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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 2002/N0900

BETWEEN NEW FALMOUTH RESORTS LIMITED CLAIMANT

A N D INTERNATIONAL HOTELS JAMAICA DEFENDANT

Miss Carol Davis for Claimant.

Mr. Conrad George and Mrs. J. Collins for Defendant instructed by Hart Muirhead Fatta.

Heard: 21/7/03, 22/7/03, 23/7/03, 31/7/03, 16/10/03 and 31/10/03

Brooks, J.

When this matter came on for hearing I ruled that Judgment be entered on behalf of the Plaintiff on the claim, the Defendant's defence having previously been rendered, struck out. The Defendant had earlier failed to comply with an "unless order" made on a date on which the pre-trial review was scheduled to be heard and consequently suffered the sanction mentioned above.

As a result of Judgment having been pronounced on behalf of the Plaintiff the hearing proceeded by way of an assessment of the Plaintiff's damages.

It was I who made the "unless order" mentioned above. Although the pre-trial review was scheduled to be heard by me on that occasion that

hearing did not take place. I therefore do not consider myself disqualified by rule 38.4 from conducting the hearing of the assessment of damages.

The Plaintiff's claim as a result is for damages for trespass and for the Defendant's use and occupation of the Plaintiff's land. This land is situated at New Court in the parish of Trelawny and is registered at Volume 1066 Folio 929 of the Register Book of Titles. It is hereinafter referred to as "the land."

The evidence led on behalf of the Plaintiff as to the nature of the trespass came by way of a witness statement of Mr. James Chisholm the Managing Director of the Plaintiff's Company. Mr. Chisholm testified that since May 2000 the Defendant has remained in possession of the land, despite a notice to quit served on it dated 13th August 2002.

Mr. Chisholm further testified that in or about the year 2001 the Defendant constructed a sewage pond on the land. The Defendant utilized the pond and the equipment used in conjunction with it for the purposes of its hotel complex that it operated on land adjacent to the land.

Apart from the sewage plant the Defendant also used a portion of the land for tennis courts. Those courts were, according to Mr. Chisholm's testimony in cross-examination, previously placed on the land by the (then) owners of the said hotel complex, and with the Plaintiff's permission.

The Plaintiff called two witnesses to testify as experts. The first was Mr. Robert Evans, a civil engineer. His witness statement dated the 17th day of June 2003 asserted that at the request of Mr. James Chisholm he estimated the cost of removing the sewage pond and re-instating the land to its pre-existing condition. This cost he placed at U.S. $141,475.00. The Jamaican equivalent was $8,368,258.00 according to Mr. Evans.

He originally had calculated the costs in Jamaican Dollars and then converted the total to United States Dollars using an exchange rate of J$59.15: U.S. $1.00 which he says was the rate on the 16th June 2003.

The second expert witness was Mr. Edwin Tulloch-Reid, a chartered valuation surveyor. By virtue of his witness statement and testimony under cross-examination Mr. Tulloch-Reid opined that at August 2003:

(a) the market value of the land for a "special purchaser" such as the Defendant, would be $36.2M.

(b) the value of the improvements to the land namely tennis courts and perimeter walls would be $12.0M

making a total value of $48.0M; and

(c) the monthly rental value of the land would be $800,000.

(d) the monthly value to the proprietor of the land from the operation of the tennis and sewage treatment/irrigation facilities would be $750,000

making a total monthly rental value of $1,550,000.00.

Mr. George in his closing submissions submitted that there were fatal flaws in the reports of both these expert witnesses. These flaws stem, according to Mr. George, from the failure to comply with the rules set out in Part 32 of the Civil Procedure Rules 2002. Consequently, submitted Mr. George, the reports do not qualify as expert reports; they rank as hearsay evidence and are therefore inadmissible. He concluded that the court should ignore them.

Before going into the details of Mr. George's criticisms of the reports it would perhaps be beneficial to examine how these reports came to be produced. A brief outline of the relevant orders at the interlocutory stages would also be helpful in this regard. They are as follows:

(1) No order regarding any expert report was made at the case management conference before Clarke J. (now deceased) on 8th April 2003.

(2) On 2nd June 2003, McCalla J. on the application of the Plaintiff ordered, *inter alia*,

> "that a professional appointed by the Plaintiff be permitted access to (the land) for purpose of examining the requirements to return land to natural state, such inspection to take place within 21 days of the date hereof."

(3) On 25th June 2003 Reid J., on the application of the claimant ordered "that the Plaintiff herein be permitted to call and/or put in expert report by Mr. Robert Evans, Professional Engineer of the company Technical Enterprises Ltd."

It is to be noted that Mr. Evans' expert report, which was appended to a witness statement made by him, had already been filed in court. It was also referred to in the affidavit filed in support of the application that gave rise to this order.

(4) Reid J held the pre-trial review on the same day (25/6/03), but he made no order therein concerning any expert witness or report.

(5) On the 31st July, after the commencement of this assessment exercise, again on the application of the Plaintiff, I ordered, *inter alia*,

(a) that the Plaintiff herein be permitted to call and/or put in evidence report by Mr. Edwin E. Tulloch-Reid chartered Valuation Surveyor.

(b) that the expert report prepared by the said Valuation Surveyor be served on the Defendant on or before 16th September 2003.

As explained above both experts provided witness statements to which their respective reports were appended. Both attended court and were cross-examined.

Based on the answers in cross-examination as well as his observations made of the reports, Mr. George made the following specific complaints of the reports but more so of Mr. Tulloch-Reid's.

(a) "The reports do not comply with rule 32.12 which requires that the "expert witness must address his or her report to the court and not to any person

from whom the expert witness has received instructions."

(b) The report of Mr. Tulloch-Reid fails to comply with the requirements of rule 32.13 which requirements are also mandatory since the word "must" is used for every paragraph under that rule. In particular Mr. George highlighted that Mr. Tulloch-Reid gave *viva voce* evidence in cross-examination that he relied on information from other sources, yet in breach of rule 32.13(1) (b) he failed to give the details of that information in his report. For example Mr. Tulloch-Reid stated that he relied on the Statistical Institutes inflation rate for real property. For information as to replacement costs for structures on the property he relied on a Mr. Spence a Quantity Surveyor. Despite this these sources were not cited in the report nor were Mr. Spence's qualifications reported.

Mr. George complained that these and other, similar failures in Mr. Tulloch-Reid's report breach the spirit and intention of Part 32 in that the court is given no empirical evidence by which to test the validity or otherwise of the expert's opinion.

The opinion should therefore, he concluded, be rejected. He submitted that by Rules 32.12 and 32.13 the court has no discretion to admit the evidence if it finds that there has been a breach of the provisions of those Rules. Mr. George cited no cases in support of his submissions. The court has, however, in considering the submissions, considered the cases of Stevens v Gullis [2000], 1 ALL E.R. 527, and in particular the dictum of

Woolf M.R. at p. 533. The learned Master of the Rolls said, in considering the practice directions associated with rule 35 of the United Kingdom CPR (which directions are very similar in content to our rule 32.13) said as follows:

> "The requirements of the practice direction that an expert understands his responsibilities, and is required to give details of his qualifications and the other matters set out in paragraph 1 of the practice direction, are intended to focus the mind of the expert on his responsibilities in order that the litigation may progress in accordance with the overriding principles contained in part 1 of the CPR."

The principle which can also be extracted from that case is that where an expert witness fails to set out the substance of his instructions and in other respects fails to comply with the relevant rule, the judge has a discretion as to whether to allow the expert to give evidence. (Emphasis mine).

I have also considered the very (in my respectful view) comprehensive judgment by Anderson J. on the point of expert reports under these rules. This was in the case of Eagle Merchant Bank of Jamaica Ltd. & another vs. Paul Chen-Young and others (C.L.1998/E095). The judgment was delivered on May 19, 2003. In that case Anderson, J. in considering complaints made against an expert's report, which complaints are very similar to those being

made by Mr. George in the instant case, refused to exclude the expert witness' report despite the procedural failures.

Based on the above cases, the reasoning in which, I respectfully agree, I am of the view that it is for the trial judge, (provided that he is allowed the discretion) to determine the admissibility or otherwise of evidence, and to give such weight as he deems fit to the evidence which is admissible.

I too draw support from the dicta cited by Anderson, J. from the case of Barings Plc (in Liquidation) and another vs. Coopers and Lybrand (a firm) and others; Barings Futures (Singapore) PTE Ltd. (In Liquidation) v Mattar and Others, Times Law Reports, March 7, 2001.

At page 32 of his Judgment, Anderson J., in the context of expert evidence, quoted from that Judgment as follows:

> "The modern view was to regulate such matters of evidence by weight rather than admissibility even where the evidence in question went to the ultimate issue in the case. A trial Judge could safely and gratefully rely on such evidence provided that he did not lose sight of the fact that the final decision as to what was or was not negligence was for him alone."

I find therefore that the trial judge does have a discretion as to the admissibility of expert reports despite failures in complying with the requirements of rules 32.12 and 32.13.

In considering Mr. George's submissions on the point of the admissibility of these expert reports I have taken into account the following:

(1) Rule 32.6 was complied with in alerting the court and the defendant herein as to the expert evidence to be adduced.

(2) The expert witnesses each provided witness statements and attended in person and were cross-examined.

(3) Their respective reports were not addressed to the party instructing them and though neither report was addressed to the court they were each exhibited to the witness statement made to the court.

(4) There was no challenge to the qualifications or expertise of either of the experts.

Based on the above and my view of the discretion given to the trial judge I find that the expert's reports of Messrs Evans and Tulloch-Reid and their respective testimonies are admissible as such. It is for me to determine what weight to give to each, and in doing so I shall take into account the substance of Mr. George's complaints concerning the information on which the expert Mr. Tulloch-Reid purported to rely.

The Plaintiff in its further amended statement of claim has claimed as special damages the sum of US$141,475 as the cost of removal of the sewage pond and of reinstating the land to its pre-existing condition.

There can, in my view, be no serious objection to the principle that the Defendant should pay for the cost of such removal, bearing in mind the principle of restitution.

There is however the case of Jones v Gooday 8 M and W 146 (reported at 151 E.R. at p 985) where it was held that:

> "In trespass for cutting into the Plaintiff's close and carrying away the soil, the proper measure of damages is the value to the Plaintiff of the land removed, not the expense of restoring it to its original condition."

It appears however that in the technology of 1841 the task of replacing the earth was considered "extensive engineering operations." There, a strip of the Plaintiff's land had been removed for the purposes of widening an adjoining ditch. The reasoning of the court was that by that means the Defendant may have to pay significantly more for replacement than the soil removed was worth.

I believe that that case is distinguishable from the facts of the present case. What we have here is a case of removal of things placed on the land by the Defendant and the leveling of the land.

I am concerned however that the claim has been made in United States Dollars. No evidence was given by Mr. Evans as to any component of the work being incurred in United States currency. In justification for converting the Jamaican dollar cost to United States Dollars, Mr. Evans at page 3 of his report stated:

> "It must be clearly understood that this is an estimate – not a tender – and does not constitute a contract by that firm to carry out the works mentioned therein. Typically Bills of Quantities together with specifications, drawings and a form of contract are given to a number of contractors for bidding and the most responsive bid accepted. The figure given is what is described in the trade as a Consultant's Estimate and it could be that a tendered figure could be a little higher or lower than the figure given.
>
> Notwithstanding, it is the opinion of the consultant that the figure quoted viz. $8,368,258.00 is a reasonable estimate to reinstate the land to its original standard typical of the land west of the tennis courts as stated herein above.
>
> It must also be appreciated that this figure was computed on June 16th 2003 at a time when the rate of exchange relative to the United States Dollar was about 59.15: 1 and thus the reinstatement cost can be viewed as US $141,475. The consulting engineer is well aware of the sensitivity of civil engineering estimates to exchange rate fluctuations. This is because civil works typically has (sic) a labour content of only 15% of the overall price. A significant element of the remaining price is the operating and maintenance costs of heavy equipment and this also impacts on the mining and transportation of the predominant material, marl."

Based on that evidence I find that there is no justification for the claim being made in United States Dollars. The award of interest, both up to the time of judgment and thereafter, theoretically is to compensate the Plaintiff for being kept out of his money until payment by the Defendant. The cost will be incurred in Jamaican Dollars, according to the Bill of Quantities. Any award to be made must therefore be made in Jamaican Dollars.

On the issue of the reasonableness of the Bill of Quantities, Mr. George made no attack on the validity of the figures or the method by which they were calculated. The Defendant also did not advance any evidence of its own concerning the cost of the re-instatement exercise.

Mr. George did however ask the question:

> "Is there a range of opinion in relation to the cost?
>
> The witness Mr. Evans answered as follows:
>
> "Yes, some people may charge less and some people more, but for reasons not conventionally taken into account in costings."

In re-examination he testified that the Bill of Quantities that he had prepared and presented to the court was called a "Consultant Estimate."

The witness in evidence stated that he prepared the Bill of Quantities from his experience and training as a Civil Engineer. He said that although he has never before had to remove a sewage treatment plant he has been

involved in earth works over the years and been "involved in the removal of hundreds of thousands of tons of earth."

In perusing the Bill of Quantities the court has to be careful not to abdicate its responsibility as the tribunal as to fact. It however has to rely on the evidence of those trained in the peculiar field for guidance as to what is reasonable in the circumstances.

I found only one aspect of the Bill of Quantities, which caused me concern. This was contained in items D, F and G on page 3 of the document.

Item D stipulates:

> "Allow for all preliminaries in connection with the foregoing (the details of the work to be done) including but not restricted to for <u>all engineering supervision,</u> insurances, watching and lighting, security, water for the works, lighting and power for the works, communication, safety measures, sanitary conveniences, mobilization and demobilization." $1,250,000.00

Item F stated:

> "Allow for <u>fees and expenses (including G.C.T. for Engineering Services to supervise the implementation of the rehabilitation works</u> $ 337,065.00

Item G stated:

> "Allow for costs (including G.C.T.) related to payment and expenses <u>for full time engineer's representative to monitor and supervise the rehabilitation works for 90 days.</u> $1,152,162.00

(All emphases mine)

No clarification was sought of Mr. Evans of what, at first sight, seems to be a duplication of the costs of the engineer's supervision of the works. Each item expresses this aspect a little differently from its fellows, but the core of "engineer's supervision" remains. If item D refers to "all engineering supervision" why should there be need to mention that supervision again separately? Is it that the term "all" in that context is delimited by the term "preliminaries" used earlier in the item?

These questions caused the court concern, but in the end there being no challenge in cross-examination, and because of the difference of expression in such item the court is left to consider what it considers reasonable.

I am of the view that item F being the only one restricted to engineers supervision alone, represents a duplication of either or both of the relevant portions of items D and G and in the circumstances I shall not allow the claim for that figure.

I am satisfied that, but for that item, the Bill of Quantities represents a fair and reasonable cost for the removal of the sewage pond and its related equipment and the re-instatement of the land to its pre-existing condition.

I shall therefore award a sum of $8,031,193.00 ($8,368,258.00 less $337,065.00) under that head.

The other item of damages claimed is mesne profits for the period 22nd May 2000 to the present time. The claim as pleaded by way of amendment to the statement of claim is for 41 months @ $1,550,000.00 per month making a total of $63,550,000.00.

As an aside it should perhaps be pointed out that the pleadings indicated that the total of $63,550,000 included General Consumption Tax. It however does not, and in any event I have been shown no authority, which indicates that General Consumption Tax is payable on an award of damages by the court on a claim for mesne profits.

I now return to the issue of the claim. As mentioned earlier in this judgment the monthly sum of $1,550,000.00 was made up of two components according to the report of Mr. Tulloch-Reid. The first was the monthly rental value and the second the monthly value to the proprietor from the operation of the tennis court and the sewage treatment/irrigation facilities.

These deserve separate consideration:

Monthly Rental Value

Mr. Tulloch-Reid calculated the monthly rental value by taking 20% of what he assessed to be the improved value of the land ($48.0M) and dividing the result by 12.

In arriving at the value of the improvements, Mr. Tulloch-Reid said that he secured replacement values of the tennis courts and the concrete perimeter wall from a Mr. Errol Spence. Mr. Tulloch-Reid said that he then applied depreciation rates using his own expertise to arrive at the final value of $12.0M. He said that Mr. Spence was a Quantity Surveyor. On this area of the evidence Mr. George complained that the court was not provided with Mr. Spence's qualifications.

Indeed Mr. George pointed out, Mr. Tulloch-Reid did not even mention Mr. Spence's input in his report. Apart for the clear breach of the tenor of rule 32 Mr. George pointed out that there was no empirical data provided by the Plaintiff by which Mr. Spence's assessment may be tested.

The result is that the court has been provided with hearsay information the reliability of which is untested.

Mr. Tulloch-Reid has assessed the value of the unimproved land at $36.0M. He based that value on the information gleaned from a sale in 1998 of a property adjoining the land.

The sale price in that transaction was adjusted, said Mr. Tulloch-Reid, for differences in site characteristics, the fact of a "special purchaser" (in this case a neighboring land owner who requires the land) and for inflation over the five-year period. Again, Mr. George complained that none

of the empirical bases for Mr. Tulloch-Reid calculations was provided to the court.

Mr. Tulloch-Reid stated that the value for the adjoining property updated for inflation would now be $6.7M per acre or $154 per square foot. He applied a 12.5% surcharge because of the nature of the Defendant's interest and arrived at a value of $7.5M per acre. Although the adjoining property was beachfront land, the subject land has no beach frontage, and although there are differences in their respective sizes, Mr. Tulloch-Reid applies the very rate used for the adjoining land. This is so despite the fact that he stated that "consideration is also given to the differences in site characteristics including size and road/beach frontage."

No documentation of the sale of the adjoining property was provided. No information concerning the rate of inflation since 1998 was provided and nothing was provided to show why the surcharge should be 12.5%. Mr. George pointed out all these defects.

Finally Mr. George also complained that there was nothing provided to the court to substantiate Mr. Tulloch-Reid's assertion that 20% would be a reasonable rate of return to be applied for determining the rental value of the property.

I now turn to the other aspect of the mesne profits claim.

Monthly value to the proprietor of the operation of the tennis courts and the sewage treatment/irrigation facilities.

It concerned me whether this aspect of the claim could properly co-exist with the claim for the cost of the removal of the sewage treatment and irrigation facilities. Mr. Tulloch-Reid testified that this aspect of the claim was based on the assumption that it was the proprietor of the land who has provided these facilities. It seemed to me incongruous that the Defendant should be asked to pay for the removal of the sewage treatment facilities having paid for their use. Miss Davis in addressing this concern submitted as follows:

(a) Mesne Profits includes the damages for use and occupation plus the damage caused to the premises.

(b) The sewage pond is a part of the land and therefore becomes the Plaintiff's property.

(c) The Defendant must pay for its occupation of the land including the pond.

She relied on Clerk and Lindsell on Tort, 14th edition paragraph 1363 and Halsbury's Laws of England 4th edition volume 27 paragraphs 142 and 147 as authorities for her submissions.

I also found assistance in determining the appropriate approach from the following cases.

1. Whitwham v Westminster Brymbo Coal and Coke Company. [1896] 2 Ch 538.

The headnote in that case reads as follows:

> "The defendants having trespassed on the plaintiff's land by tipping spoil thereon from their colliery:-
> Held (affirming the decision of Chitty J.) that the amount of damages was not to be assessed by ascertaining merely the diminution in value of the plaintiff's land, but that the principle of the way-leave cases (Martin v. Porter, 5M. & W. 351; Jegon v. Vivian, L. R. 6 Ch. 742; and Phillips v. Homfray, L.R. 6 Ch. 770) applied: namely, that if one person without leave of another uses the other's land for his own purposes he ought to pay for such user; and that therefore, as to so much of the land as was covered with spoil, the value of the land for the purpose for which it was used by the wrongdoers ought to be taken into account; and that as to the rest of the land the measure of damages was the diminution of the value thereof to the plaintiffs by reason of the wrongful acts of the defendants."

Of more modern vintage is the case of Inverugie Investments Ltd. vs. Hacket [1995] 1 WLR 731 where the Judicial Committee of the Privy Council held that "the landlord of residential property can recover damages from a trespasser who has wrongfully used his property, whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself."

In McGregor on Damages 16th Edition paragraph 1507 the learned author, after reviewing a line of cases ending with the Inverugie case (supra) commented as follows.

> "In so far as these decisions may look beyond even market rental value of the land to the benefit which the defendant has extracted from its user, they are moving away from damages to restitution."

He makes it clear that it is a choice of either one or the other, in that later in paragraph 1507 he says:

> "Yet the choice between damages and restitution had already been faced by the Court of Appeal in Ministry of Defence v Ashman." (1993) 25 H.L.R. 513

At paragraph 1508 after referring to Ashman (supra) and the case of Ministry of Defence v. Thompson (1993) 25 H.L.R. 552 he said:

> "Where do these two decisions leave the damages claim for mesne profits? That it still exists is undoubted. Hoffman L.J. clearly stated that a plaintiff was entitled to elect between the damages claim and the restitution claim and said further that the owner was not in any way prejudiced by being afforded a restitutionary claim since, if his loss were greater than the benefit to the defendant, he could claim that loss by way of damages."

Applying these comments to the instant case it confirms for me that this Plaintiff has not elected to choose between damages and restitution, it has claimed both.

I am of the view that having claimed for the cost of the restoration of the land to its pre-existing condition the Plaintiff cannot also claim for the cost of the use made of the land by the Defendant plus a market rental.

In light of the defects in the report by Mr. Tulloch-Reid, I shall avoid referring to the operation costs of the facilities. In attempting to assess the matter I shall use the rental method together with the cost of restoration of the land. I have already analysed both the restoration aspect and the weaknesses in respect of the rental evidence.

Despite those weaknesses the court still has to make a decision.

I shall start with the value used in the sale of the adjoining land in 1998 of $5.8M per acre. In attempting to adjust for the absence of any beach frontage in the land and considering the absence of any statistical information showing the inflation rate for the period for land in this area I shall not apply any increase. Using this method I arrive at an unimproved value of the land of $27.18M (say $27.2M). There is no doubt that the Defendant is a special purchaser as defined by Mr. Tulloch-Reid.

He explained the term "special purchaser" as

> "where the market shows a certain level of sales there may be a specific purchaser who is prepared to pay over and above the normal market price rather than fail to obtain that property."

This Defendant has an adjoining property. It has need of land on which to place its sewage disposal/tennis court facilities and it has invested in placing those facilities on the subject land. Certainly, it would be prepared to pay more to secure the land, than another purchaser who has no such connections with it, would be willing to pay.

I am prepared to apply the 12.5 % surcharge recommended by Mr. Tulloch-Reid and in so doing I arrive at an additional figure of approximately $3.4M making a total for the unimproved value of the land of $30.6M. It is a natural extension of the principle that a "special purchaser" would also have a special interest as a tenant.

In recognition of the fact that the claim for mesne profits in this context is a claim for special damages, I am reminded that the Plaintiff not only has to specifically plead the loss, but also strictly prove it. The weaknesses in the evidence concerning the value of the improvements cause it to fall well below the level of proof. I am therefore obliged to ignore the opinion of Mr. Tulloch-Reid as to that value. Since there is no other evidence available to the court as to the value of the improvements, I shall use only the unimproved value of the land for the rest of the calculation.

I shall however use the rate of 20% as recommended by Mr. Tulloch-Reid as I accept that it is in the nature of his expertise and experience to

determine rental rates based on land values. Using the value of $30.6M, I therefore arrive at a monthly rental of $510,000.00 per month.

By way of conclusion therefore I award damages to the Plaintiff as follows:

Mesne Profits for the Defendant's use and occupation of the said land from 22nd May 2000 to 31st October 2003; 41 months at $510,000.00 per month		$20,910,000.00
Cost of removal of sewage ponds And restoration of the land		8,031,193.00
	Total	$28,941,193.00

Interest is awarded on $8,031,193.00 at 6% per annum from 17th June 2003 to 31st October 2003.

Interest is awarded on the sum of $20,910,000.00 at 3% per annum from 22nd May 2000 to 31st October 2003. I have used the lower interest rate for this portion in recognition of the fact that the sum would have accrued over the period. Forbes J. utilized this method in Tate and Lyle Food Distribution Ltd. vs. Greater London Council and Another, reported at [1981] 3 All E.R. 716 at p. 723e.

The Defendant is hereby ordered to quit and deliver up to the Plaintiff on or before the 1st day of December 2003, all that parcel of land known as Lot 3A part of New Court in the Parish of Trelawny being the land

comprised in certificate of Title registered at Volume 1066 Folio 929 of the Register Book of Titles.

Costs to the Plaintiff are to be taxed if not agreed.