REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2006-02600

BETWEEN

VINCENT JOSEPH

Claimant

AND

DANISH MAHABIR

Defendant

****

Before: Master Alexander

Appearances:
For the Claimant: **Mr Mervyn Mitchell**
For the Defendant: **Mr Bronock A Reid, instructed by Mr Brendan M Sutherland**

DECISION

I. INTRODUCTION

1. In this matter, I was called upon to assess the damages payable to the claimant arising out of trespass by the defendant upon his lands and premises situated at Alice Gardens, Morne Coco Road, Petit Valley (hereinafter referred to as "the said lands") pursuant to a judgment entered against the defendant, by consent, on the 1st day of June 2009.

2. By his statement of case filed on the 5th September 2006, the claimant alleged that in or about January 2006 in pursuance of the development of a portion of land adjacent to the claimant's property, and known as Hill Crest Housing Development (hereinafter "the development site"), the defendant and/or his servant and/or his agents (hereinafter called "the defendant") removed soil from the defendant's land to facilitate construction of roads and buildings and further, with the use of a bulldozer and/or similar equipment, ventured onto

the claimant's property without his knowledge or consent, and deposited said soil. The defendant also removed flags, representing boundary demarcations, from the said lands of the claimant without his permission. The claimant also claims that the excavation that had been carried out at the development site caused erosion and distortion of his property line and fundamentally changed the overall topography of the said lands.

II. THE EVIDENCE

3. Evidence on behalf of the claimant was adduced by the claimant himself, Mr Aldwyn Chandler and Mr David Boyce. The defendant testified on his own behalf and, in support of his case, evidence was also adduced by Mr Arnold Ramon-Fortune and Mr Afra Raymond.

4. It is not in dispute that there was trespass by the defendant onto the property of the claimant. It is also not in dispute that this trespass entailed the cutting and clearing of a portion of the said lands of the claimant, as conceded in the defendant's submissions. Also not in dispute is that the said lands would have sustained damage as a result of the actions of the defendant. In dispute, however, is the extent of this damage and of any loss sustained as well as the sums recoverable by the claimant in damages.

Evidence of the claimant

5. In the claimant's witness statement, he testified that he lived at No 70 Calcutta Settlement No 1, Freeport and was a retired topographical, engineering and architectural draftsman. By a Deed of Partition No 2428 of 1967 he became the owner of the said lands.

6. The said lands formed a portion of a larger parcel comprising of approximately 3 ½ acres. The said lands consisted of 4 several pieces or parcels of varying sizes, described as lots '6', '15' and '16' on an attached plan. It is his evidence that he was in possession of 'outline approval' to develop the said lands into 17 plots for building purposes in lots ranging from 5,000 square feet to 12,000 square feet each as specified in a survey plan prepared by Neville Aqui.

7. He further testified that in or about 2005, he found out about a landslide in the area of the said lands and decided to visit. Around January 2006 he went to examine the property in the company of a friend, Aldwyn Chandler. Upon arrival at the said lands, he observed that there were several tons of earth, rocks, trees and other materials deposited on his property. He also observed that the defendant had started to develop a portion of land to the east of and adjacent to the said lands.

8. It is the claimant's evidence that the developmental work done by the defendant resulted in the erosion of several parts of the said lands and fundamentally changed its topography.

Evidence of Aldwyn Chandler

9. Aldwyn Chandler is the claimant's friend. He testified to the presence of flags and iron stakes buried/inserted into the said lands marking the claimant's property when he visited with the claimant in or about January 2006. He stated that he had observed an excavator being operated at the development site and that the defendant was in the process of constructing roads, walls and buildings, which involved digging and removal of soil. Further, it is his evidence that he spent 2 to 3 hours on the said lands where he saw rubble, debris, dirt and uprooted trees deposited unto the said lands. In his witness statement he stated, "*[T]here were a number of heavy machines being used on the defendant's property including a bulldozer/excavator and backhoe. These heavy machines caused erosion of the soil on the property of the claimant and created a free pathway for large quantities of rain water to flow unto the claimant's property*."

Evidence of David Boyce

10. David Boyce is a chartered civil engineer who was retained by the claimant to conduct investigations and analysis of the said lands. He submitted a report dated January 2011 on the impact of the works at the defendant's development site on adjacent properties. It examined the damage to and loss of use of the entire 3.5 acre parcel of land and which included the said lands that are in issue in the instant matter. In his report (hereinafter referred to as "the Boyce report") he noted that based on his estimate of the material removed from the defendant's development site (975 cu. m), "*the extensive earthworks have*

adversely affected the landscape topography, loss of construction material, disturbance of the integrity of the escarpment and resulted in uncontrolled drainage throughout the remaining property."

11. He goes on to state also in the Boyce report that this extensive earthworks affected the implementation of proposed works for development of the said lands of the claimant, *"[P]roposed development for the property of Vincent Joseph which cannot be implemented due to the cutting and excavation carried out for the construction of Hill Crest Town Homes Development. The associated works caused major changes to the topography, drainage system, instability within areas of the escarpment and areas where construction is not feasible due to the proximity of the new structures*."

12. The Boyce report further states that any development of the said lands of the claimant will require extensive rework, "*to reconstruct drainage systems, and incorporate retaining structures to provide a measure of safety for potential development*." The Boyce report went on to give recommendations and suggestions to restore the entire 3.5 acre parcel as well as the cost associated with such. The cost submitted, including remedial work and loss of use, **totaled $4,981,452.00**.

13. Under cross examination, David Boyce admitted that his report dealt with the full 3 ½ acre parcel of land. It is to be noted that there was no separation or identification in the Boyce report of the cost (inclusive of remedial work and loss of use) of restoring the said lands specifically. It is to be noted also that in the Boyce report no formula was given or method of calculating the losses sustained by the said lands specifically, from the damage done to or sustained by the larger parcel.

Evidence of the defendant

14. The defendant testified to purchasing the land adjacent to the said lands in or about November 2003 which he started to develop in May 2005. He admits that while clearing his property, the contractor crossed the boundary line and cut a portion of the said lands. It is the defendant's evidence that this trespass was brought to his attention, in or about January 2006, by the claimant who also complained that certain flags representing the boundary line were removed. The defendant stated that he did not remember seeing any visible flags

demarcating the boundary line apart from the two irons that identified the extreme limits of the common boundary.

15. The defendant denies depositing soil from the development site onto the said lands. He testified that, since the accidental cutting of the said lands there has been no further trespass onto it.

Evidence of Arnold Ramon-Fortune

16. Arnold Ramon-Fortune is a registered surveyor with the Land Survey Board of Trinidad and Tobago and a member of the Royal Institute of Chartered Surveyors. He gave evidence that the said lands of the claimant formed part of a larger parcel and that the spillage of material from the defendant's property and area of clearing mainly affected lots 6 and 7 and a very small portion of lots 4 and 5. These lots abut the western boundary of the defendant's property and are undeveloped. Of the cleared properties, the claimant was the owner of the affected lot 6 only. He testified that the area of land cleared on lot 6 of the said lands amounted to 880 square feet and that the volume of material cut amounted to 530 cubic feet, concluding, therefore, that the material deposited on the said lands was minimal. In his witness statement he explains it thus, "*I calculated the area of land cleared on lot 6 to be 880 square feet. I also calculated the volume of material cut from lot 6 to be 530 cubic feet. If the volume of material cut on lot 6 were spread across the area of lot 6 the height of the land will increase by 0.04 feet. Therefore … the material deposited on Mr Joseph's land would have to be considered minimal*."

17. To be noted also is his evidence via his witness statement that, "*[O]n examining the topography as captured on the title, one can clearly see that the natural flow of rainfall runoff would normally emanate from Mr Mahabir's land onto Mr Joseph's land in a westerly direction. Mr Mahabir, by constructing his retaining wall, has prevented runoff of water coming from his property onto Mr Joseph's property*."

18. Under cross examination, he admitted also that when the defendant constructed the retaining wall there was a very slight encroachment about ½ a foot onto the said lands of the claimant.

Evidence of Afra Raymond

19. Afra Raymond is a chartered valuation surveyor who conducted a valuation of the said property on behalf of the defendant. He prepared a valuation report dated 29th April 2009 (hereinafter referred to as "the Raymond report") on the diminution in the value of the said lands consequent on the defendant's trespass. He concluded that, "*having regard to the steep, inaccessible and undeveloped character of the portion of the parcel of land that was trespassed upon, there has been no diminution in the value of the said parcel of land*." [emphasis mine]

SUBMISSIONS

20. The main issue dealt with in the claimant's submissions, is whether the claimant is only entitled to the damages claimed in his particulars of claim or rather whether he is also entitled to damages not specifically pleaded but set out in the evidence of David Boyce. It is noted that the claimant claimed "damages for trespass" in his claim form and statement of case but by his submissions sought an alternative measure of damages. Based on the ***Charmaine Bernard*** judgment with respect to general damages, I am satisfied that in determining the damages to be awarded to the claimant, all witness statements accepted into evidence will be taken into account.

21. Under cross examination the claimant stated with respect to the 3 acre parcel of land divided into 17 plots, that "they do not belong to me… this is an inheritance from my mother and I am the one that had to do the survey and the development. However, in his submissions, counsel for the claimant stated that, "*[T]he claimant hereby concedes/admits that his compensation is limited to his four (4) plots as set out in the evidence of Mr Fortune*." I note that the evidence of Arnold Ramon-Fortune was clear that injury was only done to a small portion of lot 6 of the said lands and not the entire property and that this damage and/or any material deposited thereon was 'minimal.' The evidence of Arnold Ramon-Fortune is accepted and in light of the claimant conceding the limits of the trespass, I will now examine the law on trespass with a view to assessing the compensation payable to the claimant.

III. LAW ON DAMAGES IN TRESPASS

22. A claimant is entitled to nominal damages for trespass to land even if no loss or damage is caused.[1] If, as claimed by the claimant in this matter, damage or loss is caused then substantial damages may be recovered. The fundamental rule on recovery for damage to land is that the owner of the land is entitled to be restored, as far as money can do it, to the position he would have been in had the wrong not been suffered. See ***Livingstone* v *Rawyards Coal Co***[2]. The prima facie measure of damages for all torts affecting land is -

    i. the diminution in value to the plaintiff or
    ii. the cost of reasonable reinstatement.

    It would appear from the learning that a claimant is entitled to either diminution in value or the cost of reasonable reinstatement but not to both.

Diminution in value vs the cost of reinstatement:

23. As a condition precedent, it falls to be determined the proper measure of damages in this case. Which measure of damages is to be used in each case turns either on the nature of the claimant's interest or on the unreasonableness of reinstatement. In **The Common Law Series: The Law on Damages**[3], it is noted that, awarding the claimant the diminution in value merely puts him in the situation he would have occupied had he turned his asset into money. In most instances this is emphatically not the same thing as restoring him to the position he would have been in had the damage not been done, since in that case he would have had the undamaged asset itself and not merely its cash proceeds. It follows that to obtain full reparation he will need to recover the cost of reinstatement.

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1 Halsbury's Laws of England vol 5 4th ed, para 1170 at page 460 where it was stated that a trespasser may have to pay damages not only for the injury caused by the trespass to the land, or to the plaintiff's interest in the land, but also for any consequential injury to the plaintiff from the trespass complained of, notwithstanding that the further injury might have formed the subject matter of a separate action.

2 *Livingstone* v *Rawyards Coal Co.* (1880) 5 App Cas 25

3 The Common Law Series: The Law on Damages Part II: Damages other than for Personal Injuries, para 12.05

24. ***In British Coal Corporation* v *Gwent County Council***[4], Glidewell LJ said that, "*in an action in tort for damage to a building, the reasonable cost of reinstatement and repair will normally be the proper basis for the assessment of damages*."

25. The cost of re-instatement is generally preferred provided:

    (*a*) the claimant has restored, or intends to and can restore, the land to its previous condition, and

    (*b*) the cost of so doing is not entirely disproportionate or unreasonable. See ***Lodge Holes Colliery Co* v *Wednesbury Corpn***[5].

26. Examples of claimants being awarded the costs of restoration include ***Hollebone* v *Fernhurst and Midhurst Builders Ltd***[6], where the plaintiff after a disastrous fire went to the expense of restoring his home, referred to by the judge as one which, "*by reason of its size, its position, its features, its seclusion and the area in which it is located … is properly termed unique*" and ***Ward* v *Cannock Chase District Council***[7] where the property damaged was once again residential, being a cottage of "*special and particular value*" to its owner. The decision in ***Hollebone*** rested, it is submitted, essentially on the basis that the plaintiff had acted reasonably in the circumstances, and it would seem hard to argue that the owner of even an otherwise undistinguished bungalow was unreasonable in deciding to rebuild it rather than accept a sum for diminution in value, sell and seek another house. This decision was approved in ***Harbutt's Plasticine Ltd* v *Wayne Tank and Pump Co Ltd***[8] where a factory was rebuilt after destruction by fire and the cost of reinstatement was recovered rather than the difference in value before and after the fire. Although this case was strictly a case of breach of contract, its application to tort cannot be doubted.

27. In working out the measure of recovery and the values to be applied, all the circumstances are in account. In ***Guaideen Bankay and ors* v *Harrilal and ors***[9], Stollmeyer J (as he then

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4 *In British Coal Corporation* v *Gwent County Council* (1995) Times, 18 July, CA
5 *Lodge Holes Colliery Co* v *Wednesbury Corpn* [1908] AC 323
6 *Hollebone* v *Fernhurst and Midhurst Builders Ltd* [1968] 1 Lloyd's Rep 38
7 *Ward* v *Cannock Chase District Council* [1985] 3 All ER 537
8 *Harbutt's Plasticine Ltd* v *Wayne Tank and Pump Co Ltd* [1970] 1 QB 447
9 *Guaideen Bankay and ors* v *Harrilal and ors* HCA S-100 of 1999

was) noted, "*the difficulty in deciding between diminution in value and the cost of reinstatement as the proper measure of damages arises from the fact that the plaintiff may want his property in the same state as before commission of the tort, but the amount required to effect this may be substantially greater than the amount by which the property has been diminished. The appropriate test seems to be whether the plaintiff's desire to reinstate is reasonable, and this will be decided partly by the advantages of reinstatement in relation to the extra cost to the defendant having to pay for reinstatement, rather than for diminution in value.*" [emphasis mine]

28. The defendant sought to rely on the case of ***C R Taylor (Wholesale) Limited*** **v** ***Hepworths Ltd***[10] which concerned the destruction of a building by the negligent act of the defendant. That case noted that, "*[T]he basic principle that damages awarded against a tortfeasor were to be as such as would, so far as money could, put the plaintiff in the same position as he would have been in had the tort not occurred, was* ***subject to the further principle that the damages awarded were to be reasonable as between the plaintiff and the defendant***." [emphasis mine] In ***Dodd Properties*** **v** ***Canterbury City Council***[11] it was emphasized that the cost of repair was to be assessed according to the broad and fundamental principle regarding damages, namely that they were compensatory. Applying this principle, Megaw LJ held that the cost of repairs was to be assessed at the earliest time when, having regard to the circumstances, they could reasonably be undertaken, rather than the date when the damage occurred.

29. As to the requirement that damages awarded be reasonable, the reasonableness *"… is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. … first the cost of reinstatement is not the appropriate measure of damages if the expenditure will be out of all proportion to the good obtained, and secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award."* [emphasis mine] See ***Ruxley Electronics & Construction Ltd*** **v** ***Forsyth***.[12]

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10 *C R Taylor (Wholesale) Limited* v *Hepworths Ltd* [1977] 2 All ER 784
11 *Dodd Properties* v *Canterbury City Council* [1980] 1 All ER 928
12 *Ruxley Electronics & Construction Ltd* v *Forsyth* [1995] 3 All ER 268

30. In the present case, the claimant is claiming damages "to restore the lands owned by Vincent Joseph to a satisfactory state and lessen the progressive instability" as stated by the expert brought by the claimant (David Boyce). It is to be noted that the claimant's witness statement and statement of case are both silent as to whether he intends to and can reinstate the said lands to its former condition. What, therefore, is the estimated cost of reinstatement of the said lands? There is no evidence before me that the trespass was onto the entire extent of the said lands but only onto lot 6, but nevertheless I note that the claimant seeks broader compensation for restoring his whole property. Counsel for the defendant has submitted further that this claim for reinstatement of the said lands to what it was prior to the trespass, on the basis of the Boyce report and evidence in that regard, is without foundation and cannot be taken into account. In fact, there was no plea in the statement of case that he was seeking damages for or intended to pursue reinstatement. It was also further submitted that assuming but not accepting that the claimant has suffered loss, he may be able to recover consequential loss in accordance with ordinary principles but he is not entitled to claim damages that do not flow reasonably from the trespass.

31. It must be noted that the accepted principle is that damages for reinstatement are only appropriate where a claimant has indicated his genuine intention to reinstate and where it is reasonable to do so. See the local case of ***Guaideen Bankay***. I note also that the instant claimant has not only failed to plead his intention to reinstate but his evidence is markedly silent in that regard, save and except for the Boyce report. Further, the cost of reinstatement of lot 6 of the said lands, even in the face of the Boyce report, is not clearly identified.

Alternative measure of damages:

32. Counsel for the claimant in his submission has sought to make a case for an alternative measure of damages on the basis of the Boyce report and some cases (discussed below). In this regard, I note the defendant's reference to ***Field Common Limited*** **v** ***Elmbridge Borough Council***[13], where Warren J, after expressly acknowledging that the normal measure of damages for trespass was either diminution in value of the land or the fact that the claimant had been deprived the use of his land, nevertheless accepted that in certain cases an

13 *Field Common Limited* v *Elmbridge Borough Council* [2008] All ER (D) 141

alternative measure of damages based on the principle of an hypothetical negotiation between the parties may be applicable. This principle was used by Lord Nicholls in the ***Attorney General* v *Blake***[14] who stated it thus:

> *Damages are measured by the plaintiff's loss, not the defendant's gain. But the common law, pragmatic as ever, has long recognized that there are many commonplace situations where a strict application of this principle would not do justice between the parties. The compensation for the wrong done to the plaintiff is measured by a different yardstick. A trespasser who enters another's land may cause the landowner no financial loss. In such a case damages are measured by the benefit received by the trespasser, namely by the use of the land. The same principle is applied where the wrong consists of use of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user …*

33. Another case on point is ***Horsford* v *Bird***[15] where a respondent built a boundary wall and fence which encroached to a considerable extent on the appellant's land, with the expropriated land becoming part of the respondent's garden. In awarding judgment to the appellant, the Privy Council determined that he was entitled to recover damages representing the value of the expropriated land to the respondent. This case supports the suggestion that the claimant may be able to recover damages by reference to the benefits obtained by the defendant from the trespass. In his submissions, counsel for the claimant sought to rely on the recent case of ***Bocardo SA* v *Star Energy UK***[16] to support his claim for this alternative measure of damages by contending that Lord Hope approached the issue of user damages and compensation for trespass as follows, *"[T] he basis on which compensation is awarded is the value of the land to the owner, not its value when taken by the promoter of the scheme. But if the land has a special value because it is the key to the development of other land, that will represent part of its value to the owner which may be taken into account in the assessment of compensation in just the same way as it would if the owner was negotiating to realize its value in the open market*." He further relied on the case of ***Waters and ors* v *Welsh Development Agency***[17] where Lord Nicholls espoused an "open market value" approach where compensation would be assessed by reference to the price a

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14 *Attorney General* v *Blake* [2001] 1AC 268 at page 278
15 *Horsford* v *Bird* [2006] UKPC 3
16 *Bocardo SA* v *Star Energy UK* [2010] 3 AER 975
17 W*aters and ors* v *Welsh Development Agency* [2004] UKHL 19 also reported in [2004] 1 WLR 1304

willing seller might reasonably expect to obtain from a willing buyer and consideration given to the enhanced value of the land because of its location or attraction to a particular buyer or class of buyers or its value to an adjoining landowner or that it might be particularly adaptable for a certain purpose.

34. Counsel for the defendant has counter submitted, however, that whilst the ***Bocardo*** case (supra) appears to accept the principle espoused by Lord Nicholls in ***Blake*** case (supra) it is not in itself relevant as damages fell to be determined under a particular statute that dealt with the right to mine for oil. He submitted further that with respect to the ***Waters*** case (supra), it too is irrelevant as it concerned the measure of damages applicable where the Agency had compulsorily acquired the property and so fell to be determined under that particular statute. The submissions of the defendant in the above regard are accepted as the cases sought to be relied upon by the instant claimant are clearly distinguishable from the present facts. Further, it is to be noted that the alternative measure of damages approach for trespass is arguably only applicable where there is repeated and/or continuous trespassing upon a claimant's property such as the paving of part of the land (as in ***Field Common Limited*** above) or drilling into the land (as in ***Bocardo*** above) or building a wall (as in ***Horsford*** above). In this regard, I accept that the alternative measure of damages principle does not and cannot apply to cases where the trespass is a "one-off" occurrence without any lasting effect on the said lands. In such a circumstance, the normal measure of damages would apply.

35. The difficulty in this case is the lack of substantive evidence as to cost and value of the said lands provided by the claimant. It is the responsibility of the claimant having alleged injury to his property upon the trespass to assist the assessing court in quantifying the compensation. The challenge is that the claimant sought to do so via the evidence of an expert witness, which was broad based, relating to a wider area of trespass and not solely to the said lands that are the subject of this instant action.

36. In the case of ***Thornhill Carrington* v *Tobago House of Assembly***[18], des Vignes J, when addressing the claimant's entitlement to compensation for damage to his land, stated, "*the difficulty that I have in accepting this evidence from the claimant is that he did not produce any documentary or photographic evidence to support these serious allegations. Given these serious allegations of damage, the Court would have expected that the claimant would have sought to adduce evidence from an expert, such as a civil engineer or a soils expert, to confirm the extent of the physical damage to the claimant's land. Further the claimant did not give any evidence of what it would cost to restore his land to its former condition.*"

37. Unlike the ***Thornhill Carrington*** (supra), the claimant in the instant matter has brought before the court both photographic evidence (which also showed the defendant's land) as well as the evidence of an expert as to the damage sustained to a 3.5 acre plot of land, under which the said lands of the claimant are subsumed. In the circumstances, this proved to be of little assistance in the determination of either the cost of reinstatement or the value of diminution of the said lands. Given the generality and/or lack of specificity of the Boyce report in relation to the said lands of the claimant, I had a real difficulty in accepting this evidence. The evidence of David Boyce was, therefore, of a Lilliputian nature in assessing compensation in this matter.

38. Given the loopholes in the evidence of the claimant and his expert, resort was had to the expert evidence of the defendant given its specificity in nature. In this regard, the Raymond report was extremely relevant and played a key role in the determination of this assessment. This report described the said lands as a freehold property comprising 12,842 square feet. With respect to the trespass, the report noted, "*Our estimated area for the land affected by the trespass is of the order of 1,000 s.f. and that is about 7.8% of the total.*" The Raymond report concluded that the current market value of the said lands was in the order of $300,000.00. Bearing this in mind, it would appear, therefore, that a reasonable award of damages for injury sustained to the claimant land is approximately $23,400.00. Is this a just award for diminution in value and/or to restore the said lands in all the circumstances of this case? This court finds favour in the defendant's submission that there may be situations where the

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18 *Thornhill Carrington* v *Tobago House of Assembly* CV 2008-02214

basic rule as to the measure of damages is modified in an effort to do justice between the parties. See ***Field Common Limited*** (supra).

39. The instant claimant is seeking compensation for reinstatement of the said lands to its former state based on the Boyce report and evidence. No evidence was provided by either side to satisfactorily and definitively come to a conclusion on this. Further, given that I have accepted the evidence of the expert witnesses of the defendant that there was no diminution in value of the said lands and that any material deposited thereon was minimal and in the face of the deficiency in the claimant's pleadings of and claim for reinstatement, it is my view that he is not entitled to the cost of reinstatement. In the circumstances, I now turn to the question of 'nominal damages' to resolve the issue.

IV. NOMINAL DAMAGES

40. The Defendant submits that since the claimant has not provided sufficient evidence as to the damages to be awarded for the injury to the land, he should only be awarded nominal damages for the trespass. In this regard, he notes the case of ***Jacob & Polar*** **v** ***Samlal***[19], where Pemberton J accepted that nominal damages will be awarded in two circumstances:
    (a) In recognition of an infraction of a legal right giving the successful party judgment. There is no need to prove actual loss; and
    (b) Where damage is shown but its amount is not sufficiently proved. See **McGregor on Damages**.[20]

41. In the ***Jacob & Polar*** case (supra) both parties had agreed to the award of nominal damages for trespass because of the minimal damage done to the plot. In that case, the learned judge awarded the sum of $7,000.00 as nominal damages after stating the range at present value to be between 3,500.00 and $10,500. The defendant concluded with the submission that the claimant is entitled rather to no more than $1,500.00 as nominal damages, on the basis of the

19 *Jacob & Polar* v *Samlal* CV 2005-00454
20 McGregor on Damages Common Law Library 1997 paras 420; 427-429

recent cases of ***Nagasar* v *Goodridge***[21] where Rampersad J awarded nominal damages of $2,500.00 and ***Baldeo* v *Baldeo***[22] where des Vignes J awarded $1,000.00 as nominal damages. This figure suggested by the defendant is rejected as there is no sufficient basis established for it within the confines of this particular case. I bear in mind that in the instant case at bar, despite the lack of exactitude by the claimant in calculating and proving his loss consequent on the trespass, it was the defendant who had perpetrated the wrong and for this he was fully responsible. The failure of the claimant to prove the extent of compensation due to him does not give the defendant a 'Get Out of Jail Free' card to play and so allow him to escape with a slight tap on the hands nor does it absolve this court from attempting to fairly assess damages and/or in default of this making a fair and reasonable award in nominal damages.

42. Nevertheless, I accept the defendant's submission that in the confines of this case and in the face of the evidence or lack thereof before me, it may be necessary to award nominal damages. However, it is duly noted that the claimant has suffered a wrong and has sufficiently proved such. The inadequacy of proof is only with regard to the figures to be awarded. Thus, whilst it is the responsibility of this court to ensure that the claimant receives reasonable and adequate compensatory damages, in the absence of the requisite evidence, I am unable to presume what are his losses or assess just compensation. In the circumstances, it falls to me to determine a just award of nominal damages. See ***Greer*** v ***Alstons Engineering Sales and Services Ltd***.[23] In so doing, I bear in mind and do accept that the claimant had plans for developing his own property; the entire parcel of land owned by the claimant was not affected by the trespass, only lot 6 and even then just a small portion; there is no evidence that the trespass affected the use and enjoyment of the entire parcel of the said lands; whilst the said lands was not majorly affected the defendant did trespass onto a portion of same and has committed certain acts thereupon and that the claimant is entitled to some measure of compensation for this. Nevertheless, given the insufficiency of the evidence before me as regards the calculation of the loss and more particularly that the

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21 *Nagasar* v *Goodridge* CV2009-00771

22 *Baldeo* v *Baldeo and ors* CV2007-04311

23 *Greer* v *Alstons Engineering Sales and Services Ltd.* PC App No. 61 of 2001

resulting damage was 'minimal', I am minded to award nominal damages rather than the cost for reinstatement, for which there was no pleading or evidence to calculate this loss.

43. Bearing the above in mind, I sought guidance from the following cases:

- ***Gillian Thomson and Giselle Thomson-Lowe* v *Gunbridge Enterprises Limited***[24] where Rajkumar J on the 5th April 2011 awarded nominal damages for wrongful interference with the Claimants' goods and/or trespass to the claimants' goods and/ or detention and/or destruction of the claimants' goods in the sum of $15,000.00. Rajkumar J opined, "*I accept the claimant's evidence as to the fact that certain of their personal goods were damaged, some were stolen and some were detained. It is difficult to arrive at a value for each such category of items. In the absence of evidence of the value of those items, I am constrained to award nominal damages as in* ***Carlton Greer v Alstons Engineering, Civil Appeal No. 2 of 1996 at pg.13*** *per Jones JA I award the sum of $15,000.00.*"

- ***D. Lak Transport Limited* v *Renaud Joseph, The Comptroller of Customs and anor***[25] where Master Sobion-Awai on the 24th October, 2011 awarded to the plaintiff, a haulage company, with respect to loss of use of a truck and trailer seized by the defendants, a sum of $20,000.00 as nominal damages. Master Sobion expounded:

  I noted that the onus was on the plaintiff to prove the loss it ***actually*** *sustained … The plaintiff's actual loss was measurable by increases in overtime payments for drivers, increased wear and tear on vehicles and increased operating expenses of vehicles occasioned by maximizing the use of his remaining vehicles. If the plaintiff was unable to meet particular contractual commitments despite the use of vehicles at its disposal and there were resulting financial losses, I would have expected the plaintiff to explain its contractual failings and resulting losses with specificity. In the absence of such evidence, no such losses can be presumed.*

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24 *Gillian Thomson and Giselle Thomson-Lowe* v *Gunbridge Enterprises Limited* CV2009-02823

25 *D. Lak Transport Limited* v *Renaud Joseph, The Comptroller of Customs, The AG of T&T* HCA 1766 of 2004

In the case of ***Goolcharan*** **v** ***General Finance Corporation HCA 148 of 1998****, the court was unable to find that the seizure of the plaintiff's excavator resulted in the failure of his rice business and his inability to award nominal damages stating as follows at page 24:*

> *'Notwithstanding that the Plaintiff failed to establish any loss, I think it is fair to say that the deprivation of an asset such as the excavator over the period for which it was detained must have resulted in some loss to the plaintiff. I think therefore that this is an appropriate case in which to make an award of nominal damages. In* ***Civil Appeal Number 2 of 1996 Greer v Alstons Engineering Sales and Services Limited*** *the sum of $5,000.00 was awarded as nominal damages for the loss of use of a back-hoe for the period July 1982 to July 1984. In this case, a sum of $10,000.00 is an appropriate sum to be awarded as nominal damages.'*

Similarly, I was of the opinion that this was an appropriate case for an award of nominal damages though the plaintiff failed to establish the quantum of loss of use of the trailer and the truck.

- The St. Lucian decision of ***William*** **v** ***Comptroller of Customs and the Attorney General***[26] which dealt with the breach of a constitutional right noted as follows:

In accepting the claimant's difficulty in establishing the specific loss he suffered, the Court is obliged in those circumstances to do its best on the very limited available evidential basis to recompense the claimant. As stated by the Privy Council in the Trinidad and Tobago case of Carlton Greer v Alston's Engineering Sales and Services Ltd (2003), when the necessary evidence is not provided but the circumstances warrant it, it is open to the Court to give consideration to an award of nominal damages… Nominal damages, however does not mean small damages but it is the duty of the Court to recognize it by an award that is not out of scale. By this I take it to mean that the quantum of damages awarded while not reaching the level requested by the claimant ought in the Court's mind to be sufficiently reflective of his loss. In the premises I deem that an award of $50,000.00 should be made. And I so order.

[26] *William* v *Comptroller of Customs and the Attorney General* SLUHCV 259 of 2006

44. Whilst the above cited authorities were not strictly on point with the instant case, I am satisfied that this is an appropriate case for the award of nominal damages for trespass, inclusive of cutting and clearing of lot 6 of the said lands, removal of flags and depositing soil and other materials. Given the state of the claimant's evidence and his failure to assist with any degree of specificity in the quantification of his loss occasioned by the trespass, I am constrained to award nominal damages.

45. Further, based on the authority of ***Linda Ramesar and ors*** **v** ***Ocean View Development Co Ltd***[27] and ***Manzoor Ali*** **v** ***Tobago House of Assembly***[28], I find this to be an appropriate case for the award of exemplary damages. The defendant in this matter was so concerned with the accumulation of his own profit that he disregarded the rights of the claimant. The defendant's conduct was targeted at making a profit for himself, which was likely to exceed the compensation payable to the plaintiff. In the circumstances, and in light of the awards in other cases of this nature, I find the sum of $50,000.00 to be reasonable as exemplary damages.

V. CONCLUSION

46. It is ordered that the defendant do pay to the claimant -
    a. nominal damages for trespass in the sum of $5,000.00;
    b. exemplary damages in the sum of $50,000.00;
    c. costs to be assessed, if not agreed, by a Registrar.

Dated 9th May, 2012

Martha Alexander
Master (Ag)

Judicial Research Assistant: Kimberly Romany

[27] *Linda Ramesar and ors* v *Ocean View Development Co Ltd* CV 2007-04135
[28] *Manzoor Ali* v *Tobago House of Assembly* Civ App No 43 of 2008