COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2004/CLE/gen/No.00370

BETWEEN

JUDY MUNNINGS DEVEAUX

AND

VANRIA B. FISHER
(As Executrixes of the Estate of Vendal P. Munnings)

Plaintiffs

AND

BAHAMAS ELECTRICITY CORPORATION

Defendant

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mr. Kahlil D. Parker KC and Mr. Miles Parker for the Plaintiffs**
	Mr. Audley D. Hanna Jr., Mr. David Hanna and Mr. Keith Major for the Defendant
Judgment Date:	**21st April 2023**

JUDGMENT

BACKGROUND

1. By a Writ of Summons filed 22nd March 2004, Judy Munnings Deveaux and Vanria B. Fisher, in their capacities as Executrixes of the Estate of the late Vendal P. Munnings ("**Plaintiffs**") commenced an action and sought damages for trespass, *mesne profits*, and costs against the Bahamas Electricity Corporation ("**Defendant**").

2. The trespass occurred in or about the year 1998 and continues to date. The property in question comprises 12.284 acres of land and in the vicinity of South Ocean Boulevard in the Southern District of the island of New Providence, The Bahamas ("**Property**"). The Property forms a part of a larger parcel of land (approximately 120 acres) which is owned by the Estate of the late Vendal P. Munnings. The Defendant, without permission, erected high power lines on the Property and put them to its own use. The Defendant also destroyed a road reservation which was necessary to gain access to the larger 120-acre tract of land from its southern boundary causing a severance of an additional 4.5 acres of land, which the Plaintiffs then had to use to create a new road reservation for access.

3. A Judgment in Default of Appearance was filed on 29th April 2004 and Notices for an Assessment of Damages were filed on 21st June 2004 and on 05th July 2017.

4. Prior to the hearing of the Assessment of Damages, both parties filed their respective evidence that they wished to rely on inclusive of expert reports from appraisers.

ISSUES

5. The issues which this Court must determine are: (i) What value should be attributed to the Property? (ii) What is the correct method to employ in order to ascertain the *mesne profits* and damages the Plaintiffs are entitled to due to the Defendant's trespass on the Property? (iii) What amount should be awarded for *mesne profits* and damages?

EVIDENCE

The Plaintiffs' Evidence

8. Mr. Joseph F.M. Major ("**Mr. Major**") filed a witness statement on 11th January 2018 ("**Major Witness Statement**"). Mr. Major is a licensed appraiser employed with J.M. Appraisers Limited with thirteen (13) years' experience in the appraising of real property. He exhibited to his witness statement an appraisal report of the Property prepared by him dated 15th August 2003 ("**Major 2003 Appraisal Report**). The Major 2003 Appraisal Report valued the Property at $4,300,000.00. He also provided an appraisal report which he states was prepared by Mr. James Newbold ("**Mr. Newbold**") who is deceased.

9. The Plaintiffs also filed an Affidavit of Roberta Quant on 23rd January 2018 which provided evidence of the Plaintiffs' ownership of the Property and exhibited two title deeds.

10. A second Affidavit of Roberta Quant ("**Second Quant Affidavit**") was filed on 25th April 2018 which; (i) exhibited a second appraisal report of the Property prepared by Mr. Major dated 16th April 2018 ("**Major 2018 Appraisal Report**") which valued the Property at $4,304,000.00; and (ii) provided excerpts from the 1992 and 2008 Civil Procedure (Rate of Interest) Rules along with a chart purportedly exhibiting the prime rate from the Central Bank of The Bahamas from 2008 to date.

11. The Affidavit of Donald Thompson ("**Mr. Thompson**") was also filed on 25th April 2018. As a licensed surveyor, he averred as to (i) ownership of the Property; (ii) that he surveyed the Property and exhibited the survey plan produced; and (iii) the location of the power lines and poles erected on the Property by the Defendant.

12. On 30th May 2018, Mr. Major filed a subsequent witness statement ("**Second Major Witness Statement**") which attached: (i) The Major 2018 Appraisal Report; (ii) the valuation and lease rate of the Property opined by him (being $4,304,000.00 and $17,933.33 respectively); and (iii) listings for the sale of various properties located in the vicinity of the Property.

13. The Plaintiffs filed a third witness statement of Mr. Major ("**Third Major Witness Statement**") on 07th August 2018. The Third Major Witness Statement provided a response to the Affidavit and Supplemental Affidavit of Mr. Robin B. Brownrigg ("**Mr. Brownrigg**"); and (ii) an analysis of the Major 2018 Appraisal Report where Mr. Major expressly provided at paragraph 6 (a) the following in relation to how he, in part, arrived at his valuation of the Property:

> **"a) As set out in the RICS Valuation – Global Standards 2017, Red Book, pgs. 78-79 ("The Red Book") an appraiser can use his discretion regarding the approach he uses depending on the nature of the relevant valuation exercise. If there is a deviation from the accepted approaches, an explanation of the approach used will suffice. The relevant factors involved in my April 2018 appraisal of the subject land are as follows;**
>
> **(i) The Presence of the Power Grid on the subject property.**
>
> **(ii) The subject property is long, with a highway nearby.**
>
> **(iii) The subject property is undeveloped.**
>
> **(iv) Properties acquired by the Bahamas Government to construct the highway are part of the subject land.**
>
> **(v) Large Tracts of land with similar characteristics that were sold are non-existent...."**

14. The Plaintiffs also filed a Joint Affidavit with the Defendant verifying the Plaintiffs' and the Defendant's respective Scott Schedules on 23rd July 2020 ("**Joint Affidavit**").

The Defendant's Evidence

15. The Defendant filed an Affidavit of Nia Rolle on 05th July 2018 along with a Summons. Her affidavit in support of the Summons to have the Major Witness Statement and/or the appraisal report prepared by Mr. Newbold struck out averred that: (i) Mr. Newbold passed away some years ago; (ii) Mr. Newbold's appraisal report of the Property had not been properly admitted into evidence

16. The Defendant also filed the Affidavit of Robin B. Brownrigg on 05th July 2018. That Affidavit provided: (i) that Mr. Brownrigg as a senior appraiser had prepared along with Mr. Paul Antonas an appraisal report of the Property dated 23rd April 2018 which was attached ("**BR 2018 Appraisal Report**"). The BR 2018 Appraisal Report valued the Property at $600,000.00 as at 01st June 2008 and $1,650,000.00 as at 23rd April 2018.

17. Mr. Corey Brown filed an affidavit 09th July 2018 which averred:- that Mr. Newbold was deceased. It also attached an appraisal prepared by Mr. Major for the Delta Properties Limited v Bahamas Electricity Corporation 2007/CLE/gen/01385 action ("**Supreme Court Action**"), an excerpt from the transcript for the Supreme Court Action, the judgement from the Supreme Court Action along with the Court of Appeal's ruling on the appeal from the Supreme Court Action and averred that the Court in that decision did not find the appraisal report helpful;

18. The Defendant then filed a Supplemental Affidavit of Robin B. Brownrigg on 11th July 2018 in response to the Major Witness Statement and the Major 2018 Appraisal Report. At paragraph 3 of this Affidavit Mr. Brownrigg states:

> **"In my review of the Newbold Appraisal, the 2003 and 2018 Major Appraisals and the Opinion, I found the same to be based upon unfounded, bare and unexplained assumptions and conclusion and/or conducted on a basis that is inconsistent with the industry-wide recognized and/or accepted practice of valuing land. Most notably, beginning at Item 9 of the 2018 Major Appraisal, Mr. Major makes reference to the Sales Comparison Approach (or Market Approach) as his chosen method of valuing the Property. While I agree with Mr. Major's use of the Sales Comparison Approach as the best method to ascertain the value of the Property, he has failed to adhere to the basic tenet of that approach namely, the use of comparable sales of other lots of land."**

19. Mr. Robin B. Brownrigg also filed a Witness Statement on 01st February 2022 which attached the complete appraisal prepared by himself on 13th November 2007 for the Office of the Prime Minister of various parcels land one of which was owned by the Plaintiffs and adjacent to the Property.

SUBMISSIONS

The Plaintiffs' Submissions

20. The Plaintiffs submitted that they are entitled to *mesne profits* along with damages in lieu of an injunction. With respect to *mesne profits*, they highlighted the Court of Appeal decision of **Delta Properties Limited v Bahamas Electricity Corporation SCCivApp No. 1 of 2013 "Delta")** as the locus classicus for establishing principles which the Court must consider when awarding damages in trespass. At page 19 of ***Delta***, President Allen stated:-

> **"It is a well-established principle that where a landowner has lost the use of his property to a trespasser, he is entitled to recover a reasonable sum in recompense for the loss."**

21. The Plaintiffs further submitted that Allen P referred to the Privy Council decision of **Inverugie Investments Ltd v Hackett [1995] 3 All ER 840** where the court stated:-

> **"...The Plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterized as exclusively compensatory, or exclusively restitutionary; it combines elements of both."**

22. They further contended that the approach to determine the mesne profits and damages requires a factual assessment of certain values of the land in order to determine what is a reasonable rent.

23. The Plainiffs submitted relied on the method and calculation of mesne profits as determined in ***Delta***:

> **"i. The median market value of the two 2003 appraisals ($4,300,000.00 and $2,650,000.00) is $3,475,000.00 (which we submit represents the market value of the Tract).**
>
> **ii. $3,475,000.00 x 8% = $278,000.00 represents the annual lease amount of the Tract.**
>
> **iii. April 1998 – April 29th 2004 = 6 years multiplier (being the period of the Defendant's trespass up to the date of Judgement).**
>
> **The amount due to the Plaintiffs for mesne profits is therefore $278,000.00 x 6 = $1,668,000.00, less 5% of this amount ($83,400.00) giving a total award for mesne profits of $1,584,600.00. It is submitted that in accordance with the ruling in Delta, the Plaintiffs are also entitled to interest on this amount at a rate of 7% per annum from the date of Judgement to the date of payment which amounts to $1, 552, 908. 00 to date."**

24. The Plaintiffs submitted that they are also entitled to damages in lieu of an injunction for the continuing trespass. They contended that the approach used in ***Delta*** is the appropriate method to apply when arriving at the quantum of damages to be awarded. They further submitted that the appropriate measure is that of the hypothetical negotiation principle, which would be the price of the property agreed between a willing buyer and seller. They asserted that this method was employed in **Enfield London Borough Council v Outdoor Plus Ltd and another [2012] EWCA Civ 608** and **Horsford v Bird and others [2006] UKPC 3.**

25. The starting point in determining damages in lieu of an injunction should be the present value of the Property. They rely on the median figure of the value stated in the Major 2018 Appraisal Report (namely $3,401,000.00) and value of the property stated in the appraisal report provided by Mr. James Newbold (being $2,650.000.00, with the median figure of the two being $3,475,000.00).

26. The second step is to determine the value of the land being used by the Defendant. The Plaintiffs posited that such value is 30% of the value of the property and that the amount should be calculated as an uplift on the market value as follows – ($3,475,000.00 (the market value of the tract) + $1,042,500.00 (30% of the market value of the tract)) giving an amount of $4,517,500.00. The Plaintiffs also submitted that an interest rate of 7% from the date of judgement until payment should apply. This would amount to $4,427,150.00 to date. The Plaintiffs concluded by submitting they are entitled to the sum of $1,584,600.00 for *mesne profits* and $4,517,500.00 for damages in lieu of an injunction with the interest rate of 7% applied plus costs.

27. In their closing submissions, the Plaintiffs sought to discredit the BR Appraisal Report through evidence obtained in the cross-examination of Mr. Brownrigg. They highlighted the following:

"(i) There were multiple inconsistencies and inaccuracies throughout the BR Appraisal, which Mr. Brownrigg admitted to.

(ii) Mr. Brownrigg appraised Parcel M an equally sized parcel of land contiguous to the subject land at a value of $70,000.00 per acre and a total value of $880,000.00 as at November 2007.

(iii) He acknowledged the 2006 sale of Parcel K as a very good comparable for the subject property and using his corrected calculations when using Parcel K as a comparable gave the subject property a value of $88,568.00 per acre giving a total value of $1,089,386.00 for the entire 12.3 acres.

(iv) He maintained his position that the value of the subject land doubled upon completion of the Frank Watson Highway in 2008.

(v) Deducting $9,000.00 from the per acre value for the period between 2006 and 2004 as per Mr. Brownrigg's deductions in the Scott Schedule would give the subject land a value of $978,686.00."

28. The Plaintiffs further submitted that, using Mr. Brownrigg's reasoning and methodology, the Property would have a market value of $978,686.00 as at 2004. They also resiled from their initial position and provide the following calculation for mesne profits in their submissions:

"Appling the formula used in Delta it is therefore submitted that, in this case, the proper calculation of the mesne profits due to the Plaintiffs is as follows:

i. The market value of the Tract according to the 2003 Major appraisal is $4,300,000.00
ii. $4,300,000.00 x 8% = $344,000.00 represents the annual lease amount for the Tract.
iii. April 1998 - April 29th 2004 = 6 years multiplier (being the period of the Defendant's trespass up to the date of Judgement).

The amount due to the Plaintiffs for mesne profits is therefore $344,000.00 x 6 = $2,064,000.00 less 5% of this amount ($103,200.00), giving a total award for mesne profits of $1,960,800.00...the Plaintiffs are also entitled to interest on this amount at a rate of 7% per annum from the date of judgement to the date of payment."

29. Alternatively, if the Court considers the evidence of Mr. Brownrigg, the median value of $4,300,000.00 and $978,686.00 (being $2,639,343.00) should be used. The total figure, if this new sum is used, would then be $1,203,540.41 with the 7% interest rate attached from judgment to the date of payment.

30. In relation to damages in lieu of an injunction, the Plaintiffs submitted that, if the figure of $4,300,000.00 is used, the total sum would be $5,590,000.00. Alternatively, using a median figure between Mr. Major's valuation and the valuation arrived at based on Mr. Brownrigg's cross examination, $2,639,343.00 is to be used. The total sum (using the applicable method of calculation) would be $3,431,145.90 with the 7% interest attaching from the date of judgement to the date of payment.

The Defendant's Submissions

31. The Defendants submitted that ***Delta*** provides the formula for determining damages payable by a trespasser and for determining mesne profits. They also submit that ***Delta*** confirms that the appropriate limitation period for any damages would date back to six years prior to the commencement of the action. It relied on Allen P's pronouncements in ***Delta*** *where she stated*:-

> **"In Horsford, a case concerning the award of mesne profits for a continuing trespass, the Privy Council opined at paragraph 15:**
>
> > **'However, in their lordships' view, the appellant has a clear claim to damages in the form of mesne profits for the use made of his land by the respondent. Any such claim for a period of more than six years before the commencement of proceedings would be statute-barred, so the claim can lie only for the period starting on 20 November 1994.'"**
>
> **Similarly, in the present case, any award of damages for mesne profits will be limited to six years preceding the commencement of proceedings."**

32. The formula for calculating *mesne profits* in this matter requires: (i) calculating the per annum lease rate of the Property as a percentage within the range of 6%-8% of its current market value, (ii) determining the prima facie award of mesne profits at the appropriate multiplier, allowing for the applicable limitation period; and (iii) allowing for a discount of 5% from the aforesaid prima facie award to account for fluctuations in the land values.

33. The Defendants initially contend that, the market value of the Property at 2018 is $1,650,000.00 and $1,750,000.00 as at 2020 in accordance with the BR 2018 Appraisal and, the per annum lease rate would be $132,000.00. The Defendant submitted further that the appropriate multiplier ought to be 6.1 being the period of six years prior to the commencement of the Action up to the date of judgment (being 22 March 1998 to 29 April 2004). The Defendant contended that the prima facie award of mesne profits should be $805,200.00 minus the 5% (due to fluctuations in land values) resulting in a total amount of $764,940.00.

34. The Defendant also agreed that ***Delta*** outlined the approach to employ when determining damages in lieu of injunction which provided:-

> **"30 the previously mentioned Privy Council decision in Horsford v Bird and others [2006] UKPC 3 (see at tab 6) is instructive on the issue of the award of damages in lieu of an injunction in trespass cases.....It follows that the starting point for the calculation of the damages to be awarded in lieu of the injunction must be EC 13, 650 (the market value of the land). But Joseph-Olivetti J was, in their lordship's view, correct in taking into account the extent to which the encroached upon piece of land had enhanced the amenities of the respondent's house.....In Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798, damages in lieu of an injunction to remove a number of dwelling-houses that had been built in breach of a restrictive covenant were assessed as a proportion of the profit that the developer/defendant had made out of the development. Brightman J (as he then**

> was) asked himself what sum the plaintiff might reasonably have sought from the developer as his price of waiving the restrictive covenants. In the present case the comparable question would have been how much the appellant could reasonably have sought from the respondent in November 2000 as the price of the appellant's land that the respondent had incorporated in his garden. On the basis that the value of the piece of the land as a part of an undeveloped plot was EC13, 650, their lordships think that its value to the respondent as part of the garden of his new home would have been at least double that figure.....In determining the answer to this question it is clear that an awarding court should consider the value of the land encroached upon, the value of the land to the respondent and the effect of the trespass i.e. whether the trespass served to expropriate the land in question to the trespasser so that the trespasser was effectively granted de jure as well as de facto ownership of the property."
>
> 32. In the present case, the comparable question to be asked is how much the appellant could reasonably have sought from the respondent as the price of the appellant's land over which the power lines hang. In determining the answer to this question it is clear that an awarding court should consider the value of the land to the respondent and the effect or of the trespass i.e. whether the trespass served to expropriate the land in question to the trespasser so that the trespasser was effectively granted de jure as well as de facto ownership of the property. It is interesting to note that the Privy Council used the value of the land as at November 2000, the date the proceedings began, as opposed to the date in 1989 when the trespass began. (Emphasis added)."

35. The Defendant submitted that the appropriate formula is (i) determining the value of the Property as at the commencement of the Action, (ii) ascertaining the value of the Property to the Defendant, and (iii) considering the effect of the trespass. The Defendants relied upon the value of the land stated in the BR 2018 Appraisal Report (being $600,000 in 2008). The Defendant submitted that, using this value along with the aforementioned formulae, the final figures arrived at should be $764,940.00 for *mesne profits* and $780,000.00 for damages in lieu of an injunction.

36. The Defendant also challenged the admissibility of the appraisal report prepared by Mr. Newbold. Mr. Newbold being deceased, is unable to submit to cross examination and the appraisal report he purportedly prepared is undated. Further, no evidence was tendered to confirm the authenticity of his signature placed on the appraisal report and no evidence was given of his compliance with the requirements of an expert giving evidence in court. Based on these facts, the Defendant submitted that the Newbold appraisal report is inadmissible and that the Court ought not consider it.

37. Finally they submit that hearsay evidence is only admissible under the exception to the hearsay rule of facts seeking to be adduced and not opinions, which Mr. Newbold's appraisal is accordingly, hence it should not be admitted or considered.

38. In supplemental skeleton arguments the Defendant resiled from its original figures for mesne profits and damages in lieu of an injunction. Based on a different calculation of the values (i.e., the values of the Property provided by Mr. Brownrigg), the Defendant submitted that the total figures that the Plaintiffs are entitled to for mesne profits and damages in lieu of an injunction are $129,861.44 and $521,625.00 respectively.

39. The Defendant challenged the evidence provided by Mr. Major during cross-examination and submitted that Mr. Major's use of listed property prices as opposed to actual sales prices in his appraisal is incorrect, thus rendering his valuations unreliable. The Defendant also contended that inadequate comparables were used by Mr. Major in his appraisal along with inaccurate square footage. This, further discredited the Plaintiffs expert evidence.

40. They maintain that the correct method to arrive at the value of the properties (for purposes of deriving mesne profits) is to apply the sum total of the market values for the period of occupation up to the date of judgment which provides a figure of $121,365.83 and applying the principles enunciated in ***Delta***, the final sum would be $265,791.20.

41. In determining the damages in lieu of an injunction, the market value of the Property as at 2004, would be $375,000.00 and using the applicable uplift method would increase the value to $487,750.00. When interest is added to this figure, the final figure for this head of damages, the Defendant submitted, is $521,623.00.

DECISION

Whether the James Newbold ("Mr. Newbold") Appraisal Report should be considered?

42. According to the Affidavit of Nia Rolle and the Affidavit of Corey Brown , Mr. Newbold died (this evidence was not challenged or refuted) and is therefore unable to be cross examined on the appraisal produced by the Plaintiffs and allegedly prepared by him on the Property. The appraisal by Mr. Newbold is undated and no evidence was tendered to verify the authenticity of the signature placed thereon. Though counsel directed the Court to Order 38 rule 20 of the Rules of the Supreme Court, the Court also considered the Evidence Act, Chapter 65 of the Statute Laws of the Commonwealth of the Bahamas ("**EA**") when considering the admissibility of the appraisal.

43. Section 65 of the EA provides:

> **"65. (1) Subject to the provisions of this section, sections 58 to 60 and 62 to 64 shall apply in relation to statements of opinion as they apply in relation to statements of fact, subject to the necessary modifications and in particular that any reference to a fact stated in a statement shall be construed as a reference to a matter dealt with therein.**
> **(2) Section 60 as applied to subsection (1), shall not render admissible in any civil proceedings a statement of opinion contained in a record unless that statement would be admissible in those proceedings if made in the course of giving oral evidence by the person who originally supplied the information from which the record was compiled; but where a statement of opinion contained in a record deals with a matter on which the person who originally supplied the information from which the record was compiled is (or would if living be) qualified to give oral evidence, section 60, as applied by subsection (1) shall have effect in relation to that statement as if so much of subsection (1) of section 60 as requires personal knowledge on the part of that person were omitted (emphasis added)."**

The appraisal does not form a part of a record.

44. With respect to the signature, section 55 of the EA provides:

> **"If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to being his handwriting (emphasis added)"**

45. Section 56 of the EA states how the signature is to be proven:

> **"56. (1) In order to ascertain whether any signature or writing is that of the person by whom it purports to have been written any signature or writing, admitted or proved to the satisfaction of the court to have been written by that person, may be compared by a witness, or by the court, or the jury, with the one which is to be proved, although that signature or writing has not been produced or proved for any other purpose.**
> **(2) The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by that person (emphasis added)"**

No evidence was led to prove that the signature was Mr. Newbold's. The Defendant did not agree that document so as to waive this requirement.

46. Order 38 rule 20 of the Rules of the Supreme Court, 1978 states:

> **"20. (1) Subject to the provisions of this rule, a party to a cause or matter who desires to give in evidence at the trial or hearing of the cause or matter any statement which is admissible in evidence by virtue of section 2, 4, or 5 of the Act must —**
> **(a) in the case of a cause or matter which is required to be set down for trial or hearing or adjourned into court, within 21 days after it is set down or so adjourned, or within such other period as the Court may specify; and**
> **(b) in the case of any other cause or matter, within 21 days after the date on which an appointment for the first hearing of the cause or matter is obtained, or within such other period as the Court may specify, serve on every other party to the cause or matter notice of his desire to do so, and the notice must comply with the provisions of rule 21, 22 or 23, as the circumstances of the case require.**
> **(2) Paragraph (1) shall not apply in relation to any statement which is admissible as evidence of any fact stated therein by virtue not only of the said section 2, 4 or 5 but by virtue also of any other statutory provision within the meaning of section 1 of the Act."**

47. The Act referred to is the Civil Evidence Act, 1968 of England ("**CEA**"). Sections 2, and 4 provide:

> **"2. In any civil proceedings a statement made, whether orally or in a document or otherwise, by any person, whether called as a witness in those proceedings or not, shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence by him would be admissible.**

> **4. (1) Without prejudice to section 5 of this Act, in any civil proceedings a statement contained in a document subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person (whether acting under a duty or not) who had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied to him to the compiler of the record indirectly through one or more intermediaries each acting under a duty."**

As stated previously, the appraisal does not form a part of a record.

48. Section 5 of the CEA relates to evidence produced by computers and therefore does not assist the Court. Section 2 is the applicable section. Mr. Newbold having died cannot be cross-examined and thus, no oral evidence can be obtained to test the contents of the appraisal. This of and by itself does not prohibit the court from admitting the same, subject only to a determination as to the weight to be given to the document considering that its contents were not tested by cross-examination.

49. The Plaintiffs sought to rely on the appraisal report of Mr. Newbold without complying with Order 38 rule 20 and did not seek to make the requisite application until after the Defendant challenged its admissibility. The appraisal was not tendered as evidence in compliance with Order 38 rule 20 initially - yet several references were made to it throughout the admissible evidence led by the Plaintiffs. The Defendant also made reference to it in the Supplemental Affidavit of Robin B. Brownrigg, but only if the appraisal were admissible.

50. Mr. Newbold did not prepare an affidavit or a witness statement in these proceedings prior to his demise. Even if the Court were to attempt to consider the appraisal, no evidence has been provided to confirm that the signature, is indeed his nor is any date apparent as to when the appraisal report was made other than to state that he inspected the property in September 2003. Section 55 of the EA requires proof of the signature in order for it to be authenticated and admitted into evidence. Lastly, without a date on the appraisal report, it is difficult for the Court to accept evidence as it is unknown when the report was prepared. Accordingly, the Court cannot give any weight to the appraisal Mr. Newbold purportedly prepared and it is ruled as inadmissible.

I. What value should be attributed to the Property?

51. Judgment having been granted on liability to the Plaintiffs, the court must determine the damages which were and are being suffered by the Plaintiffs as a result of the Defendants ongoing trespass. In order to ascertain them, the court must first determine what is the value of the Property.

52. Both parties have provided expert evidence as to their respective values of the Property.

53. When there is competing evidence from expert witnesses, the Court is entitled to prefer the evidence of one over the other or not accept either or accept some evidence from each.

54. I accept that the appropriate method was succinctly expressed in **Expert Evidence: Law and Practice, London Sweet & Maxwell 1990 at page 248** which stated:

> **"It is a matter of valuation expertise and practice as to how to value a particular piece of land and the buildings upon it. The higher courts will not without good reason interfere with the decision of a court at first instance, arbitrator or tribunal which has assessed the valuation evidence and come to a conclusion upon it. There is a very substantial body of case law as to the relationship between actual valuation practice, which is a matter for the witness, and the requirements of the particular statute or contract pursuant to which the valuation is made. Where the question is what the particular land would be worth on the open market, the principal method is the use of comparable. However, these are only as useful as their similarities with the subject property, and it may be necessary to carry out a valuation exercise based upon the value of the property itself in commercial terms."**

55. The Plaintiffs are relying on the opinion of Mr. Joseph Major and the Defendant on Mr. Robert Brownrigg. Both witnesses have been accepted as experts by the court.

56. The court ordered also that these experts prepare a joint affidavit providing their comments and analysis of each other's appraisal reports in one consolidated document with their respective schedules of values attached.

57. Unsurprisingly, both appraisers challenge and deny the values attributed by the other to the Property throughout the years of 1998 to 2020. Each side provided their analysis and criticism of the other. Mr. Brownrigg provides comparable sale prices of similar parcels of land to the Property, whereas Mr. Major appeared not to provide any in his schedule.

58. The court accepts that five different conveyances were admitted into evidence by the Plaintiffs as evidence of sales in 1998, 2004 and 2006. On a review of each of them, I note the following:-
    i. The 1998 Conveyance is 85.22 acres and comprises 13 separate lots at a price of $1,100,000.00 which were sold under a power of sale by a mortgagee.
    ii. The 2004 Conveyance – of 93.58 acres was sold for $6,060,275.00.
    iii. The 2006 Conveyance of 261.17 acres was sold for $13,058,734.00. This conveyance sold several large tracts of land belonging to two separate Vendors.
    iv. Property in Exuma – not applicable
    v. The 2006 Conveyance of 21 acres was sold by the Plaintiffs for $1,500,000.00.

59. Mr. Major states in one of his witness statements that the Property was compared to different tracts of land but these comparisons were not inserted in the schedule. It is not clear which 15 tracts of land were being referenced as their respective values were not included in the appraisals or schedule. He makes this statement without substantiating it, neither does he say whether the market value was ascertained by comparing a sale or a listing price.

60. Both appraisers critiqued the other's annual valuations of the land. The Defendant challenges the Plaintiffs' valuations based on the valuation method used, namely a cost approach rather than a sales approach. They challenge the reliability of the comparable

data, namely that the size, location, price and date of the sales is not provided. They also maintain that the Plaintiffs' did not provide for the requisite adjustment and relied on a price per square foot rather than a price per acre when selling a large tract of land.

61. The Plaintiffs challenge the Defendant's valuations for their failure to inter alia establish a location, or to confirm whether the value of the land was injured by the power grid. They maintain that the Plaintiffs failed to explain how they arrived at their valuations and whether the value was adjusted and if so, why.

62. What is readily apparent in the Joint Affidavit is the vast difference in values of the Property throughout the years. I accept that the appropriate method of valuing the property is based on comparables of sales of similar parcels of land as opposed to listing prices. Listing prices are subject to change at any time and are not definitive indicia of an actual sale price. They can be changed on multiple occasions before a sale. Accordingly, I am unable to rely on listing prices of property as evidence of a market value and will consider comparables of actual sale prices.

63. I also note that no adverse/beneficial effect of the erection of power lines on the Property was discussed in any of the Plaintiffs appraisals. Mr. Brownrigg however acknowledges in his appraisal that overhead power lines are detrimental to the development of the site.

64. Mr. Major, in his Third Witness Statement states that the presence of the power grid factored in his 2018 appraisal but he does not state whether it is an adverse or beneficial factor which would affect the value.

65. It is apparent that both appraisers supplemental witness statements were made to address issues which were not addressed in their appraisal reports and to respond to the evidence led by the other.

66. As stated, the Defendant's 2018 report refers to comparable sales to determine the value arrived at in 2008 and 2018.

67. The Plaintiffs provide a comparable sale valuation in their 2003 appraisal based on a 10,000 sq. ft. property sold in Country Club Estates for $80,000.00 which translated to $8.00 per sq. ft. It was based on this sale that the initial valuation of $4,300,000 was derived. In their 2018 appraisal they do not provide any sales comparables but only listing prices. The value determined in 2018 had only increased by $4,000.00 since 2003.

68. The Plaintiffs produced an excerpt from the RICS Valuation – Global Standards 2017 Red Book which stated that the three categories of valuations of land are (i) market approach which is the sales approach, (ii) the income approach which is based on capitalization and conversion of present and predictive income to produce a single value and (iii) the cost approach which is based on the economic principle that a purchaser will pay no more than the cost to purchase or build.

    What is striking however is the caution contained in the Red Book against using the cost approach. The Red Book states:-

"Great care must be exercised when relying on the cost approach as the primary or only approach as the relationship between cost and value is rarely direct."

I accept this caution and hold that the safest approach to be utilized to determine the market value is the sales approach.

69. I accept that determining the value of vacant land or land being sold "as is") is "*heavily dependent upon the availability of data on recent sales of properties similar in location, size, and utility to the land being sold or valued.*". The Major 2018 Appraisal also accepted that the sales comparison approach is the most direct of the three approaches and usually the most reliable.

70. Mr. Major also confirmed in his witness statement that:-
"It is a basic principle of valuation that a number of property sales over an extended period of time is the basis for establishing true market value."

71. Both appraisers accordingly endorse the Sales Approach Method as the best method of valuing the Property.

72. One of the factors to be considered in arriving at a value of the land is the government declared use or zoning of the Property. The Plaintiff states that it is multifamily and the Defendant states that it is open zoning. Mr. Major contends that as it is an acquisition matter, it is appropriate to use the best use and higher value zoning. It is not an acquisition matter but a claim for damages for trespass. There is no evidence of acquisition by the Crown or purchase by the Defendant. Further open zoning does not negate the possibility of multifamily development.

73. Mr. Brownrigg provided a valuation in 2007 of various parcels of land in close proximity to the Property which were being acquired by the Government for the construction of the Albany Road. One of these parcels was owned by the Estate of Percy Munnings. That property which was acquired by the Government was 12.345 acres and was valued by Mr. Brownrigg at $70,000.00 per acre with a total value of $880,000.00. These properties were all vacant land and in the immediate vicinity of the Property. Mr. Brownrigg accepted that Lot M was adjacent to the Property. He also accepted that Lot K was a good comparable to the Property and it was valued at $88,568.00 per acre with a value of $1,089,386.00 for the 12.3 acres. He was extensively cross-examined on this appraisal. The properties were also zoned as "open" as is the Property. Lot M at the time of the appraisal did not have any services. Mr. Brownrigg in his evidence did not stand by this valuation even though he submitted it to the Government who relied on it in order to acquire the various parcels of land.

74. He also confirmed that Lot M was also appraised by Damianos Realty at the same time and valued at $1,066,332.00. His reasoning for not standing by his 2007 valuation was because "his sensitivity to adjustment was not then what it is now." He opined that he would reduce the value in Lot M to approximately $45,000 per acre. He maintained that the smaller the property, the higher the per acre value and the larger the property the lower the per acre value. The inference was that as Lot M was a large tract of land it should have a lower per acre value.

75. Mr. Major in his schedule reflected a larger increase in the value of the Property than he had in his 2018 appraisal. His explanation for the difference is a result of the evidence which was available in 2003 compared to the sales data which was available in 2020. Yet, despite this, he stood by both valuations.

76. Both appraisers have changed their valuation of the Property at different times and for different reasons. Mr. Brownrigg's 2007 Appraisal contradicts his earlier evidence where he had given the subject land a per acre value of $43,000.00 as at 2007."

77. The Affidavit of Wendell Munnings filed on the 29th September 2021("the Munnings Affidavit") exhibited a spreadsheet which he avers was provided to the Estate by the Government of The Bahamas reciting the 2007 appraised values of the various parcels of land being acquired for the Albany Road and which had been appraised by both Mr. Brownrigg and Damianos Realty. It is also noted that Parcel M was appraised at a higher value by Damianos Realty and which higher valuation was accepted by the Government as a fair market value.

78. The Court must weigh this undisputed fact against all other evidence provided. Having reviewed the Brownrigg 2007 appraisal, and the listing which the Plaintiffs aver that they received from the Government as the value actually accepted for Parcel M. I accept that the value of Lot M appears to be the most accurate comparable of the value of the Property as at 2007 I do not accept that the valuation should have been further adjusted as Mr. Brownrigg claims and I do not accept the valuation of Mr. Major as his value was based on a price per square foot, which I accept is suitable for smaller parcels of land and not large acreage. The initial valuation by Mr. Brownrigg for the Property in 2007 of $534,000 cannot be reconciled with his own valuation of a property immediately adjacent and similar in size which was valued for $70,000.00 per acre and actually acquired for $85,000.00 per acre. I also accept that it was a compulsory acquisition but I am aware that the Government was satisfied and accepted that the valuation was fair. Accordingly, this Court finds that the property was valued at $854,000.00 as at 2007.

79. I also accept that the market value of the Property in 2004 at the time of the commencement of this action would have been at a slightly lower price and as there were no changes to the property other than, the building of the proximate Albany Road. I accept that a reduction of $3,000.00 per year relying on the regression analysis utilized by the Defendant to give a market value of $61,000.00 per acre to give a total of $744,200.00 for the 12.2 acre tract as at 2004 .

80. Using the regression analysis formula as proffered by the Defendant and based on comparable sales in 2018 as listed in the Brownrigg 2018 Appraisal, the Property would have been valued at $398,258.50 per acre which would have to be reduced by 45% to account for the commercial zoning and location of the comparable sales compared to the Property leaving a value of $219.042.17 per acre and giving a total market value of $2,672,314.47. I also accept that in computing the value of an acre of the Property that the value of the land increased in 2008 because of the completion of the road.

81. In 2022 the market value would have increased slightly by $10,000 per acre to $229,042.17 to give a total market value of $2,794,314.47.

II. What is the correct method to employ in order to ascertain the damages for mesne profits and in lieu of an injunction the Plaintiffs are entitled to due to the Defendant's trespass on the Property and what amount should be awarded, if any?

Mesne Profits

82. It is accepted that the Defendant's numerous high powered electricity poles on the Plaintiffs' land is a continuing trespass and which fact is not in dispute. The Plaintiffs by the judgment obtained in their favour is entitled to damages for the continuing trespass.

83. The Court of Appeal in Delta confirmed that the right to damages was as established in Icebird Ltd v Winegardner (2009) VKPC 24 where they stated:-

> **"Finally, there are the time-bar points... If the Appellant's easement is still subsisting, ie has not been extinguished by abandonment, interference with it is a common law nuisance. Future interference can be restrained by an injunction. Past interference can be remedied by an award of tortious damages. The limitation period applicable to claim for tortious damages for nuisance is six years. It follows that if the Appellant succeeds in its claim based on interference with its right of way it can expect to obtain an injunction and damages limited to the period of interference starting six years before the commencement of the action."**

84. Further President Allen confirmed that an award of damages for mesne profits is limited to 6 years prior to the commencement of the proceedings as determined in Horsford v Bird et al [2006] 1EGLR 75 where the Privy Council held:-

> **"However, in their lordships' view, the appellant has a clear claim to damages in the form of mesne profits for the use made of his land by the respondent. Any such claim for a period of more than six years before the commencement of proceedings would be statute-barred, so the claim can lie only for the period starting on 20th November 1994."**

85. The Plaintiff in this action has elected compensation on the basis of the loss of the use of its land based on the letting value or mesne profits.

86. Allen P also relied on Inverugie Investments v Hackett (1995) 3AER840 as the authority that the injured party could obtain mesne profits for an ongoing trespass where it was held:-

> **" a person who lets out goods on hire, or the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody to else, and whether or not he would have used the property himself... It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the "loss" which the Plaintiff has suffered... The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be**

characterized as exclusively compensatory, or exclusively restitutionary; it combines elements of both."

The Plaintiffs accordingly are entitled to mesne profits.

87. The law establishing the appropriate principles to apply in determining *mesne profits* is not in dispute. The Court of Appeal decision in **Delta Properties Limited v Bahamas Electricity Corporation [2014] 1BHS J. No 101** sets out the correct formula to calculate mesne *profits*. Allen P stated :-

> **"The starting point, therefore in the current assessment of mesne profits is the market value of the tract, namely $179,550.00 ($150,000 x 1.197 acres) Applying the aforementioned 8% we determine that the appellant should be awarded mesne profits in the amount of $14,364.00 per annum. The proceedings began 22nd October 2007, subtracting six years this brings us to a start date of 22nd October 2001; judgement in favor of the appellant was handed down in November of 2012; yielding a multiplier of 11.1. The appellant is therefore prima facie entitled to $159,440.00 ($14,364.00 x 11.1) in mesne profits. Subtracting the aforementioned 5% the appellant is awarded $151,468.00 in mesne profits. Interest on this amount is awarded at 7% per annum from the date of judgement to payment."**

88. The Court of Appeal had determined that 8% per annum was a reasonable lease rate in Delta. The parties in this action accept that the rate should be between 6 to 8%.

89. Applying a rate of 7% and using the current value of the Property as adjudged by this Court being $2,794,314.47, the per annum lease rate would be $195,602.01. The Court relies on the 7% lease rate as this is the median of the rates agreed between the parties.

90. As the action began in March 2004, the limitation period would start in March 1998. From 1998, we must then calculate the length of time to the date of judgment which was 29 April 2004. The multiplier would accordingly be 6.1 years. Applying this to the aforementioned annual lease rate of $195,601.01 we arrive at a figure of $1,193,172.23 of which 5% of this sum is to be deducted for fluctuation in the value of the land giving a final sum of $1,133,513.65. Interest is awarded on this sum at 7% per annum from the date of judgment to payment.

Damages in lieu of an injunction

91. The purpose of the damages in lieu of an injunction is to compensate the Plaintiffs for the continuing trespass. In keeping with the formula applied in Horsford the court must consider, using the hypothetical negotiation method, the following:-

    i. The value of the property;
    ii. The value to the Defendant of the land trespassed;
    iii. The effect of the trespass to the land.

In Horsford, the hypothetical negotiating method was reviewed where they held:-

> **"[11] ... neither Joseph-Olivetti J nor the Court of Appeal took into account that ever since 1990, when the wall was completed, the respondent has had the exclusive**

use and benefit of the encroached- upon piece of the appellant's land. The refusal by Joseph-Olivetti of the mandatory injunction and her decision to award damages in lieu had the consequence of, in effect, expropriating that piece of land from the appellant the enabling it to become thenceforth, de jure as well as de facto part of the respondent's garden...

[12] Their lordships are not disposed to question the basis upon which the value of the piece of land to the appellant was assessed by Redhead JA. It follows that the starting point for the calculation of the damages to be awarded in lieu of the injunction must be EC 13, 650 (the market value of the land). But Joseph-Olivetti J was, in their lordships view correct in taking into account the extent to which the encroached upon piece of land had enhanced the amenities of the respondents house. Without it, either the passageway would not have been wide enough to accommodate ta vehicle or the garden area would have had to be reduced in size. Moreover, the building of the wall along the north and east sides of the respondent's parcel had cost him approximately EC$144,000, an expenditure that would have been very substantially increased if the part of the wall forming the boundary with the appellant's parcel had to be removed and rebuilt along the correct boundary line. These considerations demonstrate that the respondent, by building his wall on the appellant's land and thereby incorporating a piece of the appellant's land into his garden had given the expropriated land a value to himself considerably in excess of its value simply as 455 sq. ft of an undeveloped plot. In their lordships opinion, this was a value proper to have been taken into account in assessing the damages to be paid in lieu of a mandatory injunction for the removal of the wall.

[13] In Wrothman Park Estate Co Ltd. v Parkside Homes Ltd [1974] WLR 798, damages in lieu of an injunction to remove a number of dwelling-houses that had been built in breach of restrictive covenant were assessed as a proportion of the profit that the developer/defendant had made out of the development. Brightman J (as he then was) asked himself what sum the plaintiff might reasonably have sought from the developer as his price of waiving the restrictive covenants. In the present case the comparable question would have been how much the appellant's could reasonably have sought from the respondent in November 2000 as the price of the appellant's land that the respondent had incorporated into his garden. On the basis that the value of the piece of the land as a part of an undeveloped plot was EC13, 650, their lordships think that its value to the respondent as part of the garden of his new home would have been at least double that figure. "

92. In Horsford, The Privy Council used the value of the land as at the date of the commencement of the action and not when the trespass actually commenced. In 2004 the Property was valued at $744,200.00.

93. The effect of the trespass in this action is to effectively grant the Defendant de jure and de facto ownership of the land. I accept the Defendant's submission that the Plaintiffs did not lead any evidence of the benefit of the land to the Defendant which would have resulted in a higher value of the land to them over the market value. The Plaintiffs also did not lead any evidence of any improvement to the land by the Defendant other than the erection of the poles. I accept of course that the erection of the poles were a necessary component of the business of the Defendant and would have required the use of the land for the same. However, there is no other deduction from the presence of the electricity poles on the Plaintiffs' land which can be made to satisfy the requirement of finding a greater value of the land to the Defendant other than the market value. I am satisfied therefore that a 30% uplift of the value of the property as at 2004 would be an appropriate percentage for damages in lieu of an injunction, namely $967,460.00.

Interest on this sum at 7% per annum from 2004 to 2022 totals $1,218,999.60.

94. The total amount of damages in lieu of an injunction inclusive of interest is $2,186,459.60.

95. The Defendant shall pay the Plaintiffs costs of this assessment to be taxed if not agreed.

CONCLUSION

96. The Plaintiffs are awarded the sum of $1,133,513.65 for mesne profits.

97. Interest is awarded at 7% from the date of judgment to payment.

98. The Plaintiffs are awarded $2,186,459.60 in damages in lieu of an injunction.

99. Interest at the statutory rate shall be payable from the date of judgment to the date of payment.

100. The Defendant shall pay the Plaintiffs costs to be taxed if not agreed.

Dated this 21st day of April, 2023

Justice G. Diane Stewart