[2026] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO 26/2018

APPLICATION NO COA2025APP00057

BETWEEN	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**APPELLANT**
AND	**LETHE ESTATE LIMITED**	**RESPONDENT**

Mrs Symone Mayhew KC and Miss Ashley Mair instructed by Mayhew Law for the appellant

Dr Lloyd Barnett, Weiden Daley and Miss Shaydia Sirjue instructed by Hart Muirhead Fatta for the respondent

2 June, 16 July 2025 and 31 July 2026

Civil law – Land law – Wayleave/easement agreement – Trespass to land – Damages for trespass to land – Assessment of damages for additional lots not compensated under easement agreement – Unavailability of trial judge – New assessment of damages by appellate court – Application to vary directions of the court – Scope of appellate jurisdiction – Fresh evidence – Whether application in substance for fresh evidence – Rehearing distinguished from retrial – Whether appellate court may admit further expert evidence – Court confined to evidence adduced at trial – Assessment based on available evidence

Assessment of damages – User principle – Difficulty in quantification – Court to do best with available evidence – Nominal damages – Interest – Hypothetical negotiation damages – Diminution in value – Evidentiary requirements – Value of benefit to trespasser – Costs – Partial success – Discretion – Apportionment – Special costs certificate – Stay of execution – Dissolution of stay – Court of Appeal Rules, rule 1.18 – Civil Procedure Rules, (2002), rules 64.6, 64.12(3) and 65.17

FOSTER-PUSEY JA

Introduction

[1] In this judgment, the court provides its reasons for the orders it made on an application made by Lethe Estate Limited ('Lethe Estate'). In addition, the court's decision on damages is provided.

Background

[2] This ruling arises from the decision delivered by this court on 7 March 2025, in which the appeal by the Jamaica Public Service Company Limited ('JPS') was allowed in part against a judgment of the Supreme Court in favour of Lethe Estate (see **Jamaica Public Service Company Limited v Lethe Estate Limited** [2025] JMCA Civ 3 ('the judgment')).

[3] JPS sought to set aside a decision of the Supreme Court, dated 23 February 2018, in which Lethe Estate was awarded special and general damages for trespass. In the alternative, JPS sought a reduction in the quantum of damages awarded. Lethe Estate counter-appealed, seeking to have the appeal dismissed and the judgment affirmed on additional grounds.

[4] The dispute arose from JPS' installation of transmission lines and towers on land previously owned by Mr Francis Tulloch, the former landowner, who had been paid $5,000,000.00 by JPS for an easement to construct them. After Lethe Estate acquired the property, it sued JPS and asserted, among other things, that JPS trespassed by affecting six lots rather than the three originally covered by the easement agreement. The Supreme Court awarded Lethe Estate $58,150,000.00 in general damages and $191,500.00 in special damages.

[5] On appeal, JPS argued that the easement agreement bound Lethe Estate and that the general damages awarded were excessive.

[6] This court found that Lethe Estate held the land in trust for Mr Tulloch and was bound by the easement agreement. Additionally, the court ruled that the learned judge erred in accepting the expert valuation evidence led by Lethe Estate to assess damages, as it lacked supporting data. The court also determined that damages should not have been awarded for lots indirectly affected by the trespass, since the original compensation in the easement agreement covered those. However, the court held that Lethe Estate was entitled to damages for three additional lots that were directly affected but for which no compensation had been paid. By its judgment delivered on 7 March 2025, the court held that:

> "i. The appeal is allowed in part.
>
> ii. Judgment in favour of Lethe Estate is affirmed.
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> iii. The award of general damages in the sum of $58,150,000.00 with interest at the rate of 3% per annum from 14 June 2011 to 23 February 2018, is set aside.
>
> iv. This court will assess general damages to be awarded to Lethe Estate for JPS' trespass on the three additional lots that were impacted by the transmission towers and lines.
>
> v. The parties are invited to make submissions on the following issues:
>
> a. The quantum of damages to be awarded;
>
> b. The costs of this appeal hearing; and
>
> c. The stay of execution.
>
> vi. Lethe Estate shall file and serve its submissions on or before 28 March 2025 and JPS shall file and serve submissions in response on or before 22 April 2025. The court will thereafter provide its ruling on the matter.
>
> vii. Liberty to apply.

> viii. The counter-notice of appeal is dismissed with no order as to costs."

[7] Following the court's judgment and orders, Lethe Estate filed a notice of application for court orders on 26 March 2025 seeking to vary certain orders made by the court, and filed submissions in support on 27 March 2025. JPS filed its submissions in response on 22 April 2025.

[8] The application was heard on 2 June 2025. The court reserved its written reasons and made the following orders:

> "1. Orders 1,2,3, and 4 that are sought by notice of application filed 26 March 2025 are refused.
>
> 2. [Lethe Estate] shall file and serve written submissions and authorities in respect of the assessment of the general damages by the Court of Appeal to be awarded to [Lethe Estate] for [JPS'] trespass on the three additional lots that were impacted by the transmission towers and lines, on or before 24 June 2025.
>
> 3. [JPS] shall file and serve written submissions in reply and authorities in respect of the assessment of the general damages by the Court of Appeal to be awarded to [Lethe Estate] for [JPS'] trespass on the three additional lots that were impacted by the transmission towers and lines, on or before 16 July 2025.
>
> 4. Submissions as to the costs of the application to be included in the parties' submissions on the costs of the appeal hearing.
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> 5. The stay of execution will remain in place until the conclusion of the appeal."

[9] We now provide the reasons for our decision.

The application

[10] Pursuant to orders (v) and (vii) referenced above at para. [6], Lethe Estate sought the following reliefs:

"1. The Orders numbered v and vi of the Orders of the Court of Appeal made herein on 7th March 2025 be varied by replacing it by the following orders:

(1) An order that:

(a) the parties shall seek to agree, within seven (7) days from the determination of this application or such period as the Court specifies, on the identity of the three (3) additional lots that were impacted by [JPS'] transmission towers and lines and are referred to in paragraph iv of the Order made on 7th March 2025;

(b) in the absence of such agreement, the parties be permitted to submit evidence on affidavit to the Court of Appeal within fourteen (14) days from the date specified by the Court of Appeal for the Court of Appeal to identify those lots.

(2) Permission be granted for [Lethe Estate] to file and serve within 14 days a Supplemental Expert Report by Mr Gordon Langford, limited to the diminution in value of the six (6) lots which were impacted by the transmission towers and lines and to include comparable sales in the said Supplemental Expert Report, to assist this Honourable Court in its assessment of general damages to be awarded to [Lethe Estate] for [JPS'] trespass on the three (3) additional lots that were impacted by [JPS'] transmission towers and lines.

(3) Further, permission be granted for [Lethe Estate] and/or the expert witness Mr Gordon Langford, to:

(a) refer to and rely upon, in respect of the Court of Appeal's assessment of general damages to be awarded to [Lethe Estate] for [JPS'] trespass on the three (3) additional lots that were impacted by [JPS'] transmission towers and lines:

(i) the Agreement for Sale dated 22nd March 2018 and exhibited to the Affidavit of Francis Tulloch sworn on 3rd February 2019 and already filed herein on 4th February 2019, in respect of its sale to Outlier Bio-Pharma Limited of the lots numbered 13 and 14 on Deposited Plan number 14960, being parts of the lands contained in Certificate of Title Registered at Volume 1283 Folio 504 of the Register Book of Titles and which by order of the Court of Appeal made herein on 5th February 2019 were exempt from the operation of Miscellaneous No 2131325 in respect of paragraphs 1(b) and 1(c) of the order of the Court of Appeal dated 12th June 2018 and endorsed on Certificate of Title Registered at Volume 1283 Folio 504 of the Register Book of Titles; and

(ii) the related Affidavit of Francis Tulloch sworn on 31st January 2019 and already filed herein on 1st February 2019, and Affidavit of Francis Tulloch sworn on 3rd February 2019 and already filed herein on 4th February 2019.

(b) adduce additional evidence, namely, of the completion of the sale under the said the [sic] Agreement for Sale dated 22nd March 2018.

(4) Permission be given to both [JPS] and [Lethe Estate] to adduce additional evidence by affidavits, to be filed and served within 21 days, with respect to comparable values of any properties they consider relevant for the Court of Appeal's assessment.

(5) [Lethe Estate] shall file and serve written submissions and authorities in respect of the assessment of the general damages by the Court of Appeal to be awarded to [Lethe Estate] for [JPS'] trespass on the three additional lots that were impacted by the transmission towers and lines, within 21 days after the filing of the Supplemental Expert Report of Mr Gordon Langford and any additional evidence which may be filed by [JPS] and/or [Lethe Estate].

(6) [JPS] shall file and serve written submissions in reply and authorities in respect of the assessment of the general damages by the

Court of Appeal to be awarded to [Lethe Estate] for [JPS'] trespass on three additional lots that were impacted by the transmission towers and lines, within 21 days after the filing of [Lethe Estate's] said written submissions and authorities.

2. Costs of this application be costs in the appeal.

3. There be liberty to apply.

4. Such further and other order(s) and/or relief(s) as the Honourable Court may deem just."

[11] The grounds for seeking the proposed orders were as follows:

"(1) The Court of Appeal, in its judgment delivered on 7th March 2025, made the following Order…….

(2) The Court of Appeal, in exercising its jurisdiction to conduct the assessment of damages has all the powers of a judge of the Supreme Court in conducting that assessment. See CAR 2.14.

(3) The trial Judgment in the court below was delivered on 20th September 2017 in draft, with judgment for [Lethe Estate].

(4) Being dissatisfied with the draft Judgment, [JPS] applied on 23rd November 2017 for certain orders stated in the draft Judgment to be varied or revoked or that the Court should assess damages for trespass only in respect of Lot 2 of Lethe Estate's subdivision plan. Included in JPS' grounds for its application was that the award of damages should be reduced to reflect trespass to only the subdivision lots affected by the transmission line and in respect of which the Court below found that there was no agreement or for which no compensation was already paid to Francis Tulloch by the JPS.

(5) In respect of JPS' said application, JPS argued (para. 301 of the judgment of the court below) '*that the court was being asked to revisit its finding that [Lethe Estate] was not bound by the wayleave agreement on the*

basis that certain principles of law were not brought to the courts [sic] *attention'*.

(6) JPS was permitted to argue those principles of law and JPS did so, but its application to vary or revoke the order was refused in the Judgment of the learned Judge in the court below on 23rd February 2018.

(7) On 9th March 2018 JPS filed its appeal in this Honourable Court and an application for a stay of execution.

(8) In opposing JPS' application, an affidavit of Francis Tulloch was filed in this Honourable Court on behalf of Lethe Estate, in which he, *inter alia*, disclosed that Lethe Estate had shortly before entered into a contract for the sale to Outlier Bio-Pharma Limited of a part (20 acres) of the land comprised in Certificate of Title registered at Volume 1283 Folio 504 (totalling over 129 acres).

(9) On 12th June 2018 this Honourable Court (the Honourable Mr Justice Brooks JA (as he then was) granted JPS' application for a stay of execution pending the outcome of the appeal herein on certain conditions that:

> '[Lethe Estate] is restrained by itself or by its servants or agents or otherwise from selling, charging or leasing or otherwise parting with its interest in the lands comprised in Certificate of Title registered at Volume 1283 Folio 504 and Volume 1283 and Folio 505 of the Register Book of Titles'.

(10) Pursuant to and in respect of the said Order, the Registrar of Titles has endorsed Miscellaneous No 2131325 on Certificate of Title registered at Volume 1283 Folio 504 of the Register Book of Titles at the request of JPS, having complied with paragraph (1)(a) of the said Order.

(11) In making the Order, the Honourable Mr Justice Brooks JA was aware of the then pending sale by Lethe Estate to Outlier Bio-Pharma Limited, of a part (20 acres) of the land comprised in the said Certificate of Title

registered at Volume 1283 Folio 504, and the orders when made on 12th June 2018 contemplated this Honourable Court making an order to permit the completion of that sale pending the appeal.

(12) By an amended application filed 4th February 2019, Lethe Estate sought permission to complete the said then pending sale to Outlier Bio-Pharma Limited which this Honourable court granted on 5th February 2019.

(13) In support of the application, an Affidavit of Francis Tulloch sworn on 31st January 2019 was filed herein on 1st February 2019 and an Affidavit of Francis Tulloch sworn to on 3rd February 2019 was filed herein on 4th February 2019, exhibiting, *inter alia*, the Agreement for Sale dated 22nd March 2018 in respect of the said sale to Outlier Bio-Pharma Limited.

(14) The said sale to Outlier Bio-Pharma Limited has been completed as reflected on relevant Certificates of Title issued on 12th June 2019 and stamped instrument of Transfer of Land.

(15) The Orders applied for above are necessary for the proper and effective implementation of the Order of the Court of Appeal for the assessment of general damages to be awarded to [Lethe Estate] for [JPS'] trespass on the three (3) additional lots that were impacted by [JPS'] transmission towers and lines, and for the just, fair and effective disposal of these proceedings." (Italics as in the original)

Submissions on behalf of Lethe Estate

[12] In seeking to persuade the court to vary its orders, counsel for Lethe Estate, Dr Lloyd Barnett, indicated that the court, in its judgment, found that transmission lines and towers affected six lots, three more than those for which compensation had been provided in the easement agreement. This constituted trespass, and the court held that damages should be awarded for the three additional lots. However, due to the unavailability of the learned judge in the lower court, this court decided to assess damages itself, exercising its powers under the Court of Appeal Rules ('CAR').

[13] Learned counsel argued that, although the court proposed a written submissions approach similar to that adopted in **Garfield Segree v Jamaica Wells and Services Limited and another** [2017] JMCA Civ 25 ('**Garfield Segree**'), the circumstances here are distinguishable. He argued that in **Garfield Segree**, the parties mutually agreed to proceed by written submissions, and the damages awarded were supported by clear and quantified evidence. Counsel submitted that, in contrast, the present case lacks sufficient evidence to support a fair assessment by written submissions alone. Counsel noted that the only expert evidence presented, Mr Gordon Langford's report, was rejected not because of any question regarding his expertise or integrity, but because he failed to provide concrete comparable property values. Counsel observed that while the court acknowledged that Mr Langford's opinions were logical and grounded in real estate valuation principles, including the impact of aesthetics and public perception, it found that he appeared to have misunderstood his role as an expert, believing that including comparable property data would confuse the court.

[14] On this basis, Dr Barnett argued that Mr Langford, as a court-appointed expert, should be allowed to present the comparable property data he referenced but did not include in his original report. He contended that both legal authorities and professional standards support the admissibility of expert opinions based on experience and general market knowledge, even when direct evidence is limited. To support this view, learned counsel cited The Royal Institute of Chartered Surveyors' publication titled Comparable Evidence in Real Estate Valuation, 1st edition, 2019, as well as case law, including **English Exporters (London) Ltd v Eldonwall Ltd** [1973] 2 WLR 435 ('**English Exporters**'). Counsel stated that these authorities affirm that expert valuation evidence can be admissible and persuasive even without detailed comparable data, as long as it is rooted in professional expertise and market understanding.

[15] Further, learned counsel submitted that this court, now exercising its rehearing jurisdiction, has full authority under rules 2.14 and 1.7 of the CAR to admit further evidence in the interest of a just assessment. He contended that the lower court would have had the power to receive the additional evidence that Lethe Estate sought

permission to adduce, to manage the appeal, and take necessary steps to resolve the real issues in dispute. In support of this proposition, learned counsel relied on **Hort v Charles Trent Ltd** [2012] EWHC 3966 (QB); **Cosgrove and another v Pattison and another** [2000] Lexis Citation 4347; **M P (by his father and litigation friend, RJP) v Mid Kent Healthcare NHS Trust** [2002] 3 ALL ER 688 and **Beck v Ministry of Defence** [2005] 1 WLR 2206. Counsel submitted that these authorities demonstrate that appellate courts may allow additional expert evidence, particularly where justice demands it. He also cited local authorities such as **Century National Bank Ltd and others v Windsor Commercial Land Company Ltd and others** (unreported), Supreme Court, Jamaica, Claim No 1993 CLC 363, judgment delivered 19 April 2011 and **Nicola Lauder and Lydia Jones v Everett Brady** [2020] JMSC Civ 160. These authorities, counsel submitted, confirm that new tribunals or judges assessing damages are not limited to the original evidence and may admit fresh material.

[16] Dr Barnett's submissions highlighted the practical challenges in assessing damages, including the need to identify the three affected lots and determine the diminution in market value due to the trespass, in a context where the current record lacks sufficient evidence. Additionally, learned counsel argued that the court-set timeframe was inadequate for preparing meaningful submissions on the assessment of damages. As a result, Lethe Estate also sought to vary the order regarding the filing of submissions.

[17] Dr Barnett urged that, given that the trespass was ongoing, the assessment must reflect the current situation. Therefore, updated and/or additional evidence was legally necessary to ensure a fair and accurate determination of damages. He submitted that to properly exercise this jurisdiction, the court must be empowered to receive relevant and necessary evidence, including expert comparable property values. Learned counsel therefore urged that the court grant the orders sought in its notice of application to vary the directions regarding submissions and allow the admission of further evidence.

Submissions on behalf of JPS

[18] In opposing Lethe Estate's application to vary the orders, Mrs Symone Mayhew KC, for JPS, noted that Lethe Estate's primary contention was that the proposed orders were necessary for the proper and effective implementation of this court's judgment on the assessment of general damages and for the just and fair resolution of the proceedings. She, however, advanced two preliminary observations. First, the application went beyond a mere variation of the court's judgment or a simple direction under liberty to apply. It effectively sought to reopen the case and introduce new evidence, amounting to a retrial without addressing the procedural consequences. King's Counsel questioned whether Mr Langford's new report would be subject to cross-examination or whether the court and JPS would be expected to accept it without scrutiny. King's Counsel stated that similar concerns arose regarding the affidavits mentioned in proposed order (iii), which were not part of the trial record and were not included in the appeal. That evidence, she argued, was originally submitted in support of an interim application and was therefore subject to less rigorous evidentiary standards, including the admissibility of hearsay standards that would be inappropriate for determining substantive issues.

[19] Second, the application did not address the issue of 'fresh evidence'. King's Counsel argued that the omission was significant, given that Lethe Estate was clearly seeking to introduce material that was not before this court during the hearing of the appeal. King's Counsel submitted that the application failed to engage with the established test for admitting fresh evidence on appeal under **Ladd v Marshall** [1954] 1 WLR 1489. That test requires the applicant to establish that: (a) the evidence could not have been obtained with reasonable diligence for use at trial; (b) the evidence is credible; and (c) the evidence would probably have influenced the outcome. She emphasised that all three criteria must be satisfied, and failure to meet any one is fatal to the application.

[20] Learned King's Counsel contended that Lethe Estate could not satisfy the **Ladd v Marshall** criteria. In particular, the comparable sales data was available at trial but deliberately omitted by Mr Langford; the proposed 2018 agreement for sale is irrelevant

to the affected lots; and the evidence was not shown to be unavailable at trial. Moreover, Mr Tulloch, the key witness, was deceased. She noted that Lethe Estate sought to introduce evidence on two issues: (a) the identification of lots affected by the transmission lines and towers but not covered by the easement agreement, and (b) the valuation of comparable properties. She referred to para. [156] of the court's judgment, which acknowledged the absence of direct evidence identifying a third lot covered by the March 1996 compensation letter. King's Counsel referred to Mr Tulloch's cross-examination and the fact that lots 2A, 7A, and 7B were affected by the transmission line, providing indirect evidence of the three impacted lots not included in the agreement.

[21] Mrs Mayhew further argued that the proposed introduction of a new report from Mr Langford to cure deficiencies in his original report was impermissible. She stated that the report was previously found inadequate and unreliable, and Lethe Estate relied on it throughout the trial and appeal without seeking correction until after the appeal was partially allowed. Additionally, in her view, the authorities cited by counsel for Lethe Estate did not support introducing expert evidence post-trial to remedy such deficiencies. King's Counsel submitted that since Lethe Estate had not demonstrated that the evidence was unavailable with reasonable diligence at trial, there was no legal basis for admitting the proposed fresh evidence at this stage.

[22] King's Counsel acknowledged that the court has power under rule 1.7(7) of the CAR to vary or revoke orders, but submitted that this discretion is guided by principles of finality and the overriding objective, as outlined in **West Indies Petroleum v Courtney Wilkinson and others** [2024] JMCA App 33 and **AIC Ltd v Federal Airports Authority of Nigeria** [2022] UKSC 16. King's Counsel submitted that the orders sought by Lethe Estate disregarded the principle of finality as articulated in **AIC Ltd v Federal Airports Authority of Nigeria**. Learned King's Counsel contended reopening proceedings should only occur where factors outweigh finality. King's Counsel also argued that even if the specific lots cannot be definitively identified, additional evidence was unnecessary as the court can assess damages based on existing evidence, adopting a practical approach to arrive at a fair outcome as endorsed in **Jamalco (Clarendon**

Alumina Works) v Lunette Dennie [2014] JMCA Civ 29 ('**Jamalco**') **and Garfield Segree** cases. Further, learned King's Counsel noted that where precise quantification is difficult and where loss is evident but the damage is unproven, courts may fix a figure or award nominal damages, as in **George Rowe v Robin Rowe** [2014] JMCA Civ 46 ('**George Rowe**'). Reliance was also placed on McGregor on Damages, 13th edition. King's Counsel also submitted that the court may consider awarding negotiating damages based on the agreed compensation for three lots, subject to adjustments for factors such as inflation.

[23] Mrs Mayhew also argued that Lethe Estate's claim, that the trial judge and this court had the authority to direct Mr Langford to provide evidence of comparable property values, was without merit. She stated that no authority was cited to support this claim, and the stage of the proceedings at which such a direction could have been issued was not identified. While courts sometimes invite additional submissions after a judgment, the learned King's Counsel emphasised that allowing the introduction of new evidence after a judgment is a completely different issue. Therefore, the analogy suggested by Lethe Estate lacked legal support. King's Counsel further argued that if JPS had requested permission to present new evidence after the judgment to contest Mr Langford's valuation, such a request would have been denied. It follows that Lethe Estate should not now be allowed to submit evidence supporting the same valuation.

[24] Learned King's Counsel also clarified that these submissions were solely in response to Lethe Estate's application and did not constitute JPS' substantive submission on damages. She underscored that this matter had been before the court since 2011, with trial and appeal proceedings spanning several years and consuming significant judicial resources. King's Counsel submitted that allowing new evidence would undermine finality, prolong litigation, and contravene the overriding objective. It would amount to giving Lethe Estate a "third bite at the cherry," which is inconsistent with justice and procedural fairness.

[25] In light of the foregoing, King's Counsel concluded that the application should be dismissed with costs awarded to JPS, and the court should proceed to confirm its existing orders directing the parties to submit their submissions on the assessment of damages.

Lethe Estate's reply to JPS' submissions

[26] Dr Barnett submitted that the orders of this court required a rehearing of the damages issue concerning six lots, three of which had never been assessed. Accordingly, the principles governing the admission of fresh evidence on appeal do not apply. He argued that the cases cited by JPS, including **Harold Brady v General Legal Council** [2021] JMCA App 27, are distinguishable, as they involved presenting a new case on appeal under special statutory provisions. Counsel argued that in this case, the trial judge did not assess damages for three lots, placing the matter in a unique category in which the court, exercising its civil jurisdiction, may determine whether a de novo hearing is appropriate.

[27] Learned counsel concluded that the authorities cited by JPS were not applicable, as none involved an appellate court ordering an assessment amid ongoing trespass, adverse effects on development potential, and the likelihood of increasing damages. Given these unique circumstances, the lack of prior assessment, and the need for expert evidence, a full and fair reassessment was justified. Accordingly, he argued that the court should grant the requested orders to ensure an equitable determination of damages.

Discussion

[28] I largely agreed with counsel for JPS' submissions.

[29] The main grounds on which Lethe Estate relied for the orders sought were that they were "necessary for the proper and effective implementation of the Order of the Court of Appeal for the assessment of general damages" and for "the just, fair and effective disposal of these proceedings". I agree with JPS' submissions that Lethe Estate's application was essentially one to adduce fresh evidence. However, Lethe Estate did not use that phrase or term, being, I am sure, well aware of the matters that would have

needed to be established, as outlined in case law. I note JPS' reference to various cases concerning fresh evidence, such as **Ladd v Marshall**. I will not discuss them further because there was no application to adduce fresh evidence before this court. Therefore, it was neither possible nor appropriate for the court to permit Mr Langford to appear and provide additional evidence. Nor was it appropriate to allow Lethe Estate to depend on the additional evidence it relied on in an interlocutory application before this court. That would also have needed to qualify as fresh evidence.

[30] Regarding the evidence for identifying the three additional lots affected by the transmission lines and towers, I agreed with counsel for JPS that there is indirect evidence before this court that can assist in this process. Otherwise, this court must do the best it can with the available material.

[31] It remained for me to carefully review the cases on which counsel for Lethe Estate relied as giving this court authority to admit the new evidence.

[32] Having reviewed the **English Exporters** case, I did not doubt that a valuer is entitled to express his opinions about matters within his competence, as Megarry J stated. However, in this instance, the court had already ruled that Mr Langford's failure to provide comparable sales information, which he claimed he could have provided, made it improper for the court to rely on his value conclusions. Since he said he could have provided the information but did not do so out of concern that it would confuse the court, Lethe Estate's reliance on the excerpt from the publication Comparable Evidence in Real Estate Valuation, which mentions "a shortage of evidence" preventing a valuation, was misplaced.

[33] The view expressed by Lockhart J in **Arnotts v Trade Practices Commission** (1990) 97 ALR 555, that an expert should be able to base his opinion on his experience without needing to prove all the facts underlying it, was not relevant at this stage of the proceedings. We had moved beyond the point of deciding whether we could rely on Mr Langford's conclusions.

[34] There is no dispute that this court, in the context of its rehearing capacity, has the authority to do certain things. However, apart from circumstances involving fresh evidence, this court does not have the authority to admit further evidence as Lethe Estate has submitted "in the interest of a just assessment". This court is limited to the evidence that was adduced before the court below. Accordingly, the authorities of **Hort v Charles Trent Ltd**, **Cosgrove and another v Pattison and another**, **M P (by his father and litigation friend, RJP) v Mid Kent Healthcare NHS Trust**, and **Beck v Ministry of Defence** are not applicable as will be further explored below. Neither the court's powers outlined in rule 2.14 of the CAR, nor the general case management powers of our courts outlined in rule 1.7 of the CPR, permit the approach Lethe Estate has suggested.

[35] In **Archibald Newland and another v Joseph Walker and another** (1978) 16 JLR 126, a judgment on which Lethe Estate relied, the appellants filed an application seeking to vary orders contained in an earlier judgment of the Court of Appeal in which the court dismissed the appellant's appeal. After analysing the relevant rules of this court at the time and the Judicature (Civil Procedure) Law applicable at the time, the court ruled that once the registrar's certificate was filed, and the judgment to which it related was perfected, the court could no longer entertain applications to modify it. I did not find that case helpful in considering the issues before this court. There is no application to rehear the appeal.

[36] Lethe Estate has argued that numerous judicial decisions show that when there is a right to access expert evidence to resolve an issue on appeal, the appellate court has the same authority as the trial court and can, therefore, allow additional expert evidence to be presented.

[37] Counsel relied on **Hort v Charles Trent Ltd** and argued that a claimant on appeal was permitted to substitute a report from a neurologist for an earlier disclosed report from another neurologist. In that case, Eady J, in the Queen's Bench Division, heard an appeal from a case management decision of a district judge. The judge had refused the claimant permission to rely on an expert report from neurologist Dr Sawle in substitution

for his first-choice expert. This case is not helpful. The matter had not been tried. The appeal concerned a case management decision.

[38] Counsel also relied on **Cosgrove and another v Pattison and another**. That case is also distinguishable. It was an appeal from a decision on the appellants' application to call their own expert witness. The question on appeal concerned when a single joint expert was appointed and in what circumstances it would be appropriate to allow one party to call an expert witness of his own.

[39] I also reviewed **M P (by his father and litigation friend, RJP) v Mid Kent Healthcare NHS Trust**. Simon Brown LJ of the Court of Appeal of England helpfully summarised the issue before the court at para. 32. He wrote:

> "When, if at all, should one party, without the consent of the other party, be permitted to have sole access to a single joint expert, ie an expert instructed and retained by both parties? In common with Lord Woolf CJ, I believe that the answer to this question must be an unequivocal 'Never'."

The quotation from the case speaks for itself. It does not assist this court with the issue before us.

[40] With admirable conciseness, Simon Brown LJ again outlined the issue before the court in **Beck v Ministry of Defence**. At para. 2 of the judgment, he wrote:

> "This is a second appeal against what can only be characterised as an **interlocutory case management decision**; not, therefore, everyday fare in this court. It nevertheless raises a question of some little importance, namely whether it can ever be appropriate to allow a party to substitute one expert for another without, at some stage at least, being required to disclose the first expert's report." (Emphasis supplied)

Again, a decision clearly related to an interlocutory matter. That case did not support the argument made by Lethe Estate's attorneys-at-law.

[41] One of the main planks of Lethe Estate's argument that this court would have the power to allow additional evidence to be adduced, rested on the proposition that had the matter been sent back to the Supreme Court for assessment of damages concerning the three additional lots, the judge could have allowed that evidence. As such, Lethe Estate argued that this court would also have similar powers. I examined the cases cited in support of this proposition.

[42] In **Century National Bank and others v Windsor Commercial Land Company Ltd and others**, Brooks J (as he then was) considered whether, where the Court of Appeal has ordered a retrial, no new evidence can be placed before the court. This was in the context of an application before him for the appointment of an expert witness who had not been called at the first trial. Brooks J stated that the fact that, on a retrial, the court would be examining the same issue of fact as at the first trial does not limit the new tribunal to inspecting the same evidence adduced before the previous tribunal. I have no difficulty with that principle. However, in the case at bar, this court did not order a retrial. We have acknowledged that, as a Court of Appeal, we have the power to rehear the matter. This is not the same as a retrial. On rehearing the matter, or a particular issue, except for evidence adduced on the basis of a fresh evidence application, this court is limited to the evidence led by the parties at the trial. Thus, **Century National Bank and others v Windsor Commercial Land Company Ltd and others** does not support Lethe Estate's submissions that this court should call for further evidence from Mr Langford.

[43] Counsel also relied on the case of **Nicola Lauder and Lydia Jones v Everett Brady**. Counsel submitted that in that case, Wolfe-Reece J, in conducting a damages assessment where the matter was remitted to the Supreme Court for assessment of damages before another judge, allowed evidence to be adduced afresh in order to conduct the assessment. This led me to review the judgment of this court that resulted in the assessment of the damages in question. This judgment was found at **Everett Brady v Nicola Lauder and Lydia Jones** [2017] JMCA Civ 18. In that appeal, the appellant sought to set aside orders made in the Supreme Court where judgment was

entered against him in the sum of $30,533,825.58 with interest for the appellant's failure to build a roof in a workmanlike manner. The respondent claimed that the appellant ought to have built a primarily slab roof and instead built a timber roof with poor workmanship. This court agreed with the appellant's concern that the judge at first instance concluded that the roof was not repairable on the evidence of the quantity surveyor, whose specialisation was in quantities (see para. [22]). The quantity surveyor's evidence did not address the cost of remedying the defects in the roof or making the existing roof functional. Instead, his sole focus was on building a roof in accordance with the original approved design. The judge at first instance had indicated that there was no evidence before the court to enable it to assess the cost of curing the roof defects. F Williams JA, who delivered the judgment of the court, stated:

> "[23] …However, it was, of course, open to the court below to have settled the question of liability alone at that stage and then set the matter down for assessment of damages - either by that court itself or another court differently constituted. So that the absence of evidence at that point was not an insurmountable obstacle and that approach (of dealing with liability alone first and ordering an assessment) could have been adopted in order to obtain the required evidence for the court to use in arriving at and applying the correct measure of damages."

[44] This court concluded that the learned trial judge failed to consider the reasonableness of the use of the cost of reinstatement in arriving at the compensatory award, and failed to ascertain the respondent's actual loss. The concluding paragraphs of the judgment are helpful. There, F Williams JA wrote:

> "[62] At the end of the day, although there did not appear to be enough by way of error on the part of the court below to disturb the finding on liability (as the ultimate issue was one of a question of fact), there was enough to warrant a setting aside of the award of damages. This was so mainly because the court below failed to consider the question of reasonableness in arriving at what it considered to be the appropriate measure of damages. In the result, there was no alternative but to remit the matter to the court below for

> damages to be assessed, using the measure of damages stated in **McGregor on Damages**, which is, first, 'the cost of remedying the defect'. The assessment should, therefore, seek to focus on the cost of making the adjustments that are necessary to correct the defects in order to make the existing roof functional, bearing in mind at all times the consideration of reasonableness. If that cost is disproportionate to the end to be obtained, then the measure should be: 'the value of the building had it been built as required by the contract less its value as it stands'.
>
> [63] Using this approach in the assessment of damages should ensure that a result that is fair, equitable and reasonable to the parties is achieved." (Emphasis as in the original)

[45] If, as Lethe Estate asserts, Wolfe-Reece J allowed fresh evidence to be adduced before her, it would have been understandable in light of this court's ruling. That situation is distinguishable from the instant case where the expert understood his remit but decided not to provide the required evidence to the court.

[46] Having reviewed the cases cited, I was not persuaded that if the matter had been sent back to the learned judge, she would have had the authority or power to direct Mr Langford to provide evidence of comparable values of other properties.

[47] Contrary to Lethe Estate's submissions, I did not agree that it was a distinguishing factor that the claim is for a continuing trespass. It is still necessary that this court keep within the established legal principles concerning fresh evidence on appeal. This meant that it was not possible for this court to allow new and updated information so as to assess damages in what Lethe Estate describes as "the contemporaneous situation".

[48] There is no denying that there are practical challenges to assessing the damages in this case. It is also true that the court will face challenges in assessing the diminution in market value of the lots in question. However, this court has to rely on the evidence led before the judge at first instance. The damages/compensation the court awarded below and to be awarded here are to bring finality to the dispute. It would have been useful if, at first instance, Lethe Estate had provided the evidence it has sought to adduce

here. However, that could not now be done, barring satisfaction of a fresh evidence application.

[49] In **Garfield Segree**, the judge at first instance dismissed the appellant's claim for damages. The appeal on liability succeeded, and this court proceeded to assess the relevant damages to be awarded. The court invited the parties to make written submissions on damages. They did so, and damages were assessed on the basis of the evidence that had been led at trial. This court had to proceed in a similar manner.

[50] The case of **Jamalco**, to which JPS referred, is of interest. As Panton P stated in that case, at paras. [20] and [21], this court will have to do the best it can with the available evidence to compensate the respondent in the face of its obvious loss. A similar position was taken by the Privy Council in **Tai Hing Cotton Mill v Kamsing Knitting Factory** [1979] AC 91.

[51] It was for the above reasons that I agreed with my sisters that we should refuse the application.

Assessment of damages

[52] The court considered this aspect of the proceedings on the basis of written submissions from counsel representing both parties. Lethe Estate filed its submissions on 24 June 2025, and JPS filed its submissions on 16 July 2025.

<u>Submissions on behalf of Lethe Estate</u>

[53] Dr Barnett submitted that the learned judge erred in limiting compensation to the three lots covered by the easement/wayleave agreement when the court found that a total of six lots (lots 2A, 6A, 6B, 7A, 7B, and 8) were directly affected by JPS' transmission lines and towers. Counsel argued that the evidence of Mr Tulloch, which was accepted and unchallenged, established that lots 2A, 7A, and 7B, being riverside and tourism-development lots, should not have been impacted. He relied on Mr Langford's evidence that these lots were "severely affected" and had become effectively sterile.

[54] Counsel submitted that, although additional valuation evidence was excluded, the court was nevertheless required to assess damages on the available evidence. Relying on Mr Langford's valuation methodology, which the court had accepted, counsel argued that compensation should reflect the diminution in value of the affected land and the benefit derived by JPS from its continued use of the property. He identified four relevant factors: (1) the extent of the impact; (2) the value of the lots; (3) the duration of the trespass and (4) the benefit obtained by JPS. He further submitted that the evidence established a reduction in value of approximately 96% in relation to the riverside lots.

[55] Dr Barnett argued that damages for continuing trespass may include future losses because successive actions cannot be brought for future trespasses. He relied on **Clegg v Dearden** (1848) 12 QB 576 and **Whitwham v Westminster Brymbo Coal and Coke Company** [1896] 2 Ch 538 ('**Whitwham**') for the propositions that the court may award compensation for prospective losses and take into account the benefit obtained by the trespasser.

[56] In addressing the quantum of damages, learned counsel submitted that the affected lots were substantially more valuable than the agricultural lots covered by the wayleave agreement because of their riverside location, tourism potential and commercial value. He argued that any compensation payable at the time of construction would have been significantly greater than the compensation paid under the agreement and that the court should consider JPS' long-term benefit and the appreciation in land values over the past three decades.

[57] Counsel further contended that JPS derived substantial financial benefit from the use of the property while Lethe Estate suffered loss of value, income-generating potential and development opportunities. He submitted that the compensation paid under the wayleave agreement was not a reliable comparator because the subject lots were commercially superior to the agricultural lots covered by that agreement.

[58] Dr Barnett emphasised that the trespass was ongoing, since the installations require continuing access, maintenance, and a 100-foot clearance area that continues to impair Lethe Estate's proprietary rights. He submitted that, conservatively assessed, the affected lots were worth at least five times the value of the lots compensated under the wayleave agreement and that damages should accordingly be assessed at not less than $25,000,000.00.

[59] Regarding continuing trespass, counsel relied on JPS' evidence that relocation of the transmission line would cost approximately US$4,200,000.00 and would cause extensive power disruptions. He argued that this demonstrated both the substantial benefit JPS derived from the trespass and the ongoing burden imposed upon Lethe Estate. Accordingly, he submitted that damages should reflect the continuing nature of the trespass and the economic advantage accruing to JPS.

[60] Dr Barnett further submitted that the trespass was deliberate. He referred to documentary evidence and witness testimony showing that JPS was aware of Lethe Estate's objections to any route affecting the riverside lots and nevertheless proceeded with the chosen route after rejecting alternatives on cost grounds. Counsel argued that JPS knowingly prioritised its financial interests over Lethe Estate's proprietary rights.

[61] Counsel submitted that both the diminution in value principle and the user principle were applicable. Relying on authorities including **Horsford v Bird and another** [2006] 1 EGLR 75, **Inverugie Investments Ltd v Hackett** 1 WLR 713 and McGregor on Damages, 18th edition, paras. 34-043 – 34-051, he argued that damages for continuing trespass should reflect not only the reduction in the value of the land but also the benefit obtained by the trespasser from its continued occupation and use.

[62] Dr Barnett also contended that exemplary damages were warranted because the trespass was deliberate, calculated, and maintained for decades despite Lethe Estate's objections. He submitted that exemplary damages are particularly appropriate where the defendant's conduct was directed at securing a financial advantage exceeding any

compensatory award. Supporting authorities relied on include **JPS v Enid Campbell and Marcia Clare** [2013] JMSC Civ 22; **Townsview Properties Ltd et al v Sun Construction and Equipment Ltd et al** (1975) 7 OR (2d) 666; **Lester D Collicut Lumber Building Supplies Ltd v Dorey** [1980] NSJ No 519; and **Johnson v British Columbia Hydro and Power Authority** [1981] CNLR 63.

[63] Finally, counsel argued that interest should be calculated from 1995, as JPS benefited from its unlawful actions during that period. It was submitted that had damages been paid when due, Lethe Estate could have invested the funds at prevailing interest rates. It was argued that, given that JPS' installations destroyed the income-generating potential of the property, awarding interest ensures fair compensation. Counsel submitted that inflation and currency devaluation must also be considered, as they have significantly impacted financial values. It was also his submission that the original estimate of US$4,200,000.00 made in 2017, if JPS had to utilise a different route, equated to $671,622,000.00 at the current exchange rate of US$1:00 to $159.91 (June 2025).

[64] Relying on section 3 of the Law Reform (Miscellaneous Provisions) Act and The **Owners of the MV Myron v Tradax Export SA** [1969] 3 WLR 292, and **British Caribbean Insurance Company Limited v Delbert Perrier** (1996) 33 JLR 119, counsel submitted that the court should award interest at a commercially realistic rate to compensate Lethe Estate for the loss of the use of the money and the effects of inflation and currency depreciation.

[65] Accordingly, counsel submitted that the damages recoverable by Lethe Estate for the continuing trespass may be summarised as follows:

1. Damages for trespass as at 1996: $25,000,000.00 plus interest, or alternatively $275,000,000.00, representing the original sum adjusted for inflation to present-day value (June 2025).
2. Interest on $25,000,000.00: either at 8.23% per annum ($60,181,875.00) or at 20.43% per annum ($164,019,375.00).

3. Alternative measure: damages for continuing trespass since 1996 and for an indefinite future period, calculated at US$4,200,000.00 ($671,622,000.00), representing the benefits JPS has derived and will continue to derive.
4. Exemplary damages: in an amount the court considers appropriate.

<u>Submissions on behalf of JPS</u>

[66] Mrs Mayhew acknowledged the difficulty in assessing damages, particularly since the court found Mr Langford's expert valuation of the subdivision lots unreliable due to insufficient supporting data. Nevertheless, she argued that the court must still assess damages using the best available evidence, as required by established principles. King's Counsel noted that the court identified six lots affected by the transmission line: 2A, 6A, 6B, 7A, 7B, and 8, and that Mr Tulloch testified that only lots 6A, 8, and 10A were intended to be impacted, with 10A ultimately unaffected. King's Counsel indicated that the court invited submissions on which additional lots were covered by the compensation referenced in the March 1996 letter from JPS.

[67] Learned King's Counsel noted that item 6 of the March 1996 letter included compensation for income lost due to banana crops destroyed for a transmission tower. Further, during cross-examination, Mr Tulloch identified this as relating to lot 7B, which he said the line was "supposed to skirt". He had also indicated that lots 7A and 2A were to be skirted. King's Counsel submitted that while "skirting" suggests the line was intended to bypass these lots, the reference to banana crop destruction and the plantation's location on lot 7B supports its inclusion among the three lots considered for compensation in the letter. She therefore submitted that the lots not agreed to be affected and for which damages for trespass must now be assessed are 6B, 7A, and 2A. However, given Lethe Estate's inadequate evidence of losses, she argued that precise identification of the lots may not significantly affect the assessment.

[68] King's Counsel submitted that although trespass is actionable without proof of actual damage, damages beyond a nominal award must be supported by evidence. Relying on Halsbury's Laws of England, Volume 97A, (2021), para. 189, **George Rowe**,

McGregor on Damages, 13th edition, para. 295 and **Nattal Smith v Newton Wright** [2020] JMSC Civ 100, she argued that Lethe Estate had failed to prove any actual diminution in value because the court had rejected Mr Langford's valuation methodology. Accordingly, any award based on diminution in value would be speculative, and nominal damages only should be awarded. On that basis, she suggested an award not exceeding $300,000.00.

[69] In the alternative, Mrs Mayhew submitted that the court should apply the user principle or negotiating damages approach rather than the diminution in value principle. Relying on **Stoke-on-Trent City Council v W & J Wass Ltd** [1988] 1 WLR 1406 ('**Stoke-on-Trent City**'), **Swordheath Properties Ltd v Tabet** [1979] 1 WLR 285, **Inverugie Investments Ltd v Hackett**, **London Borough of Enfield v Outdoor Plus Ltd and another** [2012] EWCA Civ 608 ('**Enfield**'), and **Eaton Mansions (Westminster) Ltd v Stinger Compania De Inversion SA** [2013] EWCA Civ 1308 ('**Eaton Mansions**'), King's Counsel argued that damages should represent the reasonable value of JPS' use of the land, determined through a hypothetical negotiation. She submitted that the appropriate measure was the reasonable fee that JPS would have paid for the right to use the land, irrespective of whether Lethe Estate could prove actual loss.

[70] Counsel rejected Lethe Estate's reliance on JPS' estimate that relocation of the transmission line would cost approximately US$4,200,000.00. She submitted that the relocation cost relates to reconstructing approximately 28 kilometres of transmission line and bears no relationship to the value of the trespass over the disputed lots. Relying on **JPS v Enid Campbell and Marcia Clare** [2013] JMSC Civ 22, she argued that relocation costs are not an appropriate measure of damages and do not represent the benefit obtained by the trespasser.

[71] Mrs Mayhew contended that the best evidence of the value of JPS' use of the land was the compensation negotiated between JPS and Mr Tulloch in 1996. She pointed out that the March 1996 agreement allocated $1,000,000.00 specifically for the easement,

with the remaining sums addressing other matters such as crop losses, nuisance, access rights, environmental impacts, and diminution in value. King's Counsel submitted that the easement payment provides a reliable benchmark for negotiating damages. Adjusted for inflation to 2018, that figure amounted to approximately $6,018,028.50, which she proposed as a fair and proportionate award for trespass over the three additional lots. She further noted that only one tower was located on those lots and that they were smaller than the lots originally covered by the easement.

[72] On exemplary damages, Mrs Mayhew noted that Lethe Estate's renewed request must fail. The learned judge rejected this claim at para. [228] of her judgment, and Lethe Estate did not appeal that refusal. The claim for deceit was abandoned at trial, and the learned judge's reasoning was legally sound and factually supported. Similarly, Lethe Estate's request for a commercial rate of interest cannot succeed, as the learned judge declined to award such interest at para. [273], and that decision was not challenged on appeal.

Issues that arise for determination

[73] A number of issues arise for determination at this stage. These include:

a. For which three lots should compensation or damages be assessed?

b. Should there be an award of nominal damages?

c. What are the applicable principles to ensure a fair assessment?

d. Over what period should interest run on the figure arrived at?

e. Should inflation, currency devaluation, and commercial interest rate be taken into account or applied? and

f. Should this court order JPS to pay exemplary damages?

Discussion

[74] The assessment of damages in this case has been no easy task. However, this court, in the face of the indisputable loss that Lethe Estate has suffered, must do the best it can with the information that is available.

[75] In **George Rowe** this court found that the Resident Magistrate had erred in finding that George Rowe was not in possession of the land in dispute. The question of damages for trespass then arose in this court. The court examined the applicable principles for the award of damages for trespass. Referring to the case of **Stoke-on-Trent City** at para. [50] of the judgment, Brooks JA (as he then was) noted the principle that the general rule is that where a plaintiff succeeds in an action in tort, he is to recover damages that are equivalent to the loss he suffered and if he suffered no loss, then he could only recover nominal damages. Importantly, Brooks JA went on to state at paras. [51]-[54], again quoting from the **Stoke-on-Trent City** case, that:

> "[51] One of the exceptions to that general rule lies in the tort of trespass. Nourse LJ explained that the origins of this exception lay in wayleave cases. He said:
>
> > 'The first and best-established exception is in trespass to land. It originated in the wayleave cases, where the defendant trespassed by carrying coals along an underground way through the plaintiff's mine. Although the value of his land had not been diminished by the trespass, the plaintiff recovered damages equivalent to what he would have received if he had been paid for a wayleave...'
>
> [52] Based on those origins, it is said that trespass is actionable without the need to prove loss. Proof of loss is, however, what is required to assist the court in quantifying the appropriate award of damages. Nourse LJ pointed out that for residential properties the court would use evidence of the rental value to guide its deliberations. He said:
>
> > '...in **Swordheath Properties Ltd v Tabet** [1979] 1 All ER 240, [1979] 1 WLR, 285... it was held that **a defendant who had occupied residential premises as a trespasser was**

> **liable to pay damages calculated by reference to the ordinary letting value of the premises even where there was no evidence that the plaintiff could or would have let the premises to someone else**....
> As I understand these authorities, their broad effect is this. In cases of trespass to land and patent infringement and in some cases of detinue and nuisance the court will award damages in accordance with what Nicholls LJ has aptly termed 'the user principle'....'

[53] The 'user principle' referred to in that extract states simply:

> '...if one person has without leave of another been using that other's land for his own purposes, he ought to pay for such user.'

[54] Although Nicholls LJ, in **Stoke-on-Trent City Council**, stated in his judgment that a trespasser may be liable to pay more than nominal damages for his tort, a claimant who proves trespass, but fails to prove the value of the property trespassed upon may yet only recover nominal damages. The restriction to nominal damages, in cases where only the fact of the trespass is proved, was explained in **Twyman v Knowles** (1853) 13 CB 222; 138 ER 1183. There the Court of Appeal of England approved a summation in the court below, to the effect that where a claimant in a case of trespass, fails to prove more than his bare possession of the land, he is only entitled to nominal damages." (Emphasis as in the original)

[76] Against that background, the approach to the assessment of damages where precise quantification is difficult is well established. In **Jamalco** at paras. [21] and [22] Panton P wrote:

> "[21] Mr Leiba's complaint that the judge extrapolated without any evidential base has to be viewed in the light of the obvious loss that the respondent has suffered, and is still suffering. **In this situation, where the evidence does not enable precise quantification, the learned judge was correct to assess damages on the available evidence (Tai Hing**

Cotton Mill v Kamsing Knitting Factory [1979] AC 91). The learned judge erred in referring to research indicating that [sic] the cost of building the additional 40 sq ft being in the region of $6,000.00 per sq ft seeing that the evidence did not include the research. However, that is not a good reason to set aside the award. In looking at awards of this nature, this court should only set aside an award if it is either inordinately high or inordinately low: **Flint v Lovell** [1935] 1 KB 354. Taking into consideration matters relating to the currency, particularly its value, it would not be reasonable for the assessment in this case to be thought inordinately high.

[22] Earlier, reference was made to the case **Tai Hing Cotton Mill v Kamsing Knitting Factory**. There, the Privy Council dealt with the assessment of damages arising from a breach of contract. **It was apparent that substantial loss had been suffered but the material to enable the loss to be precisely quantified was lacking.** The Privy Council considered the possible courses that were open to it to resolved [sic] the matter. These courses included ordering a retrial, restoring the figures fixed by the lower court, or fixing a new figure. Lord Keith of Kinkel said:

> 'Their Lordships are not disposed to order a new trial. Amendment of the pleadings would be required and the delay, trouble and expense which would be involved in further proceedings do not appear to their Lordships to be consonant with the due administration of justice. **The problem about the figure of damages fixed by Briggs C.J. is that it was plainly arrived at upon a wrong basis, and that is now common ground between the parties. In the result, their Lordships have come to the conclusion that the ends of justice would best be served if they were to fix a new figure of damages as best they can upon the available evidence, such as it is**.'"
> (Emphasis supplied)

[77] After examining some useful cases on the issues before the court, Phillips JA wrote:

> "[60] In summary, from the above authorities, I deduce the following considerations:
>
> (1) The Court of Appeal is hesitant to interfere with an award of damages made in the lower court and will only do so in specific circumstances.
> (2) A person claiming damage must be prepared to prove their damage.
> (3) **If the damage sustained is clear and substantial, but the assessment of the same is difficult, the court must do the best it can in the circumstances**." (Emphasis supplied)

[78] Later at paras. [80] and [81], Phillips JA also stated:

> "[80] In my view, the approach of the learned trial judge was the same with regard to this issue as those stated at (a) and (b) above, which is why I would not disturb this award of general damages either. The principles are the same. As a result of a clear breach of the agreement, there was substantial loss which was clear. The Dennies were without the entire use of the fowl coop, which was important to them for the rearing of chickens, for several years unnecessarily. Had the resettlement house and the acreage of the property been as agreed, the fowl coop would have been constructed and available for their use, as against what occurred, which was an absence of the fowl coop, for an extended period, resulting in financial loss to them.
>
> [81] **In Chaplin v Hicks**, where the court was grappling with the lost opportunity of the plaintiff, due to the negligent actions of the defendant, to participate in a competition where the entrants had been reduced from thousands to 50, with a potential of winning 12 prizes, Vaughan Williams LJ who made it clear, that in spite of the arguments based on the fact that there was no assessable value of the lost opportunity, **emphasized that because precision could not be arrived at did not mean that damages could not be assessed.** He stated that:

> **'in such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that the damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract.'**

Fletcher Moulton LJ stated at page 795:

> 'I think that, where it is clear that there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there should be an absolute measure of damages in each case.'" (Emphasis supplied)

<u>Issue a: The lots for which compensation or damages are to be assessed</u>

[79] Six lots were impacted by the transmission lines and towers, rather than three. As was explored in paras. [153]-[157] of the judgment, there is no dispute that Mr Tulloch expressly indicated to JPS that lots 2A and 7B should have been skirted as they were riverside lots critical to the tourism development plans for Lethe Estate. He agreed that lots 6A and 8 could be included in the easement route. The two remaining lots are lots 6B and 7A, from which to identify the likely third lot. A review of the record of appeal suggests that Mr Tulloch also wished for lot 7A to be skirted. This seems logical, bearing in mind its proximity to lot 7B and the impact that it could have on tourism development plans for lot 7B. I agree with Lethe Estate's submissions that compensation should be assessed as regards lots 2A, 7A, and 7B.

<u>Issues d, e and f: Exemplary damages, interest at a commercial rate and for interest to run from the date of the trespass</u>

[80] At the outset, I will address Lethe Estate's request for exemplary damages, the award of a commercial rate of interest, and for interest to accrue from the date of trespass. The learned judge declined to award exemplary damages and interest at a commercial rate, and Lethe Estate did not appeal her decision. Additionally, Lethe Estate

did not raise any issue regarding the period from which interest should run in their counter notice of appeal. Consequently, such issues do not fall within the scope of this appeal and will not be further considered.

Issue b: Nominal damages

[81] But what of nominal damages? In **George Rowe**, the appellant, George Rowe, had not adduced any evidence regarding the value of the land or even the value of a fence that the respondent had destroyed. This court noted that although George Rowe sought $250,000.00 as damages, there was nothing that would assist the court in assessing the damages. As a result, this court awarded $50,000.00 as nominal damages. This was because he did not prove any quantifiable loss.

[82] I have considered JPS' submissions on the award of nominal damages. This is not a case in which it would be appropriate or fair for the court to award nominal damages, given that information is available regarding the amount paid for an easement over three lots.

Issue c: Exploring the applicable legal principles to ensure a fair assessment of damages

[83] I am grateful to counsel for the cases cited in this unusual matter. I have considered several useful points from them and now highlight some of these principles and interesting facts, insofar as they are relevant to the issues before the court.

[84] The discussion on the award of damages in this matter would be incomplete without a reference to **Whitwham**, an 1896 decision of the Chancery Division in the Court of Appeal of England and Wales. In that case, the plaintiffs owned land near the defendants' colliery. Over a period of time, the defendants dumped refuse from their colliery on the plaintiffs' land, covering a portion of it. At trial, it was declared that the land belonged to the plaintiffs, an injunction was granted to restrain the defendants from further dumping, and they were ordered to deliver up possession to the plaintiffs.

[85] An inquiry was to be undertaken to determine the damages that the defendants should pay for the injury the plaintiffs sustained since March 1888 due to the trespass by tipping or depositing spoil, or other refuse, on the land. The official referee provided a report and stated that the defendants' actions had made the plaintiffs' land valueless except for tipping purposes and indicated a sum to be paid representing the diminution in value caused by the defendants' trespass since March 1888. The court had to decide on the relevant principles to calculate the damages due to the plaintiffs. Lindley LJ wrote at page 541:

> "In this case we are all agreed that the principle acted upon by the learned judge is right. Let us consider what the defendants have done. They have done two things. They have, first of all, so used the plaintiff's land as to diminish its value, say by 200*l*. Mr. Russell admits that the defendants must pay that, but contends they are to pay no more. That leaves out of sight what more the defendants have done. What they have done more is this-they have been using the land for years. Why are not the plaintiffs to be entitled to some compensation in respect of that user? The plaintiffs have been injured in two respects. First, they have had the value of their land diminished; secondly, they have lost the use of their land, and the defendants have had it for their own benefit. It is unjust to leave out of sight the use which the defendants have made of this land for their own purposes, and that lies at the bottom of what are called the way-leave cases. Those cases are based upon the principle that, if one person has without the leave of another been using that other's land for his own purposes, he ought to pay for such user…Applying that reasoning to this case, on what principle of justice can it be said that these defendants are to use the plaintiff's land for years for their own purposes, and to pay nothing for it, in addition to the injury that they have done to the land? Chitty J. has proceeded upon that principle, and, the principle being right, the figures are not disputed. The appeal must be dismissed with costs."

[86] Rigby LJ's judgment was also helpful. He wrote at page 543:

> "I am of the same opinion. We have nothing to do with the figures, and we are only concerned with the principle of Chitty

> J.'s judgment, which I consider to be right. Independently of the permanent damage done, there has been a user of the plaintiff's land by the defendants. We cannot take an account of the profits derived by the defendants from such user; and in fact it is a matter of indifference whether the defendants made a profit or loss out of the transaction. They did use the land for the purpose of carrying over it the spoil which they ultimately deposited at the foot of the tip on the plaintiff's land…
>
> The principle is that a trespasser shall not be allowed to make use of another person's land without in some way compensating that other person for that user. Where the trespass consists in using a way over the plaintiff's land, a convenient way of assessing damages may be an inquiry as to way-leave, which, when there is a customary rate of charge for way-leave in the locality, may furnish a convenient measure of damages; but the principle is that in some way or other, if you can do nothing better then by rule of thumb, the trespasser must be charged for the use of the land."

[87] Arising from the **Whitwham** case, it is established that in such circumstances, it is appropriate for the court to award compensation both for diminution in the value of the land as well as for the user of the land.

[88] **Inverugie Investments Ltd v Hackett,** a 1995 decision of the Privy Council, on appeal from the Court of Appeal of the Commonwealth of the Bahamas, is central in our consideration of the issues in this case. Both Lethe Estate and JPS relied on it. In that matter the property consisted of 30 specified apartments in a larger hotel owned by the defendant, Inverugie. The plaintiff had leased the apartments for a term of 99 years. The defendant ejected the plaintiff, who then brought proceedings for possession. The defendant lost an appeal against the decision of the Court of Appeal of the Commonwealth of the Bahamas in favour of the plaintiff. Although the defendant faced a further order on 23 June 1986 ordering it to give possession forthwith, it did not do so until April 1990. The trespass lasted for 15 ½ years, and the question before the Board was the appropriate measure of damages. Both sides accepted that the plaintiff was

entitled to a reasonable rent for the period of the trespass. The question was how the reasonable rent should be calculated.

[89] Lord Lloyd of Berwick delivered the court's judgment. Their Lordships noted that in the ordinary cases where the plaintiff is the landlord of domestic premises and the defendant the tenant, the reasonable rent was almost always the rent reserved under the expiring lease. The difficulty in the case, however, was that the tenant was the plaintiff. Rowe JA in the Court of Appeal of the Commonwealth of the Bahamas took a different route from the other members of the panel in calculating the reasonable rent. Rowe JA opined that as the defendants were in possession of the plaintiff's apartments for 365 days in each year of the trespass, they were liable to pay the plaintiff the reasonable rent for the apartments, whether or not the defendants wished to or were able to rent them. He opined that the amounts the defendant earned from operating the hotel were irrelevant and focused on the reasonable rent that could be obtained for the plaintiff's apartments in summer and winter from tour operators over the 15 ½ years. He arrived at a figure after making certain deductions from the gross rental value of the 30 apartments.

[90] Their Lordships quoted with approval a passage from a judgment of Megaw LJ in **Swordheath Properties Ltd v Tabet** indicating that where a plaintiff has established that a defendant has remained on his property as a trespasser, he is entitled, without showing that he would have rented the property to someone other than the trespasser, to receive as damages for the trespass, the value of the property calculated fairly. In the absence of anything special in the particular case, the ordinary leasing value of the property would decide the amount of damages.

[91] Their Lordships referred to the user principle, which establishes that a plaintiff deprived of the use of his land is entitled to recover a reasonable rent for the trespasser's wrongful use of the property, and agreed with the approach taken by Rowe JA. The court applied the user principle and ruled that the defendant was to pay the going rate for the use of all 30 apartments for 15½ years. As the amount that Rowe JA arrived at was

greater than the sum awarded by the majority, and the plaintiff had not appealed the figure awarded, the defendant's appeal was dismissed.

[92] **Horsford v Bird and another**, cited by Lethe Estate, is a 2006 decision of the Privy Council on an appeal from the decision of the Eastern Caribbean Court of Appeal. The appellant and respondent had adjoining parcels of undeveloped land in Antigua. In or around 1986, the respondent decided to build on his parcel of land. The respondent built a new boundary wall and fencing that trespassed on the appellant's land. The judge at first instance refused a mandatory injunction for the removal of the wall and fence and ordered payment of damages instead. Their Lordships agreed with the judge at first instance, who took into account the extent to which the encroachment enhanced the amenities of the respondent's house. The additional land allowed for a passageway between the fence and the swimming pool wide enough to accommodate a vehicle driving around the pool and a larger garden space. Their Lordships noted that the cost of the building of the wall would have been "very substantially increased if the part of the wall forming the boundary with the appellant's land had to be removed and rebuilt along the correct boundary line". Their Lordships then stated:

> "[12]...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 *Wrotham Park Estate co Ltd v Parkside Homes Ltd*…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 for 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 into his garden. On the basis that the value of the piece of land as part of an undeveloped plot was EC$13,650, their lordships think that its value to the respondent as part of the garden of his new house would have been at least double that figure. Their lordships would therefore substitute the sum of EC$27,300 for the sum of EC$13,650 as the value of the land." (Italics as in the original)

[93] Their Lordships agreed that the case before them was not one in which a claim for aggravated damages could succeed. They, however, had a different position on damages in the form of mesne profits for the use the respondent made of the land and indicated that the appellant was entitled to compensation for the respondent's use of the land for eight years and three months. This was to be assessed annually as a percentage of the land's capital value. Taking the capital value as EC$27,300.00 their Lordships opined that an annual rate of 7.5% of that capital value would represent reasonable mesne profits. That rate yielded EC$2,047.50 per annum, and eight years and three months amounted to EC$16,892.00 up to the date of the judge's order at first instance.

[94] In **Enfield**, relied on by JPS, the Court of Appeal of England and Wales considered the assessment of damages for trespass under the hypothetical negotiation principle. The defendants had erected and maintained advertising hoardings that encroached on land owned by the claimant council. Trespass was admitted, and the issue before the court was the proper measure of damages. Expert evidence was obtained from a surveyor who assessed the hypothetical licence fees that reasonable commercial parties would have agreed for the use of the land. The court ultimately considered damages by reference to the value of the benefit derived by the trespassers from their use of the property.

[95] In reviewing the authorities, Henderson J, who wrote the judgment of the court, endorsed the statement of principle extracted by Vos J in **Stadium Capital Holdings Ltd v St Marylebone Property Co Plc** [2011] EWHC 2856 (Ch). Vos J stated:

> "31……In the light of these authorities, it seems to me that, in a trespass case of this kind**, "hypothetical negotiation damages"** of the kind described in these cases are obviously appropriate. **That negotiation is taken to be one between a willing buyer and a willing seller at an appropriate time (in this case accepted to be when the trespass began).** Events after the valuation date are generally ignored. **The fact that one party might have refused to agree is irrelevant.** But the fact that one party held a trump card and could have stopped the defendant obtaining any benefit is a relevant matter. **The value of the benefit of the trespass to a reasonable person in the position of the particular defendant is what is being sought. In other words, the price which a reasonable person would pay for the right of user, or the sum of money which might reasonably have been demanded as a quid pro quo for permitting the trespass**." (Emphasis supplied)

[96] Henderson J also referred to **Swordheath Properties Ltd v Tabet**, where it was held that a claimant who establishes trespass may recover damages assessed by reference to the ordinary letting value of the property, without having to prove that the property could or would have been let to another during the period of occupation.

[97] His Lordship noted that this principle was reaffirmed by the House of Lords in **Attorney General v Blake** [2001] 1 AC 268, where Lord Nicholls stated that, even where a landowner suffers no measurable financial loss, damages for trespass may be assessed by reference to the benefit obtained by the trespasser, namely the price that a reasonable person would pay for the right of user of the land.

[98] Henderson J further referred to **Sinclair v Gavaghan** [2007] EWHC 2256 (Ch), in which Patten J explained that the assessment requires consideration of: (i) the nature and purpose of the trespass; (ii) the benefit obtained by the defendant; and (iii) the alternatives available to the defendant. Patten J noted that:

> "35. ……**On the basis of these findings the court must then assess what payment would have been agreed for the temporary use of the claimants'**

> **land. It is not of course open to the defendants as part of this exercise to say that they would (if confronted with a demand for payment) have avoided making any use of the claimants' land. The purpose of the assessment is to calculate a sum which compensates the Claimants for the financial benefits which the Defendants actually made from using the [claimant's land]**." (Emphasis supplied)

[99] In applying those principles, Patten J, in **Sinclair v Gavaghan**, found that the defendants had merely obtained a more convenient means of accessing their development and that alternative means of access remained available, albeit less convenient and more expensive. Accordingly, only a modest licence fee was justified. The availability of alternatives was therefore recognised as a relevant factor in valuing the hypothetical licence fee.

[100] Henderson J, in **Enfield**, emphasised that the court must assume that a hypothetical agreement would have been reached, even where the parties may, in reality, have been unwilling to negotiate. The task of the court is therefore to determine what a reasonable trespasser would have paid for the right of user and what a reasonable landowner could have demanded for permitting that use.

[101] Applying those principles, Henderson J concluded that the trial judge erred in awarding only nominal damages. Accepting the expert evidence as a guide, and taking into account the alternatives available to the defendants, the court awarded damages based on the notional licence fee that would have emerged from the hypothetical negotiation, together with interest.

[102] **Eaton Mansions**, a 2013 decision of the Court of Appeal of England and Wales, also relied on by JPS, is another important decision on the hypothetical negotiation principle. In this case, Patten LJ wrote the judgment for the court. Eaton Mansions (Westminster) Ltd ('EML') was head lessee of a block of flats at Eaton Mansions. The freehold of the building was owned by Grosvenor Estate. Stinger Compania De Inversion

SA (‘Stinger’) was the lessee of two flats in the building. In June 2007, Stinger placed two condenser units on the roof of the building. These units were installed in breach of planning control and would never have been consented to by Grosvenor Estate. Grosvenor had excluded the installation of air conditioning from consent it gave in 2006 for refurbishment works to the flat. Consequently, EML could not consent to the installation of the units. EML issued a claim form seeking an injunction and damages for trespass. Stinger completed the sale of the two underleases on 11 March 2010, and the claim continued as one for damages. The trespass in question continued until the underleases were sold.

[103] EML accepted that it did not suffer any direct loss from the trespass apart from the cost of removing the equipment from the roof. However, it sought damages for trespass calculated by reference to what the court assessed that Stinger would have agreed to pay when the trespass commenced for permission to place the air conditioning equipment on the roof. Patten LJ stated it as common ground that the temporary, non-transferable consent subsisting until the date of the sale in 2010, would have had a very limited value, which the judge at first instance assessed in the sum of £6,000.00.

[104] Patten LJ also referred to **Attorney General v Blake**, as including a useful summary of the occasions when a court will assess damages in tort or contract on an alternative basis to compensation for direct loss. He wrote that in particular, Lord Nicholls observed that:

> "…. **As with breaches of contract, so with tort**, the general principle regarding assessment of damages is that they are compensatory for loss or injury. **The general rule is that**, in the oft quoted words of Lord Blackburn, **the measure of damages is to be, as far as possible, that amount of money which will put the injured party in the same position he would have been in had he not sustained the wrong:** *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39. Damages are measured by the plaintiff's loss, not the Defendant's gain. But the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this

> principle would not do justice between the parties. Then 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 his 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: see *Whitwham v Westminster Brymbo Coal and Coke Co*** [1896] 2 Ch 538, and the 'wayleave' cases such as *Martin v Porter* (1839) 5 M & W 351 and *Jegon v Vivian* (1871) LR 6 Ch App 742. A more recent example was the non-removal of a floating dock, in *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359.'" (Emphasis supplied)

[105] Patten LJ noted that, where an injunction is refused and a continuing trespass is permitted to continue, damages may extend to both past and future losses and may be assessed by reference to the benefit obtained or likely to be obtained by the wrongdoer. Such damages are often regarded as compensation for the loss of a bargaining opportunity or the price payable for the compulsory acquisition of a right.

[106] Patten LJ further observed that damages awarded in lieu of an injunction often compensate for the permanent infringement of a claimant's rights, although not every trespass case involves a permanent loss. Referring to **Wrotham Park Estate Co Ltd v Parkside Homes Ltd** and **Sinclair v Gavaghan**, His Lordship reiterated that, in assessing damages under the hypothetical negotiation principle, the court must consider the nature and purpose of the trespass, the benefit obtained by the trespasser, and any available alternatives. Patten LJ also stated that EML's claim in damages was not for its loss of opportunity in being able to negotiate a licence fee for the grant of the right in question. Further, EML was not entitled to recover the value of a permanent licence that it was never willing to grant. Rather, its recovery was limited to the value of the rights actually obtained by Stinger through the trespass. Accordingly, damages were to be assessed by reference to the benefit derived by the trespasser from its unlawful use of

the property and not by reference to a hypothetical right greater than that which was in fact acquired. The other members of the panel agreed with Patten LJ and upheld the lower court's award. Interestingly, the court also held that aggravated damages are not recoverable by a limited company.

[107] In **JPS v Enid Campbell and Marcia Clare**, a case relied on by Lethe Estate, Mangatal J, sitting as a judge of our Supreme Court, found at para. [51] that JPS had acted in breach of the easement contract it had with the owners when it embarked on a new route for its transmission or distribution lines over their land. The learned judge noted that the original plan with the owners did not show any tower being built on their land, and opined that the value of an easement will be higher where a tower has to be erected on a citizen’s land, as it occupies more land than transmission lines and is “far more intrusive”. Continuing, the learned judge wrote:

> “[51] …Further, in seeking to enforce an easement in an area where none existed by agreement, JPS were guilty of trespass on the Owners’ Land. An agreement that one can enter one portion of a person’s property, or exercise rights over it, does not translate to an agreement for one to enter or exercise rights upon another portion of property. So, for example, an occupier may invite visitors onto portions of his property but not onto others. In respect of the parts where there is no invitation, the person who would be classified as a visitor to the invited property, may become a trespasser in respect of the other.”

[108] Mangatal J, having refused injunctive relief, held that the owners' remedy lay in damages in lieu of an injunction. The learned judge considered that the wayleave cases, particularly **Whitwham**, provided the appropriate framework for assessing damages for trespass. Her Ladyship noted that **Whitwham** recognised two heads of loss: diminution in the value of the claimant’s land and the loss of the claimant’s use of the land, coupled with the benefit derived by the trespasser. However, the learned judge found that there was no evidence before the court upon which the user principle could properly be applied, as no evidence had been adduced regarding the value or benefit of the land to JPS for the purpose for which it was being used. In particular, she rejected the submission that

the estimated cost of relocating the transmission line could be equated with the benefit obtained by JPS from its use of the land. Her Ladyship further observed that the case was distinguishable from the usual trespass case because the parties had already agreed to the grant of an easement, and JPS would in any event have been entitled to use a portion of the owners' land for transmission lines.

[109] In assessing damages, Mangatal J held that, where damages are awarded in lieu of a permanent injunction, the appropriate valuation date is the date of judgment rather than the date of the loss. Her Ladyship preferred the valuation approach adopted by Edwin Tulloch-Reid and Associates because it assessed both the value of the easement corridor and the diminution in value of the remaining land. Given the absence of evidence to support damages based on the benefit obtained by JPS, the learned judge assessed compensation by reference to the value of the easement area and the diminution in value of the affected property, ultimately awarding damages for trespass in the sum of $3,750,000.00, subject to a deduction for sums previously paid under the easement agreement.

[110] Mangatal J went on to award the owners aggravated damages.

[111] The above review of cases establishes the following helpful principles, some of which may overlap slightly:

i. Trespass is actionable without needing to prove loss. However, proof of loss is necessary to help the court determine an appropriate damages award (**George Rowe v Robin Rowe**);

ii. Claimants must be prepared to prove their damages (**Jamalco**);

iii. If it is clear that a claimant has suffered substantial damage, but assessing the damage is difficult, the court must do the best it can, given the circumstances (**Jamalco**);

iv. A trespasser is liable for any diminution in the value of the property affected by his/her activities on the property, as well as for the use of the property, whether temporarily or permanently (**Whitwham**);

v. In cases of trespass, the court considers what sum the claimant might reasonably have sought from the trespasser as compensation for allowing the use of its property. The benefit that the trespasser gained by including the trespassed land in its development may mean that the undeveloped value of the land is not the correct measure to use when assessing damages. The court may determine the value of the land by considering what it permitted the defendant to achieve (**Horsford v Bird**);

vi. The relevant principle in trespass cases of this kind is "hypothetical negotiation damages". This negotiation is assumed to be between a willing buyer and a willing seller. It does not matter if one party might have refused to agree; it must be presumed that the hypothetical negotiation would have resulted in an agreement. The court aims to determine the value of the benefit of the trespass to a reasonable person in the defendant's position. The question is what price a reasonable person would pay or the amount that might reasonably have been demanded for allowing the trespass (**Enfield**);

vii. Any possibility that the trespasser could have achieved the object of the trespass through other means must be considered in the hypothetical negotiation (**Enfield**);

viii. It is important to consider whether the compensation is for a continuing and permanent invasion and loss of rights by the claimant. If the court refuses to grant an injunction, thus allowing the trespass to continue indefinitely, it may award damages that cover future losses expected from the ongoing trespass, as well as past losses (**Eaton Mansions**). The damages awarded are often considered as compensation for the loss of a bargaining opportunity or the cost of a compulsory acquisition of a right;

ix. In attempting to establish the value of the trespass for the defendants, the court will consider what the acts of trespass were, what the purpose of the trespass was (what was to be achieved), and what alternatives the defendant had for using the trespassed property to carry out the intended works (**Eaton Mansions**);

x. The court may consider the fact that the respondent had agreed to transmission lines and towers crossing the land, and therefore, the use of an altered route (or additional lots) would not constitute exploitation to the same extent as it would if there had been no easement agreement. (**JPS v Enid Campbell**);

xi. Where the court is granting damages under its equitable jurisdiction, taking account of the future as well as the past, the court may assess damages as at the date when the mandatory permanent injunction could have been ordered. (**JPS v Enid Campbell**); and

xii. The cost of relocating and reconstructing the towers and lines would not equate to the value/benefit of JPS using the property (**JPS v Enid Campbell**).

[112] Although JPS proposed an award of nominal damages to Lethe Estate, it also acknowledged the potential applicability of the hypothetical negotiation damages principles based on the consideration in the easement/wayleave agreement signed between Mr Tulloch and JPS. Lethe Estate has also included this principle in calculating a proposed compensation amount. I agree with the parties that the principle is appropriate and applicable in the instant case.

<u>Applying the hypothetical negotiation damages principles</u>

[113] Therefore, the court must examine the original agreement and any relevant surrounding circumstances to identify which facts will assist in determining damages

based on a hypothetical negotiation for easement access to the three additional lots. The situation is made even more complex because two of the lots involved were those Mr Tulloch had insisted were not to be impacted by the tower lines and transmission towers due to plans for tourist activities.

[114] A look at the exact terms of the letter agreement is essential. It stated:

> "March 27, 1996
>
> Francis Tulloch
>
> Lethe Copse P.A.
>
> HANOVER
>
> **Attention: Mr Francis Tulloch**
>
> Dear Sirs:
>
> **Re: Easement Settlement for Property at Lethe-Orange Bay/Bogue Transmission Line**
>
> Further to our meeting of February 28, 1996, and also subsequent discussions, this is to document the items you require as consideration for settlement of the easement and property damages and other encumbrances. It is understood that these listed issues represent your considered and final requirements to settle this matter.
>
> <u>Items of Consideration/Encumbrances</u>
>
> 1. Compensation for grant of easement for the Orange Bay-Bogue transmission line, the easement path being approximately 2700 feet long by 100 feet wide (approximately 6.2 acres) and containing three transmission tower locations. **It is recognized and agreed that three subdivision lots will be affected by the presence of the transmission lines.**
>
> 2. The use of the property and subdivision roads during construction of the transmission line. Some of these roads were to be constructed by JPSCo.

3. The reservation of approximately 1500 ft. of your subdivision roads, with extensions to the tower sites, to allow JPS permanent access to maintain two (2) of the transmission tower angle stations on your property.

4. Compensation for JPS cutting of temporary access roads on your property, inclusive of an access road to a transmission tower site in an adjoining (Mr. Allison's) property.

5. Compensation related to your making of a road diversion in your banana plantation for the Jitney tour ride. The Jitney tour ride is being shortened as a result of the road diversion, also there is loss of income from the section of the banana plantation through which the road diversion will be made.

6. Compensation for income loss from bananas that will be destroyed in order to place one of our towers.

7. Compensation for the two purchasers you had to relocate on more expensive lots because we did not construct roads and extend the lines by October 10, 1995.

8. Compensation for the nuisance caused to the users of your attractions as a result of the roads not being completed by October 10, 1995 which impacted negatively on the attractions.

9. Compensation for diminution in value of a third subdivision lot, approximately 17 acres in size.

10. Compensation suffered by your environmentally friendly development.

Items 1,2 and 3 above were to be settled by JPSCo's payment of $1 million cash, upgrading of property and subdivision roads and also an extension of the JPS distribution system on your property at a total costs of $3 million. These were to be completed by JPSCo by October 10, 1995, you now require a cash payment of $3 million to cover these items.

New considerations are listed in items 4 to 10, for which you require an additional payment of $2 million cash.

> You had stated that you required a settlement of $6 million for all the items of consideration and encumbrances listed herein. However, subject to JPS Board of Directors approval, for a speedy conclusion you will accept a total of $5 million as full and final settlement, to be paid by March 31, 1996.
>
> JPS understands that you are still prepared to go to arbitration.
>
> Please sign the enclosed copy of this letter to confirm your receipt and also that you are in agreement with the contents. The contents of this letter is [sic] in addition to the rights accruing to JPS consequent upon the execution of the easement.
>
> Yours truly
> JAMAICA PUBLIC SERVICE COMPANY LIMITED
>
> ……………………………………………………………
>
> J.E. MURRAY
> MANAGER, ENGINEERING SERVICES." (Emphasis supplied)

[115] The matter went to the directors' meeting of JPS held 4 April 1996, an excerpt from the minutes of the meeting reads:

> "**Approval of Easement-Francis Tulloch**
>
> There was circulated to the meeting a recommendation to the Board for the approval of the payment of $5,000,000 to Mr. Francis Tulloch for the acquisition of an easement over lands at Lethe District in Hanover to accommodate the construction of the Orange Bay to Bogue 69kv Transmission Line.
>
> The Board was informed that it had previously agreed at its meeting of October 19, 1995 to acquire the easement for $3,000,000. As a result of the agreement reached with Mr. Tulloch construction work on the line had commenced.
>
> Mr. Tulloch has changed his mind and has requested $3,000,000 in cash and a new claim of $2,000,000 in respect of interference with three lots in his sub-division being affected by the Transmission Line, the use of his property

roads and the cutting of access roads of over 5,000' long X 16' wide, 1472' of the permanent roads to be used by JPS in order to maintain the lines. The cost would also cover the making of a road diversion for Mr Tulloch's 'Jitney Tour Ride' to obviate the need for tourists to travel under the path of the Transmission Line.

It was-

RESOLVED that-

this Board HEREBY-

(a) REVOKES its resolution passed on October 19, 1995 authorizing the payment of $3,000,000 in cash to Mr. Francis Tulloch for easements acquired over his land at Lethe District in Hanover;

(b) APPROVES

i) The acquisition of an easement from Mr. Francis Tulloch over lands at Lethe District, Hanover, to accommodate the construction of the Orange Bay to Bogue 69 KV Transmission Line;

ii) the payment of $5,000,000 for the said easement on the following basis: -

$3,000,000 in cash and $2,000,000 to settle new claims, namely for three (3) lots in his subdivision being affected by the Transmission Line, the use of Mr. Tulloch's property roads and the cutting of access roads of over 5000' long X 16' wide. 1472' of the permanent roads to be used by JPS in order to maintain the lines, and the making of a road diversion for Mr. Tulloch's 'Jitney Tour Ride' to obviate the need for tourists to travel under the path of the Transmission Line;

(c) AUTHORIZES the execution by the Chief Executive/Managing Director and Secretary & Senior Legal Counsel of the agreement or any other document to give effect to this transaction or under the Corporate Seal if this is considered necessary." (Emphasis supplied)

[116] There is evidence of an incomplete grant of easement dated 4 April 1996 between Mr Tulloch and JPS, for a consideration of $5,000,000.00. Mr Tulloch indicated that he received this sum and subsequently transferred it to Lethe Estate. It therefore appears that $5,000,000.00 represented the agreed price for the easement.

[117] It is also significant that, by letter dated 27 March 1996, the proposed easement corridor was estimated to be approximately 2,700 feet in length and 100 feet in width. According to the map showing the as-built power line route overlaid on the subdivision plan approved by Hanover Parish Council, the actual distance of the power line across the property is approximately 779.053 metres (or about 2,556 feet 11.328 inches). This indicates that the final easement path was broadly consistent with the estimate contained in the letter agreement.

[118] However, the extent of access reserved for JPS appears to have significantly exceeded that originally contemplated. The March 1996 correspondence indicated that approximately 1,500 feet of subdivision roads would be reserved, together with extensions to tower sites. The Board approval referred to 1472 feet of the permanent roads to be used by JPS in order to maintain the lines. In contrast, the diagram prepared by Llewelyn Allen and Associates indicates that approximately 1,862 metres (or about 6,108 feet) of roads are now used to access JPS' facilities.[1] This represents more than four times the extent originally envisaged.

[119] The documentary material further indicates that various elements of compensation were included in the agreed sum. These included compensation for loss of income from banana cultivation, apparently related to one of the agricultural lots covered by the original agreement, as well as compensation for the diversion of a road within the banana plantation for a jitney ride.

[1] See Volume 2 page 249

[120] Provision was also made for compensation relating to the relocation of two purchasers and for inconvenience or nuisance arising from the disruption of access and incomplete roadworks. These elements appear to have been fully absorbed within the original compensation paid.

[121] Of particular note is the reference to compensation for diminution in value in respect of a third subdivision lot of approximately 17 acres. This appears to have been confined to a single lot, and it is not immediately clear why that lot alone was identified for such treatment.

[122] As explained in **JPS v Enid Campbell**, it is not appropriate to use the costs JPS would incur if required to reroute power lines and remove transmission towers as the measure of compensation for 'user' of the property. I agree with King's Counsel that the relocation cost of the transmission lines and towers is not equivalent to the benefit derived from the use of the land. The cost, however, may influence the compensation the court sees fit to award.

[123] In the circumstances of this case, the court cannot consider the devaluation of the dollar or the increase in property values. Using the consumer price index at the relevant time will be the best the court can do (Issue d).

[124] Lots 2A, 7A, and 7B should not have been impacted, given their significance for commercial use in tourism, their superior ambiance, and their foreign-exchange-earning potential. These are lots that Mr Tulloch had repeatedly insisted ought not to have been included in the easement path. What was the extent of the impact? These lots were severely affected by the JPS installations. Mr Langford described the lots directly impacted by the transmission lines and towers as sterile and best suited for pasture. This court accepted this professional assessment. While counsel for Lethe Estate has referenced and relied on a 96% reduction in the value of the riverside lots, the court did not accept this evidence. Although Mr Langford's testimony regarding the actual decrease in value was not accepted, the court recognises that the reduction in value is significant, considering

the high commercial value of the lots and the negative impact the towers and power lines have on their ambiance.

[125] The trespass is permanent, and JPS' installations require continuous access and maintenance. JPS derived significant benefit from the use of the lots, particularly as an alternative original path for the easement would have been extremely expensive. In addition, the significant value of the easement to JPS is without question, bearing in mind the expense it would incur to reconstruct the transmission line at an approximate cost of US$4,200,000.00 if the company were to be forced to remove the towers and lines.

[126] What is the usual value of the riverside lots in the area? The court accepted Mr Langford's evidence and his description of property in the locality as becoming 'semirural' and 'suburban'. In his report, he also pointed out that properties in the locality offered 'luxury riverside residencies'. Further, the claim that the riverside properties were earmarked for tourist commercial activities was established. Great River Rafting, a party to the claim below, was licenced to offer a recreational river activity with a finishing point on the relevant riverside lots. Consequently, the riverside lots in particular were far more valuable than agricultural lots in the area.

[127] Another matter to consider is the duration of trespass. This trespass has lasted thus far for an extensive period, from between 1995 and 1997 up to the time of trial in February 2018. Approximately 21 years.

[128] I note Lethe Estate's submissions regarding JPS' conduct. The issue of how JPS decided on the easement route would be more relevant to a decision on whether to award exemplary damages; however, that matter was not raised on appeal in a counter notice of appeal.

[129] As indicated above, I agree with the parties that the best and most logical approach is to examine the evidence of sums negotiated between Mr Tulloch and JPS in 1996 and apply the principles of hypothetical negotiating damages. I disagree with King's Counsel's submission, however, that such damages would only focus on the user

principle. This is because the sums negotiated included consideration of the diminution in value of the subdivision. If the diminution in value of the subdivision as a whole (at a time when the riverside lots were not supposed to be impacted) was taken into account, it follows that an easement impacting the most valuable lots in the subdivision (which Mr Tulloch explicitly stated were not to have been impacted) must include an element for the diminution in value of these particularly valuable lots. Therefore, the hypothetical negotiating damages must consider both the user principle and the diminution in value of the three lots. The consideration of diminution in the value of the lots, as well as the permanent use of the property, is consistent with the **Whitwham** principle.

[130] The issues of (i) the extent of the impact of the trespass, (ii) the benefit gained by JPS by virtue of the trespass, and (iii) the usual value of the riverside lots in particular, were explored above. Having established that the agreed consideration for the easement in 1996 was $5,000,000.00, it is necessary to identify what components formed part of that sum and which are relevant to the present assessment. JPS has submitted that the agreed compensation for the easement was $1,000,000.00. The evidence from the JPS Board minutes, however, confirms that the easement compensation figure was $5,000,000.00. It must, however, be acknowledged that certain elements included in the figure would not be relevant in an assessment at this point. For example, the current assessed figure would not include:

i. Compensation to make a road diversion in the banana plantation for a jitney tour ride.

ii. Compensation for income loss from bananas that were to be destroyed in order to place a tower.

iii. Compensation for two purchasers who had to be relocated.

iv. Compensation for nuisance.

v. Compensation in value for one of the three subdivisions included in the original compensation.

[131] Other matters to be taken into account include the fact that the easement path did not increase. However, JPS uses four times the intended original length of Lethe Estate's subdivision roads to access its facilities. As explored above, the additional impacted lots are far more valuable than the lots originally intended to be included in the easement path. The inclusion of these lots resulted in savings for JPS, and relocation of the transmission line would be at a tremendous cost and result in the dislocation of consumers.

[132] In reviewing the March 1996 letter again, it appears that Item 1 – reflects the fact that 3 lots were to be impacted by transmission lines and towers, and there is a reference to the easement path. As indicated earlier, although six lots were impacted, the original easement path is not increased, (compensation for user principle).

[133] Items 2 – 4 of the letter addressed the use of subdivision roads, reservations of subdivision roads with extensions to tower sites, and the cutting of temporary access roads. After the impact on six lots, four times more access roads are utilised by JPS than originally intended, (compensation for user principle).

[134] Item 9 in the letter made specific reference to the diminution in value of a particular lot among those to be directly impacted. This justifies consideration of the diminution in value of three prime lots of great commercial value, particularly the two riverside lots, (compensation for diminution in value).

[135] I have asked myself what Mr Tulloch might reasonably have asked for as a price for the easement affecting his most valuable riverside lots. Additionally, what is the value of the benefit to JPS, and what price might JPS have been willing to pay to include Lethe Estate's most valuable lots in its easement path?

[136] I have considered that it would have caused JPS significant difficulty to use an alternative route for the easement. I also recognise that the compensation is for an ongoing, permanent invasion and loss of rights by Lethe Estate. The riverside lots will always have these transmission lines and towers, which are unattractive and even feared by residents (see witness statement of Francis Tulloch at para. [33]), negatively affecting the ambiance of the lots and the tourist development intended to generate substantial foreign-exchange earnings. The erection of a transmission tower on a property has often been seen as more intrusive than the passage of transmission lines, and, in this case, at least one tower was erected on a riverside lot.

[137] Although Lethe Estate had no intention to grant an easement to JPS that would impact these three additional lots, it is nevertheless arguable that Lethe Estate has a claim for the loss of opportunity to negotiate a substantial easement fee.

[138] This court has to estimate a fair price for the trespass in the absence of expert evidence of an easement price at market rate or of the actual diminution in value of the relevant lots. The compensation will also take account of prospective loss.

[139] Upon a review of the March 1996 letter signed by Mr Tulloch, it can reasonably be said that any new compensation can properly take into account items 1 – 4 (compensation for user) and item 9 (diminution in value of the three valuable lots). Taking into account all the relevant principles and in all the circumstances, in my view, it would be appropriate to utilise a figure of $12,500,000.00 ($5,000,000.00 x 2.5) as negotiating damages in all the circumstances.

[140] JPS accepted in its submissions that the Consumer Price Index ('CPI') would be applied to any figure calculated as the hypothetical negotiating damages. Using a CPI to adjust for inflation, with the CPI for April 1996 at 15.1 and February 2018 at 95.1, $12,500,000 divided by 15.1, then multiplied by 95.1, equals $78,725,165.56.

[141] Accordingly, I suggest that the damages be assessed at $78,725,165.56.

Costs

Submissions on behalf of JPS

[142] On costs, Mrs Mayhew referred to rule 1.18(1) of the CAR, which applies parts 64 and 65 of the Civil Procedure Rules, 2002 ('CPR'), to costs in this court. King's Counsel noted that rule 64.6 reflects the principle that costs follow the event but allows discretion for different orders based on circumstances, including partial success or unnecessary pursuit of issues. King's Counsel submitted that in **Capital & Credit Merchant Bank Ltd v Real Estate Board** [2013] JMCA Civ 48 and **Private Power Operators Ltd v Industrial Disputes Tribunal and others** [2021] JMCA Civ 18A, the court confirmed that costs must reflect overall justice.

[143] King's Counsel contended that JPS succeeded on both main issues, whether the easement agreement bound Lethe Estate and whether the damages awarded were appropriate, even though the judgment for trespass was affirmed. It was urged that the main objectives of the appeal were achieved, and JPS' liability for damages does not negate its success.

[144] Accordingly, Mrs Mayhew submitted that JPS should be awarded 85% of its costs on the appeal, as well as costs for Lethe Estate's unsuccessful application to vary the court's orders (refused on 2 June 2025) and on the dismissed counter-notice of appeal. Pursuant to rule 64.12(3) of the CPR, King's Counsel indicated that JPS seeks a special costs certificate for three attorneys-at-law, given the complexity and weight of the matter, especially since Lethe Estate was also represented by three counsel.

Submissions for Lethe Estate

[145] Regarding costs, Dr Barnett argued that rule 64.6(1) of the CPR sets the general principle that costs follow the event, meaning the unsuccessful party must pay the successful party's costs. Counsel cited **Stewart Brown Investments Ltd and others v National Export-Import Bank Jamaica Ltd** [2023] JMCA Civ 4, where this court awarded 70% of costs instead of 80%, noting that although the respondent was generally

successful, its failure on counter appeals justified a reduction. Counsel further argued that this court should consider that costs should reflect the time and effort spent on specific issues.

[146] Learned counsel also placed reliance on **Private Power Operators Ltd v Industrial Disputes Tribunal and others**, where the court adopted guiding principles from **Johnsey Estates Ltd (1990) v Secretary of State for Environment** [2001] EWCA Civ 535 and **Bardi Limited v McDonald Millingen** [2021] JMCA Civ 25 ('**Bardi Ltd**'). It was argued that these principles confirm that while costs generally follow the event, the court may make different orders for discrete issues, deprive a party of costs for unreasonable conduct, and exercise discretion to achieve overall justice. It was submitted that the first question is always who won the appeal, followed by either a detailed assessment or a broad-brush judgment of costs.

[147] Counsel submitted that although the court upheld JPS' liability for trespass and damages, it would reassess the quantum due to deficiencies in expert evidence. It was submitted that most submissions and hearing time focused on liability, and JPS succeeded only on a minor point regarding comparables. Counsel argued that JPS therefore failed to achieve its primary objective of overturning liability, while Lethe Estate succeeded in affirming liability and securing substantial damages. Counsel opined that Lethe Estate is clearly the overall successful party. Reference was made to Phillips JA in **Bardi Ltd**, who wrote that the key question is who won the appeal, and counsel submitted that here, Lethe Estate did. Counsel also cited **Gordon Stewart v Goblin Hill Hotels Ltd & others** [2016] JMCC Comm 39, where Sykes J (as he then was), relying on **Day v Day** [2006] EWCA Civ 415, reinforced that the successful party is generally the one who must be paid money by the other. Applying this principle, counsel stated that JPS will write the cheque to Lethe Estate. It was argued that this conclusion remains unaffected by Lethe Estate's post-judgment application for directions, which were case management issues and whose costs are typically considered as costs in the appeal. Moreover, counsel asserted that the court granted Lethe Estate most of the directions it sought. Accordingly,

it was submitted that costs should follow the event and that Lethe Estate should be awarded its costs of the appeal, or at least 95% of those costs.

[148] Counsel further relied on rule 64.12(3) of the CPR, which permits certification for more than two attorneys-at-law where justified by the importance, complexity, and novelty under rule 65.17(3) of the CPR. It was submitted that this case involved a substantial record of approximately 900 pages, excluding submissions and authorities, and Lethe Estate reasonably retained three counsel, so costs should be awarded to Lethe Estate with a certificate for three counsel.

Ruling on costs

[149] Rule 1.18 of the CAR provides that CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal, subject to any necessary modifications. Additionally, rule 64.4 of the CPR provides that this court, when hearing an appeal, may make orders about the costs of the proceedings that gave rise to the appeal as well as the costs of the appeal.

[150] The general rule is that, when a court orders costs, it must require the unsuccessful party to pay the successful party's costs, (see rule 64.6(1) of the CPR). However, the court may, under rule 64.6(2) of the CPR, order a successful party to pay all or part of the unsuccessful party's costs and may also choose not to make any order regarding costs. The award of costs is a discretionary decision, and there is no right to it. If the court finds it appropriate to award costs, it must consider all the circumstances of the case.

[151] Rule 64.6(4) of the CPR provides a very useful framework for the assessment of costs. After reviewing many cases on costs, it seems to me that the rule covers the key principles emerging from the authorities and illustrates the factors to which the court must have regard. The rule requires the court to consider:

> "(a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

(c) any payment into court or offer to settle made by the party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);

(d) whether it was reasonable for a party –

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(e) the manner in which a party has pursued –

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue;

(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim."

[152] In addition, rule 64.6(5) states:

"(5) The orders which the court may make under this rule include orders that a party must pay -

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings;

(g) costs limited to basic costs in accordance with rule 65.10; and

(h) interest on costs from or until a certain date, including a date before judgment.

(6) Where the court would otherwise consider making an order under paragraphs (5)(c) to (f), it must instead, if practicable, make an order under paragraph (5)(a) or (b)."

[153] In its notice of appeal, filed 9 March 2018, JPS sought the following orders:

"i. The judgment of the Honourable Miss Justice Simmons be set aside.

ii. Judgment be entered for the Appellant.

iii. In the alternative, that the award of damages for trespass be reduced.

iv. Costs of the Appeal and costs in the Court below to the Appellant be taxed if not agreed."

[154] This court will, therefore, consider the award of costs for both the proceedings below and those in this court. The court partially allowed JPS' appeal but upheld the judgment in favour of Lethe Estate. The damages awarded previously were set aside, and this court has now reassessed the damages, resulting in a new, higher award. Importantly, the court has already ruled that there is no order as to costs regarding Lethe Estate's counter-notice of appeal.

[155] The assessment of costs usually involves a review of the issues before the court and how they were resolved. In this appeal, generally speaking, the issues were whether the learned judge erred in finding that the easement/wayleave agreement did not bind Lethe Estate, and whether the learned judge erred in awarding damages on the basis and in the amounts indicated in the judgment (see para. [41] of the judgment).

[156] Regarding whether the easement or wayleave agreement bound Lethe Estate, as stated in the judgment, (see para. [77]), JPS initially claimed in its pleadings that it had

not entered into a grant of easement with Lethe Estate, but only with Mr Tulloch. JPS argued that Lethe Estate was not entitled to sue for damages for trespass or breach of contract. It was only after the learned judge delivered a ruling accepting that Lethe Estate was not a party to or bound by the easement agreement and ordering JPS to pay damages for trespass that JPS then sought to have the judge vary her ruling to find that Lethe Estate was bound by the agreement. The learned judge did not accept JPS' arguments. However, on appeal, this court found that the easement or wayleave agreement did bind Lethe Estate, since it held the property in trust for Mr Tulloch. Lethe Estate had filed its pleadings based on being bound by the agreement Mr Tulloch entered into with JPS. Therefore, although JPS succeeded on this issue, the history of the proceedings will significantly influence the decision on costs.

[157] This court agreed that JPS had committed trespass on Lethe Estate's property because the agreement signed with Mr Tulloch covered three lots in the subdivision, but the transmission lines and towers affected six lots. Therefore, JPS was liable for damages due to trespass on three additional lots.

[158] On the issue of the damages assessed by the learned judge, this court concluded that the learned judge erred in relying on the expert evidence of Mr Langford and in the basis on which she assessed damages. As we stated in our conclusion at para. [160]:

> "[160] In concluding, in my view,
>
> a. It was open to the learned judge to find that the easement/wayleave agreement entered between Mr Tulloch and JPS was valid;
>
> b. The learned judge erred in her finding that the easement/wayleave agreement did not bind Lethe Estate as Lethe Estate held the New Milns land in trust for Mr Tulloch;
>
> c. The learned judge erred in adopting Mr Langford's assessment of the loss which required utilising the property values proposed by Mr Langford, as his evidence

was unreliable because he did not provide comparable property values although he purported to have done a comparative assessment;

d. The learned judge erred in awarding compensation for the lots that were not directly impacted by the transmission towers and lines as compensation for that indirect impact was included in the $5,000,000.00 provided to Mr Tulloch and handed over to Lethe Estate;

e. The learned judge erred in failing to compensate Lethe Estate for the three additional lots that were directly impacted by the JPS transmission towers and lines."

[159] Of these findings, it would only be items c and d above that could be seen as rulings that were not in Lethe Estate's favour.

[160] In this appeal, I am attracted to Ward LJ's approach in **Day v Day** where he stated:

> "[16] We must ask ourselves whether the primary rule applies in this case – the general rule, that is, that the unsuccessful party will ordinarily be ordered to pay the cost of the successful party unless the court thinks otherwise. The question is, which, if any, of these parties did enjoy success in this litigation? We were referred to a judgment of Lightman J in *Bank of Credit and Commerce International SA v Ali* (no 3) [1999] NLJ 1734 Vol 149 where he said that:
>
>> **'For the purposes of the CPR success is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense.'**
>
> [17] **I would go further and say that in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case; and there is absolutely**

> **no doubt at all that the person who has to put his hand in his pocket and pay up the money that is in dispute was Phillip. He failed; his mother succeeded.** She succeeded, all the more so, because Phillip adamantly and persistently refused to pay her a penny piece, notwithstanding his fallback position. So I am in no doubt at all that this case did not end in a draw, but ended in victory for mother. Therefore the ordinary rule should apply, and the judge was correct in applying it to the cut off point of 14 February; but was, I regret to say, in error in failing to apply it for the costs of the hearing. That hearing was necessary. This unfortunate mother had to pursue her son to the judgment seat in order to recover that which was rightfully found to be hers. There was in my judgment, therefore, a fundamental error of principle in the judge's analysis which itself allows this court to intervene." (Emphasis supplied)

[161] This method of determining who is responsible for paying money to the other, especially in a commercial setting, to help establish the winning party, also attracted the attention of Sykes J in **Gordon Stewart v Goblin Hill Hotels Limited and others** (see para. [6] of his judgment on costs in the proceedings).

[162] On assessment, it can be seen that, overall, Lethe Estate succeeded in establishing JPS' liability and in its claim for damages. Inadequacy of its expert evidence and the learned judge's error in approach to the assessment, however, led to the overruling of the award of damages and for damages to be reassessed. In my view, a fair resolution of the costs here and below is for JPS to pay 80% of Lethe Estate's costs in the court below and on appeal, to be agreed or taxed.

[163] On the other hand, contrary to its submissions, Lethe Estate was not successful in its application to vary the orders of this court. It did not satisfy this court that there was authority to do what it sought. I note Rule 64.6(6) that provides that instead of making an order that a party pay costs relating to a distinct part of the proceedings, the court must, if practicable, make an order for a party to pay a proportion of another party's costs or a stated amount of another party's costs. In this matter, I believe it would be less complicated to make an order for costs solely relating to the application. In my view,

costs of the application to vary the court's orders should be awarded to JPS, to be agreed or taxed.

[164] Both sides have sought orders for special costs certificates. Rule 64.12(3) provides:

> "(3) **The court, having regard to the matters set out in rule 65.17(3), may direct that the costs of the attendance of more than -**
>
> (a) one attorney-at-law on the hearing of an application; or
>
> **(b) two attorneys-at-law at the [hearing of the appeal],**
>
> **Be allowed.**
>
> (The grant of a "special costs certificate" entitles the receiving party to a higher level of basic costs under Appendix B, Table 2 to this Part.)." (Emphasis supplied)

[165] It must be noted, however, that CAR 1.18(4) provides that Appendices A and B of rule 65 of the CPR do not apply to appeals.

[166] Rule 65.17 of the CPR provides:

> "(1) Where the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount -
>
> (a) that the court deems to be reasonable; and
>
> (b) which appears to the court to be fair both to the person paying and the person receiving such costs.
>
> (2) Where the costs to be taxed are claimed by an attorney-at-law from his or her client, these costs are to be presumed -
>
> (a) to have been reasonably incurred if they were incurred with the express or implied consent of the client;

(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client; and

(c) to have been unreasonably incurred if -

(i) they are of an unusual nature or amount; and

(ii) the attorney-at-law did not inform his or her client that the client might not recover them all from the other party.

(3) **In deciding what would be reasonable the court must take into account all the circumstances, including -**

(a) any orders that have already been made;

(b) the conduct of the parties before as well as during the proceedings;

(c) the importance of the matter to the parties;

(d) the time reasonably spent on the matter;

(e) whether the cause or matter or the particular item is appropriate for a senior attorney-at-law or an attorney-at law of specialised knowledge;

(f) the degree of responsibility accepted by the attorney-at law;

(g) the care, speed and economy with which the matter was prepared;

(h) the novelty, weight and complexity of the matter; and

(i) and in the case of costs charged by an attorney-at-law to his or her client-

(i) subject to section 21 of the Legal Profession Act, any agreement that may have been made as to the basis of charging;

(ii) any agreement about the seniority of attorney-at law who should carry out the work;

(iii) whether the attorney-at-law advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the matter.

(4) The registrar on taxation may not allow an attorney-at-law less than the rates set out in Appendix B.

(5) In this rule the expression 'court' includes a registrar." (Emphasis supplied)

[167] In my view, this is a matter in which the parties were justified in hiring more than two attorneys-at-law for the hearing of the appeal and applications, bearing in mind the importance of the matter to the parties, the time reasonably spent, the novelty, weight, and complexity of the matter, and the need for senior attorneys-at-law to handle it. A special costs certificate ought to be granted for three attorneys-at-law to represent both JPS and Lethe Estate in the appeal, and various applications before this court.

Stay of Execution

Submissions on behalf of JPS

[168] Finally, Mrs Mayhew addressed the stay of execution. King's Counsel noted that as a condition of the stay pending appeal, JPS paid $20,000,000.00 to Lethe Estate. It was submitted that upon the court's final award, this sum should be credited against the judgment as of the date of payment. Thereafter, the parties should then conduct an accounting to reconcile any difference between the amount paid and the total liability, including damages, interest, and costs.

Submissions on behalf of Lethe Estate

[169] Regarding the stay of execution, Dr Barnett submitted that the stay granted on 12 June 2018 was to remain in effect pending the outcome of the appeal. Since the court's decision on damages and costs will dispose of the appeal, it was submitted that the stay will automatically dissolve upon delivery of the decision.

Discussion

[170] On 12 June 2018, Brooks JA (as he then was) made an order for the stay of execution of the judgment in favour of Lethe Estate. It is useful to quote the order verbatim:

> "(1) The judgment of Simmons J handed down on 23 February 2018 is stayed pending the outcome of this appeal on the following conditions:
>
> a. [JPS] pays [Lethe Estate] the sum of $20 million on or before June 30, 2018;
>
> b. [Lethe Estate] is restrained…from selling, charging, leasing or otherwise parting with its interest in the lands comprised in Certificates of Title registered at Volume 1283 Folio 504 and Volume 1283 Folio 505 of the Register Book of Titles;
>
> c. Upon payment of the sum [JPS] may lodge a caveat against these titles pending the outcome of the appeal;
>
> d. Both parties shall have liberty to apply.
>
> (2) Costs to be costs in the appeal."

[171] Arising out of the stay of execution, the Office of Titles noted the restraint on the sale of the impacted properties. The miscellaneous entry, on the relevant titles, reads:

> "Miscellaneous No. 2131325 entered on the 19th day of June 2018 By Court Order dated 13th day of June, 2018 made in Claim No. 2016 CD 00112 in the Court of Appeal whereby it is ordered that the registered proprietor LETHE ESTATE LIMITED is restrained by itself or by its servants or agents or otherwise from selling, charging, leasing or otherwise parting with its interest in the lands comprised in this Certificate of Title. No entry has been made on the duplicate hereof same having not been produced."

[172] In February 2019, Brooks JA exempted two lots of land in the New Milns Division from the stay, allowing them to be sold.

[173] On the determination of this appeal, the stay of execution will fall away, the order restraining Lethe Estate from parting with its interest in the relevant lands will be lifted, and the caveat that JPS lodged against the titles pending the outcome of the appeal should be removed.

[174] The $20,000,000.00 paid by JPS to Lethe Estate is to be credited against the judgment as of the payment date, and thereafter, the parties will undertake any necessary reconciliation to determine the amounts payable.

[175] In all the circumstances, I propose that the court order as follows:

(i) JPS pays to Lethe Estate general damages for trespass in the sum of $78,725,165.56 with interest at the rate of 3% per annum from 14 June 2011 to 23 February 2018;

(ii) The stay of execution made on 12 June 2018 is hereby lifted.

(iii) The Registrar of Titles is hereby directed to remove Miscellaneous No 2131325 entered on 19 June 2018 on Certificates of Title registered at Volume 1283 Folio 504 and Volume 1283 Folio 505 of the Register Book of Titles;

(iv) Lethe Estate is awarded 80% of the costs in the proceedings below and in the appeal (excluding the costs in the application filed in this court on 26 March 2025). Such costs to be taxed if not agreed.

(v) JPS is awarded the costs of the application filed on 26 March 2025 and determined by this court. Such costs to be taxed if not agreed.

(vi) A special costs certificate is granted to Lethe Estate for three attorneys-at-law to represent it in the proceedings in this court, and to JPS in respect of the application filed on 26 March 2025.

DUNBAR GREEN JA

[176] I have read, in draft, the comprehensive judgment of Foster-Pusey JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

G FRASER JA (AG)

[177] I have also read the draft judgment of Foster-Pusey JA. I agree with her reasoning and conclusion. I have nothing further to add.

FOSTER-PUSEY JA

ORDER

(i) JPS is to pay to Lethe Estate general damages for trespass in the sum of $78,725,165.56 with interest at the rate of 3% per annum from 14 June 2011 to 23 February 2018;

(ii) The stay of execution made on 12 June 2018 is hereby lifted.

(iii) The Registrar of Titles is hereby directed to remove Miscellaneous No 2131325 entered on 19 June 2018 on Certificates of Title registered at Volume 1283 Folio 504 and Volume 1283 Folio 505 of the Register Book of Titles;

(iv) Lethe Estate is awarded 80% of the costs in the proceedings below and in the appeal (excluding the costs in the application filed in this court on 26 March 2025). Such costs to be taxed if not agreed.

(v) JPS is awarded the costs of the application filed on 26 March 2025 and determined by this court. Such costs to be taxed if not agreed.

(vi) A special costs certificate is granted to Lethe Estate for three attorneys-at-law to represent it in the proceedings in this court, and to JPS in respect of the application filed on 26 March 2025.