

**IN THE SUPREME COURT OF BELIZE A.D., 2020**

**CLAIM NO. 398 OF 2020**

**BETWEEN**

**(P. NOREEN FAIRWEATHER**

**CLAIMANT**

**(**

**(AND**

**(**

**(GLADWIN PENNER**

**DEFENDANT**

**BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG**

**Decision Date:**

16<sup>th</sup> March, 2021

**Appearances:**

Mrs. Andrea McSweaney-McCoy, Counsel for the Claimant.

**KEYWORDS: Tort - Trespass - Damage to Property - Remedies - Damages – Injunction.**

**JUDGMENT**

1. The Claimant, is the registered freehold owner of property in Camalote Village (the Property), which she says she occupied and developed by cultivating crops thereon.
2. The Defendant, she claims, was well aware of her ownership of the Property as he had made multiple requests and proposals for purchase or exchange of

same which she had repeatedly refused. He has apparently based his interest in the Property on the fact that his family members own the surrounding lands. In fact, he raises cattle and carries on business as a butcher on adjoining property.

3. Notwithstanding his awareness, the Defendant, his workmen and agents, have entered upon the Property without her consent. She attests that around 2017 they bulldozed and cleared ten (10) acres and destroyed three (3) acres of young mahogany trees.
4. Later, in 2018 they destroyed 98 coconut trees she had planted, constructed a fence and enclosed large tracts as corrals for grazing goats and sheep. He placed a private property sign on a gate at the front portion. He cultivated crops, allowed his workers to trespass and threatened her for what he termed her interference with the Property. He has even asked her for compensation for the developments he has allegedly made to the Property.
5. Although she destroyed his constructions, he has simply rebuilt them. She has made numerous verbal and written requests to him, and also sought the assistance of the police but he continues his trespass. He is sometimes quite aggressive so she stays away from the Property for her own safety as she considers the situation to be volatile. She has, therefore, been deprived of the use and benefit of the Property since 2017.
6. She claims a declaration that she is entitled to possession, an order of recovery of possession, a permanent injunction against him and his agents, damages for trespass with interests and costs.

### **Preliminary Matters**

7. On the 24<sup>th</sup> August, 2020, the Defendant acknowledged having been served on the 12<sup>th</sup> August, 2020 but never filed a Defence. At the first hearing, on the 9<sup>th</sup> September, the Defendant did not appear. The Court decided to deal with the matter summarily and asked for evidence by affidavit. The Claimant requested an opportunity to make an application for an expert to be appointed to aid the assessment of damages. Leave was granted and the matter was adjourned to the 22<sup>nd</sup> October, 2020.
8. On that date there still; was no Defence filed but the Defendant appeared in person and was then represented by Counsel. There was an oral application for an extension of time in which to file a Defence. The Court informed that a written application ought to be made as orders had already been issued for the trial to be done summarily. Counsel for the Defendant informed that the appropriate application would be made without delay but to date none has been filed.
9. On the 28<sup>th</sup> October, 2020 leave was granted for the expert to be appointed. Subsequently, the Claimant did file additional affidavits and an expert report. The Court continued to deal with the matter summarily and gave dates for the filing of written submissions from the Claimant. Those submissions were to have been filed on the 21<sup>st</sup> December, 2020 but were only filed on the 16<sup>th</sup> March, 2021 prompting this decision.

### **The Issues for Determination are:**

1. Whether the Defendant trespassed on the Claimant's land?
2. If he did trespass, what remedies are the Claimant entitled to?

**Whether the Defendant trespassed on the Claimant's land:**

10. Halsbury's Laws of England, 4<sup>th</sup> ed Vol 45, paragraph 1384 defines trespass as:

*“Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes mineral from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land onto another's land.”*

**The Evidence:**

11. The Claimant filed two (2) additional affidavits to the one filed with her Fixed Date Claim Form. The first affidavit included much of what was stated in the introduction above. It annexed the Claimant's land certificate as proof of her legal title.
12. A letter dated July, 2016 signed by the Claimant and addressed to the Defendant was also annexed. It was carbon copied to the Officer Commanding, Police Department, Belmopan. It spoke to the Defendant's illegal building of animal enclosures and other structures, the bulldozing of a significant portion of the Property and the destruction of mahogany trees planted there.
13. That letter also referred to the Defendant having approached the Claimant with a proposal to purchase or exchange property and concludes by giving him notice to remove his structures, animals etc. within thirty days or face

court action. There included a request to the Police Department to initiate action against Mr. Penner to stop his illegal encroachment.

14. Also attached to the affidavit are photographs of the property. There is a fence surrounding flat land, a gate with a no trespassing sign, and another with what appears to be a corral. Although the photographs were in color, they were not the clearest so it was difficult to determine their precise content.
15. The second affidavit supported her application for an expert to be appointed to value the trees and crops allegedly destroyed to assist the assessment of damages. That report will be discussed later.
16. The third affidavit repeated much of what had been said in the first affidavit. It went into more detail about the purchasing and nurturing of the coconut trees by the Claimant and their eventual transplant by her workers. She then explained how the Defendant's goats had destroyed them all.
17. She went on to discuss her removal of the fence and gate which the Defendant had erected. She said his farmhand approached her, and amidst his threats, she called the police to report the trespass. The police never came. The Defendant then reconstructed the fence and continued to graze his animals. She decided it best not to attempt to remove the fence again or to go to her property alone for that matter.

18. This Court finds that the Defendant's trespass was blatant and continuous from 2017 to the present. The Court will now consider any remedies the Claimant may be entitled to.

**What remedies are the Claimant entitled to?**

19. The Claimant has proven her right to an order for the recovery of possession of the property. She is also entitled to compensation in the form of damages.
20. In *Michael Modiri v Bradley Paumen et al Belize Supreme Court Claim 586 of 2016 (the Modiri case)*, this Court explained that “damages for trespass to land are said to be at large. This means that the Court must consider all the relevant circumstances when making the assessment.”
21. The circumstances as they have been presented in this matter are, and the Court accepts, that there has been a trespass and there has been damage done. The land was bulldozed clearing some ten (10) acres and destroying 98 young coconut trees and 250 young mahogany trees.
22. While there is evidence as to the value of the mahogany and coconut trees that evidence admits to not including the cost of fertilizer, weed control and labour, receipts for which, the Claimant says, she no longer has. Furthermore, there was other damage for which there has been no valuation presented; the destruction and burning of vegetation during the clearance. This means that if the Court attempts simply to use the value of the destroyed trees, the compensation would be inadequate and unfair.

23. The Claimant, in her submissions, seeks damages in accordance with the user principle. That is a reasonable sum for the wrongful use of the property. She accepts that she has tendered no evidence in relation to the value of the property or of the Defendant's use of the property in the course of his business. Yet, without any basis whatsoever, she submits \$5,000.00 per month as a reasonable value. And she insists that it is the fairest approach "*as it takes into consideration the value of the use of the land to the Defendant and the fact that the Defendant may consider his exposure to damages for trespass to be minuscule or insignificant compared to his benefit for committing the trespass.*"
24. Counsel sought to rely on *Michael Modiri et or v Bradley Paumen et or Civil Appeal No. 27 of 2016*. In that case, there was evidence of the original value of the land and sums with which the parties had used in an attempt to negotiate a monthly rental figure. The Court of Appeal approved the trial judge's use of those negotiating figures, adjusted down to accommodate the possibility that they were inflated to begin with (done during ongoing contentious litigation) and the evident reciprocity of user (both parties had used each other's land for access). It was felt that the trial judge had done the best that could have been done in the circumstances.
25. Importantly, the Court of Appeal, at **paragraph 20** quoted from *Asot A. Michael v Astra Holdings Limited, Antigua & Barbuda Civ. App No. 17 of 2004*:
- "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.”*

26. The Court of Appeal continued at **paragraph 21:**

*“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 continue to make use of the Appellant’s land, nominal damages arise where a successful claimant has proved the tort but can not prove loss or damage.”*

26. This Court has nothing by which user value could possibly be calculated. So embarking on this journey makes no good sense whatsoever. Although Counsel for the Claimant felt that nominal damages were not appropriate because some proof of loss had been presented, the Claimant can clearly not prove the full loss or damage. The Court has but one alternative left; that is to give a figure which it finds fair in the circumstances i.e. nominal damages.

27. This Court at **paragraph 47** of **the Modiri case (ibid)** quoted from **paragraph 58 of Asot Holdings (ibid)** and it bears repeating here:

*“58. A claimant may recover nominal damages where he had not suffered actual loss or where he does not prove actual loss because loss is presumed. The Privy Council reminded us in Greer v Alston Engineering Sales & Services Lrd. (2003) 63 WIR 388, at paragraph 7. That ‘nominal damages’ does not mean small damages. Greer involved a claim for damages for the loss of use of a backhoe for the period July 1982 to January 1984 and by amendment of the claim, for detinue for a further period of 6 months. Their Lordships stated, at paragraph 9, that although damages for loss of use were not quantified, it was the duty of the Court, in awarding nominal damages, to recognize the loss by an award that is not out of scale. Their Lordships thought that the \$5,000.00 that*



*the Court awarded was low. The daily rates for the use of the backhoe went from \$500.00 per day in 1982 to \$800.00 per day by 1984. They confirmed the award of \$5,000.00 nominal damages on the ground that it was not so low to warrant their interference.”*

28. In considering a fair amount, the Court is allowed to consider all the circumstances including the figure presented by the expert for the destroyed trees. This means that the nominal figure will not be less than that known part of the loss which totaled \$1, 057.42. The Court also considers that the trespass has gone on for over three (3) years (beginning in 2017) notwithstanding the Claimant’s attempts to stop it and the commencement of these proceedings. The Claimant has used various self-help methods but only approached the Court in 2020.
29. The Court noted that the Claimant designated the land as her retirement plan and so planted trees on it some five (5) years ago. The intended use was therefore agricultural and not residential. The Defendant himself was using the land for agricultural purposes and was earning from the animals he reared there. The Court is unaware of the amount which the Defendant makes from this business.
30. The Court having nothing concrete to go on and since each case has to be determined on its own merit Counsel’s attempt to use the *Modiri* award of \$40,000.00 in nominal damages is of no assistance.
31. The Court considers \$1000.00 per month or \$39,000.00 up to the end of March, 2021 to be a fair figure. The sum for the replacement of the destroyed trees will be added to this sum. Perhaps if the Court had been

provided with proper evidence, a different assessment would have been possible.

32. In fact, not even a month in 2017 was offered as to when the trespass began so the Court will use December of 2017 as the date. The Court notes that the letter to the Defendant which the Claimant annexes states a date in 2016 but the pleadings and the Claimant's own testimony state 2017 so the Court accepts 2017.
33. There has been no pleaded claim to any other form of damages.
34. The Court considers the Defendant's general behavior. His awareness of his trespass, his aggression towards the Claimant, his continued trespass even where these proceedings have been instituted and his overall disregard for the Claimant and her rights. This Court is of the view that the Defendant will not be deterred unless an injunction is granted as prayed.

**Determination:**

It is ordered that:

1. The Claimant is entitled to possession of the Property described as Parcel 421, Block 24 Society Hall Registration Section, situated at Camalote Village, George Price Highway, Cayo District, Belize.
2. The Defendant is to surrender possession of the Property on or before the 31<sup>st</sup> March, 2021.
3. Thereafter, the Defendant whether by himself or his agents or whosoever, are permanently restrained from trespassing, wrongfully interfering with,

obstructing the Claimant's access to the Property or dealing with same in contravention of the Claimant's ownership and consent.

4. Damages for trespass are awarded to the Claimant in the sum of \$40,057.42 to be paid by the Defendant.
5. Interest is awarded at the assessed rate of 6% from December, 2017 to the date of judgment herein and thereafter, at the statutory rate of 6% until payment in full.

**SONYA YOUNG**  
**SUPREME COURT JUDGE**