

IN THE SUPREME COURT OF BELIZE A.D. 2017

CLAIM NO. 586 of 2016

MICHAEL MODIRI

CLAIMANT

AND

BRADLEY PAUMEN

FIRST DEFENDANT

**DAYLIGHT AND DARKNIGHT
CAVES ADVENTURES LIMITED**

SECOND DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Hearings

2017

13th December

14th December

Submissions

Claimant – 16.1.2018

Defendant – 15.1.2018

Decision

13.4.2018

Ms. Leslie Mendez for the Claimant.

Mrs. Agnes Segura-Gillett for the Defendant.

**Keywords: Tort – Trespass to land – Using Road – Liability Vicarious
Liability – Damages – Exemplary Damages – Aggravated Damages –
Injunction – Civil Procedure Rules (CPR) – Rule 8.6**

JUDGMENT

1. It has often been said that when Hollywood in its infinite creative genius determines that the saga ought to continue very often part II is never as

riveting as the original. This analogy is by no means intended to trivialize the seriousness of the dispute between these parties. It is simply to show how life often imitates art. This matter is particularly disturbing because there seems to be no amicable end in sight, without which, it is feared that an escalation is practically inevitable.

2. Presented now for determination before the court is a claim and counterclaim both for trespass and both praying damages. Briefly, Mr. Modiri owns lands through which Mr. Paumen created a road that he used to facilitate the business of the Daylight and Darknights Caves Adventures Limited (Darknight), for which he is the registered owner. Darknight's endeavours consist of organizing tours and other tourist activities.
3. It had previously been determined, through separate court proceedings, that Mr. Paumen had no right to do this and his presence on Mr. Modiri's property constituted a significant trespass attracting exemplary damages. Mr. Modiri says that in wilful disregard of this previous judgment Mr. Paumen and Darknight have persisted in their trespass and have done so continuously from January 2016 to November 2016. He seeks damages (including exemplary damages) for this further trespass.
4. Mr. Paumen, on the other hand, alleges that despite being warned to cease and desist, Mr. Modiri has since 2014 used his (Mr. Paumen's) land as access to the very same property Mr. Modiri owns. This, he says, equally constitutes a trespass which ought to be condemned by payment of damages. Furthermore, in November, 2016, Mr. Modiri unlawfully prevented him from accessing and retrieving his equipment needed to run Darknight tours

at an alternate site. This caused him financial loss for which he ought to be adequately compensated as well.

The Locus

5. I have had the privilege of visiting the locus of both claims. They sit adjacent to each other in rural Belize. On two sides Mr. Modiri's land borders lands belonging to Mr. Paumen. I found them all, nestled amidst beautiful lush hills, with a pristine river flowing through majestic caves and towering forests.
6. They are a natural feast for almost every sense our human bodies possess. It is here in this earthly paradise that these two neighbours make their battlefield. The problem is clear. Mr. Modiri cannot easily access his land without passing through Mr. Paumen's and Mr. Paumen cannot easily get from one parcel to the next to conduct tours and carry out his business without passing through Mr. Modiri's. The solution has proven difficult.

The Issues:

7.
 1. Did the Defendants trespass on the Claimant's land.
 2. Did the Claimant and/or his employees or agents trespass on the Defendant's land.
 3. Did the Claimant wrongfully retain the Defendants' property causing them financial loss.
 4. What damages, if any, is the Claimant entitled to.
 5. What damages, if any, is the Defendant entitled to.

Trespass:

8. Counsel for the defence relies on **Halbsury's laws of England, 4th Ed. Vol 45, paragraph 1384** which defines trespass as "*Every unlawful entry by one*

person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes mineral from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land onto another's land."

Did the Defendants trespass on the Claimant's Land:

9. The original claim dealt with a trespass of a similar nature exacerbated by the fact that the Defendant had also unlawfully cut a road through the Claimant's land. It is this same road which, Mr. Paumen admits that he used from January, 2016, and even after judgment he continued to use. He first offered that he was not aware of the judgment and order of the court but that defence was swiftly abandoned and wisely so, as he was competently represented by counsel throughout that matter.
10. His next explanation, for what could only be considered as blatant defiance, was that he had been assured by government officials that the road would be made public. I cannot imagine for an instant that this Defendant could honestly have formed the belief that an assurance of an intended act, given by a government official could somehow grant him legal access across private property.
11. This excuse is rejected in its entirety as ridiculous and absurd. It goes without saying that an assurance is not permission and in any event a government official, no matter his position or authority, could not by his mere expression of opinion or intent be understood as permitting a breach of the law.

12. I find that the Defendants' trespass was blatant, wilful and continuous from January, 2016 to November 2016 when Mr. Modiri installed a gate. Before going any further I must state that Mr Modiri admits to knowing that the trespass was ongoing since January, yet it is only in November that he took serious action. He says in June his attorney wrote to the defendants directing them to desist. His claim was filed in December.

Did the Claimant and/or his employees or agents trespass on the Defendant's land:

13. Mr. Modiri admits using Mr. Paumen's property to access his own from 2014. During the previous court matter Mr. Paumen gave an undertaking to allow Mr. Modiri access. That undertaking was from 25th March, 2015 and ended on 5th February, 2016, when judgment was rendered. He can find no shield outside that period. The court finds that before and after that period Mr Modiri had no right of passage without Mr Paumen's consent.
14. Following this period, the undisputed evidence is that at the entrance to his property Mr. Paumen installed a chain barrier under the supervision of a security guard. Mr. Modiri could not, via a vehicle, access his own property without passing through that barrier. He could access, on foot, through an alternate route but with extreme difficulty.
15. Mr. Modiri and his witnesses testified that the chain was kept up and only lowered to allow access by and with the consent of the security guard. They said, whenever they gained access it was always with the consent of the security guard. They add that the number of times they actual passed through the Defendant's property was exaggerated. Although Mr. Modiri was insistent that he had given strict instructions to secure permission before

utilizing the road through the Defendant's property, the court did not believe that this had always been complied with.

16. Now, Mr. Modiri employed an armed Jerome Crawford to guard his property. Mr. Crawford said he brought two other persons with him, one he refused to call by name, even when pressed. The Claimant submitted that neither Jerome Crawford or the other guards were his employees. He says Mr. Crawford was an independent contractor and the others were his employees. So, if indeed they did trespass on the Defendants' property he ought not to be held liable. The court must therefore consider all the circumstances of their employment to determine their status.
17. Mr. Crawford and the others worked directly under the instructions and direction of Mr. Modiri. This is demonstrated in Mr. Crawford's admission that he did not allow Mr. Paumen's workers to have access to the equipment because he had not been authorized. Their hours of work were set by Mr. Modiri who explained that they worked only on the days the cruise ships came and only between 8:00 a.m. and 2:00 p.m. Clearly, they had no authority over their own schedule.
18. Although a contract made between Mr. Modiri and Mr. Crawford was produced in evidence, all of the circumstances indicate that the security guards, including Mr. Crawford, were all employees of Mr. Modiri and the court so finds.
19. Mr. Crawford could be seen in a video behaving in a most menacing, even threatening manner, demanding, in language liberally seasoned with expletives, that the Defendant's barrier be removed. All while Mr. Modiri is seen sitting in his vehicle a few feet away. Mr. Modiri maintains that he

was not aware of what was transpiring. I find that extremely difficult to believe. Rather, I am of the view that he was well aware and even condoned Mr. Crawford's behaviour.

20. In another video Mr. Crawford is seen cursing in a loud and aggressive manner and informing in no uncertain terms that he would remove the barrier next time and drive through. He has a long arm in hand, a belt of bullets strapped over his shoulder and shot gun cartridges between his fingers. His intent was obvious.
21. By way of explanation allow me to introduce Jerome Crawford, the person in whose hands Mr. Modiri also left the responsibility of sourcing his other security officers. Mr. Crawford had a particularly troubling history. He had recently accused Mr. Paumen of having paid him to cause harm to, or kill Mr. Modiri. That allegation is the subject of pending criminal proceedings and Mr. Modiri was well aware of this.
22. The question remains, why of all the security personnel Mr. Modiri could employ, would he choose Mr. Crawford. He must have known it would create a volatile situation, particularly because he knew Mr. Crawford would be armed and would more than likely have to pass over Mr. Paumen's land to access his work place on Mr. Modiri's land.
23. Mr. Modiri admits that Mr. Crawford's own resistance to instructions and overall thuggishness caused him to release him from this security detail in little over one month. The court could only find that by employing Mr. Crawford, Mr. Modiri was not only concerned for his own security but intended to provoke and intimidate Mr. Paumen with his presence.

24. The court is convinced of this because Mr. Modiri, admits that he did not go to his property often. Clearly, Mr. Crawford's presence there was not to protect Mr. Modiri's person. Secondly, Mr. Modiri's property consists of jungle. Other than the illegally cut road, there is no development of any kind there to protect. At best, Mr. Crawford was to ensure that the trespass through the property did not continue. There was no reason why someone else could not have done this.
25. Finally, Mr. Crawford had no security experience. The business name he worked under was registered the day before he began doing his security duties for Mr. Modiri. On leaving Mr. Modiri's employ he took up the entertainment business. He was not particularly qualified and he seemed conveniently and strategically placed. This caused great concern for the court.
26. There was also in evidence another video of the Claimant's employees on the Defendant's land and in the vicinity of the Defendant's structure.
27. Although I am confounded and suspicious as to why the Defendant's claim in trespass since 2014 and up to the time of the earlier action had not been brought as part of that action, I find some level of trespass by the Defendant and his employees has been made out from 2014 until late 2016. However, I find the instances to be few and punctuated by the undertaking.

The Claimant will be held personally liable for his own trespass and vicariously liable for the tortious acts of his employees as well.

Did the Claimant wrongfully retain the Defendants' property causing them financial loss:

28. The Defendants pleaded that on November 16th, 2016 they sought to retrieve their equipment but were prevented from doing so by the Claimant's armed security guards who threatened them with violence. Without the equipment they could not conduct tours elsewhere. This caused them to lose valuable contracts with both Carnival Cruise Lines and Royal Caribbean Cruise Lines. They insist that this was an intentional move, calculated by Mr. Modiri, to cause them financial ruin.
29. The evidence reveals that on the 15th (some say the 16th) November the Defendants' employees were only sent to check on the equipment. This is taken directly from Mr. Paumen's own witness statement. Witness for the defence Andy Choc also stated that they only went to check on and do an inventory of, the equipment on the 15th November, 2016. He explained that they could not move them because "*it was quite a lot.*" Even his contemporary report of the incident made to the Police, which he exhibited, stated that they only went to check on the equipment. He does not speak of any incident of attempting to retrieve the equipment.
30. From none of this is it proven that Mr. Modiri did not allow them to remove the equipment. However, Mr. Modiri admitted under cross-examination that they had not been allowed to remove the equipment. He said that nonetheless, in December, 2016, he did allow removal but some were apparently left behind. The defence offered no explanation for this.

31. When the court intervened, in January, 2017, so that the remainder could be retrieved, Mr. Modiri appeared fully cooperative. He went on to explain that although no request had ever been made directly to him, he had instructed his attorney to make arrangements with the attorney for the defence to have the equipment moved prior to the order of the court.
32. I found no reason to doubt him especially since there was no evidence whatsoever from the defence of any other attempt being made by them to get the equipment. They exhibited no correspondence, they seemed to have taken no action, other than to lie dormant. To my mind, if your entire livelihood depended on the equipment, some urgent action, beyond sending a few employees on a single occasion, should have been taken. It is also noted that the claim for the equipment came by way of a counterclaim filed only after the Claimant had already approached the court and after the contracts had allegedly been lost.
33. More importantly, however, the Defendant proved no nexus whatsoever between the lack of equipment and the loss of the contracts. Truth be told he has not even proven when these contracts were lost, if indeed they were. He says this was not a matter in dispute. I direct him to paragraph 8 of the defence to his counterclaim. Indeed, the court wonders whether they were not in fact lost because the Claimant stopped the trespass in its entirety in November 2016. Be reminded, he who asserts must prove.
34. This claim has not been proven to the requisite standard and accordingly fails in its entirety.

What Damages are the Claimant And Counter-Claimant entitled to:

35. The court having found both parties liable in trespass will now assess the damages for each party and make a set off if this is at all possible.

General:

36. Damages for trespass to land are said to be at large. This means that the court must consider all the relevant circumstances when making the assessment. Even where the successful party may not have suffered any actual loss he is still entitled to recover nominal damages.
37. Counsel for the Claimant quoted from **Asot A. Michael v Astra Holding Limited; Robert Cleveland and others v Astra Holdings Limited Eastern Caribbean Supreme Court Civil Appeal 17 and 15 of 2004** which explains at paragraph 56:

“56. A Claimant who suffers actual damage as a result of a trespass is entitled to be compensated with substantial damages, which he must prove. He must set out in his pleadings the value by which his land was diminished and the expense of removing any debris left by the trespass, if any. On the other hand, he may set out the costs of correcting the damage and restoring the land to its original condition. Where there is a continuing trespass, damages are usually measured by the worth of the use of the land. This would normally be the rental value.”

38. In the case at bar, neither of the parties have pleaded or proven actual damage. However, they have both made use of each other’s land and ought to be compensated in a sum which is reasonable payment for that use. A proper assessment ought to be made using the ‘rental value’. In essence, how much the Claimant or Ancillary Claimant would reasonably have required from the Defendant or Ancillary Defendant, respectively, to secure the right to do what they had done without permission.
39. It is obvious that the difference between both these claims is the length of time of the trespass and the actual use to which the trespassed land was put.

The first and second Defendants admitted to traversing the Claimant's land to conduct business, while the Claimant used the Defendant's land for private access only. Unfortunately, neither of them have presented any evidence on which the court could properly make the requisite assessment. Allow me to digress for just a moment.

40. There is something fundamentally disconcerting about the state of affairs between these two parties. They had both given an undertaking to this court to allow the other, for limited periods on specified days, to have access through each other's property. Additionally, they had both consented to having an expert assess the possible rental due for the use of each piece of property whether for business or privately. This was not an expert applied for and appointed to assist the court, rather it was to assist the parties going forward.
41. Following a very lengthy period of settling the terms of reference and very close to trial, the Claimant, without explanation, withdrew his consent. In my humble opinion, upon considering his new and unpleasant position he then subsequently, made an application for the same expert to be appointed to assist him in providing the evidence needed to properly assess damages if his case met with success.
42. The Defendant strenuously objected although he himself was in the very same position. The court considered the application, particularly, that no reason whatsoever was given for its lateness or why it was being made at the pre-trial review more than a year after the claim had been filed. The application was denied.

43. Counsel for the Claimant then asked that the trial be bifurcated. This would not have assisted her as she had no expert evidence on which to rely. Any damages she could prove at the bifurcated hearing would be the same as any she could prove during a single trial. Finally, she asked that the assessment of damages be adjourned until the appeal in the first case had been dealt with. Again, the court could find no rationale for such a delay since damages are assessed fresh and according to the circumstances of each case. The trial date was maintained.
44. Counsel for the Claimant submitted in closing that a sum appearing on an arbitrary lease agreement of an unrelated piece of land be considered as the basis for the assessment. This is rejected in its entirety since the court, from the evidence presented, is unable to make any comparison between that lease and the subject property. Nor is the court skilled enough to conduct what rightly ought to have been, an expert analysis.
45. She next asked that the court consider the damages awarded in the original claim as a guide. Counsel for the Defendant stated in response that this was sent to the court via correspondence. I direct her to paragraph 10 of the Claimant's written submissions. She further stated, by way of objection, that the court "*cannot be bound by the decision of another judge in a previous case, no matter how similar the parties or circumstances.*" The court finds merit in this and wholly agrees.
46. So, both parties having failed to provide any evidence on which actual compensatory damages could be awarded will be awarded nominal damages only. Counsel for the defence conceded this position where liability was found against either party.

47. In **Asot Holding Limited** (ibid) the court expounded on the measure of nominal damages as follows:

“58. A claimant may recover nominal damages where he had not suffered actual loss or where he does not prove actual loss because loss is presumed. The Privy Council reminded us in Greer v Alston Engineering Sales & Services Ltd. (2003) 63 WIR 388, at paragraph 7. That ‘nominal damages’ does not mean small damages. Greer involved a claim for damages for the loss of use of a backhoe for the period July 1982 to January 1984 and by amendment of the claim, for detinue for a further period of 6 months. Their Lordships stated, at paragraph 9, that although damages for loss of use were not quantified, it was the duty of the Court, in awarding nominal damages, to recognize the loss by an award that is not out of scale. Their Lordships thought that the \$5,000.00 that the Court awarded was low. The daily rates for the use of the backhoe went from \$500.00 per day in 1982 to \$800.00 per day by 1984. They confirmed the award of \$5,000.00 nominal damages on the ground that it was not so low to warrant their interference.”

48. I award the Claimant nominal damages of \$40,000 and the Counter-Claimant the sum of \$20,000.

Exemplary Damages:

49. Counsel for the Claimant helpfully provided **Rookes v Barnard [1964] UKHL [TAB 3], at para. 34**, where the House of Lords explained that the object of exemplary damages is to “*punish and deter.*” In his speech, Lord Devlin laid down three categories in which punitive damages can be awarded. The head note of the said case helpfully sets out the holding insofar as instances where exemplary damages may be awarded as follows:

“..exemplary damages could be awarded in case (i) of oppressive, arbitrary or unconstitutional acts by government servants; (ii) where the defendant’s conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; (iii) where expressly authorized by statute.”

The Claim:

50. It is clear that the tortfeasor’s conduct is key. When the court considers Mr.

Paumen's behaviour it finds it egregious. He continued to trespass in clear disregard of the findings of a court the specifics of which he ought to have known particularly because he was competently represented by counsel. Mr. Paumen can find no shelter in declaring his own ignorance. His behaviour cannot be condoned, it goes far beyond inadvertence or misunderstanding.

51. The trespass was continuing and to my mind was likely to be repeated to conduct Darknights' tours if Mr. Modir had not constructed a barrier. He showed a cynical disregard for Mr. Modiri's rights in his land with the sole object of making a gain by this unlawful conduct. Moreover, the nominal damages awarded are, to my mind, insufficient as a true deterrent or punishment.
52. The second Defendant owns land. He claims to have fallen on hard times having lost contracts with the cruise ships, but he continues to conduct business at another site, so both Defendants are earning. Further, their previous earnings must have been considerable where a decision is taken and executed to unlawfully cut a road, use that road to trespass and continue that trespass even after judgment is entered against them.
53. All this, admittedly, to recover a \$5 million investment. Mr Paumen must have deduced that his profits would surpass whatever possible award could be made against him for this trespass. Counsel for the Claimant urged that obviously the award made in the previous matter did not adequately serve as a deterrent. She respectfully submitted that a higher sum ought to be awarded here.
54. According to **Cassell & Co. v. Broome [1972] A.C. 1027** the true question is not how much Mr Modiri must receive but how much Mr Paumen and

Darknight must pay. It is not intended to be a windfall or to cripple. What resounds with the Court is that by February Mr Paumen was aware of the previous judgment. He did not then stand in the shoes of total oblivion when he continued the trespass. He knew what the possible outcome could be if he were taken to court again. But so too did Mr Modiri. Could this have been his reason for the prolonged inactivity. He does say that he wrote to Mr Paumen offering a solution. Mr Paumen says he never received same.

55. Again, I reiterate that each case is to be considered on its own merit. I find an award of \$120,000 to be reasonable in these circumstances and I so order. This award, coupled with the original ought to be a swift and sufficient deterrent.

The Counterclaim:

56. I could find no reason whatsoever to award exemplary damages on the counterclaim. Neither Mr. Modiri's nor his employees' trespass has been proven to have been motivated by any gain or 'mercenary considerations' whatsoever. However, where damages are at large the court could consider whether another form of damages could be awarded.
57. Rule 8.6(2) of the CPR mandates that "*(a) Claimant who seeks aggravated damages and/or exemplary damages must say so in the claim form.*" Rule 8.6(1)(b) explains that in granting a remedy the court is not limited only to those specified in the claim form but may grant any to which the Claimant is in fact entitled to. A claim for exemplary damages was specifically pleaded and the court could well order aggravated damages instead if an entitlement to same is proven.

58. When the court considers Mr. Modiri's decision to employ Mr. Crawford as a security guard and his condonation of Mr. Crawford's abusive behaviour and trespass, the court forms the immediate view that aggravated damages ought rightly to be awarded.

59. **Halsbury's Laws of England 4th Ed Re-Issue Volume 12(1) – Damages at paragraph 1114** explains:

“In actions in tort, where the damages are at large, the court may take into account the Defendant's motives, conduct and manner of committing the tort, and where these have aggravated the plaintiff's damage by injuring his proper feelings of dignity and pride, aggravated damages may be awarded. The Defendant may have acted with malevolence or spite or behaved in a highhanded, malicious, insulting or aggravated manner.”

60. By allowing Mr. Crawford to use Mr. Paumen's land, Mr. Modiri must have been aware that the possibility existed for some friction (at the very least) between the two. Mr. Crawford was required to be armed, he had a volatile disposition, all setting the scene for chaos. What ensued were verbal threats, high handed behaviour, mysterious threatening notes, allegations of police beatings, vicious dogs and road blocks. It is fortunate that Mr. Modiri quickly realized the error of this decision and dismissed Mr. Crawford before the situation worsened.

61. I find Mr. Modiri's placement of Mr. Crawford and his condonation of his actions were intentional, malicious and offensive. There is absolutely no way Mr. Paumen could not have been insulted and disturbed by his accuser taking such liberties on his own property. This is certainly exceptional conduct which caused humiliation and for which Mr. Paumen would be compensated. It is unusual for aggravated damages to be greater than the award of general damages.

62. Aggravated damages for the period 1st November to 9th December, are awarded in the sum of \$15,000 which, with the award of nominal damages is considered fair compensation for the overall trespass.

Other reliefs and costs:

63. The awards of damages made to the Counter-Claimants are to be set off against the awards made to the Claimant. Costs on the claim and counterclaim to be calculated on the prescribed basis. I rely on counsel to calculate. The court also finds it necessary to grant both sides the permanent injunctions they have sought.

Determination

It is hereby order:

On the Claim:

1. Judgment to the Claimant in the sum of \$40,000 as nominal damages and \$120,000 as exemplary damages for trespass.
2. Interest is awarded on the nominal damages at the rate of 6% from January, 2016, to the date of judgment herein.
3. Interest is awarded on the entire judgment from the date of judgment at the statutory rate of 6%.
4. The Defendants are hereby permanently restrained whether by themselves their employees, servants or agents or otherwise, howsoever from entering upon, using, and/or further trespassing on the Claimant's property located at Indian Creek, Frank's Eddy Agricultural Layout, Cayo District, Belize.
5. Costs to the Claimant on the prescribed basis.

On the Counterclaim:

1. Judgment to the Counter-Claimant in the sum of \$20,000 as nominal damages and \$15,000 as aggravated damages for trespass.
2. Interest is awarded on the nominal damages at the rate of 6% from December, 2016 to the date of judgment herein.
3. Interest is awarded on the entire judgment from the date of judgment at the statutory rate of 6%.
6. The claim for intentionally causing economic loss through conversion is dismissed.
7. The Counter-Defendant is hereby permanently restrained whether by himself, his employees, servants or agents or otherwise, from entering upon, using, and/or further trespassing on the Counter-Claimant's leased property situated along Indian Creek, Frank's Eddy Agricultural Layout, Cayo District, owned by Indian Creek Equestrian Center Limited (Entry No. 11846, Reg. No. 28) and along the Sibun River Caves Branch Area, Cayo District, owned by the Sibun Grain and Cattle Limited (Minister's Fiat Grant No. 409 of 2011).
8. Costs to the Counter-Claimant on the prescribed basis.

**SONYA YOUNG
JUDGE OF THE SUPREME COURT**