[2021] JMSC Civ 28

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2012HCV02765

BETWEEN	**PAULINE WILLIAMS**	**CLAIMANT**
AND	**NORMAN WILLIS**	**1ST DEFENDANT**
AND	**ESTATE OF SARAH WILLIS (by duly appointed representative Damian Willis)**	**2ND DEFENDANT**

IN OPEN COURT

Ms. Cavelle Johnston and Mrs. Kaysian Kennedy-Sherman instructed by Townsend, Whyte & Porter for the Claimant.

Ms. Zara Lewis instructed by Zara Lewis and Company for the Defendants.

Heard: December 15, 2020 and February 19, 2021.

Assessment of Damages – Trespass and wrongful use of land – Claim for mesne profits – Claimant seeking restitutionary damages – Claimant seeking sum equivalent to the profits made by the defendants through the use of land – How to quantify the measure of damages.

N. HART-HINES, J (Ag.)

[1] Nestled in the hills of Westmoreland is, by all accounts, an idyllic property. This property is now regarded by many as a natural attraction. This is due primarily to its direct access to a waterfall now called “Mayfield Falls”, which I gather is created by the Cabarita River descending from the Dolphin Head Mountains, and running along the northern and eastern boundaries of the

property. In addition, it is believed that there is a mineral spring within the river, which is also directly accessed by the property. This 2.75-acre lot, registered at Volume 346 Folio 56 in the register book of titles, is described as Lot 25 Glenbrook, Flower Hill, Mayfield, Westmoreland ("the property"). The claimant asserts her right to possess the land although her name does not appear on the certificate of title. It is the claimant's case that her father John McKenzie purchased the property on December 19, 1939, that she took possession of it in 1976, and that she is the owner of the property.

BACKGROUND

[2] Sometime prior to 2002, the claimant leased part of the property to Norman Willis and Sarah Willis ("the defendants"). Sarah Willis is now deceased. A new lease agreement was entered into on January 1, 2002, for a term of five years, for the sum of Thirty Thousand Dollars ($30,000.00) per annum with incremental increases, payable on the 1st day of January each year. The claimant states that only a small section of the property was leased to the defendants, but they ventured outside the leased area and took possession of the entire property without her permission. The defendants also erected fourteen (14) structures on the property. At some point during their occupation of the land, the defendants obtained a licence from the Jamaica Tourist Board to operate a tourism attraction on the claimant's land, trading under the name of "Mayfield Falls and Mineral Springs Limited".

[3] On the December 31, 2006, the lease expired and no new lease was granted. The defendants made no further payments and failed to vacate the leased premises. On March 10, 2007, the defendants were served a notice to quit the said premises. Proceedings were commenced by the claimant, seeking inter alia, recovery of possession and mesne profits. Up to the date of the hearing on December 15, 2020, the 1st defendant remained at the property, despite an order of a Judge of the Supreme Court, made on September 18, 2019, directing that the claimant shall have possession of the subject property. This court must now determine the most appropriate monetary remedy available to the claimant based on the pleadings.

THE CLAIM AND REMEDIES SOUGHT

[4] The claimant initiated proceedings against the defendants in the Westmoreland Parish Court in 2007 seeking, inter alia, recovery of possession of the said property, and mesne profits. In 2012, the matter was transferred to the Supreme Court. Following the case management conference, an Amended Fixed Date Claim Form ("Amended FDCF") was filed on February 28, 2013. Therein, the claimant indicated that she sought the following orders:

> *"a. An Order for the Recovery of Possession of premises situate at Glenbrook, Mayfields in the parish of Westmoreland.*
> *b. That the Defendants pay to the Claimant mesne profits in respect of the period between December 31, 2006 to the date of this Order, such sums to be assessed by this Honourable Court.*
> *c. Damages*
> *d. Interest*
> *e. Costs and Attorney's fees …"*

[5] The defendants failed to comply with an Unless Order made on March 27, 2014 and their Defence was struck out and judgment entered for the claimant on July 21, 2014. Following Sarah Willis' death, Damian Willis was appointed representative of her estate on June 23, 2016 for the purposes of continuing the claim. On September 18, 2019, it was ordered that the judgment entered in favour of the claimant on July 21, 2014, be treated as a final judgment, and the matter fixed for assessment of damages on December 15, 2020.

[6] The claimant's prayer for relief in the Amended FDCF does not expressly seek relief in the form of restitutionary damages akin to an account of profits. However, the expert's report and the claimant's witness statement suggest that restitution is being sought. Case law suggests that in an action for damages for trespass, where a claimant does not seek to prove the losses which he has suffered as a result of the defendant's trespass, he will be regarded as pursuing a claim for restitution[1]. However, where a claimant does seek to prove losses, he has to show what the rent would have been if the property had been let to another tenant[2]. In this case, the claimant has sought to prove the gains made by the defendants rather than what her losses were.

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[1] See the judgment of Hoffman LJ in ***Ministry of Defence v Ashman*** [1993] 2 EGLR 102.
[2] See the judgment of Lloyd LJ in ***Ministry of Defence v Ashman*** *supra*.

[7] The claimant's witness statement filed on June 5, 2015 indicates that she seeks "*mesne profits from December 31, 2006 to the date of [the court's] Order in accordance with the Expert Report provided by Mr. Andrew James*". Mr. Andrew James is a Valuator and Realtor, and he was given instructions by the claimant's Attorneys-at-Law to calculate the mesne profits to be awarded to the claimant. Mr. James prepared a report dated March 10, 2015 and an addendum report dated June, 2018. In his report dated March 10, 2015, Mr. James indicated that it was his considered opinion that the mesne profits for the period January 1, 2007 to December 31, 2014 was fifty million, seven hundred and seventy-two thousand, thirty dollars and seventy-eight cents ($50,772,030.78).

[8] The basis of Mr. James' opinion that this figure ($50,772,030.78) represents the mesne profits is that this sum is the estimated profit which the defendants made during the seven-year period between January 2007 and December 2014. In the Preamble of his report dated March 10, 2015, Mr. James stated that he relied on the Oxford Dictionary's definition of mesne profits as "*the profit of an estate received by a tenant in wrongful possession and recoverable by the landlord*". However, this definition is not consistent with the courts' approach in awarding damages representing the "value of the benefit" to the defendant, rather than the "profits" which the defendant made.

THE ISSUES

[9] The issues for determination by this court are:

1. Is the claimant's definition of "mesne profits" correct?
2. Can a claimant seeking mesne profits obtain 100% of a defendant's profits as damages?
3. How might mesne profits be calculated?
4. How should the court quantify the measure of damages in this case?
5. Would nominal damages be appropriate in the circumstances?
6. Are there are aggravating circumstances which would merit an award of exemplary or aggravated damages.

THE EVIDENCE

[10] On December 15, 2020, the court heard evidence from the claimant and the court appointed expert, Mr. Andrew James. During cross-examination, the claimant gave evidence that when the property was first leased to the defendants, the property was undeveloped or unimproved, and it was the defendants who developed and improved it. She said that she was not aware that the defendants leased one acre of land from a neighbour Herbert Harrison. The claimant insisted that the buildings which the defendants erected were on her property. She conceded that she has not verified the boundaries of the land with the aid of a surveyor, but she said that there are mango trees and a "never dead" tree around the boundaries.

[11] Mr. James' reports indicate that the eco-tourism attraction trading under the name of "Mayfield Falls and Mineral Springs Limited" offers several activities including hiking on the river trail, company retreats, weddings and special events, and picnic area. Mr. James indicated that the land was described as "agricultural land" in Glenbrook, Westmoreland. However, he said the area has changed as most residents were now working in tourism and other areas. The report stated that twelve (12) timber buildings and two (2) concrete buildings were seen on the property, and income was earned from an entrance fee, lodging, a restaurant serving lunch and dinner, arts and crafts, the hosting of weddings and renting of the land for other events. The report listed the various expenses, estimated income, and estimated profits generated by the attraction. However, it did not provide rental rates for comparable properties, or suggest a fair market rate.

[12] During cross-examination, there was no challenge to the computation of the alleged profits. Instead, counsel Ms. Lewis sought to ascertain whether Mr. James was able to quantify sums received from activities related solely to the use of the land, and unconnected to the structures built on it. Mr. James said that without the structures, some income could still have been earned from activities such as hiking. However, he said it would take him about two (2) months to produce further calculations specific to those activities. He agreed

with counsel that without the structures, income linked to those structures would not have been earned.

SUBMISSIONS

Submissions on behalf of the claimant

[13] Counsel Ms. Johnston and Mrs. Kennedy-Sherman submitted that the natural habitat and water features offered by the property contribute to the viability of the defendants' activities. Counsel opined that if the property was not critical to the generation of profits, the defendants would ply their trade elsewhere.

[14] Counsel submitted the claimant ought to be awarded the profit which the expert calculated based on the estimated revenues and expenses of the business. Counsel for the claimant have relied on the case of ***Inverugie Investments Ltd v Hackett*** [1995] 1 WLR 713, in support of their contention that the defendants should compensate the claimant significantly for their occupation of the land. It was submitted that the previous rent of thirty thousand dollars ($30,000.00) was merely "*a reference point a potential rental sum, but is in no way a guidepost as to the reasonable letting value of the property*" and that the court should make an award which surpasses the annual increase of 7.5% allowed by statute. Finally, counsel submitted that "*the ambit of the law gives the presiding trial judge the opportunity to determine that [sic] is fair and reasonable in the circumstances of the case*".

Submissions on behalf of the defendants

[15] Counsel submitted that the restitutionary approach to calculating mesne profits is used when there has been no damage to the land. Ms. Lewis opined that in such a case, the sum awarded to the claimant as a result of the defendants' use and occupation of the land should be restricted to a reasonable sum for the user of the property, and not the income the generated on the property.

[16] Counsel Ms. Lewis submitted that the property now called "Mayfield Falls", was developed due to the initiative and industry of the defendants, and it would not be fair for the claimant to be awarded a sum representing the profits made

by the defendants. Instead, Counsel submitted that a more appropriate sum to award was Ten Thousand Dollars ($10,000.00) per month. Ms. Lewis submitted that this would represent an appropriate nominal figure, since the claimant failed to provide evidence of the ordinary letting value of the property.

THE LAW AND ANALYSIS

Is the claimant's definition of "mesne profits" correct?

[17] The terms "damages for use and occupation" and "mesne profits" are terms which are used in respect of damages for trespass. The term "mesne profits" is usually used where damages are awarded where a former tenant holds over and becomes a trespasser. In an action for mesne profits, a person entitled to possession of land, might recover the damages which he has suffered as a result of being out of possession of the land, or, such sums as he reasonably could have received for the use of the land, but not the defendants' "profits".

[18] It is my opinion that an award of mesne profits might be compensatory or restitutionary in nature, depending what the claimant seeks to prove. Since at least 1993[3] it has been widely accepted that a claim for mesne profits may be regarded as a claim for restitution, provided that the claimant seeks to prove the defendant's gains. Where damages are sought for the financial loss incurred by the person entitled to possession of the land, those damages would be regarded as "compensatory". Where the property has been damaged, the claimant is usually awarded as damages, a sum representing the diminution in value and the sum required to correct the damage. However, even where there is no damage to the property, if the claimant can prove loss of income as a result of being deprived of possession of his land, compensatory damages can be awarded in the form of mesne profits. However, where damages are sought in respect of the extent to which the former tenant has benefitted or been unjustly enriched by the continued use and occupation of the land, mesne profits can be regarded as "restitutionary" in nature. In pursuing a gain-based award, a claimant is "waiving" the tort and there is no need for proof of loss caused by the commission of the tort.

[3] See ***Ministry of Defence v Ashman*** *supra*.

[19] The general rule is that damages in tort are compensatory, or they address a claimant's financial loss as a result of wrongdoing. Restitutionary damages are an exception to that general rule. The aim of restitutionary damages is to strip a tortfeasor of his gains and to some extent, to deter defendants. Since damages are assessed by reference to the value of the benefit to the trespasser, a restitutionary award might exceed the market value of the property used by the tortfeasor[4], or it might fall below the market value[5].

Can a claimant obtain 100% of a defendant's profits as restitutionary damages?

[20] The appropriateness of an award of damages will depend on the facts of each case. It is clear however, that it will only be in a rare case that there would be 100% disgorgement of the profits made by the tortfeasor. This was expressly stated in the case of ***Stadium Capital Holdings (No 2) Ltd v St Marylebone Property Co plc*** [2010] EWCA Civ 952. In that case, at paragraph 13 of the judgment, Peter Smith J opined that the restitutionary approach introduces a flexible basis for assessment of damages and, "*in an appropriate case"*, could possibly result in the measure of damages representing 100% of the gross profits earned from the exploitation of land by trespasser. However, at paragraph 17, Sullivan LJ cautioned that an award of damages representing 100% of the profits was akin to an account of profits, and cited ***Attorney General v Blake*** [2001] 1 A.C. 268 for the position that awarding 100% of the profits was an exceptional remedy and "*could not be made at common law in the form of an award of damages*". He stated that an award of a restitutionary damages on the basis of the user principle, "*will not produce a figure equal to 100% of the profits of the unlawful venture*".

How might mesne profits be calculated?

[21] So what then ought to be the measure of damages and how should the court arrive at a fair figure? Guidance can be found in case law and texts. In the normal trespass case, the measure of damages will be the "ordinary letting

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[4] See ***Horsford v Bird*** [2006] UKPC 3.
[5] See ***Ministry of Defence v Ashman*** *supra*.

value"[6] of the property at the date of the trespass. This is the primary method of calculating the value of the benefit to the trespasser. The rent paid under any expired tenancy is strong evidence as to the letting value.

[22] If it is inappropriate or not feasible to use the ordinary letting value, English case law indicates that the court may assess the rental value of the premises on the basis of a "hypothetical negotiation" between the parties. When calculating the measure of damages, regard is had to the gain received, the market value of the gain, the use to which the land was put by the trespasser, his circumstances, and what he would be likely to pay for the use of that land.

[23] **McGregor on Damages**, 17th ed. (2003), p. 1152, under the heading "*Occupation and User"* states:

> *"1. Normal measure*
> *34-041.* ***The normal measure of damages is the market value of the property occupied or used for the period of wrongful occupation or user****.*[7] *There is little authority but this measure is consonant with general principles and with the name of the action for wrongful occupation as one for mesne profits, and as a measure has been confirmed by the Judicial Committee of the Privy Council in the unusual case of* ***Inverugie Investments Ltd v Hackett*** *…. If the rental value varies due to market fluctuations during the period of wrongful occupation, these fluctuations should be taken into account.* ***If the defendant makes improvements on the land, the rental value should be assessed upon the unimproved value****." (My emphasis)*

[24] The benefit enjoyed by the defendant, that is, the actual use of the land, is distinguishable from the fruits of the enjoyment, or the profit made as a result of his trespass. The decision of the Judicial Committee of the Privy Council in ***Inverugie Investments Ltd v Hackett*** [1995] 1 WLR 713 is an example of the courts assessing the measure of damages by the "*ordinary letting value*" of the property, rather than by the profits made. There, the plaintiff was the lessee of 30 apartments within a hotel complex. The defendants, who were the reversioners under the lease, ejected the plaintiff, and used the apartments for 15 years and 5 months as part of the hotel. The Court of Appeal of the Bahamas in assessing the damages, held that the starting point of the award

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[6] Per Megaw LJ in ***Swordheath Properties Ltd v Tabet*** [1979] 1 WLR 285 at p288.
[7] The footnote states: "*This assumes no damage or injury to the land…. But if there should be wrongful damage during wrongful occupation is should be recoverable in the action for mesne profits and the damages for such will be assessed as in actions for wrongful damage simpliciter".*

was the gross revenue received by the defendants over the fifteen-year period, less appropriate expenses. The Privy Council disagreed with that approach of the majority of the Court of Appeal. Since the award of restitutionary damages was intended to disgorge the defendant's notional gains, a fair annual rate for all of the rooms was to be used, even though the hotel had an average occupancy of 35% to 40%. The focus was not on whether the rooms were used, but rather, that the defendants could have used them.

[25] Their Lordships held that the starting point should be such sums as should "reasonably be paid" for the use of the property, that is, a reasonable rate. The Privy Council agreed with the approach taken by Rowe JA in the Court of Appeal, in using the wholesale market rate for room rental, as the annual room rate for all thirty (30) rooms. However, in the interest of fairness to the defendants, deductions were made in respect of appropriate expenses. It must be noted that by considering various expenses to be deducted, the Privy Council indicated that full disgorgement is inappropriate, even in a case with aggravating features such as a lengthy period of trespass.

[26] The decision of the Privy Council in ***Inverugie*** was not focused on the profits made by the defendant, but instead on what reasonable sum should be awarded, having regard to the "ordinary letting value" of the rooms. Further, the instant case is distinguishable from the ***Inverugie*** case in that, here, the property leased was unimproved land at the time of the trespass, while the rooms in issue in the ***Inverugie*** case formed part of a hotel complex.

[27] Mr. James' report has been prepared on the wrong premise, and did not assist me in determining a fair market monthly rate for the use and occupation of the property. I will therefore give consideration to some other methods utilised by the courts in determining an appropriate award as mesne profits.

(1) The "passing rent" method

[28] One method of determining the ordinary letting value, is to have regard to the last rent payable at the end of the tenancy. However, this method would be

inappropriate where the rent no longer reflects the actual value of the premises at the date of the assessment of damages hearing. In such a case, the "passing rent" approach may be rejected in favour of the "hypothetical negotiation" approach.

[29] In my opinion, it is inappropriate in this case to use the past rent of thirty thousand dollars ($30,000.00) per annum (which was last agreed in 2002 under the lease agreement), in order to determine the ordinary letting value as at the date of the trespass on January 1, 2007. This sum could not accurately reflect the value of the premises. According to Mr. James' report, the nature of the community had changed by 2014 from a farming community to one dependent on tourism. The value of the property and the rental payable would have correspondingly increased.

[30] Clause 1 of the signed lease agreement indicated the intention of the parties as regards the sums to be paid annually for the duration of the five-year lease, and it indicates that there were to be incremental increases by up to 15% annually. By the end of the lease, the defendants were to pay forty-three thousand dollars, six hundred and forty-two dollars and fifty cents ($43,642.50) in years 2005 and 2006. I have noted that these increases would not have been in keeping with **section 3(1)** of the **Rent Restriction (Percentage of Assessed Value) Order 1983**, which provides for an annual increase of 7.5%, in the standard rent, provided that the circumstances stated in the Act and the Order. Notwithstanding, it seems to me that a 15% increase in the rent in 2007 would have been inadequate. I come to this position after having regard to the fact that the nature of the community had begun to change since 2002, as well as the fact that the defendants were said to have ventured outside the leased area initially agreed and had erected structures on the land. It would have been appropriate to renegotiate an entirely new lease in terms of the area to be occupied, the use to which the property could be put, what could be erected thereon, and the sums to be paid under the lease. In my opinion, the sum of fifty thousand dollars, one hundred and eighty-eight dollars and ninety cents ($50,188.90), representing a 15% increase in the rent in 2007, would have

been inordinately low and unreasonable, having regard to the use to which the land was put by the defendants, the likely increased market value of the property, and the estimated profits made by the defendants. The CPI in January 2007 was 38.7, and this figure updates to one hundred and thirty-nine thousand, one hundred and fifty-four dollars and twenty-three cents ($139,154.23) per year (as at January 2021, with a CPI of 107.3). This sum is clearly low for the lease of a 2.75-acre property which had vast income-earning potential as an eco-tourism attraction. I therefore do not adopt the "passing rent" approach. I now consider the "hypothetical negotiation" approach.

(2) The "hypothetical negotiation" method

[31] Under the "hypothetical negotiation" method, now referred to as the "negotiating damages"[8] method, damages are assessed by reference to a hypothetical negotiation between the parties. A valuation exercise is done by the court based on a hypothetical negotiation between the landlord and the tenant at the end of the lease, where they agree a sum for the continued occupation, having regard to the some factors such as[9]:

a) what a tenant, acting reasonably, would pay to remain in possession as a tenant on a yearly basis;
b) what the premises would let for in the open market; and
c) the cost to the tenant of relocating to such alternative accommodation.

[32] The English cases suggest that the courts have regard to the nature and duration of the trespass, its purpose and effect, and the availability of other options to the defendant. In addition, to assist the court with the calculation of the award, expert evidence is often used to indicate reasonable rates in the hypothetical negotiation approach. This method of assessment would often require some evidence from a real estate expert or valuator in respect of lettings of comparable properties, or some other basis is used for the calculation of the rate, and the bases of the rates are explained. However, in the case of ***Eaton Mansions (Westminster) Ltd v Stinger Compania De***

[8] See ***Morris-Garner and another v One Step (Support) Ltd*** [2018] UKSC 20.
[9] See **Hill and Redman's Law of Landlord and Tenant**, Chapter 15, paragraph 5187.

Inversion SA [2013] EWCA Civ 1308, no expert evidence was relied on in respect of fees for the use of space on the roof of an apartment complex in London, on which air conditioning units were erected without permission. Notwithstanding, a sum representing a "notional licence fee" was awarded for the trespass. The England and Wales Court of Appeal held that the "negotiations" must consider the period and the extent of the trespass which occurred, and in keeping with the user principle, the defendant should pay a reasonable fee for the use of the space on the roof.

[33] If the only way to achieve the object of the trespass is to use the claimant's land, then the defendant would not be in an extremely strong negotiating position, and the rate would be higher. In ***Enfield London Borough Council v Outdoor Plus Ltd and another*** [2012] 2 EGLR 105, the defendant had erected two commercial advertising hoarding panels on the claimant's land without permission. While the panels were largely in a neighbouring lot, three (3) of the steel supports fell within the claimant's land. The advertisements were displayed over a five-year period. The claimant sought damages for trespass. Despite the assistance of an expert report on the hypothetical licence fees which would have been negotiated by two properly advised commercial parties, the trial judge awarded nominal damages for the encroachment.

[34] The England and Wales Court of Appeal criticised the award and the approach taken by the judge in finding that the claimant failed to show that the defendant derived any financial benefit and failed to prove what reasonable fees for the licences would have been. The Court of Appeal held that when applying the hypothetical negotiation method, the award of damages should have been based on the unchallenged evidence of the expert as to what hypothetical licence fees would have been agreed between two properly advised commercial parties. The Court of Appeal observed that the defendant was not in an extremely strong negotiating position, since the only way of achieving its purpose of displaying advertisements, was to trespass on the claimant's land. and accepted the notional licence fees indicated in the expert report.

[35] Like the defendant in the ***Enfield LBC*** case, the defendants in this case would not have been in an extremely strong negotiating position when renegotiating the rent in January 2007. Having regard to the uniqueness of the property, there would be limited alternative options available to the defendants in the area, if they hoped to continue their business. Also, in light of the extensive profits made by the defendants, it seems fair to say that a tenant in the defendants' position, acting reasonably, would pay a significant sum to remain in possession as a tenant on a yearly basis.

[36] As regards the claimant, I believe that the claimant would have renegotiated a lease with certain information in mind. She last visited the property in 2005 and she would have been able to see the vision which the defendants had for the property and see the number of patrons visiting the property on that day. She would also have been aware that in addition to the waterfall and mineral spring, that there are a large variety of flora and birds on the property, which contribute to the property being "*picturesque*" and a "*delightful oasis*". Access to the waterfall is gained from the claimant's property and there were a limited number of neighbouring properties which had access to the waterfall and mineral spring. She would have been aware that the value of the unimproved land would have increased by 2007, not just because of the uniqueness and natural beauty of the property, but also because of the attraction the property had become by virtue of the defendants' operations. If the court were to apply the "hypothetical negotiation" method, these are factors which the court would expect the parties, to have considered in arriving at a reasonable rate.

[37] However, unlike the ***Enfield LBC*** case, this court does not have the benefit of evidence regarding fair market rates and, unlike the ***Eaton Mansions*** case, it is difficult to assess an appropriate hypothetical rental without the assistance of expert evidence regarding comparable rental rates. The expert report in this case was not prepared with a "user fee" or rent in mind, but instead focused on the profits made by the defendants. I am mindful of the fact that Lord Reed in ***Morris-Garner and another v One Step (Support) Ltd*** [2018] UKSC 20, opined at paragraphs 74 and 75 that the assessment of a hypothetical release

fee is "*a difficult and uncertain exercise*" with an element of "*artificiality*", and that even when expert evidence is given about a hypothetical negotiation, several questions might emerge as to the basis on which the parties should have hypothesised. The lack of an evidential basis to make an award makes the "hypothetical negotiation" method inappropriate in this case. I therefore do not adopt this method and now give consideration to a third alternative.

(3) A percentage of the unimproved value of land – approach in Horsford v Bird

[38] Where the defendants have improved the land, it would be appropriate to award damages based on the value of the unimproved land. In ***Joseph Horsford v Lester Bird and others*** [2006] UKPC 3, the Judicial Committee of the Privy Council assessed the mesne profits as a percentage of the capital or unimproved value[10] of the land. There, the former Prime Minster of Antigua and Barbuda built a wall which encroached on his neighbour's land and appropriated some 455 square feet of land, which he incorporated into his garden. The claimant instituted proceedings in 2000, but by the time the matter was heard by the Privy Council, approximately 8 years and 3 months had passed since the date of the trespass. The claimant was not required to elect between compensatory damages (damages in lieu of an injunction) and restitutionary damages (mesne profits), and awarded both. However, their Lordships held that the building of the wall had not been accompanied by high handed or reprehensible behaviour by the defendant and therefore an award of aggravated damages was not justified.

[39] In assessing the damages, their Lordships disagreed with the decision of the Court of Appeal of Antigua and Barbuda in calculating the capital value of the undeveloped plot of land as EC $13,650 (at a rate of $30 per square feet). The Privy Council held that the notional value to the defendant in having the land as part of his garden was "*at least double that figure*". The Privy Council substituted the doubled figure (EC $27,300) as the true value for the purposes of assessing (1) damages in lieu of an injunction and (2) mesne profits. An

[10] See **section 2** of the **Land Valuation Act** (Jamaica) for definitions for "improved land", "improved value", "improvements", "unimproved land" and "unimproved value".

annual rate of 7.5% was selected as a “reasonable” percentage to calculate the mesne profits. The substituted capital value was then multiplied by the annual rate of 7.5%, to arrive at an annual mesne profit figure, which was then multiplied by the number of years of wrongful occupation.

[40] The instant case is slightly distinguishable from the ***Horsford*** case in that, the ***Horsford*** case concerned residential property, whereas in this case, the land is being used for business or commercial purposes. I believe that it is appropriate to adopt the approach of the Privy Council in (1) assessing the value of the land to the defendants, and (2) selecting an annual percentage rate to determine the mesne profits. However, in light of the fact that the property is being used to earn income, it is my opinion that the notional value to the defendants should be higher than that in the ***Horsford*** case.

(i) Value of land to the defendants

[41] Mr. James did not indicate the value of the property as at the date of his report or the date of the hearing. However, annexed to his report is a document issued by the Commissioner of Land Valuation, indicating that the value of the property in 2002 was two hundred and thirty thousand dollars ($230,000). The valuation of the property in 2002 is likely to have been based on the type of land and the characteristics of the neighbourhood. In 2002 the area was predominantly a farming community, and this would account for the low valuation. However, the nature of land and neighbourhood changed by 2007. In my opinion, the value of the property to the defendants in January 2007 would have been at least three (3) times that sum, having regard to the use to which the land was being put and its income-making potential in 2007.

[42] The CPI in March 2002 was 23.4, and two hundred and thirty thousand dollars ($230,000.00) updates to one million, fifty-four thousand and six hundred and fifty-eight dollars ($1,054,658.00) as at January 2021, with a CPI of 107.3. The value of the property to the defendants would have been at least three (3) times that sum, and the substituted capital value would therefore be three million, one hundred and sixty-three thousand, and nine hundred and seventy-four dollars and thirty-five cents ($3,163,974.35).

(ii) Appropriate percentage of the value of the land as mesne profits

[43] The Privy Council offered no explanation or basis for the exercise of their discretion in selecting a rate of 7.5% to determine the annual mesne profits. Notwithstanding, having regard to the fact that the property in this case is being used for business or commercial purposes, I believe that a rate of 30% of the substituted capital value would represent reasonable mesne profits.

[44] I have given consideration to the property's uniqueness and its income-earning potential. I have noted that the property's income-earning potential is largely attributable to the work undertaken by the defendants. The defendants improved and developed the property by doing various things including (1) erecting buildings which included facilities such as the restaurant, bar and gift shop, (2) facilitating hiking on the river trail, (3) organising bus tours and marketing the location, and (4) hosting special events. The improvements would have contributed to the increased rent payable. However, the rent should not be oppressive. I believe that the court ought to acknowledge the initiative, physical effort and organisation of the defendants in developing an eco-tourism attraction when determining a fair rent[11]. When I weigh up all these factors, I believe that 30% of the value of the unimproved land represents reasonable mesne profits.

[45] The annual mesne profits would be nine hundred and forty-nine thousand, one hundred and ninety-two hundred and thirty cents ($949,192.30) (that is, $3,163,974.35 x 30%). The sum due after a fourteen-year period would be thirteen million, two hundred and eighty-eight thousand and six hundred and ninety-two dollars ($13,288,692). The sum due monthly would be seventy-nine thousand, ninety-nine dollars and thirty-six cents ($79,099.36). I believe that this monthly figure, while conservative, is a fair sum in the circumstances. If Mr. James had provided the court with rental rates for comparable properties, the award may well have been more, but he did not do so.

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[11] See for example ***Boardman v Phipps*** [1967] 2 A.C. 46 for the principle that allowances might be given for the skill, labour and effort expended by a defendant (who is a fiduciary) in making a profit.

Would nominal damages be appropriate?

[46] I have considered Ms. Lewis' submission that a nominal award of ten thousand dollars ($10,000) monthly would be appropriate as the claimant has not provided evidence of the ordinary letting value of the property. This submission does not find favour with me. The claimant has been deprived of the use of her land for fourteen (14) years, and nominal damages would not represent due compensation or reasonable disgorgement of the benefits received by the defendants. The enrichment ought to be measurable, but it seems to me that it might be measured in more than one way, especially where it is difficult to precisely identify the amount of the benefit obtained. In ***Biggin & Co Ltd v Permanite Ltd*** [1951] 1 KB 422 at page 438, Devlin J (as the then was) said:

> "…*where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can*".

[47] Neither do I believe that it is appropriate to make an award based on the entrance fees paid by visitors, or the sums earned strictly from activities associated with the use of the property (such as hiking), as the award would not reflect the fact that there was some input made by the defendants. Without the conveniences offered and without some amount of marketing, tourists and Jamaican residents might not have visited the property.

[48] I believe that a fair award can be made by using the value of the unimproved land, as indicated in the document issued by the Commissioner of Land Valuation in 2002. The approach in the ***Horsford*** seems to give a court wide discretion in making a "reasonable" award which seeks to strip a defendant of his gains. I believe that justice is done between the parties when this approach is adopted, as I have considered the unimproved state of the property, the value of the benefit to the defendants, as well as the work undertaken by them.

Is there a basis for an award of exemplary or aggravated damages?

[49] There are some aggravating features in this case including the length of the trespass, the allegation that the defendants extended the area of occupation without the claimant's consent, and the fact that they have not vacated the property despite a court order in September 2019. The defendants' conduct

could be described as “outrageous”. This case would fall within category two of the categories listed by Lord Devlin in ***Rookes v. Barnard*** [1964] AC 1129, that is, “*the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff*”.

[50] Having regard to how low the lease was in 2006 and how much profit they were making, the defendants could have easily increased the sums payable to the claimant or even sought to buy the property from her. Instead, they elected to hold over and pay no rent to the claimant for over fourteen years. This conduct is unconscionable and would merit an award of exemplary damages. However, punitive damages would have to be specifically pleaded in order for such an award to be made[12], and this was not done in this case. Exemplary and/or aggravated damages therefore cannot be awarded.

DECISION AND ORDERS

[51] My orders are as follows:

1. Mesne profits awarded in the sum of thirteen million, two hundred and eighty-eight thousand and six hundred and ninety-two dollars ($13,288,692) for the period January 1, 2007 to December 31, 2020 plus the sum of one hundred and fifty-eight thousand, one hundred and ninety-eight dollars and seventy-two cents ($158,198.72) for the months of January and February 2021 (at a rate of $79,099.36 monthly). The total award is thirteen million, four hundred and forty-six thousand and eight hundred and ninety dollars and seventy-two cents ($13,446,890.72).
2. Interest is awarded at the rate of 6% per annum from January 1, 2007 to the date of the judgment, and at a rate of 10% per annum from the date of the judgment until the judgment is satisfied.
3. Costs to the claimant to be agreed or taxed.
4. Attorneys-at-Law for the claimant are to prepare file and serve this order.

[12] See **Rule 8.7(2)** of the Civil Procedure Rules 2002, as amended.