



[2018] JMSC. Civ.211

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2013 HCV 02399**

BETWEEN TREEBROS HOLDINGS LIMITED CLAIMANT
AND NATIONAL HOUSING TRUST DEFENDANT

A. Earle and N. Young-Shand, instructed by Earle and Wilson for Claimant.
M. Nicholson and H. McDermott, instructed by Nicholson Phillips for the Defendant.

**Damages- nuisance-negligence- trespass- Flood Water Act- aggravated
damagescommercial interest-special costs certificate-indemnity costs**

**HEARD: September 19, 20, 21, 22, 23, October 18, 19, 20,21, 31,
November 1,2,3,4, December 16, 2016, February 24, December
20, 2017 and January 10, 2018.**

LAWRENCE-BESWICK, J.

THE CLAIM

- [1]** In this claim Treebros Holdings Limited (Treebros), the claimant successfully contends that it has suffered damage as a result of the erosion of its land, consequent upon water being unlawfully discharged onto it by National Housing Trust (NHT), the defendant.
- [2]** The claim is for damages for nuisance and negligence and also aggravated damages. Treebros also seeks damages for trespass by NHT's servants and/or

agents and/or workmen for unlawfully entering upon and erecting structures on its property. In addition, Treebros claims a permanent injunction to restrain NHT from permitting the discharge and/or flow of water onto its land and from entering onto or remaining on Treebros' property.

- [3] Both parties agree that negotiations were ongoing between them to grant an easement to NHT to permit its surface and storm water to traverse Treebros' land. Treebros' case is that there was never a concluded agreement between them and that NHT caused its water and representatives to enter the land without authorisation and thereby caused damage. NHT's case is that the negotiations for the agreement were aborted because of Treebros' unreasonable desire for additional money and infrastructure. NHT argues that the spirit and expectation of the parties is that the agreement exists.

BACKGROUND The Land

- [4] NHT is developing a 40 acre area of land at Creighton Hall Estate, St. Thomas. To the south of that development, separated by a road, lies 28 acres of land belonging to Treebros, known as Lot 8 part of Creighton Hall. South of Treebros' land on a slope is Lot 24, and further south, Lot 2.
- [5] Water on the surface of the NHT land drains naturally to the south towards the sea passing over Lot 8 then 24 then 2. Treebros' contention is that there is additional water directed onto its land from a culvert and indentations made by NHT to drain its land. The culvert collects the water from the NHT land and sends it under the separating roadway, exiting on the southern side of the roadway onto Treebros' property.
- [6] There are also three indentations on the road between NHT and Treebros' land which channel water from different points of the NHT land and the separating

roadway to the surface of the Treebros land. Treebros asserts that those indentations were put there by NHT, whereas NHT says that they merely enlarged indentations which were already there. The complaint is that all the additional unnatural discharge of water is without Treebros' agreement or without an easement.

- [7]** There were discussions between NHT and Treebros concerning the grant of an easement over Treebros' land in order to construct a storm drain to channel the water from the NHT land into it so as to reduce the erosion which would have otherwise occurred. NHT had also had discussions with the previous owner of Lot 8 but the drainage connection was not complete until July-August 2012 by which time Treebros had become the owner.
- [8]** Without the written consent of Treebros, NHT had installed a large galvanized storm water pipe which discharged surface drainage and storm water from the NHT property unto Treebros' property.
- [9]** Treebros had expected to develop its land and would, like NHT, have needed to provide proper drainage on its land. If the proposed NHT concrete storm drain were constructed, it would reduce Treebros' future expected work as they would merely connect by a "tie in" to the drain, thus reducing their expenditure for their own future development.
- [10]** However, the drain would be on the surface of the land and thus would divide the land in a more obvious manner than now exists with the natural earthen drain. This would curtail Treebros' options on the manner of subdivision. A subterranean drain would have been ideal for Treebros' plans, but no such offer was made by NHT. Lot 24 however, is to benefit from such subterranean construction.

The Letters

- [11]** In January 2011 NHT sent a letter to the previous owners of Treebros' land and raised with them the issue of acquiring an easement over the land. About 2 months later, in March 2011, it sent a similar letter to Mr. David Williams, one of Treebros' directors. Treebros became the registered proprietor of the land in April 2011.
- [12]** According to Treebros, when NHT first approached it about granting an easement, the culvert had already been installed by NHT. NHT, for its part, agrees that it was there but contends that it was not functioning at that time. The easement was to give NHT permission to lay the drain over Treebros' property, which would allow the discharge of NHT water through a manmade pipe channelled to it. In 2012 NHT offered to pay Treebros \$1.3 million for the easement and sent a draft compensation agreement.
- [13]** Mr. Peter Mais who was then the attorney-at-law for Treebros pointed out to NHT what he regarded as defects in the draft. NHT responded with a revised compensation agreement and a draft grant of easement¹. Meanwhile Treebros discovered that NHT had offered it the lowest compensation compared to that offered to the adjoining owners of Lot 24 and Lot 2, Lloyd Young and Percival LaTouche respectively. Treebros had the largest acreage of land. Mr. Mais requested further changes, including a revised increased consideration of \$4.25 million and he also forwarded a revised grant of easement.
- [14]** NHT later responded, stating that the issues raised were being considered and that when the decision was made they would "revert" to Treebros. There was no further action until November 9, 2012, when Treebros advised that it would take legal action for an injunction, damages and other expenses if the issues were not resolved in 14 days. The issues were not resolved.

¹ Letter dated August 8, 2012

THE SUIT

[15] Treebros filed suit on the 18th of April, 2013 seeking:

- “1. Damages for nuisance*
- 2. Damages for negligence*
- 3. Damages for trespass to land*
- 4. Aggravated damages*
- 5. An injunction restraining the Defendant, whether by their directors, officers, representatives, servants and/ or agents and/ or workmen, assignees and successors or otherwise howsoever from permitting the discharge and/or flow of water from the Defendant’s said property onto the Claimant’s said property or onto the roadway adjoining the Claimant’s aforesaid property and thereafter onto the Claimant’s said property.*
- 6. An injunction restraining the Defendant whether by their directors, officers, representatives, servants and/ or agents and/ or workmen, assignees and successors or otherwise howsoever from entering onto or remaining on the Claimant’s said property.*
- 7. Interest pursuant to the Law Reform (Miscellaneous Provision) Act at such rate and for such period as this Court deems fit*
- 8. Costs*
- 9. Such further and other relief as to this Honourable Court appears just.”*

The earth drain - Land Survey

[16] Mr. Vernon Kentish, a commissioned land surveyor, testified as to the nature of the original earth drain on Treebros’ land. On January 11, 2013 he surveyed the earth drain on Treebros’ property and found that:

- the main earth drain does pass through Treebros’ property. Water enters the property from the adjoining NHT land via a galvanized pipe; □ the length of drain that passes through the property is 236.8 metres;
- the area of the surveyed drain is 736.6 sq. metres.

This exceeds the 512.2 square metres initially proposed by NHT.

- there are three areas of depressions/drains in the Parochial Road that encourage water to drain from the road onto Treebros' land.

According to Mr. Kentish, when he later surveyed the land on June 15, 2015, the existing road was by then paved.

- [17] NHT sought to call into question Mr. Kentish's credibility when, in evidence, he agreed that he had erred because in his witness statement he had said that the area of the drain is 736.6 square metres but on his survey diagram, he said the area of the drain is 868.770 square metres. He could not say which area is correct, if any. He would have to verify the measurements.

The Easement

Negotiation

- [18] Mr. Paul Tenn, a director of Treebros, testified that it was in the early part of 2012 that he and Mr. David Williams, another director, discussed with representatives of NHT the use of a portion of Treebros' property for NHT to construct an off-site storm water drain to facilitate NHT's Project. He had however noticed that a large pipe pointing to the direction of their lot had already been in place from December 2011.

- [19] His evidence was that the proposed drain would be subject to appropriate engineering structures being put in place to protect Treebros' property and to accommodate flows from any development which may in the future take place on Treebros' property.

- [20] In addition, according to witness Tenn, NHT would, at its own expense thereafter maintain the integrity of the drain and would install and surround the drain with a protective fence. They agreed that NHT would pay Treebros, the sum of One Million Three Hundred Dollars (JMD\$1,300,000.00) for the easement.

[21] The arrangements were to be subject to a formal written contract reflecting their oral agreement. Pursuant to this understanding, the NHT's Attorney-at-Law and the parties exchanged draft compensation agreements, neither of which satisfied both parties.

[22] Among the items on which they did not agree was a fundamental disagreement about a fence for the drain. Mr. Tenn's evidence was that the erection of a fence around the drain was one of the indispensable conditions to Treebros' acceptance of NHT's proposed construction of the drain. However, NHT's Attorneys-at-Law informed Treebros that the erection of a fence around the drain was impractical and was never a part of the negotiation between the parties. That issue was not resolved

Diversion of Water unto Treebros' Land

[23] Meantime, according to his evidence, Mr. Tenn noted the diversion of water from the area of Treebros' property which was to be the subject of the grant of easement, to different parts of Treebros property which had not been contemplated for the easement.

[24] He observed that when the rain fell the volume of water was now so forceful that it overrode the banks of the earth drain because there were no barriers. The flow of the water dislodged large stones from various parts of Treebros' property and uprooted trees. Photographs in support of his contention were exhibited.

[25] Witness Tenn also noticed that there was severe erosion of Treebros' property along the edge of the road, due, in his opinion, to the fact that NHT had run intermediary drains directly from NHT's property onto Treebros' property by way of deep indentations traversing the road. Mr. Tenn acknowledged that there may have been three indentations before, but testified that the depth of the indentations was enhanced when NHT constructed the road. This resulted in large volumes of water

from the road being channelled directly and unnaturally onto the Treebros' property.

[26] Mr. Tenn's view as an engineer, was that the design for the existing drain was inadequate and it could not control the volume of water now passing through it even when there were just short showers of rain. The situation would become far more severe once the construction of NHT's Creighton Hall Housing Project was completed.

Further Negotiations and no Agreement

[27] In the effort to reach an agreement Treebros' attorneys-at-law communicated to NHT that Treebros had some concerns:

- a. a revised figure of Four Million Two Hundred and Fifty Thousand Dollars \$4,250,000.00 was more appropriate in the circumstances;
- b. the inclusion of some of the terms of the proposed compensation agreement and grant of easement were simply a statement of NHT's rights without recognition of any of NHT's corresponding obligations to Treebros;
- c. the lack of sufficient detail in the plan commissioned by NHT did not satisfy the legal or technical requirements for a grant of easement as there was no indication where the lands were located nor the relative connection between the two properties, nor the area of land which was needed to provide access to NHT's workmen;
- d. there was a need for a survey diagram to be produced to indicate the details of the slope and capacity of the drain and the material to constitute the bottom of the drain and the survey was also necessary for registration of the easement on the certificate of title to Treebros' property.

[28] Representatives of Treebros and NHT met on November 16, 2012 to discuss Treebros' concerns. NHT failed to fulfil its promise to revert to Treebros' attorney-at-law as soon as it had reached a decision. According to Mr. Tenn, to date, there is no formal contract between Treebros and NHT to say whether and/or on what terms and conditions Treebros' property is to be used to host a drain to facilitate

NHT's construction of an off-site storm water drain for the Creighton Hall Housing Project. However according to witness Tenn, the degradation continues and NHT has taken no steps to avoid further damage to Treebros' property.

Entry onto Treebros' Land

[29] The witness' evidence is that NHT through its representatives continues to enter onto Treebros' property and to permit the flow of water from NHT's property through a pipe leading directly onto Treebros' property without Treebros' agreement. He continued that this causes damage to Treebros' property on a daily basis, primarily because the depth of the drain is inadequate. Since there are no barriers constructed to confine the water to the banks, the flow of water is creating its own channels and making tracks into other areas of Treebros' property.

[30] The flow of water from NHT's property onto Treebros' property has caused severe soil erosion. According to the witness, NHT disregarded the complaints made through Treebros' attorney-at-law. Treebros claims that NHT has committed these acts maliciously and spitefully and has threatened to take steps to compulsorily acquire Treebros' property and as such Treebros is seeking aggravated damages, in addition to permanent injunctions.

DEFENDANT'S EVIDENCE

Project Manager

[31] Mr. Dwayne Pryce testified on behalf of NHT as to the circumstances in which this matter has remained unresolved. He has been the Project Manager of the NHT Creighton Hall Development since January 2011. His evidence showed there were several officers of NHT responsible for the many decisions made by NHT in this matter. However, Mr. Pryce alone testified. He alone was required to provide answers concerning the negotiations.

- [32]** Mr. Pryce testified that he had discussed the design and location of the drain with Treebros directors, Mr. David Williams and Mr. Andrew Tenn, at their first site visit in 2011. The pipe between the two properties was placed there between the end of July and the beginning of August 2011. NHT, at Treebros' request, made drain design improvements such that the drain which was expected initially to cost eleven million dollars (\$11M) eventually would cost twenty-eight million (\$28M). However, not having the consent of Treebros, NHT could not complete the drainage system. Treebros, indeed, had not agreed to the discharge of the water onto its property.
- [33]** Mr. Pryce acknowledged that the NHT's contractor has driven through Lot 8 and has deposited rubble on it without Treebros' consent.
- [34]** As project manager he was aware that discharging the surface water from NHT's property onto Treebros' property was the most cost effective manner of removing the water. He had not, however, made checks as to alternative methods available or their cost.
- [35]** Mr. Pryce explained that NHT made the curb walls at the southern side of the roadway but there is no curb wall where the indentations are placed. This allowed the water to flow freely onto Treebros' property.
- [36]** The evidence was that from November 2009, NHT had planned to construct drainage works on the Treebros property even before approaching the proprietors of Lot 8, or gaining their consent. Up to the time of trial NHT did not have final approval from the Parish Council for the development. The National Environmental Planning Agency (NEPA) and the National Works Agency (NWA) had not given a Certificate of Satisfaction concerning the development. NHT did not have an easement or permission to discharge water onto Treebros' land². Mr.

² Letter from St. Thomas Parish Council dated No. 9, 2012 to NHT

Pryce acknowledged that NHT had nonetheless continued with the drainage work on the two properties below NHT's land.

Mr. Richard Stewart

[37] The evidence of Mr. Richard Stewart the other witness for the defence, was agreed between the parties. He assessed the size of the easement as 277m. and not 256m.

DEFENDANT'S SUBMISSIONS

Agreement re easement

[38] Counsel for NHT relying in large part on oral and written communication between the parties, submitted that Treebros consented to a grant of easement on terms to be agreed and with an understanding that was to be formalized by contract.

That consent permitted NHT to enter onto Treebros' land. Counsel argued that correspondence reflected that Treebros had agreed to a payment of \$1.3 million for the grant of the easement, with only the legal drafting to follow. According to his evidence six (6) inconsequential points remained unsettled. The submission continued that for all practical purposes, the grant of easement continues up to today and it is compensation which is really the issue.

Amended Design

[39] Counsel for NHT acknowledged that the agreement was in principle, subject to appropriate engineering structures to accommodate flows on Treebros' property. However the argument was that the suggested amendments to the designs had been exchanged and that both parties had agreed to use the amended design of November 2011 even though it was inadequate.

Defence of NHT

Consent, Licence, Volenti Non Fit Injuria and Implied Easement

[40] Counsel submitted that in the face of Treebros' consent, Treebros could not successfully claim nuisance or trespass because consent is generally a full and perfect shield when the complaint is of a civil injury to which the party had consented. Treebros had given NHT licence to enter on the land, then, so long as the licence continued and the entry is justified by the licence, NHT cannot be treated as a trespasser. Also, it cannot complain of a nuisance when it concurred in the erection of the nuisance³.

[41] Consequently, the argument of NHT is that the defences of consent, implied easement, and volenti non fit injuria are all applicable. NHT submitted in addition, or in the alternative, that by the time Treebros presumably withdrew its authorization for NHT to enter Treebros' land, a licence had already been created. NHT could thus rely on the defence of estoppel, having reasonably relied upon the implied agreement and assurances and having expended large sums of money before Treebros had reneged on their commitment to formalize the grant.

[42] Counsel for NHT submitted that it was therefore Treebros' action which had resulted in the anticipated drain not being constructed on Treebros' land, which in turn resulted in the storm water being discharged onto the land, causing the alleged nuisance and/or trespass. Further NHT had discharged its duty of care as it exercised neighbourly care and had conducted itself with due care, efficiency and professionalism.

³ Crawford v Magnolia Petroleum Company 62 S.W.2d 264 (Tex. Civ. App. 1933)

Estoppel

[43] Counsel argued that Treebros' actions and omissions encouraged NHT to undertake its work and it should be estopped from denying that a grant of easement was assured. NHT had spent sixteen (16) million dollars on the drain.

The court should protect the NHT from the injustice and harm being done to it.

Volenti Non Fit Injuria

[44] NHT's argument continued that Treebros had voluntarily agreed to certain actions, and with full knowledge of the risk, freely agreed to incur it. The principle of *volenti non fit injuria* should therefore apply, that is, it should bear the loss from any such acts.

Implied Agreement

[45] Counsel for NHT submitted that the documents exhibited in this matter confirm that NHT had the intention to upgrade an existing informal drainage pathway on Treebros' land and was interested in acquiring an easement on Treebros' land. One of the diagrams depicted a path through Lot 8 onto Lot 24 and 2 exiting to the sea⁴.

[46] Counsel emphasized the words at the end of a letter which were: "*Kindly indicate your willingness to negotiate the terms of the proposed easement and your permission for us to enter the premises to conduct the necessary assessment.*"

[47] The submission was that the evidence showed the clear intention of the parties was for the NHT to have access to Lot 8 for offsite drain work and for Treebros to grant an easement for that. The law would give effect to that common intention. Therefore, the law will readily imply the grant or reservation of easement as may

⁴ Diagram depicted at bundle six, page 67

be necessary to give effect to the common intention of the parties for the discharge of the water.

[48] Mr. Nicholson, Counsel for the NHT submitted further that the witness statements of 2015 differed from the documented evidence of 2011 to 2012, and had been augmented to suit Treebros' case. The witness statements state that conditions were attached to the acceptance of the proposal. He argued that those conditions were not in the initial documented evidence, and they do not reflect the parties' understanding during the period leading up to August 2012. In this regard, counsel asked the court to find that there was an implied agreement which is credibly presented in the documented evidence.

Damages and No Injunction

[49] The final submission on behalf of NHT was that if those defences are not accepted, any relief found due to Treebros should be by way of damages and not an injunction. The argument was that the granting of an injunction would be contrary to Treebros' evident expression that a constructed drain was desired and beneficial to them. Also, this would be oppressive in the circumstances.

FLOOD WATER CONTROL ACT

[50] Counsel for NHT invited the court to take judicial notice of legislation which pointed to the futility of granting an injunction against the NHT. **Jamaica Gazettes Extraordinary** Nos. 100⁵ and 17A⁶, he stated, declared an area including where the relevant Treebros lands were, as a flood water control area as of February 25, 2016 under the **Flood Water Act**.

⁵ Dated 13th August 2015

⁶ Dated 25th February 2016

- [51] Counsel said that this was not a submission but rather information for the attention of the Court. NHT had purportedly been granted statutory power to enter onto land, including Treebros' land, to do such work as necessary and expedient for securing proper control of flood water. However, counsel states that NHT has not taken any action in that regard, choosing instead to submit itself to respond to Treebros' claim.
- [52] Counsel for Treebros objected vehemently to any reference being made to the **Flood Water Act** because it was never pleaded or argued during the case until the final submission. There had been no reference to it during the evidence from the witnesses. There had been no disclosure of the Gazettes.
- [53] Counsel regarded the late introduction of the **Flood Water Act** as a brazen move by the NHT calculated to deprive Treebros of the remedy of a permanent injunction. The trial was scheduled to start on September 2016, and approximately a year before, in August 2015 and then months before, in February 2016 the Gazettes seeking to create the area were published.

THE VALUATIONS

Trespass and Damages

Valuator Mr. Langford

- [54] Treebros sought to provide evidence of the trespass and damage through several witnesses. One of these witnesses was Mr. **Gordon Langford**, a chartered valuation surveyor. NHT has on prior occasions sought his opinion.
- [55] His evidence concerned the value of the Treebros lands and of an easement to NHT. He prepared an expert report concerning the grant of easement to the NHT on the roadway leading to the NHT scheme. In his report⁷ he estimated Lot 8 to

⁷ November 14, 2015

have a value of \$3 million per acre prior to the development of the NHT scheme. However, he withdrew that report and replaced it with his final report⁸ to accord with the requirements of the Court and to make some corrections. In that report he put the value as \$2.5 million per acre. That amount he testified was based on NHT figures along with his own experiences. He testified that there was diminution in value of Treebros' land due to the drainage gully that brings water onto it from the NHT development.

[56] Mr. Langford described Treebros' Lot 8 as sloping down to the south and being comprised of scrub land vegetation with some taller trees. His report indicates that the land of Lot 8 is somewhat similar to the surrounding lands, that is, the NHT lands to the north and a small, privately developed area to the southeast.

[57] He reports that water collects up the slope off roadways which were cut as part of the NHT development, and is drained by a new concrete opening on the NHT land to an elaborate culvert.

[58] Also entering into this culvert is another concrete lined drain which carries the runoff from the road. These two sources of runoff, according to Mr. Langford, effectively funnel the runoff water from most of the NHT development onto Treebros' land.

[59] Mr. Langford inspected Treebros' land on May 21, 2015, and saw no excessive erosion. However, it was his expert opinion that once the rains start or storm weather arises, there will be serious erosion unless a concrete conduit is built. Also, there is extensive loose surface rubble, including large rocks and this could escalate the erosion and take part of the property down onto the other land to its south.

[60] His evidence continued that at the northern boundary of Treebros' land is a road which was upgraded by the NHT to access their development sometime in 2013.

⁸ Dated December 10, 2015

According to Mr. Langford, this road now encroaches onto the subject property. The parties are however not pursuing the issue of encroachment.

[61] In his report, Mr. Langford opines that prior to the building of the NHT scheme, Treebros' land would have suffered some runoff in times of bad weather from the land above to the north, that is the current NHT land. Because of this, there is the natural gully created on the land. However, as a result of the NHT scheme, the runoff is increased and will further increase as the lots are built on and there is more concrete, asphalt and roofs in the scheme.

[62] He reported however, that there is a stipulation with which all housing developers must comply, that water runoff from a scheme should be less than or certainly no greater than the runoff before the development was started.

Assessment Approach

[63] In his report, Mr. Langford sought to assess the extent of the damage caused by what he regarded as the unnatural water flow from the NHT land to Treebros' land. Mr. Langford explained his approach to such an assessment.

[64] He stated that there is no choice but to accept the nuisance in perpetuity. Future development prospects of Treebros' land will be restricted. He valued the loss of value of the land overall, that is, the value of the land without what he described as the nuisance caused by the easement, less the value without the easement in place.

[65] In addition, according to Mr. Langford, the land owner would suffer erosion in the gully area over and above the normal erosion that would have taken place. In his view, therefore, a suitable concrete gully should be built to the same standard of the other section already built, or be compensated for along the complete length of the property. In addition, NHT should indemnify Treebros for any claims for discharging waste water onto the property adjoining its land to the south.

[66] Mr. Langford considered also that the NHT development has gained in value to the degree that NHT has extended its development into an area that will increase the water runoff into Lot 8. He estimated that the extension was the equivalent of at least ten surface lots, each of which according to him, was sold at \$2,300,000.00, making a total gain to NHT of \$23,000,000 for the ten lots,

[67] Mr. Langford valued Treebros' land prior to the NHT development as being \$2.5 million per acre or a total of \$70M. His evidence was that after the drainage runs through the property, there will be a diminution in value to \$2.2M per acre or a total value of \$61.6M. The loss in value of Treebros' land therefore due to the easement would be \$70M less \$61.6M that is \$8.4 M.

[68] He calculated further that the value of the benefit to the NHT is \$12,000,000.00 being his estimated market value of the additional lots created ,of \$23,000,000.00 less the development cost of \$11,000,000.00. He describes that value as what the NHT saves by not having to do the infrastructure the "correct" way.

[69] In his report, Mr. Langford noted additional responsibilities which he regarded the NHT as having, including the clearing of material used in building of the culvert and drain to the subdivision road as those items have been strewn over the Treebros land.

[70] By Mr. Langford's method of assessment the loss to Treebros totalled \$21,400,000.00:

Loss of Land	\$8,400,000.00
Benefit to the NHT	\$12,000,000.00
Road Encroachment	<u>\$1,000,000.00</u>
Total :	<u>\$21,400,000.00</u>

Whitwham v. Westminster Brymbo Coal and Coke Co⁹

[71] Mr. Langford testified that he received instructions by letter from Mr. Peter Mais, attorney-at-law, to proceed with the job and he there directed him to the case of **Whitwham v. Westminster Brymbo Coal and Coke Co**. He testified that it was stated there that where the trespass saves the trespasser money, then the saving must be paid for by the trespasser. He agreed that **Whitwham** focused on two heads; one, diminution in value and two, value of user.

⁹ 1896 Ch. D 538

[72] He applied that case in his calculations of damages for trespass although he had never done that before. In his view, the value of user to be considered is the value to NHT because according to him, Treebros does not wish the gully to be on its land at all.

[73] Counsel for NHT submitted that Mr. Langford had totally misunderstood **Whitwham v. Westminster Brymbo Coal and Coke Co**.⁹ and had applied the principles wrongly.

[74] I agree with counsel that Mr. Langford had incorrectly included an additional \$12 million as being the benefit to NHT. It is not the profit or loss to the trespasser that must be considered. Rather, the trespasser must compensate in some way for the use of the land.

Comparable Assessment

[75] Mr. Langford acknowledged that valuations can be based on comparable prices, as was done by another witness, valuator Ms. Breakenridge. He testified that there are many factors to be considered in setting the price of land, including, for

⁹ *supra*

example, perhaps, the steepness, or if it is flood prone, or if the owner has a bank problem. The comparable valuation method used prices without the consideration of those factors. There were therefore good comparables and bad comparables. He testified that here, there were no appropriate comparable lots.

[76] In his view, in these circumstances, Ms Breckenridge's reliance on comparable data to value land was incorrect. Here, the lots she compared to Treebros' land were not comparable. Their sizes were vastly different and would not have been able to be developed in the manner Treebros land could be developed.

Residual Value Assessment

[77] Valuator Langford then explained valuation by the residual value method. It is the method which he used. The residual approach is driven by the cost for which a lot can be sold. After that, one would calculate the cost to develop the property, the profit, the finance cost and any inescapable incidental cost, for example, legal fees, sewage and amount of land.

[78] Treebros' land would have the same issues as NHT in terms of discharge of surface water if it developed the land. If they put water into the gully, then they would have to pay easement to those landowners below. At the end of the day, it is one's educated opinion which is used to determine the valuation,, after considering those variables.

[79] Mr. Langford testified that in December 2015, he said that the value of the land was \$2.5M per acre, although in his earlier report, he had said it was 3M per acre. That change resulted from his decision which he described as being more prudent to use a lower lot value and to increase his estimate for infrastructure cost.

[80] The witness Mr. Langford said that in his residual value approach, he took into account the NHT lots, because they have the same characteristics of the Treebros land. Using the residual value method, he assumed that a scheme of lots is going to be put on Treebros' land. He estimated the price per lot according to what he

thought the market could stand and he took into account any parochial road upgrade and infrastructure put there.

Valuator Ms. Breakenridge

- [81]** As a valuator, **Ms. Norma Breakenridge** gave expert evidence. She too filed two reports¹⁰, as did the other valuator, Mr. Langford. The report filed on December 14, 2015 is the one on which reliance is placed. She acknowledged making errors in her valuation including overlooking the undisputed road encroachment on Treebros' land. She had therefore valued an unencumbered fee simple interest in the land. However, the land is encumbered which would lower its new value, making the diminution in value higher. Further she had used the wrong length for the drain in her calculation.
- [82]** Ms. Breakenridge's valuation was focussed on determining compensation for an easement and she was unaware that there was no such claim in this matter. She also valued the pre-erosion and post-erosion worth of the Treebros' land.
- [83]** Ms. Breakenridge had not valued any compensation which may be payable for trespass. The witness explained that in her instructions she was asked to use the diminution in value method of valuation but she had also used the comparables method. She testified that although she is aware that a housing development is proposed on the Treebros property, in considering the value of comparable

¹⁰ Filed Dec. 7 and 14, 2015

properties she had not compared the NHT development with the proposed Treebros development.

- [84] She visibly showed surprise, when in cross-examination she became aware that although by her 2011 valuation, compensation to Treebros for an easement should be the greatest of the three lots concerned, yet NHT had offered it the least amount.
- [85] The witness agreed that there exist alternative methods for properly dealing with the run-off water, including soak-away pits. She agreed that discharging the runoff water onto Treebros' land would be a benefit to NHT.
- [86] Ms. Breakenridge testified that she had read the expert evidence of Mr. Langford but was not aware of the principles of the **Whitwham** case which he had used, and she had not sought to determine what they are.
- [87] Counsel for Treebros urged the court to reject the expert's report because her valuation was for an easement and there is no scope to now adjust the report to determine the value of the trespass.
- [88] On the other hand, Counsel for the NHT urged the Court to accept the evidence of Ms. Breakenridge because she readily accepted her errors when they were pointed out to her. Mr. Langford, according to Counsel, did not. Further, she had considered the diminution in value in Lot 8 as well as the value of the easement. That was the proper approach.

FINDINGS OF FACT

- [89] NHT, in developing its land must discharge its water in accordance with the conditions imposed by regulations and by the restrictive covenants on its title. On the title for the NHT land is recorded Condition No. 4 that, "*Surface drainage/ storm water runoffs should be effectively intercepted and disposed of before reaching the parochial and reserved roads to the satisfaction of the relevant authorities.*"

- [90]** From the evidence provided I accept as true that there are options for that disposal, the most economical and feasible being to discharge it downhill onto Treebros' land (lot 8).
- [91]** The exhibited photographs show clearly that there is construction, which appears recent, of a concrete catchment area on the NHT land which I readily accept collects water from the NHT land and channels it into the large concrete pipe, travelling under the separating road and entering directly onto a point on Lot 8.
- [92]** The photographs confirmed that there was a large plastic inlet entering onto Treebros' land. The evidence, in my view, shows that it was there in May 2011. I infer from the size of the pipe that provision is being made for a large volume of water, commensurate with its size, to be channelled through it.
- [93]** Although it is not clear when the original indentations on the road were made, I accept on a balance of probabilities that the NHT was the author of the widened, upgraded versions which funnelled the additional water from the road onto Treebros' land. The photographs painted a graphic picture of the fact, as I see it, that there is soil erosion on the land. Large stones are displaced and trees are disturbed to a much greater extent that would be expected from a natural surface run off into a natural earthen drain.
- [94]** The evidence also clear to me is that both parties stood to gain, in differing proportions, from the construction of a concrete drain to control the flow of the additional water. NHT would discharge its responsibility to dispose of its run-off water. The advantage to Treebros was the provision of a concrete drain into which water from its future subdivision could flow.
- [95]** The exchange of correspondence and the non-confrontational relationship between some of the officers of both parties is a clear indication that the parties intended to negotiate the grant of an easement. The owners of Lots 2 and 24,

south of Lot 8, had already agreed to the additional water traversing their properties.

[96] I find also that there was a noticeable change in the approach of Treebros to the amount it considered appropriate for NHT to pay for an easement. This coincided with the undisputed fact that in one of the exchanges of correspondence, there was included, perhaps in error, the information that allowed Treebros to conclude that although the valuers had recommended to NHT that its lot 8 should get the largest compensation, it in fact, had been offered, inexplicably, the least.

[97] There is no dispute that NHT had invested millions of dollars in the development of its property. Nor is there dispute that without approved arrangements for the water run-off from it, the plans for the actual development of the lots would be stymied. Blocking the progress of the development was the absence of the easement from Treebros.

[98] It is easy to accept that the need for resolution of that blockage became urgent and I do accept the evidence that NHT threatened to take steps to compulsorily acquire Lot 8 Treebros' property when it seemed that the parties would not be agreeing to the amount for the easement.

[99] Negotiations were many for the grant of easement but in my view it has not been successfully contradicted that to date there has been no contract for the grant of the easement.

ISSUES

The issues are many.

- What is the consequence of the discharge of the storm water onto Lot 8?
- Was there negligence on the part of NHT? Was there a trespass on Lot 8?
- Was a nuisance perpetrated?

- Can NHT successfully argue that Treebros acquiesced in NHT's actions?
- Is NHT estopped from claiming trespass and nuisance?
- Is it still possible for the grant of an easement?
- What would be fair compensation to Treebros for the discharge of the water unto its property?
- Are these circumstances appropriate for the award of aggravated damages?
- Is a permanent injunction part of the solution, restraining the discharge of the water onto the property and/or entry of NHT officers onto it?

DISCUSSION

[100] Treebros as the owner of Lot 8 is entitled to enjoy the property without interference from anyone, with certain exceptions which do not apply here. NHT is not entitled to enter onto Treebros' land or to intentionally and wilfully discharge material onto it, without Treebros' consent.

Was there an agreement?

[101] In determining whether or not the parties agreed to any conditions for the building of the drain, I consider the evidence of discussions about it and also the multitude of correspondence between the parties which has been exhibited.

Treebros' Mr. Williams had expressed concern that he could not consent to the location or construction of the drain until his surveyor/engineer could confirm the proposed location of the drain and construction of it.

[102] There was evidence of an email dated October 20, 2011, where NHT's Mr. Taylor confirmed a discussion of two days earlier with Mr. Williams that the NHT *"will provide the engineering drawings to your engineers by Thursday, October*

20, 2011 and should be meeting with him (your engineer) by next Tuesday, October 25, 2011, should there be any need for clarification. The comment/position of your engineer should be sufficient for us to conclude on this issue.”

[103] In my view the correspondence exhibited chronicles a history of discussions between Treebros and NHT for an easement and some associated construction plans, but had not concluded the arrangements. Even the details of the drain and its construction were not finalized. The engineers did not meet to agree and clarify those details. The contract for the easement was never created in the face of so many details on which there was no agreement.

Trespass

[104] Did NHT commit trespass in channelling water onto Treebros’ land and also when its representatives entered onto Treebros’ land without its consent?

[105] To support the claim in trespass, counsel for Treebros submitted that NHT entered Treebros’ property wrongfully several times, despite requests not to do so, and has also discharged water onto the property without permission. The Defendant submitted that the Claimant consented to its entry and therefore there was no trespass.

[106] Trespass is defined by the authors of Halsbury’s Laws of England¹² as follows;

“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 on land if he wrongly sets foot on it, rides or drives over it, ...or places ...anything on it ...or if ... he discharges water upon another’s land ...”

¹² 4th ed Vol 45

[107] I accept that Treebros consented to some specific entries onto its property by NHT primarily to make assessments as to the most acceptable manner to approach the drainage. In finding that there is trespass I do not refer to those forays but rather to the instances for which no permission was obtained and where machinery and rubble have been placed on the property. Indeed exhibited is e-mail from Mr. David Williams¹¹ showing absence of consent. It reads in part;

“ Mr. Atkinson....I was at the site approximately a week ago and it appears that your tractor has already been doing some work on our property.....I did not authorize this work to be done”.

[108] In my view, the evidence amounts to trespass. Not only has NHT placed its water on Treebros' land, but it has also placed its machinery, representatives and its material, including rubble, on Treebros' land without its permission.

Nuisance

[109] Counsel for NHT submitted that since there was no evidence of increased water flow and damage to Treebros' land, the court should find there was no nuisance. He added that the flow of water onto Treebros' property was because the drain work was not being completed on it because of Treebros' stance. It was not because of any failing by NHT.

[110] On the other hand Counsel for Treebros submitted that the discharge of the storm water has adverse consequences and is unreasonable and ought correctly to be found to amount to nuisance.

[111] It is long settled that the owner of property is entitled to quiet enjoyment of it. Where that enjoyment is interfered with nuisance may arise. Neuberger P defined nuisance in **Lawrence et anor v Fen Tigers et anor**¹² as follows:

“[3] A nuisance can be defined, albeit in general terms, as an action (or sometimes a failure to act) on the part of a Defendant, which is

¹¹ Dated July 20, 2011

¹² [2014] UKSC 13 at par, 3

*not otherwise authorised, and which causes an interference with the Claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the Claimant's enjoyment of his land. As Lord Wright said in **Sedleigh-Denfield v O'Callaghan** [1940] AC 880, 903, [1940] 3 All ER 349, 109 LJKB 893, "a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or more correctly in a particular society".*

[112] In view of my findings that NHT has discharged its water onto Treebros' property interfering with its quiet enjoyment, and continues so to do. It follows that in my judgement that NHT has committed a nuisance, and is continuing so to do.

Negligence

[113] In **Lochgelly Iron and Coal Ltd v McMullan** [1934] AC 1, p25 Lord Wright defined negligence in the following terms:

".....in strict legal analysis, 'negligence' means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

In my view, NHT owes Treebros a duty of care in these circumstances where Treebros' land neighbours NHT's land and is downhill to it, making it susceptible to material which will flow down onto it from NHT's land.

Absence of Negligence

[114] Counsel submitted that in view of the evidence showing that NHT sought approval from relevant agencies to prevent harm to lots adjoining its development, including Treebros, the court should find it had discharged its duty of care to its neighbours. It was not negligent. Further, NHT co-operated in getting valuations for the three affected lot owners.

[115] In my view, because of the location of Treebros' land, it would be reasonably foreseeable that the concentrated discharge of water from the NHT property onto

Treebros' property would cause damage. NHT by its actions showed that it recognised that to be the situation because it was negotiating for not only the easement, but was prepared to make engineering changes to the drain in order to minimise the impact of the discharge of the water on Treebros' land.

[116] The mere seeking of approval from relevant agencies does not discharge the NHT's duty of care. NHT breached its duty of care to Treebros by releasing the water onto Treebros' land, without proper preparation, and caused damage. In the circumstances NHT has in my view been negligent.

Acquiescence, Estoppel

[117] Treebros' Counsel dismisses NHT placing any reliance on Treebros' acquiescence or on estoppel as the evidence, even from their own witnesses, discloses simply that NHT was careless, and did not exercise due diligence, expecting instead that ultimately it would be allowed to discharge its water onto Treebros' land. I agree with that dismissal.

RIPARIAN RIGHTS

[118] In his written submissions, Defence Counsel urged the court to take judicial notice of the proximity of the land to the sea. He argued that the consequence of that was that proprietors in the area would have the right to the flow of water downstream subject to the ordinary use of the flowing water by upper proprietors.¹³ According to him that would mean that NHT's water would scatter from the NHT's higher elevation to lot 8, thereby a reasonable inference for the Court is that the indentations existed in the road before the NHT development commenced.

¹³ Attwood v Llay Main Collieries Ltd [1926] 1 Ch 444

¹⁶ Supra

I regard such an inference as being neither reasonable nor inescapable, and therefore that submission does not find favour with me.

DAMAGES

[119] Treebros has been wronged by NHT and must be compensated for the unlawful discharge of water onto its land and the trespass onto its land. The question to be determined now is the amount of damages to be awarded.

[120] It seems to me to be an amount representing the diminution in value of its land resulting from the discharge of the water onto its land as well as the value of the user to NHT. This reflects the principles enunciated in **Whitwham**.¹⁶

[121] **Whitwham** has been applied in this jurisdiction in the case of **Jamaica Public Service Co. Ltd v Enid Campbell and Marcia Clarke**.¹⁴ In the case at bar, the Defendants in their written submissions agreed that the principles applied in **Whitwham** are applicable and said;

*“As submitted above, in cases of trespass to land and nuisance the Court will award damages in accordance with the diminution in value of the plaintiff’s land as well as the value for the use for which the land was put or used by the wrongdoers.”*¹⁵

[122] The expert reports are of little assistance in the exercise of the computation of damages. They do not address the correct methodology to be applied in these circumstances. This stems in part from the varied instructions on which each expert acted. Each one seemingly carried out an exercise for a differing purpose.

¹⁴ [2013] JMSC Civ 22.

¹⁵ At para 6.30 of their submissions filed on December 20, 2016

[123] Mr. Langford's instructions related to the easement and diminution in value of the subject property. Valuation of compensation of \$21,400,000.00 for Treebros by Mr. Langford was on May 21, 2015. The figures which formed the basis of his computation were unreliable based as they were in part, on imprecise hearsay evidence. In any event he misapplied the principle of **Whitwham** and calculated the benefit to NHT instead of the value of the user. In computing his valuation, Mr. Langford, contacted the NHT offices and spoke to an unnamed person who is alleged to have informed him of the prices for which the lots had been sold. He used those alleged prices to compare with Treebros' land and arrive at a figure for his report. That method used unreliable hearsay information. Further NHT has maintained the position that the lots had not been sold. I do not therefore rely on his approach in this regard.

[124] The purpose of Ms. Breakenridge's report was to carry out an assessment to assist NHT in negotiating for acquisition rights for easement purposes. That written report did not consider the diminished value of the land.

[125] Mr. Stewart examined what he described as the perceived encroachment and he compared the pre-checked plan with the reality on the ground. That does not assist with the computation of damages.

What is the diminished value of the land?

[126] Treebros land comprises 28.12 acres. The calculations of the Valuator, Ms Breakenridge were based on a drain of 5,513.27 square feet. It is common ground that the drain has been increased to 9,315 square feet, almost twice the original figure since the valuation of Ms. Breakenridge who had assessed the easement as a sum of \$1.3 million.

[127] At the substratum of her calculations was her consideration of the values of comparable properties. I am not satisfied that the lands that she compared are in

fact comparable with Treebros' land. Indeed they seem to be markedly different in some instances.

[128] Further, she was valuing unencumbered land and Treebros' land is in fact encumbered by the intrusion of the water. Therefore the value she ascribed to the depreciated land would be less and her valuation of the diminution done to the land would have to increase.

[129] In arriving at what I consider to be an appropriate figure for the diminished value of the land, I would consider firstly the value that the land would have been as of December 2017 if there had not been the water damage. I then would consider the current value of the land in its damaged state. A subtraction exercise would thereafter result in the diminution in value.

[130] However, there is no reliable evidence of those values and I therefore direct that they be provided by the parties to allow the diminution in value to be computed in accordance with the method described in the above paragraph. The values can be provided either:

- firstly by agreement between the parties;
- secondly by a valuation by a single valuator agreed by both parties; or
- thirdly by averaging new valuations by Mr. Gordon Langford and Ms. Norma Breakenridge.

In the event that there is no agreement as to any of the methods above described within 30 days of today, then a valuator is to be appointed by the Registrar of the Supreme Court to provide the specified values.

The cost of the valuation(s) is to be borne by NHT.

What has been the value to the NHT for the use of the land to discharge its water?

[131] Expert Langford, opined that the drainage culverts created by NHT allowed it to make an additional 10 service lots available for sale. He calculated that the value of the benefit to the NHT is \$12,000,000.00 being his estimated market value of \$23,000,000.00 for the lots less the development cost of \$11,000,000.00. He describes that value as what the NHT saves by not having to do the infrastructure the “correct” way.

[132] I reject that opinion. There is no evidence presented to inform a conclusion that without the drainage through Treebros’ land, any or all of those ten additional lots which he identified, could not have been developed.

I therefore do not agree that computation of the value of the benefit of the land to NHT is \$12,000,000.

[133] However, the real question is as to an amount which fairly represents the value of the user of Treebros land to NHT not the value of a benefit. In my view, an appropriate place to start the computation of the measure of the value of the user to NHT is the amount that it was willing to pay to Treebros for the easement. At the time of making the offer, NHT had available to it, 3 assessments from 3 different valuers. NHT offered Treebros \$1,300,000.00. and I therefore use that amount as representing the value that NHT saw in the use of Treebros’ land.

[134] In his letter to NHT¹⁶, Mr. Mais, attorney- at- law for Treebros proposed a mathematical method of computing that amount. There he said,

“Though an oversight on your part, but fortuitously for my client, you included in your bundle of papers a form of compensation agreement with a Mr. Young who, my client informs me, owns nearby property on which you also intend to construct a drain. That agreement, which affects some 257.73 sq. meters, indicated that Mr. Young’s compensation will be \$2.4 m with an additional \$70.5k to cover attorney’s fees whilst the proposal to my clients is a payment

¹⁶ Dated August 22, 2012

of \$1.3 m and attorney's fees for an area covering 512.2 square meters.

The valuation principles affecting Mr. Young's land and the Guarantor's Land should admit of no differences. Each area of land dedicated to a drain is of equal value to the NHT, the developers of the Creighton Hall Housing Development since each is to be used as a facility for a drain and each area will forever be condemned as a drain. Consistency in treatment and full disclosure of all relevant considerations ought to have but did not characterize the negotiations with my clients.

On a square meter comparison my clients should be paid \$4.75 million (appr) but my clients will accept \$4.25 as the consideration."

That mathematical calculation commends itself to me and I accept as true the contents of that letter.

[135] In this regard I also consider that it has been accepted that Ms. Breakenridge erred in her original computation of the size of the drain which would be on Treebros' land. It was larger, in fact it was approximately twice the size of the measurement on which she had based her calculations.

Therefore considering the factors above I would award the sum of \$5 million as being the value of the use of the land to NHT.

[136] It follows therefore that as it concerns part of the damages for the tortious activity of NHT on Treebros' land, I would award the sum of the diminution in value of the land computed as directed in paragraph 130 plus \$5 million being the value of the use of the land.

Damages for Trespass of the representatives and of the machinery of NHT

[137] As it concerns the value of the damages for the trespass of the representatives and of the machinery, there is evidence that there needs to be clearing of material used in building of the culvert and drain as those items have been strewn over the Treebros land. It is undisputed that the parties had previously enjoyed an amiable

relationship and that permission was given from time to time for entry onto the land. However, the representatives and machinery and material were on Treebros' land after it had become clear that there was no longer agreement for that.

[138] In the absence of any supporting evidence as to the actual loss suffered by Treebros in this regard, I make a nominal award of one hundred thousand dollars (\$100,000.00) for the unlawful entry of the representatives and machinery and material onto the property. In so doing I consider that negotiations were ongoing, that the land was not occupied and that there had been prior occasions when NHT had been allowed entry with permission.

Treebros must present an invoice/bill to be paid by NHT for the cost of the removal of its material from the land, or if so agreed between the parties, NHT is at liberty to remove the material itself within 30 days of today.

Injunction

[139] NHT's Counsel urged the court to find that permanent injunctive relief would go against the spirit of the parties' relationship. Indeed, the evidence was that Treebros would benefit from the drainage system. The submission is that damages should be the appropriate remedy as money is the sole point of disagreement and there is no desire to stop the discharge of the water.

[140] Further, it is unchallenged that there is a natural gully course predating the NHT development. Indeed, Counsel submitted, the NHT may not even have the power or ability to stop the discharge. An injunction would leave NHT open to any extortionate demand that could be made. This would be a concern because there had been a sudden change in the attitude of Treebros from negotiating for its compensation to focusing instead on comparing its proposed compensation with that of its neighbours.

[141] In **Lawrence and another v Fen Tigers Ltd and another** ¹⁷ the United Kingdom Supreme Court held that where a claimant has established a nuisance , prima facie that claimant is entitled to an injunction to restrain the defendant from committing such nuisance in the future in addition to damages for the past nuisance. It is for the defendant to satisfy the court why the injunction should not be granted. The court can however choose to award damages in lieu of an injunction.

[142] There Neuberger P, said;

*Where a claimant has established that the defendant's activities constitute a nuisance, prima facie the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the defendant from committing such nuisance in the future; of course, the precise form of any injunction will depend very much on the facts of the particular case.*¹⁸

[143] I agree with counsel for Treebros that a permanent injunction is appropriate.

This is so because NHT has unlawfully discharged water onto Treebros' land since approximately 2012 and despite knowing of this trial, continued to do so and to do work on Lot 24, which lies south of Treebros' land. There is no evidence of a direct path for the water to reach Lot 24 from NHT lands, without traversing Treebros' land. The clear presumption by NHT must therefore be that the water will have to be allowed through the land to reach Lot 24.

[144] The damage being done to Treebros land is permanent. In my view, the circumstances have degenerated to the point where a permanent injunction against the Defendant is the appropriate remedy.

[145] In the absence of the agreement for the easement to allow the water through the land, I must grant a permanent injunction. The alternative is that NHT could be at

¹⁷ [2014] UKSC 13

¹⁸ At paragraph 101

large to discharge the water onto Treebros 'property and damage it with impunity ad infinitum.

CONCLUSION

[146] NHT's plans prior to the start of the development, showed that it routed the water from its development to be discharged onto Treebros' land and from there to the other lots to its south. There appears to have been consent from two owners in that regard. However, there was none from Treebros.

[147] NHT seems to have assumed either that all the owners of the land south of its development, including Treebros, would agree to allow the discharge of NHT's water onto their lands, or that NHT could regardless, discharge its water with impunity onto its neighbours' lands. I say that because NHT spent millions of dollars preparing its land to collect its water in certain concentrated points to discharge it onto the neighbouring lands, including Treebros', all without finalising consent of Treebros, on such a fundamental matter.

[148] NHT and Treebros were both clearly interested in reaching a consensus but they did not conclude any contract. The form of the contract was to be corrected. Details needed to be determined and the amount to be paid was not agreed. Without full agreement there is no contract, that is, no agreement for NHT to enter Treebros' property or for an easement to allow for the passage of the water through Treebros' land.

[149] In the face of NHT's active negotiations for a contract with Treebros, I do not regard any defence relied on by NHT in this suit as being an answer to the basic principles of contractual law involved here. I say so primarily because the evidence shows that NHT was concerned with an expensive project and was aware that it was critical to obtain consent of its neighbours and yet it deliberately continued with its actions which impinged on these neighbours, knowing that there was no formal consent. This matter involved acres of land and millions of dollars.

In my view, NHT cannot now seek to rely on the defences raised, based as they are, for the most part, on the presumption of the consent of Treebros.

The fact is that there was no consent and NHT knew that.

[150] A developer must make appropriate arrangements to meet all the requirements stipulated by law for approved development. Were it otherwise the purchaser of individual lots of the development, neighbouring properties and indeed the community in general could be held to ransom by the developer.

[151] NHT showed far less care in the legal/ administrative aspect of its development plan, than should be expected. Up to the date of the trial there was no approval for the subdivision from the local authorities and in particular there was no lawful provision for discharge of its water.

[152] It follows that no water can lawfully be directed onto Treebros' land. It matters not that the owners of the more southerly lands have agreed to receive the water after it would have passed through Treebros' land, thereby allowing its continued passage to the sea.

[153] Treebros, the registered owner of the land has a right to enjoy its land undisturbed except in certain circumstances which do not exist here. This right is not dependent on the size or the power of any entity interested in utilising its land.

[154] Treebros has suffered damage from the unauthorised discharge of water by NHT onto its land and unauthorized entry of NHT representatives and machinery and material onto its lands and is entitled to an award for damages and to a permanent injunction to prevent NHT's further unauthorised entry onto the land.

AGGRAVATED DAMAGES

[155] I now consider the submission of counsel for Treebros that aggravated damages should be awarded.

[156] Counsel submits for NHT that all actions of the NHT resulted from its obligation to be accountable to the people of Jamaica. It sought to exercise care in the amount of compensation it offered and paid and also in the manner of development. Its conduct does not warrant an award for aggravated damages.

[157] In seeking an award for ten million dollars (\$10M) under this head of damages, Treebros' counsel argued that NHT repeatedly enters its property and continues to discharge the water from its land and has shown spite, threatening to take steps to compulsorily acquire the property. In addition Treebros believes that the spite of NHT is reflected in the unequal treatment Treebros received at the hands of NHT.

Preferential Treatment

[158] Treebros has here complained that NHT showed preferential treatment to Mr. Percival LaTouche, owner of Lot 2 and to Mr. Lloyd Young, owner of Lot 24. The submission was that Mr. LaTouche was offered compensation for the easement while he was a member of the NHT board and was also awarded the \$2M contract to construct the drain in his land. Mr. Young was to benefit from a subterranean drain.

[159] In addition, lot owners Mr. LaTouche and Mr. Lloyd Young received the highest compensation offers although that did not accord with the valuations that were done. Three valuations which had been done were exhibited. They were by Breakenridge & Associates, Mr. Edwin Tulloch-Reid & Associates and Allison Pitter and Co.

[160] In her Feb 22, 2011 report **Ms. Breakenridge** valued the compensations payable by NHT to its neighbours for acquisition of their lands for easement purposes of facilitating a drainage channel as: \$360,000 for lot 8, \$250,000 for lot 24 and \$330,000 for lot 2. This report seemed to be a valuation of the land limited to the easement.

[161] The valuation of **Edwin Tulloch-Reid & Associates** dated February 28, 2011 valued the easement on the lots as follows:

Lot No.	Value	
Lot 8	\$200,000.00	Viewing diminution in value as relatively marginal due to the size of the land.
Lot 24	\$2,400,000.00	Viewing the possibility that the proposed drain may render it unsuitable for residential development
Lot 2	\$1,300,000.00	As the proposed drainage route should not severely affect the use and development of the land as 2 separate residential lots.

Here, Lot 2 is valued as being deserving of the highest amount for compensation for the easement for reasons shown in the table above. It is not clear to me as to the reason why Mr. Tulloch-Reid's observation results in giving Lot 2 over 600% more than Lot 8.

[162] The report by **Allison Pitter and Co.** was dated October 13 and December 15, 2011. It gave the diminution in value to the properties due to the acquisition of storm water easements. It described that the amount due to Lot 2 was as a token or nominal compensation because in their view there was little or no diminution in value of the land by the proposed easement.

[163] Two of the three valuations therefore valued Lot 8 (Treebros) as being deserving of the greatest amount of compensation. One showed it as entitled to the least. The offer made re lot 8 (Treebros) was the least.

[164] Of interest are the comments from two of the three valuers reflecting their view that Lot 2 would be minimally affected by the proposed drainage. The following table provided by Counsel for NHT shows the valuations suggested by the 3 valuers and perhaps shows a basis for the submission that there was preferential treatment to owners apart from Treebros. It also shows the offers made by NHT to them.

Lot No.	Size of easement	Breakenridge Market Value	Edwin Tulloch-Reid Value of Easement	Allison Pitter Diminution of Value	Sale/ Negotiated Price
8	512.2 sq. m	\$360,000.00	\$250,000.00	\$100,000.00- \$110,000.00	\$1,300,000.00

24	257.73sq.m	\$250,000.00	\$2,400,000.00	\$25,000.00- \$30,000.00	\$2,400,000.00
2	162.7 sq. m	\$330,000.00	\$1,300,000.00	\$10,000.00	\$1,500,000.00

[165] As a further basis for the submission that there was preferential treatment of the other lot owners, Counsel for Treebros submitted that NHT would provide the neighbour Lloyd Young with an underground drain. Such an underground drain would have been very attractive to Treebros.

[166] Counsel for NHT submits that there was no preferential treatment shown to Mr. LaTouche as the owner of Lot 2 nor to Mr. Young , as owner of Lot 24. In countering Treebros' assertion that Mr. LaTouche was in fact on the NHT board at the time of the offer made to him, Counsel for NHT argued that negotiations with Mr. LaTouche predated his appointment to the board and further, said Counsel, there was no evidence that Mr. LaTouche had not recused himself from the NHT Board's discussions regarding his compensation. He pointed out that the highest valuation for Treebros was \$360,000 yet NHT had offered it \$1.3 million.

[167] Counsel also urged the court not to "consider adversely" the evidence that Mr. LaTouche received the contract to construct his own drainage system on his lot for two (2) million dollars or that the drainage work on Lloyd Young's property started during the trial . He based that on the fact that there had been no evidence of those parties' transactions.

[168] In any event, according to him, it was not unlawful to seek to obtain an advantage in the negotiation process.

- [169]** It is agreed that Mr. Percival LaTouche had been appointed to the Board of the NHT in April 2012 and remained a member until at least December 2012. There is no evidence as to the precise day on which the Board decided on the compensation to be paid to the relevant owners.
- [170]** Absent is evidence either that Mr. LaTouche was present or was absent when the Board decided on the amounts to be paid. However, also absent from the evidence was a rationale for the apparently disproportionate amounts proposed by NHT as compensation as among Mr. LaTouche, Mr. Young and Treebros. It is no surprise that Treebros on becoming aware of this situation, requested an increase in the amount offered to it by NHT.
- [171]** NHT has also shown a determination to have matters conclude according to its own wishes. I accept on a balance of probabilities that it was threatening to take steps to compulsorily acquire Treebros' property.
- [172]** Despite the parties actively seeking a resolution of the issues through the courts, legislation was introduced to declare a particular area to be a flood water control area. This declaration seems to have been expected to allow NHT to enter Treebros land and to deal with waters there with the payment of no compensation by NHT to Treebros.
- [173]** Counsel for NHT submitted that the declaration of the area as being a Flood Water area was not pleaded and was not being used in submissions. Rather, the purported Flood Water Area Order was being mentioned simply to ensure that the Court was aware of its existence. What does that mean? Is Counsel submitting that the Court must be aware that regardless of its ruling, NHT will be discharging its water onto Treebros' land?
- [174]** In any event, there were some requirements stipulated by the Flood Water Act which must be met in order to legally declare the area a Flood Water area. They were not met. Further the Gazette which Counsel mentioned as a "reminder" to

the Court has not yet been produced. True it is that Counsel stated clearly that he is not relying on it, but there must be a lingering question as to why it was mentioned at all and indeed mentioned without showing that it in fact exists and that it says what it is purported to say.

[175] In my view, the actions of the NHT are deserving of an award of aggravated damages being made against it. NHT's actions show that it is doggedly holding to its intention to use Treebros' land for its own purposes. NHT has not been daunted by the absence of consent of Treebros to its entry onto Treebros' land and has thus introduced water, its machinery, its rubble and its representatives onto the land. NHT has expended millions of dollars in preparatory work, all with the firm expectation that Treebros' land must be available for its use. In addition the evidence provides no reason for the disparity in the awards to the land owners. Indeed the silence in this regard may itself speak volumes.

[176] To my mind NHT drew on the power of the State to enforce its will on its neighbour with whom it had been unable to reach an agreement by way of normal commercial negotiations. A private developer would not have had the ability to behave in the manner in which NHT has conducted its affairs, expecting if not almost demanding, consent of its neighbours. In my view NHT took advantage of its status as a body corporate established under the National Housing Trust Act. This highhanded behaviour of NHT would have been deserving of an award for aggravated damages.

[177] However, Treebros, which suffered this behaviour by NHT is an overseas company duly registered in Jamaica. Aggravated damages are not recoverable by a limited company.¹⁹ The authorities show that where a defendant's highhanded conduct causes damage, in order for an award for aggravated

¹⁹ **Eaton Mansions (Westminster) Ltd v Stinger Compania De Iversion SA** [2013] EWCA Civ 1308

damages to be made, the damage must be to the subjective feelings of the claimant, that is the compensation is for the claimant's hurt feelings.

[178] In **Rookes v Bernard and others**²⁰ Lord Hodson said,

*“Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to **the plaintiff's proper feelings, dignity and pride**” (emphasis supplied).*

[179] It follows therefore that although the behaviour of the NHT is such that an award of aggravated damages against it would be appropriate if the claimant were a natural person, I cannot properly make that award because Treebros is a limited liability company and thus is unable to suffer the subjective injury to feelings that a human would suffer. Counsel for the claimant has conceded this restriction placed on the award of aggravated damages.

[180] It may well be said that the silence in the manner in which compensation was determined, was a major contributor to the filing of this suit. It is of course true that parties must be at liberty to negotiate and that NHT must negotiate in its own interest. However, to my mind, NHT, acting as it does ultimately in the interest of the Jamaican people, has a responsibility to act in such a manner that its actions are transparent and can be understood.

INTEREST AND COSTS

[181] After the decision in this matter was delivered orally, the parties submitted on the matter of interest and costs.

²⁰ [1964] A.C. 1129.

Interest

Rate of interest.

[182] Counsel for Treebros submitted that interest should be awarded on the damages at the commercial rate because the property was a commercial property. A document which showed the bank rates as provided by the Bank of Jamaica was presented during the submissions

[183] I do not agree with that submission but prefer that of counsel for the NHT who argued that there was no pleading for commercial interest and any such consideration at this stage would be prejudicial to NHT.

[184] The **Civil Procedure Rules (CPR)** provide that a claimant who is seeking interest must say so in the claim form and include in the claim form or particulars of claim, details of the rate sought .²¹

[185] There is indeed no pleading for commercial interest and I therefore cannot properly award interest at a commercial rate and instead use the standard rate of 6% per annum.

Determination of the Commencement of interest

[186] The next issue is that of determining from when the interest calculation should commence. Counsel for NHT submitted that it should commence from service of the claim form and that there should be no interest on the portion of the damages for the value of the user. On the other hand, counsel for Treebros argued that the calculation of interest on damages should be from when the claimant wrote to NHT to cease the discharge of the water, that is, December 13, 2012.

²¹ Rule 8.7(3)

[187] The **Law Reform (Miscellaneous Provisions) Act** makes provision for the calculation of interest from the date when the cause of action arose.²² In this matter the precise date when the damage started is not clear. However, the letter of December 13, 2012 certainly made NHT aware that Treebros had a complaint about NHT's actions on the land. In the circumstances therefore, I view the date of service of that letter on NHT as being an appropriate time from which to start the calculation of interest. The value of the user is intertwined with the calculation for damages and it must also be considered when the interest computation is being done.

Costs

[188] The **CPR** provides that the general rule is that the unsuccessful party is to pay the costs of the successful party²³. However, counsel for Treebros also asks, based on the **CPR**, for a special costs certificate to be awarded for three (3) counsel as this matter required that amount of attention. Mr. Nicholson for the NHT conceded that an award for two (2) counsel would be appropriate but he vehemently opposed the application for three (3) counsel.

[189] There were indeed three counsel appearing for Treebros but the third counsel had substituted for the second counsel when she was not available. Costs are therefore recoverable for two (2) counsel only for all days when two (2) counsel appeared, regardless of who the two counsel were.

²² section 3

²³ Rule 64.6(1)

Special Costs Certificate

[190] The **CPR** provides that when making an order as to the costs of an application in chambers the court may grant a “special costs certificate.”²⁴ My understanding of that provision is that special costs certificates apply to chambers matters.

Civil Procedure Rule 64.12 states the following regarding special costs certificates:

(1) When making an order as to the costs of an application in chambers the court may grant a “special costs certificate”.

(2) In considering whether to grant a special costs certificate the court must take into account-

(a) Whether the application was or was reasonably expected to be contested;

(b) The complexity of the legal issues involved in the application;

And

(c) Whether the application reasonably required the citation of authorities and skeleton arguments.

(3) The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than-

(a) one attorney-at-law on the hearing of an application; or

(b) two attorneys-at-law at the trial, be allowed.

[191] Even if I am wrong in my view that special costs certificates are only permissible in chambers matters, in the trial at bar only two attorneys-at-law appeared, the

third being a substitute as became necessary. Here, in the normal course of taxing or agreeing of costs, there would be brief fees allowed for two counsel

²⁴ Rule 64.12(1)

without the necessity to make any special order. I therefore will make no award for special costs certificate.

Indemnity costs

[192] The second submission on costs was for the award of costs to Treebros to be made on an indemnity basis. Counsel for Treebros relied on **Norman Washington Manley Bowen v Robinson et al**²⁵ where costs were granted on an indemnity basis. Subsequently, in considering an appeal against the quantum of costs awarded in that matter Dukharan JA said,

*“Jones J awarded costs to the appellant on an indemnity basis. It is important to determine what this means in relation to the assessment of costs and the determination of the amount that is recoverable. It has been said that the assessment of costs is not a precise exercise. In the United Kingdom, costs are assessed on the standard or indemnity basis. Our CPR, however, does not speak specifically to standard or indemnity costs and has not adopted the English approach to expressly differentiate between the two bases. There was no appeal from Jones J’s decision and so any question as to the propriety or otherwise of this award of costs on an indemnity basis is not explored as it was never raised as an issue for determination of this court.”*²⁶

[193] In the absence of a clear pronouncement concerning the award of indemnity costs in Jamaica, I start by considering the **Judicature (Supreme Court) Act** which states that the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court²⁷. That Act empowers the

Rules Committee to make provision for the costs of civil proceedings including, in particular the manner in which the amount of any costs payable to the person shall be determined.²⁸

²⁵ Claim No. 2007 HCV 03783 unreported judgment

²⁶ [2015] JMCA Civ 57

²⁷ section 28E

²⁸ section 28E(2)

[194] **Noorani v Calver**²⁹ has provided a foundation on which some of our judgments have been based.³⁰ There Colson J stated;

“If indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs.”

In my view in exercising the discretion which it has to award costs, the Court must, in circumstances deserving of special condemnation, make clear its disapproval of the conduct of parties.

[195] The actions of NHT in this matter fall within that category of circumstances deserving of special condemnation as outlined in paragraph 175 above. I therefore regard an award of costs on an indemnity basis as being appropriate in the current circumstances where our Court of Appeal has not excluded indemnity costs as being permissible.

Disposal

The orders I make are;

1. Judgment for the claimant.
2. **Damages for nuisance and negligence** awarded to the claimant to be assessed and calculated in accordance with this judgment at paragraph 129 and 130.
3. **Damages for trespass by the representatives and by the machinery** of NHT in the sum of \$100,000 plus the amount for clearing the materials from Treebros' property. Treebros must present an invoice/bill to be paid by NHT for the cost of the removal of its material from the land, or if so agreed between the parties, NHT is at liberty to remove the material itself within 42 days of today.

²⁹ [2009] EWHC 592

³⁰ **Michael Distant & Anor v Nicroja Limited et al** Claim No 2010 HCV 1276 delivered 8 March 2011 per Brooks J and **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society** [2014] JMCA Civ 39 per Morrison JA

4. **Interest** on all damages at the rate of 6% per annum commencing at the date of service of the letter dated December 13, 2012 from Treebros to NHT until judgment.
5. **Injunction** granted to restrain the NHT, whether by their directors, officers, representatives, servants and/ or agents and/or workmen, assignees and successors or otherwise howsoever from permitting the discharge and/or flow of water onto Treebros' land or onto the roadway adjoining Treebros' property, where it would exit onto Treebros' property.
6. **Injunction** granted to restrain NHT, whether by their directors, officers, representatives, servants and/ or agents and/or workmen, assignees and successors or otherwise howsoever from entering onto or remaining on Treebros' property
7. **Costs** to the claimant, Treebros, including costs for 2 counsel on an indemnity basis.
8. **Execution of Judgment** stayed until 5 days after the delivery of the written judgement.

Although I grant this injunction I exhort the parties to continue nonetheless to negotiate an agreement that inures to the benefit of both.