IN THE COURT OF APPEAL AD 2018

CIVIL APPEAL NO 27 OF 2016

MICHAEL MODIRI Appellant

v

BRADLEY PAUMEN 1st Respondent
DAYLIGHT & DARKNIGHT CAVE ADVENTURES LTD. 2nd Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

N Uc Myles for the appellant.
A Segura-Gillett for the respondents.

15 March 2019.

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By Written Submissions

SIR MANUEL SOSA P

[1] This appeal and cross-appeal should, in my opinion be dismissed. I have read, in draft, the judgment of Ducille JA and wish to say that I concur in the reasons for judgment and proposed orders stated therein.

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SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

[2] I had the opportunity of reading in draft, the judgment of my learned brother, Ducille JA, and I am in agreement with the orders proposed by him and his reasons for doing so. I have nothing else to add.

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HAFIZ-BERTRAM JA

DUCILLE JA

[3] This case originally began as a claim for an easement of necessity or, in the alternative, declarations that a road reserve or public road existed between the Appellant's property and the Sibun River, damages for unlawful trespass by the Respondents, interest and costs. This is an appeal from that part of the judgment of Griffith J. awarding the Appellant compensatory and exemplary damages for trespass to land. Both parties have appealed. The Appellant appeals against the awards made in his favor that he contends are "excessively low." The Respondent appeals the entire award on the ground that the Appellant is only entitled to nominal damages.

Background facts pertinent to this appeal

[4] The Appellant is the owner of a large parcel of land in the Frank's Eddy Agricultural Layout in Cayo, which was originally valued at $80,000.00. The 1st Respondent is a director of the 2nd Respondent and is also a director of Sibun Grain and Cattle Ltd. The latter is not a party to this appeal. However, Sibun Grain and Cattle Ltd. also owns land in the Frank's Eddy Agricultural Layout that abuts or is adjacent to the Appellant's parcel. The parties were originally in negotiation regarding both a joint venture and permissions to pass over each other's land, but such negotiations fell through.

[5] The Appellant's complaint was that the Respondents trespassed on his land by destroying trees, removing large rocks and building a road on his property without permission. The Respondents began to use this road as transit to carry on tour operations on other land, including land known as Indian Creek Equestrian Center, for the benefit of tourists and residents. Since June 2014, the Appellant had cause on more than one occasion to seek the Court's assistance, resulting in the issuance of Interim Injunctive Orders, and their respective extensions. The Respondents disobeyed those Orders, and continued to operate their tours, traversing through a three-quarter mile stretch of the Appellant's land.

[6] The Appellant brought the action herein, claiming, inter alia, damages for trespass to land. During the course of those proceedings, the Respondents admitted the trespass, so that the sole remaining issue with respect to that claim was assessing the quantum of damages. The 1st Respondent admitted, during cross-examination, that there had been negotiations between the parties during which he had offered the Appellant $20,000 for the use of the Appellant's land for one month. The Appellant had, however, demanded $40,000. No agreement resulted. The learned trial judge awarded: compensatory damages of BZ$150,000.00 (based on her assessment of a user fee of US$5,000.00 per month for the 15 months during which the trespass continued) and exemplary damages of BZ$150,000.00; interest on the compensatory damages at 6% from June 2014 to the date of judgment; no interest on the exemplary damages; and statutory interest on the entire judgment of BZ$300,000.00 from the date of judgment until payment. In her computation, the learned trial judge did not accept the evidence as to valuation of the land provided by one Jose Garcia, one of the Appellant's witnesses.

The Grounds of Appeal

[7] The Appellant's Grounds of Appeal are as follows:

(i) that the Learned Trial Judge erred in failing to provide legal basis, comparative authorities or a calculative method in finding that "[a] fair assessment using the parties own figures and taking the two factors just noted by

the court, is considered as US$5,000 (BZ$10,000) for the Defendants' use of the Claimant's land."

(ii) that the evidence in the case compellingly establishes that the compensatory damages award by the Learned Trial Judge was excessively low. The evidence supported the Claimant's case that, at the very least, US$27,500 (BZ$55,000) being the median between the sum proposed by the Claimant and the sum proposed by the Defendant should have been awarded. The evidence before the Learned Trial Judge was sufficient to support an award of compensatory damages in excess of $150,000.00.

[8] The Respondents" Grounds of Appeal are as follows:

(i) that the learned Trial Judge erred in finding that the Appellant/Claimant was entitled to compensatory damages in the sum of $150,000.00 based on user value, as opposed to nominal damages for diminution in value of his property.

(ii) that the learned Trial Judge erred in law in relying on figures set out by the Appellant's/Claimant's Attorney in a "Without Prejudice" communication to the Respondents'/Defendants' Attorneys as the starting point for her quantification of the value of the Respondents'/Defendants' use of the Appellant's/Claimant's property.

(iii) that the Learned Trial Judge took improper considerations, that is the "Without Prejudice" communication between Attorneys, into account in arriving at the compensatory damages award in favor of the Appellant/ Claimant.

(iv) that the Appellant/Claimant, having failed to adduce evidence to establish a user value, ought to only be allowed to recover nominal damages.

[9] The Appellant asks this Court to adjust the award of compensatory damages to "a reasonable figure" utilizing US$20,000.00 (BZ$40,000.00) per month as a starting point for calculation, instead of the US$5,000.00 figure used by the learned trial judge. The Appellant also asks this court to dismiss the Respondents' appeal in its entirety.

The Respondents, on the other hand, ask this court to set aside the award of compensatory damages, substitute an award of nominal damages and dismiss the Appellant's appeal with costs to the Respondent.

The Appellant's Arguments

[10] The Appellant's arguments are somewhat of an enlargement of his Grounds of Appeal, but can be summarized as follows:

(i) the learned trial judge should have made a "two-fold award" consisting of nominal damages for the damage to the land and compensatory damages for user;

(ii) the learned trial judge failed to address the Respondent's evidence as to costs of tours and number of persons who participated; and also, failed to consider the Respondents' claim of loss due to cancellation of tours as evidence of profit;

(iii) the learned trial judge failed to address the continuing trespass after the injunction was granted;

(iv) since Jose Garcia's evidence as to the degree of trespass was accepted, so too should have been his evidence as to comparative rental

(v) the two factors considered by the learned trial judge in making the award were unjustified

(vi) the learned trial judge failed to address the Respondents' admission that the parties negotiated use of the land.

A two-fold award?

[11] The Appellant contended that the award "should have been two-fold; a nominal award for the damage done to the property between 2013 and June 2014 when the tours were commenced by the Respondents … and the user of the Appellant's land." The Respondents assert that "compensatory damages should be based on a choice between diminution in value and reinstatement cost or user value, not both."

The Appellant proffered several authorities for our perusal in support of the assertion that the award of damages should be adjusted. However, no real analysis of those

authorities was provided. In the event, it is unclear what point the excerpt from first of these cases is meant to support, although the case in general does offer some insight on the measure of damages for trespass to land. The case is **Field Common Ltd. v Elmbridge Borough Council [2008] All ER (D) 141.** There, the claimant's land was separated from the defendant's land by a private road encompassing a right of way that the defendant and its tenants enjoyed. Over the years, the right of way gradually expanded, thereby encroaching on the claimant's land. The claimant complained to the defendant, but the defendant eventually resurfaced the road and included the claimant's land without its consent. The claimant brought an action and an assessment of damages was ordered. The court held that

> "[w]here a landlord had been held to be responsible for the trespasses of its tenants, it was right in principle that the wronged party should recover compensation in respect of the benefits that the landlord had enjoyed as a result of the tenants' trespass; such benefit as the landlord enjoyed was to be treated as if it were an enjoyment of the land itself in respect of which the wronged party was entitled to recover damages."

[12] The Appellant particularly referred to the following passage by Warren J:

> "Although an analysis based on the loss of a bargaining opportunity works at least as a close analogy, in that sort of context, it is important to realise its limitations. An actual claim, pleaded and argued on the basis of a loss of opportunity, would place the onus on the claimant of showing, on a balance of probabilities that, had a negotiation taken place, it would have produced a result and that such a result would, in money terms, be the same as that which would be reached in a hypothetical negotiation. It would not be correct to assess the percentage chance that an agreement would have been reached, thus entitling the claimant to a percentage of the full damages. This is because the chance depends not on the acts of a third party when the percentage approach would apply but depends on the acts of the defendant himself where it is "all or nothing" depending on whether or not the claimant establishes on a balance of probabilities that a negotiation would have been successful: compare **Allied**

Maples Group PLC v Simmons & Simmons [1995] 1 WLR 1602. The claimant in such a case may therefore fail to establish causation. In contrast, the assessment of damages by reference to a hypothetical negotiation assumes the success of such a negotiation and assumes, often contrary to the facts, that there are willing parties on each side."

[13] It remains unclear as to why the Appellant offered this particular authority, unless it is an attempt to support an award of damages based on negotiations between the parties. Yet, if that is the case, it must be pointed out that in the instant case, the negotiations that took place and failed, were actual negotiations, not hypothetical ones. Thus the particular analysis offered by Warren J is of little assistance to the Appellant. The Respondents assert that **Field Common** is authority for the proposition that the benefit to the trespasser should be based on the market rate for hire or rental for the period of the trespass, and point out that no expert evidence was led to establish this. However, with respect to quantum of damages, Warren J also said,

"Conveniently, of course, damages for trespass as for any other tort, are compensatory; a claimant is entitled to recover money in respect of the loss which he has suffered. Loss can be suffered **either** because the value of the land is diminished **or** because the claimant has been deprived of the use of his land. In either case, there may be consequential loss recoverable in accordance with ordinary principles. But, in the present case, it is said by [the claimant] that an **alternative measure of damages applies**, based in what [the defendant] would have paid on a hypothetical negotiation between itself and [the claimant] for the grant to [the defendant] of the necessary rights … The law in this area is developing." (Emphasis added).

[14] Warren J then referred to **Attorney General v Blake (Jonathan Cape Ltd Third Party Intervening) [2001] AC 268**, as did the Appellant in the instant case. The Appellant commends the following passage by Lord Nicholls to us:

"The general rule is that in the often quoted words of Lord Blackburn, the measure of damages is to be, as far as possible, that amount of money which will

put the injured party in the same position he would have been in had he not sustained the wrong. *Livingstone v Rawyards Coal Co [1880] 5 App Cas 25, 39*. Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognized that there are many commonplace situations where a strict application of this principle would not do justice between the parties. Then compensation for the wrong done to the plaintiffs is **measured by a different yardstick**. A trespasser who enters another's land may cause the landowner no financial loss. **In such a case damages are measured by the benefit received by the trespasser, namely by his use of land.** The same principle applies where the wrong consists of use of another's land for depositing waste, or by using a path across the land, or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user…" (Emphasis added).

[15] The Appellant provided no analysis for this case. The Respondents on the other hand pointed out that **Blake** concerned a claim for damages for breach of contract. The learned trial judge, however, stated that **Blake** "affirmed the application of the user principle in an assessment of damages for trespass to land ... as a "departure from the usual principle of compensatory damages."

[16] In **Blake**, Lord Nicholls mentioned **Watson, Laidlaw & Co. Ltd. v. Pott, Cassels, and Williamson (1914) 31 R.P.C. 104, 119**, where Lord Shaw said 'wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle . . . either of price or of hire."

Lord Nicholls also said that

> "…these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule."

Lord Nicholls also referred to **Penarth Dock Engineering Co Ltd v Pounds [1963] 1 Lloyd's Rep 359**, where lord Denning MR said that "the test of the measure of damages is not what the plaintiffs have lost, but what benefit the defendant obtained by having benefit of the use of the berth [land] … the "benefit is to be ascertained by reference to the proper value to the trespasser of the use of the property on which he had trespassed, for the period during which he had trespassed…"

[17] Another authority cited by the Appellant is **Inverugie Investments Limited v Richard Hackett, Privy Council Appeal No. 17 of 1994,** where the appellant ejected the plaintiff/lessee from thirty apartments in a hotel. Those apartments, for years thereafter, had only a forty percent occupancy rate. The appellant was found liable for damages for use of each apartment at the going rate for the entire period that the trespass continued – some 15½ years. The Appellant here commends the following passage from Lord Lloyd of Berwick:

> "It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the "loss" which the plaintiff has suffered. As the Earl of Halsbury L.C. pointed out in *The Mediana [1990] AC 113* at page 117, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.
>
> In *Stoke-on-Trent City Council v W& J Wass Ltd* [*1988] 1 WLR 1406* Nicholls LJ as he then was called the underlying principle in these cases the "user principle". The plaintiff may not have suffered any actual loss by being deprived of the use

of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterized as exclusively compensatory or exclusively restitutionary; it combines elements of both."

[18] Much has been made in some of the cases as to whether awards for trespass, in cases where there has been no loss to a claimant, are compensatory or restitutionary. In **Whitwham** for instance, as one writer has pointed out, the learned law lords consistently referred to "compensation" and to the plaintiff's "loss." There was no actual loss. But since the sum awarded was far in excess of the sum attributable to the diminution in value of the land, and there was no attempt to explain the absence of pecuniary loss, that writer attributed the phenomenon to "broad appeals to justice." Kevin F K Low, *The User Principle Rashomon Effect or Much Ado about Nothing?*, 28 SAcL 984 (2016).

[19] Similarly in the current case, the learned trial judge stated, referring to the judgment of Rawlins JA in **Asot A. Michael v Astra Holdings Limited, Antigua & Barbuda Civ. App No. 17 of 2004,** 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 the land is diminished **or** the cost of restoring the land to its previous condition." The learned trial judge, in the current case, did appear to be concerned with the classification of the damages; as to whether they were compensatory or restitutionary. However, she 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 ... However (she continued) … "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 compensate for the degree of injury cased to the Claimant."

[20] The learned trial judge proceeded to discuss restitutionary damages further and stated that they "[arose] out of the law of unjust enrichment where gains by a defendant are reversed because they were unjustly acquired by tort…" Strangely, the learned judge did not refer to the following more appropriate excerpt from the **Asot A. Michael** case:

> "A claimant who suffers actual damage as a result of a trespass is entitled to be compensated with substantial damages, which he must prove. He must set out in his pleadings the value by which his land was diminished and the expense of removing any debris left by the trespass, if any. On the other hand, he may set out the costs of correcting the damage and restoring the land to its original condition. Where there is a continuing trespass, damages are usually measured by the worth of the use of the land. That would normally be the rental value."

[21] Be that as it may, it is clear that the Appellant's contention about the two-fold rule as to the measure of damages is without merit. The Appellant has provided no authority in support, and even the authorities cited by him state otherwise. In **Watson**, the principle is stated as "either price or hire." In **Blake**, Lord Nicholls referred to a "different yardstick." Damages for trespass where the owner suffers no loss, are "measured by the benefit received by the trespasser, namely by his use of land." This was repeated by Lord Denning in **Penarth Dock**. In **Asot A. Michael**, the measure was stated as either the value by which the land is diminished or the cost of restoring the land to its original condition, or the rental value (in a case of continuing trespass). There is no two-fold rule. The learned trial judge therefore correctly stated that "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 any event, it must be pointed out again that these cases do not support the assertion that nominal damages should be awarded as an addition to compensatory damages. In Halsbury's Laws of England, 4th Ed., Vol. 45(2) 2 the law on damages for trespass to land is addressed thus:

> "Damages. In a claim for trespass, if the claimant proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the

> trespass has caused the claimant actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the claimant's land, the claimant is entitled to receive by way of damages such a sum as should reasonably be paid for that use…"

Unlike the situation in current case, where there is evidence of physical damage to the Appellant's land, and where the Respondents continued to make use of the Appellant's land, nominal damages arise where a successful claimant has proved the tort but cannot prove loss or damage.

Failure to address evidence as to costs of tours and number of persons who participated; failure to consider the Respondents' claim of loss due to cancellation of tours as evidence of profit

[22] The Appellant contends that the learned trial judge, while applying the correct principle for the assessment of damages, erred in that she arrived at the figure of $150,000.00 as compensatory damages without taking into account the "overwhelming evidence from the Appellant and more particularly the Respondents that the profit made by them support[ed] a higher award." The Appellant further argued that the learned trial judge did not address the 1st Respondent's estimation of the costs for the tours, the number of persons participating, or the B$30,000.00 per week for the eight-week period from September to November 2014 set out in the 1st Respondent's Affidavit. Neither did she address the $11,000.00 gross per tour for a total of six tours, from January to February 2015, mentioned in the 1st Respondent's Affidavit in Support of Discharge of Injunction, which he classified as a loss to his business. The Respondents countered that "when applying the "user principle," the damages award [should be] equivalent to the reasonable rent that the [Appellant] may have charged for the [Respondents'] use of his property; it is not based on the [Respondents'] profit."

[23] While it is true that the learned trial judge did not refer to the figures just mentioned, what the Appellant appears to be suggesting is that those figures should have been used by the learned trial judge in her computation of the damages due to the

Appellant. Respectfully, I disagree. As Lord Nicholls said in **Blake**, "[d]amages are measured by the plaintiff's loss, not the defendant's gain." And where there has been no financial loss **"**damages are measured by the benefit received by the trespasser, namely by his use of land." Further, the learned trial judge was not bound to take into account that, as the Appellant asserts, "the Respondents were in a position to make a payment of $27,500 or more…" Benefit received by the trespasser should not be construed to be synonymous with profit.

Failure to address the continuing trespass

[24] Far from failing to address the continuing trespass, the learned trial judge specifically dealt with it when she addressed the issue of exemplary damages. Exemplary damages are discussed separately below.

Evidence of comparative rental

[25] The Appellant also contended that the learned trial judge should have given weight to the evidence of one Jose Garcia as to comparative rental. However, since no attempt was made to have Mr. Garcia declared an expert, this contention is without merit. The learned trial judge explained fully, the reasons why she accepted Mr. Garcia's evidence only as to his description of the physical damage to the Appellant's land. She stated that "[t]he assessment of the effects of the trespass is … not accepted from Mr. Garcia's evidence in light of the absence of him having been appointed an expert …"

Further,

> "…the cost of reinstatement claimed is shortly in excess of one million dollars ($1m) 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 … no application was made for and Mr. Garcia was not appointed by the Court as an expert … Additionally, Mr. Garcia's evidence sought to assess what would be

> required to reinstate the damage done to [the Appellant's] property in terms of replacing the particular vegetation in the affected areas, refilling the areas cleared for the road and parking lots. The total coast 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…the figures advanced by Mr. Garcia … 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 [Respondents] did not accept or otherwise admit the Claimant's quantification.""

The two factors considered by the learned trial judge in making the award.

[26] Two factors that the learned trial judge considered in her deliberations were that "[the] offers were made during contentious litigation of the issue which would cause the amounts to be inflated" and that "given that the Claimant would have had to seek passage through [Sibun Grain's] land without the benefit of an easement, the reciprocity of user would also reduce any fee fairly demanded by the Claimant." While it is true that contentious litigation was afoot, there is nothing in the transcript to indicate that amounts were inflated. However, the learned trial judge might have been relying on her knowledge of human nature, as well as the admonition in many of the cases to assess a "reasonable" figure. As to reciprocity of user, this factor also bears on reasonableness in calculating the award. After all, one of the original claims in this case was for a declaration that an easement of necessity in the Appellant's favor over the Respondents' land.

The parties' prior negotiation

[27] This part of the Appellant's arguments will be discussed under the "Without Prejudice" heading below.

[28] The Appellant also cited **Whitwham v Westminster Brymbo Coal and Coke Company [1808] W. 1662**, also referred to in **Blake**. In **Blake**, Lord Nicholls said

> "the judgments in **Whitwham** are instructive for they show that the damages were nonetheless seen, at least at the end of the 19th century, as purely compensatory (in the sense that the plaintiff was entitled to compensation for the use of the land even though he had not suffered loss as a result of that use), and that the recovery of damages is not based on the profit made by the defendant from the use of the plaintiff's land."

Whitwham held that the principle of the "way leave" cases applied. In that case, Lord Lindley said "if one person has without leave of another been using that other's land for his own purposes, he ought to pay for such user." The defendants had been dumping spoil from a colliery on the plaintiff's land. (Black's Law Dictionary defines "wayleave" as a "right of way over or through land for the carriage of minerals from a mine or quarry. It is an easement, being a species of the class called "rights of way," and is generally created by express grant or reservation.")

[29] The Appellant also referred us to **Bocardo SA v Star Energy Onshore Ltd & Another [2010] UKSC 35**, where Lord Hope (who gave a dissenting judgment) said,

> "The basis on which compensation is awarded is the value of the land to the owner, not its value when taken by the promoter of the scheme. But if the land has a special value because it is the key to the development of other land, that will represent part of its value to the owner which may be taken into account in the assessment of compensation in just the same way as it would if the owner was negotiating to realise its value in the open market …"

[30] The trespass in **Bocardo** was the diagonal drilling of oil wells under the claimant's land without its permission. The appellant had been granted a licence under the Petroleum Production Act (1934). The measure of damages in this case fell to be determined under the Mines (Working Facilities and Support) Act 1966, and was more of the character of the hypothetical negotiation discussed in the **Field Common** case.

[31] It is assumed that the Appellant relies on this case for the proposition that "the land has special value because it is the key to the development of other land that will represent part of its value to the owner …" The Respondents claim that this case shows that "the Appellant's approach to establishing a user value is flawed" and that the proper approach "must depend on the market value that the Appellant would be able to fetch in exchange for access through his property, nothing more."

[32] In I**nverugie,** the court noted that the "hypothetical negotiation basis" was not applied, nor were damages limited by profit or loss made or suffered by the appellant. Warner J concluded that the hypothetical negotiation approach speaks to "what is fair compensation for the claimant to receive for the unauthorized use of his land by the defendant." Further, that the open market rental value approach is more appropriate in cases where mesne profits are sought when a tenant holds over without consent. In way leave cases, the approach is what a reasonable fee would be.

[33] The Appellant contends that these cases support his submission that the award in this case should have been two-fold; that is to say, (i) an award of nominal damages for the damage done to his property and (ii) compensation for the Respondents' user of the same. The Appellant further submits that calculation of damages for user should be based on the profits made by the Respondents. The Appellant also submits that the award of damages should reflect the profits, comparative figures, and a median of the figures mentioned by each party during their pre-suit negotiations. The Respondents dispute the relevance of the alleged profits.

[34] None of the parties to this appeal challenges the award of exemplary damages. The Respondents replied to the Appellant's submissions by stating that the only damages that should have been awarded are damages for diminution in value [and since] no part of the award was attributable to this, then nominal damages should have been awarded 'if anything at all.' Further, they reject the Appellant's claim for two-fold damages on the ground that damages should be either for diminution in value or reinstatement or user.

Compensatory damages award too low?

[35] The Appellant argues that the compensatory damages award given by the learned trial judge was too low. He claimed that the evidence supported at least a median between the sums proposed by the parties during negotiations; that is to say, at least BZ$27,500.00. It would appear from the context that the Appellant means that sum to be the monthly rate for the use of his land. The Respondents' response to this is set out in their own Grounds of Appeal which raise two main issues. The first is whether nominal damages for diminution in value of the Appellant's property are more appropriate than compensatory damages based on user value, where there has been no actual financial loss suffered by the Appellant. The second is whether the contents of a "Without Prejudice" communication can be taken into consideration by the court where the party claiming the privilege did not assert that privilege in the lower court or object to the contents of the communication forming part of the evidence at trial. The first issue was fully discussed above. We now proceed to discuss the second issue.

"Without prejudice"

[36] The Respondents submissions on this point are curious. They first allege that the learned trial judge took improper considerations into account, namely the "Without Prejudice" communication between the parties' attorneys. Then the Respondents state in their written submissions that "[t]he 1st Respondent/Defendant **conceded** that he had offered the Appellant/Claimant US$20,000.00 for access through his property but

maintained that the offer was only for a one month period." (Emphasis added). The Respondents' submissions proceed to explain why that offer was only for the duration of one month: "to tie them over for a month until the compulsory acquisition [by the Government of Belize on February 28, 2015] was complete."

[37] The Respondents then provide the following statements from the judgment of Balcombe LJ in **Rush & Tompkins v Greater London Council [1987] ADR L.R. 12/21:**

> **"**The rule which gives the protection of privilege to 'without prejudice' correspondence 'depends partly on public policy, namely the need to facilitate compromise, and partly on implied agreement' as Parker LJ stated in **South Shropshire DC v Amos** [1987] 1 All ER 340 at 343, [1986] 1 WLR 1271 at 1277 … The attribution of such intentions [implied agreement] to the parties is, in our judgment, entirely consistent with the considerations of public policy which lead the court to give protection to what has been said in the course of negotiations under the 'without prejudice' rule. As Oliver LJ said in **Cutts v Head** [1984] 1 All ER 597 at 605, [1984] Ch 290 at 306: 'That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in **Scott Paper Co v Drayton Paper Works Ltd** (1927) 44 RPC 151 at 156, be encouraged freely and frankly to put their cards on the table ... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."

[38] While this is a perfectly good statement of the rule in question, it must be noted that this excerpt is not from the decision of the House of Lords, but rather the Court of Appeal judgment in the same case. In the House of Lords (see **Rush & Tompkins v Greater London Council [1989] AC1280, [1988] 3 All ER 737**), Lord Griffiths stated that "[t]he without prejudice rule" is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish." He then proceeded to reiterate the words of Oliver LJ in **Cutts v Head**, that are contained in the above excerpt from the judgment of Balcome LJ in **Rush**.

Lord Griffiths continued,

> "The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence "without prejudice" to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase "without prejudice" and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase "without prejudice." I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlement and the public interest in full discovery between parties to litigation."

[39] Lord Griffiths continued further,

> "Nearly all the cases in which the scope of the without prejudice rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances, no question of discovery arises because the

parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the without prejudice material for a variety of reasons when the justice of the case requires it… [The] authorities … all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement. Thus the without prejudice material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement, which is the point that Lindley L.J. was making in **Walker v Wilsher (1889) 23 Q.B.D 335** and which was applied in **Tomlin v Standard Telephones and Cables Ltd. [1969] 1 W.L.R. 1378**. The court will not permit the phrase to be used to exclude an act of bankruptcy; see I**n re Daintrey, Ex Parte Holt [1893] 2 Q.B. 116** nor to suppress a threat if an offer is not accepted: see **Kitcat v Sharp (1882) 48 L.T. 64**. In certain circumstances the without prejudice correspondence may be looked at to determine a question of costs after judgment has been given: see **Cutts v Head [1904] Ch. 290**. There is also authority for the proposition that the admission of an "independent fact" in no way connected with the merits of the cause is admissible even if made in the course of negotiation for a settlement…I regard this as an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts. If the compromise fails, the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence."

[40] The Respondents also submitted that

"it is clear from the legal principles … that the letter exhibited by the Appellant/Clamant … and the contents thereof, ought never to have been included in his witness statement and counsel for the Appellant/Claimant ought never to have been allowed to cross-examine the 1st respondent/Defendant about said communications. They were protected communications and cannot be

relied on to establish a value for the Respondents/Defendants" use of his property… moreover, those values were in respect of the improved value of the Appellant/Claimant's property."

[41] It is to be noted that **Cutts v Head [1984] Ch 290**, Olivier L.J. also stated

"[n]ow, it is certainly the case…that the use of the words "without prejudice" as a cover for negotiations and with no reservation of the sort suggested in **Calderbank v. Calderbank [1976] Fam. 93, 106** has today the same consequences as it had in 1889 when **Walker v. Wilsher, 23 Q.B.D. 335**, was decided. Thus, it cannot be contended that the meaning of the expression has changed … The answer to the question whether, accepting that meaning, it is yet open to a party taking advantage of the protection afforded by the use of the formula to qualify its operation must, I think, therefore be sought in an analysis of the underlying basis for the protection and the practice of the courts generally in relation to its application… If, however, the protection against disclosure rested solely upon a public policy to encourage out-of-court settlement of disputes, **Walke**r… is not readily intelligible … One is, therefore, compelled to seek some additional basis for the decision in **Walker**…and it is, as it seems to me, to be found in an implied agreement imported from the marking of a letter "without prejudice" that it shall not be referred to at all. **…"**

[42] In **Walker**, Lord Lindley said

"It is I think a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of the parties, otherwise the whole object of the limitation would be destroyed. I am therefore, of the opinion that the learned judge should not have taken these matters into consideration…" "What is the meaning of words "without prejudice"? I think they mean without prejudice to the position of the writer if the terms he proposes are not accepted...."

[43] In Framlington Group Ltd & Anor v Barnetson [2007] EWCA Civ 502, [2007] 3 All ER 1054, the court also considered the "without prejudice" issue in a wrongful dismissal case. That court phrased the issue thus: "…whether and in what circumstances there may be a dispute prior to litigation or the threat of it, to which the "without prejudice" rule may apply to settlement negotiations between the parties."

Framlington argued that portions of Barnetson's witness statement, which it had unsuccessfully sought to have struck out in the court below, referred to meetings between the parties that sought to resolve disputes without the need for litigation. The court found that the trial judge had wrongly found that a "dispute" meant "one that had become the subject of litigation or of threat of litigation." There was a dispute between the parties regarding the terms of Barnetson's termination, that was "capable of being resolved by compromise, and from which, if not so resolved the parties could reasonably have contemplated that litigation would ensue." The court phrased the rule as follows:

> "Written or oral communications made as part of negotiations genuinely aimed at, but not resulting in, settlement of a dispute are not generally admissible in evidence in litigation between parties over that dispute. It is trite law that the use or non-use of the words "without prejudice" in such negotiations may indicate whether the communication(s) in question may attract the privilege, but is not necessarily determinative on the point; see *Phipson,* para 24-16 to 24-18.

It was further stated

> "However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties."

The court continued

> "the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the Judge did, to

negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made.

It was held that

"[t]he resultant picture is one of negotiations arising out of a dispute as to Mr. Barnetson's contractual entitlement on his early dismissal, all against the backcloth of potential litigation if they could not resolve the dispute by compromise. It is not a picture of negotiations to vary his contractual entitlement against the possibility that he might not be dismissed after all, or to accommodate the proposed early dismissal, with no thought given on either side to potential litigation if variation were not agreed…For those reasons, I am of the view that the exchanges the subject of Framlington's application are covered by the "without prejudice" rule."

[44] The Appellant contends that

"[t]he label 'Without Prejudice' can be useful but it is not determinative. It is the substance that counts and this is assessed objectively [and that] there are some exceptions to the Without Prejudice Rule and these largely arise in circumstances where there is unlikely to be any prejudice arising from the disclosure or where there is waiver of the privilege. The exceptions are outlined in **Unilever v Procter & Gamble [2001] 1 All ER 783** …"

The Appellant further submitted that

"the Respondents were allowed the opportunity to object to its use before the trial of the matter and during the trial of the matter and there were no such objections. Therefore, consideration by the Learned Trial Judge to this communication was proper … At the commencement of the trial it can be seen that the Learned Trial Judge dealt with the list of objections filed by the parties. There was no mention by Ms. Duncan of objections to the evidence of Mr. Modiri or to the exhibits

attached to his witness statement. Therefore, the Respondents conceded to the communication … to be accepted as evidence… Even further there was absolutely no mention of, reference to or challenge … during cross examination of the Appellant ... Even further, during cross examination of the 1st Respondent, there was no objection to the reference to the [communication] or the line of questions as it relates to the negotiations and contents of the communication… Therefore, we submit then that the Respondents waived their right to claim that communications were privileged and the Appellant intended to and relied on the contents of the letter to set out his case."

[45] In **Rush & Tompkins Ltd v Greater London Council [1989] AC 1280** Lord Rodger said that

> "the rule is actually a privilege which forms part of the general law of evidence and is based on public policy. So, unless the parties make some agreement to narrow or broaden its effect, the scope of the privilege is a matter of general law and is not based on the supposed boundaries of a notional agreement between the parties."

In the same case, Lord Walker said that "[a]s a matter of principle I would not restrict the without prejudice rule unless justice clearly demands it."

[46] In **Unilever**, Robert Walker LJ said that

> "admissions against interest should be protected under the without prejudice rule, 'In those circumstances I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially **Cutts v Head**, **Rush and Tompkins** and **Muller**. Whatever difficulties there are in a complete reconciliation of these cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule."

[47] In **Cutts**, Oliver LJ spoke of the

> "implied agreement imported from the marking of a letter "without prejudice" [is] that it shall not be referred to at all." Further, Fox LJ said that "[t]he expression must be read as creating a situation of mutuality which enables both sides to take advantage of the "without prejudice" protection. The juridical basis of that must, I think, in part derive from an implied agreement between the parties and in part from public policy."

[48] In **Ofulue v Bossert, [2009] UKHL 16,** Lord Hope stated the rule as follows:

> "Where a letter is written "without prejudice" during negotiations with a view to a compromise, the protection that these words claim will be given to it unless the other party can show that there is a good reason for not doing so…"

Further,

> "[t]he essence of it lies in the nature of the protection that is given to parties when they are attempting to negotiate a compromise. It is the ability to speak freely that indicates where the limits of the rule should lie. Far from being mechanistic, the rule is generous in its application. It recognises that unseen dangers may lurk behind things said or written during this period, and it removes the inhibiting effect that this may have in the interests of promoting attempts to achieve a settlement. It is not to be defeated by other considerations of public policy which may emerge later…"

Additionally, Lord Hope stated that "the court should be very slow to lift the umbrella [of protection] unless the case for doing so is absolutely plain."

In **Ofulue**, the letter under consideration was clearly marked "Without Prejudice" but constituted an offer that had been made in previous proceedings which had been struck out.

[49] In **Avonwick Holdings Ltd. v Webinvest Ltd and another [2014] EWCACiv 1436**, the court reiterated the rule, concluding that

"[t]here are two bases for the operation of the without prejudice rule. The first rests on public policy and that policy is to encourage people to settle their differences. However, in order for that head of public policy to be engaged there must be a dispute. The concept of dispute is given a wide scope so that an opening shot of negotiations may fall within the policy even though the other party has not rejected the offer… In order to decide whether this head of public policy is engaged, the court must determine on an objective basis whether there was in fact a dispute or issue to be resolved. If there was not then this head of public policy is not engaged. On facts of this case, in my judgment the judge was right to say there was no dispute at the time the communications took place. The other basis for the rule is contractual, that is by contract the parties may extend the usual ambit of the without prejudice rule. In Cutts v Head the dispute was over so the justification was purely in terms of contract. In Unilever, the possibility of extending the scope of the rules was expressly envisaged and the decision in Unilever is treated as an authoritative exposition."

Waiver or when the rule does not apply

[50] In **Walker v Wilsher,** Lord Lindley said

"No doubt there are cases where letters written without prejudice may be taken into consideration as was done the other day in a case in which the question of laches was raised. The fact that such letters have been written and the dates at which they were written may be regarded, and in so doing the rule to which I have averted would not be infringed. The facts, may, I think, be given in evidence, but the offer made and the mode in which that offer was dealt with- the material matters, that is to say, of the letters-must not be looked at without consent."

[51] In **Unilever**, Lord Walker set out "important instances" or exceptions to the 'without prejudice" rule. These are repeated in their entirety below.

“Nevertheless there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.

(1) As Hoffmann LJ noted in the first passage set out above, when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible. *Tomlin v Standard Telephones and Cables* [1969] 1 WLR 1378 is an example.

(2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. *Underwood v Cox* (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.

(3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby v Wards Mobility Services* [1997] FSR 178, 191, and his view on that point was not disapproved by this court on appeal.

(4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in *Foster v Friedland*, 10 November 1992, CAT 1052). Examples (helpfully collected in Foskett's Law & Practice of Compromise, 4th ed, para 9-32) are two first-instances decisions*, Finch v Wilson* (8 May 1987) and *Hawick Jersey International v Caplan* (The Times 11 March 1988). But this court has, in *Foster v Friedland* and *Fazil-Alizadeh v Nikbin*, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

(5) Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence. Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335, 338,

noted this exception but regarded it as limited to "the fact that such letters have been written and the dates at which they were written". But occasionally fuller evidence is needed in order to give the court a fair picture of the rights and wrongs of the delay.

(6) In *Muller v Linsley & Mortimer, [1994] EWCA Civ 39]* (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.

(7) The exception (or apparent exception) for an offer expressly made 'without prejudice except as to costs' was clearly recognised by this court in *Cutts v Head*, and by the House of Lords in *Rush & Tomkins*, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasised by the importance which the new Civil Procedure Rules, Part 44.3(4), attach to the conduct of the parties in deciding questions of costs). There seems to be no reason in principle why parties to without prejudice negotiations should not expressly or impliedly agree to vary the application of the public policy rule in other respects, either by extending or by limiting its reach. In *Cutts v Head,* Fox LJ said (at p.316) "what meaning is given to the words 'without prejudice' is a matter of interpretation which is capable of variation according to use in the profession. It seems to me that, no issue of public policy being involved, it would be wrong to say that the words were given a meaning in 1889 which is immutable ever after".

(8) In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial

conciliation: see *Re D* [1993] 2 AER 693, 697, where Sir Thomas Bingham MR thought it not

"fruitful to debate the relationship of this privilege with the more familiar head of 'without prejudice' privilege. That its underlying rationale is similar, and that it developed by way of analogy with 'without prejudice' privilege, seems clear. But both Lord Hailsham and Lord Simon in *D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at 602, 610 [1978] AC 171 at 226, 236 regarded it as having developed into a new category of privilege based on the public interest in the stability of marriage."

[52] In the present case, it would appear that none of the **Unilever** exceptions applied. However, it appears that there may be a perfectly plain reason for the court to "lift the umbrella" of protection. As Lord Walker said in **Rush**, "justice clearly demands it." And so I come to the issue of the lack of objection to the evidence at trial.

Raising the point for the first time on appeal

[53] In **Singh v Rainbow Court Townhouses [2018] UKPC 19**, the Appellant was a townhouse owner who carried out work on her unit without the approval of the management company as was required by the Townhouse Community Guidelines. The judge at first instance, decided the case on the papers "without any form of hearing." On appeal, the point was taken for the first time, that the management company had no title and so could not properly bring the claim. The claim should have been brought in the name of the lessors; the company was merely their agent. Lord Carnwath, with whom the other members of the Board agreed, stated that "the point was not taken in the High Court by counsel then instructed for the Appellant, probably for the good reason that the defect had caused no prejudice and … could have been corrected by amendment. In the Board's view it was too late to take the point for the first time in the Court of Appeal…"

[54] In the instant case, it appears to me that there was perhaps a reason why the Respondents did not make the objection in the court below. The 1st Respondent needed the court to know that his offer was only good for one month. Also, the Respondents in all probability did not expect that the learned trial judge would have had to rely on the figures mentioned in the parties' communications as her starting point for calculation of damages. However, this last is wandering into the area of speculation and forms no part of the decision herein.

[55] Similar to **Singh**, in **Sam Maharaj v Prime Minister (Trinidad and Tobago) [2016] UKPC 37**, the Board, citing **Baker v R [1975] AC 774** said that

> "its normal practice... is not to allow the parties to raise for the first time in an appeal to the Board a point of law which has not been argued in the court from which the appeal is brought. Exceptionally it allows this practice to be departed from if the new point of law sought to be raised is one which in the Board's view is incapable of depending upon an appreciation of matters of evidence or of facts of which judicial notice might be taken and is also one upon which in the Board's view they would not derive assistance from learning the opinions of judges of the local courts upon it."

[56] In **Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others [2018] JMCA App 7**, the court, accepting that "[i]t is undoubtedly true that constitutional issues have, on occasion, been first raised in cases at the appellate level," stated that **Hinds and others v The Queen [1975] 24 WIR 326** "is but one example or that phenomenon." The court further stated that

> "claims for redress for breaches of constitutional rights are, for the most part, raised at the level of the trial court, being the Supreme Court. That court is better suited for the issues that are usually raised in those cases, because evidence is usually required; particularly evidence from the party said to have breached the relevant constitutional right."

In **Chen-Young** the court declined jurisdiction to "deal with the issue of assessing whether there [had] been a breach of the applicants' constitutional rights and whether redress should be provided." The court stated that "[t]he applicants are at liberty to pursue that matter with the Supreme Court if they [were] so minded." The constitutional point that was raised there, concerned the right to a fair hearing within a reasonable time. The delay alleged in the case was in the delivery of the judgment which the court thought would require evidence in response. (Additionally, there was the suggestion that such evidence would have to come from those who were either present or former members of the court.) While it is trite law that jurisdiction can be challenged at any time, and, from the cases, that constitutional points can be challenged some of the time, neither of those issues arise in the current case.

[57] The rule was also succinctly put in an old appeal from India to the Privy Council. In **Ram Krishna Das Surrowji v Surfunnissa Begum and others (1881) ILR 6 Cal 129**, Their Lordships said that

> "the point raised is one which cannot be taken here upon appeal for the first time. It is one which ought to have been taken in the Court below, and their Lordships can find no trace of its having been so taken. No such trace is to be found in the judgments, or in the evidence, or in the reasons which are stated in the petition presented to the High Court for leave to appeal to Her Majesty in Council… Their Lordships think this is clearly an objection which ought to have been taken in the Court below, and not raised for the first time here, because it involves a question of fact; and if it had been taken before the High Court and argued, the Judges of that Court might have directed a further enquiry into the matter, under the powers which its procedure gives them."

[58] Similarly, in the instant case, the privilege point or objection is one that ought to have been made in the court below. There is no trace from the transcript from the court below or from the decision of the learned trial judge that the point was taken. Like **Ram Krishna Das**, the point involves a question of fact, and since there is evidence of the "Without Prejudice" letter in the court below, this should have compelled the

Respondents, as the parties wishing to claim the privilege, to do so then and there. Also, if the objection had been made in a timely manner, the parties would, no doubt, have been obliged to provide arguments on the point in that forum, and they did not. Accordingly, I see no reason to fault the decision of the learned trial judge to utilize the figures in the "Without Prejudice" communication herein. The Respondents had ample opportunity to object to the evidence in the court below and chose not to do so. A party cannot benefit by having remained silent when, having had several opportunities to object to evidence, he did not do so, but now relies on the absent objection as a ground of appeal.

The calculation by the learned trial judge

[59] The learned trial judge began her analysis of the trespass by referring to the 1st Respondent's admission of the trespass under cross-examination. She then outlined the specific acts that comprised the trespass

> "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 … when the Government acquired the Claimant's land… 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 2nd Defendant's tour buses."

Although the learned trial judge accepted the evidence of the Appellant's witness Jose Garcia, as to the "physical assessment of the damage done to the land (which does not require being appointed as an expert), the learned trial judge also noted that

> "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 ($1m)." However, the learned trial judge found that "[t]he 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 … not accepted from Mr. Garcia's evidence in light if the absence of him having been appointed an expert …"

[60] In further discussion of the user principle, the learned trial judge said

"the Court considers the authority of **Stoke-on-Trent City Council V.W. & J. Wass Ltd** 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.

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;"

[61] The learned trial judge continued

"…in **Stoke-on-Trent** … 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 concluded that an assessment of damages according to the user principle is in order in this case."

The learned trial judge also stated that even though the Appellant had sought to claim damages for both user and reinstatement, "the award [based on user], is to be made as an alternative to the usual election of diminution in value or cost of reinstatement."

[62] The learned trial judge's assessment was eventually made based on her consideration of the figures floated by the parties during their prior negotiations – the offer of US$20,000 per month made by the 1st Respondent as against US$35,000 per month demanded by the Appellant. However, while the learned trial judge noted that the Claimant had apparently taken $US27,500 as the median of these amounts, she felt that even this amount should be reduced in consideration of the "reciprocity of user" and the presumed inflation of the figures touted by the parties. There is nothing in the record to support the presumed inflation, other than the learned trial judge's assumption that "these offers were made during contentious litigation of the issue which would cause the amounts to be inflated"; but there is ample evidence of user by the Claimant of the Respondents' land to gain access to his own. Although not the subject of appeal herein, much of the decision in the lower court was taken up with the Appellant's claim for an easement of necessity over the Respondents' land.The learned trial judge utilized these two factors to reduce the Appellant/Claimant's median figure from US$27,500 (BZ$55,000) to US$5,000 (BZ$10,000) per month for a period of 15 months, resulting in the compensatory damages award of BZ$150,000.

[63] The learned trial judge further stated that

"[t]he 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 on 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."

[64] The learned trial judge clearly stated that her assessment was undertaken as "an alternative to the usual election of diminution in value or cost of reinstatement." Her starting point as a basis for calculation was the figures mentioned by the parties during prior negotiation. Be that as it may, she did not accept those figures, but reduced them by taking two factors into account. These were reciprocity of user (to account for the fact that the Appellant and his employees were traversing across land under the control of the 1st Respondent) and the probable inflation of figures by the parties. Accordingly, doing the best that she could in the circumstances, the learned trial judge considered a figure of US$5,000 or BZ$10,000 per month to be "a fair assessment" of a user fee. The learned trial judge's calculation finds some support in the authorities.

[65] In **Horsford v Bird, [2006] UKPC 3** the Respondent had built a wall and garden on land along one side of his property which happened to include part of land belonging to the Appellant. The court stated that

[t]he period for which mesne profits could be claimed terminated in their Lordships' view when Joseph-Olivetti J on 21 February 2003 gave judgment refusing the mandatory injunction and making an award of damages in lieu. So the use by the respondent of the appellant's land for which the appellant is entitled to compensation continued for 8 years and 3 months. The quantum of the claim should, in their Lordships' opinion, be assessed on a yearly basis as a percentage of the capital value of the piece of land in question. The capital value, in their Lordships' opinion, should be taken to be EC $27,300 and their Lordships

think that an annual rate of 7.5 per cent of that capital value would represent reasonable mesne profits. That rate would lead to an annual mesne profits figure of EC $2,047.50. Eight years at that rate would produce $16,380. The figure for three months would be $512. The total figure would be $16,892.

[66] Distinguishable from the current case is that **Horsford** had the benefit of expert evidence as to valuation of the land in question. There was, therefore, a more certain figure as a starting point for calculation. **Horsford** was followed by the court in **Hugh Charles v Lyndis Wattley Claim No NEVHCV2012/0015** where Lanns M. stated that

> "[t]he formula for calculating mesne profits was set out by Lord Scott in **Horsford v Bird** ... His Lordship opined that mesne profits should be assessed on a yearly basis as a percentage of the capital value of the piece of land in question. In His Lordship's opinion, an annual rate of 7.5 per cent of the capital value would represent reasonable mesne profits."

As to why 7.5% - the court in **Ramzan v Brookwide Limited [2010] EWHC Civ 2453 (Ch**) stated that "[t]here is no explanation as to why that percentage was chosen: it was simply stated by Lord Scott to be a rate that their Lordships thought would represent reasonable mesne profits."

[67] In **Ramzan,** the court cited **Swordheath Properties v Tabet [1979] 1 WLR 285**, where Megaw LJ quoting Halsbury's Laws of England stated:

> "Where the defendant has by trespass made use of the plaintiff's land the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use. It is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for any other reason."

The court continued

> [I]n Horsford v Bird, which was such a case, the Privy Council calculated the loss to the injured party on the basis of a percentage return to the plaintiff on the capital value of the strip of appropriated land based on what the defendant would pay for it. The Privy Council characterised that compensation as mesne profits, and approached the matter by looking at the claimant's loss, rather than at the benefit enjoyed by the defendant…[T]he question whether it is or is not appropriate to calculate mesne profits on the basis of a percentage of the capital value cannot depend on whether the land is more valuable to the trespasser than it is to the dispossessed. Rather, it depends on whether the amount that the owner of the land could reasonably ask the trespasser to pay for its use and occupation would be an amount by way of rent or license fee."

The court then utilized the **Horsford** calculation but applied a lower percentage of 4.5% stating that

> "…it would be fairer to Brookwide [the defendant] to take that lower percentage of return in order to reflect a number of factors, including the fluctuations in interest rates over the period in question, the fact that any profit would be net of tax, and the impact of the recent economic downturn."

[68] In **Woolcock v Sykes, [2014] JMCA Civ 52**, Mangatal JA said that

> "this is not the type of case … where precise evidence was not or could not have been available. In this case, it seems to me that the respondents' case was simply deficient in that no effort was made to lead evidence as to the letting value, or theoretical or derived letting value, of the areas of the respondents' property upon which the appellants encroached and trespassed ...It is nevertheless clear that there has been some proof of substantial damage and diminution in value, albeit no proof of quantum. Further, the respondents have suffered loss of amenity and inconvenience over a considerable period of time in aggravating conditions. In those circumstances, I arrive at the same conclusion as the learned trial judge, (albeit by a different route), that the court has to just do

the best it can, acting with its jury mind and make an award of general damages, looking at the matter in the round…"

Woolcock referred to **Chaplin v Hicks [1911] 2 KB 786** where the court held that the "…fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract."

[69] In **Chaplin** Vaughn Williams LJ said

"I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable... I only wish to deny with emphasis that because precision cannot be arrived at, the jury has no function in the assessment of damages ... In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract."

[70] In **Akbar Ltd v Citibank NA [2014] JMCA Civ 43**, Phillips JA said

"I should indicate that I do not in the circumstances think that it would be just to allow the matter to go back for assessment in the Supreme Court, as suggested by counsel for the respondents. Instead, it falls to this court to examine the awards made by the learned trial judge, and if it is found that the amounts awarded were so extremely high … to carry out its own best assessment on the evidence as already presented at trial. The learned trial judge attempted, in the absence of evidence that should have been led, to do the best in the circumstances. However, the award of damages for trespass to land in the sum of $10,000,000.00 seems arbitrary and inordinately high…"

[71] If there is a hard and fast rule regarding the assessment of damages for trespass to land, in the absence of proof of loss, but where the trespasser continues to make use of the land, it must be the reasonable price or rental for its use by the trespasser. As is demonstrated by the cases just referred to, the court is constrained only by what is fair

in all the circumstances or what the interests of justice require. The authorities seem to be in favor of a judge making the best effort that she can in the absence of evidence of loss, valuation of the land or probable rental value. The learned trial judge in the present case did the best that she could in the circumstances, taking into account the original value of the land in question as well as a reduction of the figures from the parties' prior negotiation. While the authorities also favor some award rather than none, they also decline to suggest that the wronged party is entitled, absent proof of valuation or rental value, to damages amounting to a bonanza far and above the original value of the property in question. To borrow the words of Master Alexander in **Vincent Joseph v Danish Mahabir Trinidad and Tobago H.C. 2600/2006**,

> 'the failure of the claimant to prove the extent of the compensation due to him does not give the defendant a 'Get Out of Jail Free' card to play and so allow him to escape with a slight tap on the hands nor does it absolve [the] court from attempting to fairly assess damages and/or in default of this making a fair and reasonable award in nominal damages."

[72] The learned trial judge adjusted the figures mentioned by the parties to a figure which, while far below the parties' figures, still amounted to an award of compensatory damages considerably more than twice the original value of the Appellant's land. This case is unlike **Horsford**, where mesne profits were calculated as a percentage of the capital value (the land having been expropriated from the appellant and made part of the respondent's garden) and **Hugh Charles**, where the same calculation was done with the same 7.5 percentage as in **Horsford** (in circumstances where an entire apartment complex had been constructed on the claimant's land). As such, the learned trial judge was not obliged to take this formula into consideration.

Conclusions

[73] Consequently, I find no good reason to disturb the findings and the awards made by the learned trial judge and would confirm the orders made by her. I would dismiss the appeal and the cross-appeal and order that each party bear his/its costs of the appeal

and cross-appeal. I would further order (a) that this order as to costs be provisional in the first instance but become final after 10 clear working days from the date of delivery of judgment, unless any party shall file application for a contrary order within such period of 10 days and (b) that, in the event of the filing of such an application, the matter of costs be determined on the basis of written submissions to be filed and delivered by the parties in 10 days from the filing of the application.

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DUCILLE JA