

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2003/CLE/GEN/FP68
BETWEEN

JOANNA RUSSELL NEWTON
AND
RICARDO A. RUSSELL
AND
STEPHANA J. SAUNDERS
THE EXECUTORS OF THE ESTATE OF
AUDLEY AUSWELL PATRICK RUSSELL
First Plaintiffs

AND

RAP INVESTMENTS CO. LTD.
Second Plaintiff

AND

RICARDO A. RUSSELL
Third Plaintiff

AND

BARTAN INVESTMENTS CO. LTD
First Defendant

AND

BARBARA J. OUTTEN
Second Defendant

BEFORE: The Honourable Mrs Justice Estelle Gray Evans

APPEARANCES: Mr Ricardo A. Russell pro se

Mr Robert Adams and Mrs Aisha Stuart-Smith for the Defendants

ASSESSMENT OF DAMAGES

Gray Evans, J.

1. In a judgment delivered on 5 July 2010, this Court dismissed the plaintiffs' claim against the defendants for specific performance; found that the first defendant was the lawful owner of Lots 6 and 10 Yellow Pine Street in the Civic Industrial Area of Freeport, Grand Bahama ("the said property"); but dismissed the first defendant's counterclaim against the third plaintiff for damages for trespass on the said property.

2. The first defendant appealed the dismissal of its counterclaim, which appeal was allowed by the Court of Appeal who remitted the matter for determination of the quantum of damages to which the first defendant was entitled and claimed for the period April 2003 to August 2008.

3. This is an assessment of those damages.

4. It is accepted that damages for trespass will generally be limited to the loss arising from the period of wrongful occupation by the defendant, which are recoverable in the form of mesne profits.

5. In the case of *Inverugie Investments v Hackett* [1995] 3 All ER 841, Lord Lloyd explained the proper approach for measuring damages for trespass to land as follows:

"The landlord of residential property can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to somebody else, and whether or not he would have used the property himself."

6. The normal measure of damages is the market rental value of the property occupied or used for the period of wrongful occupation: *Inverugie Investments v Hackett*.

7. At the trial, expert testimony was provided by Mr Arthur Jones of Arthur Jones & Associates. In his report dated 30 April 2009, Mr Jones calculated the probable rental revenue from improvements of the land comprising three buildings for the period April 2003 to 27 August 2008, excluding the period September 2004 to November 2004, which was treated as a repair period. Mr Jones' evidence is that it was likely that the premises could have generated net rental revenues in the sum of \$145,913.08 over the aforesaid period of approximately 62 months, for a net rental revenue in the sum of \$2,353.44 per month.

8. Counsel for the first defendant argues that if the third plaintiff had vacated the premises when requested to do so by the first defendant it would have been possible for the second defendant to effect improvements to the premises and generate significantly higher net rental revenues.

9. The first defendant claims that the plaintiff has occupied the said property as trespasser since 7 March 2003 and continued to do so at the date of the trial.

10. Counsel, therefore, submits that the first defendant is entitled to damages in the sum of \$145,913.00 for trespass up to the date of the judgment on the counterclaim herein, which sum is calculated as follows:

Gross revenue between April 2003 and September 2004 [1.5 years x \$42,884.00]	\$ 64,326.00
Gross revenue between December 2004 and March 2010 [5.25 years x \$25,688.00]	\$126,384.96
Less: Maintenance cost @ 8%	<u>(\$ 12,688.00)</u>
Total Net Rental Revenue	<u>\$145,913.00</u>

11. Counsel for the first defendant pointed out that the plaintiffs have adduced no evidence to contradict the expert opinion evidence that was adduced on behalf of the first defendant nor did the plaintiffs seek to challenge, by cross-examination, Mr Jones' expert evidence regarding the net rental revenue which the first defendant may have derived from the premises. Counsel for the first defendant, therefore, submits that the plaintiffs must be taken to have accepted Mr Jones' evidence on that issue.

12. For that submission, counsel relied on the case of EPI Environmental Technologies Inc v Symphony Plastic Technologies plc [2004] EWHC 2045 (Ch) at para 74 per Smith J who stated the rule as follows:

"I regard it as essential that witnesses are challenged with the other side's case. This involves putting the case positively. This is important for a judge to enable him to assess that witness's response to the other case orally, by reference to his or her demeanour and in the overall context of the litigation. A failure to put a point should usually disentitle the point to be taken against a witness in a closing speech. This is especially so in an era of pre prepared witness statements. A judge does not see live in chief evidence, thereby depriving the witness of presenting himself positively in his case."

13. The first defendant invites the Court to exercise its discretion to award interest on damages awarded to it pursuant to section 3 of the Civil Procedure (Award of Interest) Act, chapter 80, and in that regard, counsel for the first defendant submits that interest should be awarded from April 2003 to the date of judgment at the rate of 6% per annum and after judgment at the statutory rate of 10% per annum until payment.

14. The third plaintiff, in his submissions in response to the first defendant's submissions, asks the Court to consider that he was not the only occupant of the premises during the relevant period; that he stayed there at the request of the first and second plaintiff and that he spent his own funds, \$300.00 every two weeks for yard maintenance for eight years for a total sum of \$62,400.00, to maintain the said property in an acceptable state which, he says, far exceeds the amount allowed in Mr Jones' calculations for maintenance.

15. As I understood the third plaintiff's submission, he should be given credit for the said sum of \$62,400.00 when damages are assessed. However, no evidence was provided by the third plaintiff to support his claim.

16. In the circumstances, I accept Mr Jones' evidence as to the calculation of the net estimated revenue for the period post-April 2003, and for the reasons advanced on behalf of the first defendant, I assess damages in the sum of \$145,913.00 together with interest at the rate of 3% per annum up to the date of judgment and thereafter at the statutory rate of prime plus two

per centum per annum (S.I. 93 of 2008 The Civil Procedure (Rate of Interest) Rules, 2008) until payment.

17. The first defendant's costs on the assessment are to be paid by the third plaintiff, to be taxed if not agreed.

Delivered this 27th day of February A.D 2014

Estelle G. Gray Evans
Justice