claimant refers to an offer made by the 1st Defendant during the course of the proceedings, to use the property in the sum of US$20,000, whilst the Claimant demanded US$35,000 per month. The Claimant appears to have taken these two amounts at a median with the result of US$27,500 or BZ$55,000 per month for the cost of user of the land for the purposes of the 1st and 6th Defendants' business. The Court firstly notes that these offers were made during contentious litigation of the issue which would cause the

amounts to be inflated. Additionally, given that the Claimant would have had to seek passage through the 5th Defendant's land without the benefit of an easement, the reciprocity of user would also reduce any fee fairly demanded by the Claimant. A fair assessment using the parties' own figures and taking the two factors just noted by the Court, is considered as US$5000 (BZ$10,000), for the Defendant's use of the Claimant's land. The period for which this user fee is attributed, is from the admitted start of the main Defendants' operations in June, 2014 to trial in December, 2015, excepting 3 months when the compulsory acquisition of Mr. Modiri's land was in effect. The total period is for 15 months at BZ$10,000 for a total of Belize one hundred and fifty thousand dollars (BZ$150,000).

Issue (v) – Exemplary Damages

48. We are all familiar with the notion that exemplary damages exists as an anomaly within the civil law, where contrary to the usual principle that damages are compensatory with respect to a Claimant's loss, exemplary damages are awarded to punish a defendant for his wrongful conduct. The fact of the anomaly is manifested in the restricted application of the award, as set out by Lord Devlin in **Rookes v Barnard**[37] into three categories – (i) oppressive or unconstitutional action by servants of the Government; (ii) where the defendant's conduct has been calculated to make a profit which may exceed any compensation to the plaintiff; and (iii) where expressly authorized by statute.[38] These categories were later affirmed in **Cassell & Co Ltd v Broome**[39] and it is the second category which arises for consideration in this case. With respect to construing the operation of this category, reference is made to Lord Hailsham's speech[40] in ***Cassell & Co Ltd v Broome***, which stated that the fact that the tortious act is committed within the course of a profit making business is not sufficient to give rise to bring a case within the category.

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[37] [1964] AC 1129
[38] Ibid @ pg 1226
[39] [1972] AC 1027
[40] Ibid @ 1079

On the other hand however, it is not required that a plaintiff prove a deliberate arithmetical calculation of profit versus damages. What is instead required is a finding of:-

(i) "knowledge that what is proposed to be done is against the law or a reckless disregard whether what is proposed to be done is illegal or legal and

(ii) A decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss"

49. There has always been much comment (judicial and otherwise) on the utility of retaining the remedy of exemplary damages, given that the realm of punishment of a defendant rests within the criminal law. The relevance of the award was however affirmed in the UK by a 1997 Law Commission Report[41] which examined the question of its continued relevance to the civil law. With that continued relevance assured, the Court finds the following statement of Lord Diplock in ***Cassell***[42] particularly applicable to the case at bar:-

    "It…may be a blunt instrument to prevent unjust enrichment by unlawful acts. But to restrict the damages recoverable to the gain made by the defendant if it exceeded the loss caused to the plaintiff would leave a defendant contemplating an unlawful act with the certainty that he had nothing to lose to balance against the chance that the plaintiff might never sue him, or if he did, he might fail in the hazards of litigation. It is only if there is a prospect that the damages may exceed the defendant's gain that the social purpose of this category is achieved – to teach a wrongdoer that tort does not pay."

50. With these words in mind, we now turn attention to the restrictions to which the court must have regard, as alluded to in both ***Rookes*** and ***Cassell***. These restrictions are that the mere fact that the conduct complained of falls within one of the categories is not sufficient to make an award of exemplary damages. There should also be no double punishment, so that if the defendant has already been punished by the criminal law in respect of the facts which give rise to the civil action there should be no award as that would be punishing the defendant twice. Further, the plaintiff's conduct is relevant in the Court's decision whether to award or reduce an award and if compensatory damages are found sufficient to punish the defendant (as distinct from sufficient to compensate the plaintiff), there should be no award of exemplary damages.

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[41] 1997 Law Commission Report on Aggravated, Exemplary and Restitutionary Damages

[42] Supra @ 1130

51. In accordance with the above principles the following conduct informs the Court's consideration of whether or not to award exemplary damages in the instant case:-

(i) It was clear to the 1st Defendant in April, 2013 that he had no permission to utilize the Claimant's property for any means whatsoever;

(ii) The 1st Defendant in spite of this knowledge cut down trees, removed large rocks and built a road and built parking lots for the purposes of engaging in business which involved a trespass to the Claimant's property;

(iii) The 1st Defendant disregarded the absence of consent and proceeded to advance his business which required use of the Claimant's property, with full knowledge of the absence of that consent. He engaged public officials by applying for and obtaining permissions; entered into contracts; employed persons for his business; provided services to the public; and profited from those services.

(iv) In addition, the 1st Defendant carried out and continued to carry out the actions listed in (iii) above, even after an action was instituted in Court by the Claimant to stop the trespass;

(v) Even more egregious than (iv) above, the 1st Defendant breached injunctions of this Court which restrained his trespass, by continuing to carry out his tour business and for every tour, he disregarded the injunction of the Court by passing his tour buses over the Claimant's property. In this respect, the 1st Defendant also had the temerity to plead in answer to the injunction that he stood to suffer significant loss of profits as a result of the injunction, that he had contracts resting on his business and persons employed whose livelihood was at stake[43]. (Affidavit of 31st December, 2014);

(vi) There is no criminal conviction existing with respect to the 1st Defendant's trespass;

(vii) There is no conduct on the part of the Claimant which ought to be taken into account to reduce or mitigate against the Defendant's conduct;

[43] 3rd Affidavit of the 1st Defendant, dd 31st December, 2014.

(viii) The award of compensatory damages in the sum of $150,000.00 is not in the circumstances of the 1st Defendant's conduct, found to be sufficient punishment for the 1st and 6th Defendants;

(ix) The 1st and 6th Defendants by the admission of the 1st Defendant are possessed of significant resources (the first Defendant estimated his worth to be in the region of US11 million dollars).

52. Based on the above factors, it is considered that if there ever was a case where the conduct of a defendant merited the imposition of an award of exemplary damages this is such a case. In assessing the quantum of the award of exemplary damages, it is noted, that the punishment for contempt of court under the Supreme Court of Judicature Act, section 106A(3) as modified by the CCJ in **Attorney-General v Philip Zuniga, Dean Boyce et al**[44] is a fine upon conviction of up to $250,000.00 for a person and up to $500,000 for a legal person. It is in no way the case that an award is sought to be imposed as if the 1st and 6th Defendants had been convicted of contempt for they certainly were not. The advertence to this provision is to recognize the clear indication of the Legislature by the high penalties available, of the seriousness of a failure to obey the orders of the Court. In these circumstances, it is the contumelious conduct of the 1st and 6th Defendants in committing and continuing to commit the trespass to the Claimant's land and whilst so doing, flouting the injunctive orders of the Court along with their professed significant resources, which informs the amount of one hundred and fifty thousand dollars ($150,000) that is herein awarded as exemplary damages against the 1st and 6th Defendants.

Final Disposition, Interest and Costs.

53. In conclusion the matter is disposed of as follows:-

(i) No easement of necessity is found to exist in favour of the Claimant over the property of the 5th Defendant, Sibun Grain and Farms Ltd.;

[44] CCJ 2 of 2014 (AJ) @ para 100 JJ Saunders, Hayton & Nelson

(ii) The claim for declarations and orders against the Commissioner of Lands, Minister of Natural Resources and Attorney-General are dismissed;

(iii) The 1st and 6th Defendants have trespassed over the land of the Claimant;

(iv) The Claimant is awarded the sum of $150,000.00 compensatory damages for the trespass in addition to $150,000.00 exemplary damages.

(v) Interest is awarded on the compensatory damages of $150,000.00 from the June, 15th 2014 to the date of judgment at the rate of 6%. No interest is awarded on the exemplary damages. Statutory interest is awarded on the total judgment sum of $300,000 from the date of judgment until payment;

(vi) The Claimant being only partially successful is awarded 50% of its costs to be assessed, if not agreed, against the 1st and 6th Defendants.

(vii) No costs are awarded to the 2nd, 3rd and 4th Defendants on account of their failure to participate in any meaningful way in claim.

Dated this day of May, 2016.

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Shona O. Griffith
Supreme Court Judge.