[2025] JMCA Civ 3

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

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

B St Michael Hylton KC, Mrs Symone Mayhew KC and Ms Ashley Mair instructed by Mayhew Law for the appellant

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

8, 9, 10 November 2023 and 7 March 2025

Civil law – Land law – Wayleave/easement agreement – Trespass to land – Damages for trespass to land – Evidence – Expert evidence – Duty of expert – Importance of expert reasoning – Civil Procedure Rules, 2002, Part 32 – Basis on which damages is to be assessed

FOSTER-PUSEY JA

Introduction

[1] In this appeal, the Jamaica Public Service Company Limited ('JPS') seeks to set aside the judgment of Simmons J ('the learned judge') delivered 23 February 2018, in which she awarded Lethe Estate Limited ('Lethe Estate') special and general damages for trespass. Alternately, JPS seeks to reduce the damages awarded by the learned judge. Lethe Estate has also counter-appealed, seeking to have the appeal dismissed and the judgment affirmed on additional grounds.

The background

[2] The learned judge made an award of damages after conducting a trial in a claim filed on 6 June 2011, by Lethe Estate and Great River Rafting and Plantation Tour Limited ('Great River Rafting') against JPS. Lethe Estate is a development company incorporated under the Companies Act of Jamaica ('the Companies Act') on 11 September 1996 and the proprietor of land located at New Milns, in the parish of Hanover and registered at Volume 1283, Folio 504 of the Register Book of Titles ('the New Milns property'). Great River Rafting, incorporated under the Companies Act on 11 October 1985, is a tour company stated at the material time to have been entitled to possession, use, and development of the New Milns property. Mr Francis Tulloch (now deceased) was a director of both companies. Mr Tulloch was also the predecessor in title to the New Milns property, which was transferred to Lethe Estate on 4 November 1996. JPS is an electrical power company providing electrical services throughout Jamaica.

[3] Lethe Estate and Great River Rafting sued JPS for, *inter alia*, damages for breach of contract, trespass, and nuisance arising from the construction of a part of the JPS 69KV Bogue to Orange Bay transmission line and related equipment on the New Milns property in the parish of Hanover. In the particulars of claim, both companies averred that while JPS had negotiated with Mr Tulloch for the future grant of an easement to build a part of the Orange Bay to Bogue transmission system over the New Milns property and had paid him $5,000,000.00 as consideration, the parties had not agreed on the path for the transmission system.

[4] It was further averred that it was an essential consideration of the negotiations that the agreed transmission system path should not interfere with the businesses of Lethe Estate and Great River Rafting on the New Milns property, including planned tourist attractions. To that end, it was stated that an agreement was effected, which provided that any disagreement on the easement path would be arbitrated to establish an alternative route. Lethe Estate and Great River Rafting contended that the transmission

system, as built, affected six lots on the New Milns property and not a maximum of three lots as was previously proposed.

[5] In para. 8 of the particulars of claim, Lethe Estate and Great River Rafting pleaded that Lethe Estate received a sum of $5,000,000.00 from JPS for various purposes, including $3,000,000.00 for the future grant of an easement.

[6] It was also posited that, by letter dated 15 March 1997, JPS had indicated a proposed point for the location of one tower, but Mr Tulloch refused to sign that letter. Further, Mr Tulloch's illness and work obligations caused him to seek treatment locally and overseas. Lethe Estate and Great River Rafting pleaded that they were unaware that the transmission system had been constructed until August 2005, when a survey of the New Milns property was commissioned.

[7] Lethe Estate and Great River Rafting claimed they had suffered loss due to JPS' actions. Accordingly, they sought damages (including special and exemplary damages) and an injunction to have JPS remove the transmission system and stop its trespass over the property.

[8] In its defence, JPS contended that Mr Tulloch was paid $5,000,000.00 for and executed a grant of easement to JPS on 4 April 1996, and Lethe Estate and Great River Rafting were not parties to the agreement. JPS also pleaded that neither company had an interest in the New Milns property at the relevant time. It was further asserted that the easement ran with the property and would bind any subsequent proprietor. JPS averred that the full terms and conditions of the easement were set out in a letter dated 27 March 1996, written by Mr J E Murray, JPS' Manager of Engineering Services, and signed by Mr Tulloch, and the easement agreement was made on 4 April 1996.

[9] JPS also relied on clause 3 of the easement agreement, which provided that in the event of a disagreement, the parties were to arbitrate any dispute about the location of the transmission lines' pathway, contending that Mr Tulloch had not exercised that option. JPS also averred that Mr Tulloch had agreed to or acquiesced to the routing of the

transmission lines and towers and that Lethe Estate and Great River Rafting had constructive notice of the construction of the transmission lines, which are visible on the property. JPS averred further that, in any event, it had complied with the terms of the easement.

[10] JPS also posited that Lethe Estate and Great River Rafting had not suffered any loss or damage, the claim was statute-barred, and they were not entitled to an award for exemplary damages.

The trial

[11] Several witnesses testified in the trial of the claim. Lethe Estate and Great River Rafting called four witnesses: Mr Tulloch, Mr Michael Gordon - an Easement Officer at JPS at the relevant time; Mr Llewelyn Allen - a Commissioned Land Surveyor; and Mr Gordon Langford - a Chartered Valuation Surveyor and expert witness. JPS called three witnesses: Mr David Lawrence - a member of JPS' project executing team at the relevant time; Mr Blaine Jarrett - Senior Director of Engineering at JPS; and Mr Bret Bennett - Easement Negotiator at JPS. JPS also relied on the expert report of Retired Major Patrick Aiken.

[12] The court had copious documentation before it, including the correspondence that had passed between JPS and Mr Tulloch concerning the negotiations for the easement, witness statements and documentation relating to the proprietorship, development, and subdivision approval of the New Milns property, and reports on the description, characteristics, and value of the New Milns property.

Decision of the learned judge

[13] The learned judge, in disposing of the claim, considered the following issues in her written decision (see para. [29] of the judgment):

> "(i) Whether there was an agreement between Mr Tulloch and [JPS] on the pathway or route for the transmission line?

(ii) Whether there was a valid wayleave agreement between Mr Tulloch and [JPS]?

(iii) If so, whether the agreement binds [Lethe Estate and Great River Rafting]?

(iv) Whether or not [JPS] is liable for breach of contract

(v) Whether or not [JPS] is liable for trespass

(vi) Whether or not [JPS] is liable for nuisance

(vii) In the event that [the] Court finds that the establishment by [JPS] of the transmission line is a trespass, what are the appropriate remedies, given the nature of the structures and the impact of the activity carried on by [JPS]."

[14] In relation to issues (i) and (ii), the learned judge found that the easement agreement, properly referred to as a wayleave agreement, was valid and binding between JPS and Mr Tulloch but they had not agreed on its route. In considering these issues, the learned judge concluded that the wayleave/easement agreement (these terms will be used interchangeably in this judgment) was reflected in the documents entitled "Grant of Easement" dated 4 April 1996 and the letter dated 27 March 1996. She also found that Mr Tulloch was compensated for granting it. However, as the evidence did not disclose that there was an agreed route, the learned judge found that JPS had unilaterally implemented the alterations for the transmission system contained in a letter dated 15 March 1997.

[15] The learned judge also observed that on a careful review of section 41(2) of the Electric Lighting Act, the failure to register the wayleave agreement on the registered title for the New Milns property did not affect its validity. Further, relying on the case of **Jamaica Public Service Company Limited v Rose Marie Samuels** [2012] JMCA Civ 42 ('**JPS v Samuels**'), the learned judge found that although the agreement would have been incomplete since no route was decided, it was rendered complete by the construction of the transmission system.

[16] Concerning issue (iii), the learned judge held that the wayleave agreement did not bind Lethe Estate, and Great River Rafting did not produce any document indicating that it was entitled to possession of the New Milns land. The learned judge noted that in a letter dated 7 June 2005, Lethe Estate claimed compensation for JPS' alleged failure to fulfil its contractual obligations to Mr Tulloch. She concluded that that letter was insufficient to establish that Lethe Estate had undertaken a new obligation under the wayleave agreement and was bound by it. Further, relying on the principles emanating from the case of **JPS v Samuels**, the learned judge found that no other evidence had been presented to suggest that Lethe Estate had undertaken any new obligation to give effect to the licence allowed by the wayleave agreement.

[17] The learned judge observed that the wayleave agreement was not a registered encumbrance on the title, Mr Tulloch had not indicated that he was acting on behalf of a company that was to be incorporated, and that at the time Mr Tulloch was compensated for the wayleave agreement, neither Lethe Estate nor Great River Rafting owned any beneficial interest in the New Milns property. In determining the effect of a caveat lodged by JPS, the learned judge held that it did not give JPS an interest in the area of land impacted by the wayleave agreement.

[18] Regarding issue (iv) the learned judge held that JPS was not liable to Lethe Estate for breach of contract because the company was not in existence when the agreement was made. The learned judge found that, moreover, an action for breach of contract could not be sustained against JPS, that action having been filed approximately 18 years after the date of the transmission system's completion. The learned judge found that the time to initiate a claim for breach of contract would have already run against Lethe Estate.

[19] Regarding issue (v), the learned judge held that JPS was a trespasser on the New Milns property. In reviewing the case of **JPS v Samuels**, the learned judge accepted that a conveyance of property terminates a licence granted in respect of that land. Thus, the learned judge found that in the particular circumstances before her, as at 4 November 1996, when the New Milns property was transferred to the Lethe Estate, JPS began to

occupy the property without Lethe Estate's permission and was thus a trespasser. Further, since the easement/wayleave agreement was not registered on the title, it would not bind Lethe Estate. The learned judge also accepted the argument proffered by counsel for Lethe Estate that JPS' trespass began when Lethe Estate demanded the removal of the transmission line, but JPS failed to do so; accordingly, the claim for trespass was not statute-barred.

[20] Regarding issue (vi), the learned judge held that Lethe Estate and Great River Rafting did not have a viable cause of action for nuisance. She also refused Lethe Estate's claim for mesne profits and both companies' claims for exemplary damages.

[21] In considering the appropriate remedies, the learned judge found that Lethe Estate had established its case for equitable relief by proving its legal right to the property and JPS' actual infringement. In awarding damages, the learned judge considered that it would be extremely difficult for JPS to relocate the transmission system, and thus, an injunction would be inappropriate. The learned judge also considered that Lethe Estate and Great River Rafting had been dilatory in seeking relief.

[22] On 20 September 2017, the learned judge delivered a draft judgment and awarded damages for all the lots that were not impacted directly by the transmission towers and lines in the following terms:

> "[247] In light of the foregoing, judgment is awarded to [Lethe Estate] as follows:-
>
> (i) General damages for trespass in the sum of $58,150,000.00 with interest at the rate of 3% per annum from June 14, 2011 to September 20, 2017;
>
> (ii) Special Damages in the sum of $191,500.00 with interest at the rate of 3% per annum from January 1, 1998 to September 20, 2017;
>
> (iii) Costs to [Lethe Estate] to be taxed, if not agreed."

[23] The learned judge invited the parties to make submissions regarding interest and costs. Having considered the submissions, the learned judge determined that interest for the period before judgment would be at 3% per annum, Lethe Estate was entitled to its full costs, and JPS was awarded 30% of its costs against Great River Rafting.

[24] On 30 November 2017, JPS applied to vary or revoke the learned judge's orders and revisit her finding that the wayleave agreement did not bind Lethe Estate. JPS argued that it was appropriate for the court to pierce the corporate veil of Lethe Estate where a person under a legal obligation, in this instance Mr Tulloch, deliberately evades it by interposing a company under his control. JPS also raised the issue as to whether a resulting trust could be implied in favour of Mr Tulloch, if the court found there was no basis to pierce the corporate veil.

[25] JPS also argued that compensation for trespass should be limited to the lots that the transmission line traversed but were not agreed upon. Further, that if the wayleave agreement were binding on Lethe Estate, compensation would not be due for a diminution in the value of all of the subdivision lots indirectly impacted due to the "unsightly easement" (see para. [318] of the judgment). It was argued that only lot 2 was not agreed upon, and if Lethe Estate is compensated for a diminution in the value of all the lots, it would receive double the compensation. Lethe Estate opposed the application.

[26] The learned judge found that there was no evidence that Mr Tulloch's actions in respect of Lethe Estate were carried out to evade or frustrate the enforcement of his legal obligations. So, there was no basis on which the court could exercise its discretion to pierce or look behind the veil of incorporation. The learned judge also found no evidence of the source of funds used to purchase the New Milns land. Consequently, there was no evidence to show that Mr Tulloch was the beneficial owner of the New Milns land now owned by Lethe Estate. She, therefore, refused JPS' application to vary or revoke her order.

[27] The learned judge made the following final award:

> "[361] In light of the foregoing, judgment is awarded to [Lethe Estate] as follows: -
>
> (i) General damages for trespass in the sum of $58,150,000.00 with interest at the rate of 3% per annum from June 14, 2011 to February 23, 2018;
>
> (ii) Special Damages in the sum of $191,500.00 with interest at the rate of 3% per annum from January 1, 1998 to February 23, 2018;
>
> (iii) Costs to be taxed, if not agreed.
>
> [362] Judgment is awarded to [JPS] against [Great River Rafting] with 30% [sic] its costs to be taxed if not agreed."

The grounds of appeal

[28] Following the ruling, on 9 March 2018, JPS filed a notice and grounds of appeal setting out the following grounds:

> "i. The learned judge erred as a matter of law in finding that the wayleave agreement between Francis Tulloch and [JPS] that permitted [JPS] to construct the transmission line and towers over and on the New Milns Property did not bind [Lethe Estate] particularly in circumstances where:
>
> a. [JPS] lodged a caveat against further dealings in the New Milns Property in or around June 1996 after entering in the wayleave agreement;
>
> b. Mr Tulloch caused [Lethe Estate] to be incorporated and transferred the New Milns Property to [Lethe Estate] a few months after entering into the wayleave agreement and accepting the agreed compensation;

c. Mr Tulloch was the sole beneficial shareholder, chief executive officer and director of [Lethe Estate];

d. Mr Tulloch and [Lethe Estate] allowed [JPS] to act on the wayleave agreement and construct the transmission line and tower over and on the New Milns Property.

e. 8 years after [JPS] completed the construction and commissioned the entire line Mr Tulloch and [Lethe Estate] threatened to claim for trespass; and

f. 11 years after that threat Mr Tulloch caused [Lethe Estate] to initiate a claim against [JPS] for trespass.

ii. The learned judge erred in failing to find that [Lethe Estate] had ratified the wayleave agreement between [JPS] and Mr Tulloch and was therefore bound by it.

The learned judge erred in accepting the evidence of Mr Langford in circumstances where it was clear that his evidence was unreliable.

iii. The learned judge erred by treating Mr Langford as an assessor and/or by surrendering her functions to him.

iv. In assessing damages for trespass the learned judge erred in relying on a valuation that did not assess the value of the lots as agricultural lots but based on the value of the other properties which were not agricultural lots and therefore were of a higher value.

v. The learned judge erred in her assessment of damages for trespass by including alleged diminution to the value of lots over which the transmission line and related equipment did not traverse and which they did not directly affect.

Orders sought:

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.

Any specific Power which the court is asked to exercise

NONE." (Emphasis as in original document)

The counter-notice of appeal

[29] Lethe Estate, in its counter-notice of appeal filed on 22 March 2018, advanced the following grounds:

"1. [JPS] produced no evidence that could assist the Court in determining the critical issue of whether there was an agreement upon the route of the wayleave.

2. [JPS'] own internal communications demonstrate a deliberate and unwilling disposition to be open about the route.

3. The clear evidence is that Mr Tulloch disagreed with the path of the line designated on Exhibit 14 as 'Suggested route (Mr. F. Tulloch)', and the route did not make a right turn but was continuously straight across John Crow Hill and the Great River, which is clearly consistent with all the expert evidence that a total of 6 lots of the subdivision have been negatively affected by the presence of the transmission lines on them, that is, Lot 6a, Lot 6b, Lot 7a, Lot 7b, Lot 8, and Lot 2a, whereas it is uncontradicted and all relevant documentary evidence demonstrates that only 3 lots were to be affected (see paragraph 1 of the [JPS'] 27th March 1996 letter which specifically stated that only 3 subdivision lots would be affected, as well as paragraph 9 of that letter which referred to a third lot of approximately 17 acres which is lot 6a which is the only 17 acre lot in the subdivision). The fact that [JPS] could only affect 3 lots and paid extra for lot 6a which it agreed to use, conclusively demonstrates that the riverside lots (the Green) which have been affected were not to be affected because if the transmission system traversed lot 6a it has

to go straight because going straight is the only way 3 lots could be affected.

4. The incomplete 'Grant of Easement' document did not create any interest in land.

5. Even if (which is denied) [Lethe Estate] was bound by the incomplete 'Grant of Easement';

   (a) there was at no time any agreement on the route to be affected by the lines and towers;

   (b) [JPS'] unilateral decision and implementation of a route fundamentally breached the incomplete 'Grant of Easement'. This constituted a repudiatory breach of any agreement between the parties and in those circumstances [Lethe Estate] was entitled to, and did by its conduct, treat any such 'Grant of Easement' as terminated.

6. [JPS'] continued presence on the land could only be considered a trespass when [Lethe Estate] demanded the removal of the equipment and [JPS] failed or refused to accede to the demand. That demand was made by the service of these proceedings seeking an injunction for the removal. For the same reason, and by virtue of the provisions of the **Prescription Act**, no issue of the claim being statute-barred arises.

7. In any event, since section 40 of the **Electric Lighting Act** confers upon the land owner a right at any time (without limitation as to time) to require JPS to remove or relocate the towers and power lines, the **Limitation of Actions Act** is irrelevant. The claim is not statute-barred."

[30] Lethe Estate did not outline any orders that it was seeking from this court or any power that it was asking this court to exercise.

[31] I have reviewed the counter notice of appeal. Lethe Estate, in simplified terms, raised the following issues or made assertions:

i. That JPS did not produce evidence to assist the court in determining the important issue as to whether there was agreement on the route of the wayleave.
ii. That JPS' internal communications showed a "deliberate and unwilling disposition to be open about the route".
iii. That there was clear evidence that Mr Tulloch disagreed with the path of the line designated on Exhibit 14 as the "Suggested route (Mr F Tulloch)", that 6 lots of the subdivision were negatively affected by the transmission lines - Lots 6a, 6b, 7a, 7b, 8, and 2a, and it was clear that only three lots were to have been impacted including lot 6a - a 17-acre plot.
iv. That the incomplete "Grant of Easement" document did not create any interest in land.
v. Even if Lethe Estate was bound by the incomplete "Grant of Easement" there was no agreement on the route that the lines and towers would affect; and JPS' implementation of a route fundamentally breached the incomplete "Grant of Easement" which constituted a repudiatory breach of any agreement between the parties, entitling Lethe Estate to treat the agreement as terminated.
vi. JPS' continued presence on the land was a trespass when Lethe Estate demanded the removal of the equipment, and JPS refused to do so. Therefore, no issue of the claim being statute-barred arises.
vii. Since the Electric Lighting Act gives a landowner the right to require JPS to remove or relocate the towers and power lines at any time, the Limitation of Actions Act is irrelevant, and the claim is not statute-barred.

[32] Before proceeding further in considering this appeal, it is necessary to determine how to treat these abovementioned issues. This court does not need to examine issues (i) and (ii) as, at the start of the appeal hearing, JPS indicated that it would not be

challenging the learned judge's finding that Mr Tulloch had not agreed on the route that the transmission line and towers would take over the property. Furthermore, JPS did not appeal the learned judge's finding on that issue.

[33] In so far as issue iii is concerned, during the hearing below, and in this court, there was no dispute that the agreement that JPS signed with Mr Tulloch expressly indicated that only three subdivision lots were to have been directly impacted and that, instead, six subdivision lots were affected by the towers and transmission lines including lot 6a. Lethe Estate has not formulated this issue as a challenge to any of the learned judge's findings. This undisputed fact will, however, come into play when this court reviews the award of damages.

[34] Issue iv does not arise for this court's consideration, bearing in mind how the matter proceeded in the court below and the learned judge's finding. Importantly, in the court below, counsel for Lethe Estate agreed that JPS acquired a contractual licence from Mr Tulloch, and the court so found.

[35] Issue v is a new position taken by Lethe Estate before this court. The argument that JPS' actions constituted a repudiatory breach entitling Lethe Estate, if it is bound by the agreement, to have treated it as ending was never pursued in the court below. This is reflected in Lethe Estate's closing submissions. It is also inconsistent with Lethe Estate's claim for damages for breach of contract in the court below. It is entirely inappropriate for Lethe Estate to raise this issue for the first time at this level, and the court will not entertain it.

[36] Issues vi and vii concern whether Lethe Estate's claim was statute-barred. JPS' grounds of appeal did not challenge the learned judge's findings that the claims were not statute-barred, and no arguments were pursued before this court in that regard.

[37] Based on this review of the counter-notice of appeal, there is no additional issue for consideration apart from those arising from JPS' grounds of appeal.

Stay of execution

[38] On 12 June 2018, on an application for stay of execution of the judgment by JPS, Brooks JA (as he then was) ordered:

> "(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."

[39] The Office of Titles noted the stay on the title by way of a miscellaneous entry.

[40] On 5 February 2019, Brooks JA granted an application made by Lethe Estate's attorneys, which JPS did not oppose, for two lots in the New Milns Division to be sold and exempted from the stay of execution.

The issues on appeal

[41] I am attracted by and will adopt the appellant's outline of the issues that arise in this appeal. Simply put, they are:

> (i) Whether the learned judge erred in finding that the easement/wayleave agreement did not bind Lethe Estate, and

(ii) Whether the learned judge erred in awarding damages on the basis and in the amounts indicated in the judgment.

Issue (i): Whether the learned judge erred in finding that the easement/wayleave agreement did not bind Lethe Estate.

Submissions for JPS

[42] Firstly, counsel for JPS submitted that the most obvious reason why the learned judge ought to have found that the wayleave agreement bound Lethe Estate, was that it was the company's case that the agreement bound it. Counsel highlighted that this was Lethe Estate's position:

a. in a pre-action letter that it sent to JPS;

b. in a pre-action letter its counsel sent to JPS;

c. in its pleadings;

d. in its witness statements; and

e. in its evidence under cross-examination.

[43] Counsel underlined that Lethe Estate not only asserted that the wayleave agreement bound it but also sued for breach of contract. Counsel urged that the above bases alone were sufficient to support their grounds of appeal on this issue.

[44] In the alternative, counsel for JPS submitted that Lethe Estate was not a bona fide purchaser for value without notice of JPS' interest in the property and thus was bound by the wayleave agreement. Counsel further argued that since JPS lodged a caveat before the New Milns property was transferred to Lethe Estate, Lethe Estate had constructive notice of JPS' interest pursuant to the wayleave agreement. Moreover, Lethe Estate had been dilatory in bringing its claim, according to counsel.

[45] Counsel also submitted that as Mr Tulloch was using the company to evade his obligations under the agreement, in applying the principles of **Prest v Petrodel**

Resource Limited and others [2013] UKSC 34, this was a fit case for the court to have pierced the corporate veil. Counsel posited that to do otherwise would allow Mr Tulloch to evade the agreement with JPS. Counsel also relied on **Jones v Lipman** [1962] 1 All ER 442, **Donovan Crawford v Financial Institutions Limited** [2005] UKPC 40 and **Suzette Hugh Sam v Quentin Hugh Sam** [2018] JMCA Civ 15.

[46] In further reliance on **Prest v Petrodel Resource Limited and others**, counsel submitted that even if the learned judge was correct to hold that this was not an appropriate case to pierce the corporate veil, she ought to have held that Lethe Estate held the property in trust for Mr Tulloch. Counsel referred to the learned judge's reasoning that as there was no evidence about the source of the funds used to purchase the property, she would not find that the company held the property on a resulting trust for Mr Tulloch. Counsel argued that the evidence in this case is similar to that in **Prest v Petrodel Resource Limited and others** as Lethe Estate was incorporated shortly before Mr Tulloch transferred the New Milns property to it. In addition, the company did not carry on any business in that short intervening period, and there was no suggestion that the company was able to, or in fact paid Mr Tulloch for the property from its own funds.

[47] Additionally, counsel argued that, in keeping with equitable principles, the learned judge ought to have found that the conscience of Lethe Estate was bound by equitable principles so that JPS could not be denied the right to maintain the transmission line over the land. Further, counsel urged that JPS was still in discussions with Mr Tulloch after 4 November 1996, when Lethe Estate became the owner of the property, and at no time did Mr Tulloch indicate that he did not have the authority to continue discussions on account of the change in the ownership of the New Milns property. It was, therefore, submitted that given the particular circumstances of this case where Mr Tulloch was the principal shareholder and controlling mind of Lethe Estate, negotiated the agreement, accepted compensation, and then transferred the New Milns property, Lethe Estate ought to be bound. Counsel relied on **JPS v Samuels**.

Submissions for Lethe Estate

[48] Counsel for Lethe Estate relied on the well-established principle that the appellate court should not lightly interfere with a trial judge's finding of facts unless the learned judge had acted erroneously (per **Caldeira v Gray** [1936] 1 All ER 540, **Industrial Chemical Company (Jamaica) Limited v Ellis** (1982) 35 WIR 303 and **Ronald Chang and Anor v Frances Rookwood et al** [2013] JMCA Civ 40). In that regard, counsel submitted that the learned judge had carefully considered the evidence of the witnesses before her and accepted Mr Tulloch's evidence, to find that he had not agreed upon a route with JPS and the route being discussed was on and over the New Milns property. In all the circumstances, counsel submitted that JPS' challenge to these findings of fact must fail.

[49] Additionally, counsel posited that since the easement was not registered on the title, it could not be enforced against Lethe Estate. Further, in its amended defence, JPS did not aver that the easement bound Lethe Estate.

[50] Counsel also submitted that the learned judge had erred in finding that since the transmission line was complete and the agreement implemented, the agreement was valid and binding between JPS and Mr Tulloch. Counsel emphasised Mr Tulloch's evidence that he was unaware that JPS had proceeded with the construction.

[51] Counsel argued that the learned judge had correctly found that the encumbrance was not registered and thus not enforceable against subsequent transferees. Additionally, the learned judge was correct in finding that the caveat did not give JPS an interest in the New Milns property. Counsel further relied on sections 63, 68, 70, and 71 of the Registration of Titles Act to submit that the learned judge was correct to find that an unregistered interest by itself does not affect a transferee and that, bearing in mind the legal principles in **JPS v Samuels**, Lethe Estate had not undertaken a new obligation to give effect to the licence held by JPS.

[52] Counsel further submitted that there was an adequate factual and legal basis to support the judge's finding that Lethe Estate had not ratified the incomplete wayleave agreement or agreed to any route as Mr Tulloch testified that he did not sign the letter of 15 March 1997. Counsel relied on : **Harvey and another v Facey and others** [1893] AC 552, **Clifton v Palumbo** [1944] 2 ALL ER 497, **Gibson v Manchester City Council** [1979] 1 WLR 294, **Reid v Bickerstaff** [1909] 2 Ch 305, **Ronald Chang and Anor v Frances Rookwood et al**, section 41(2) Electric Lighting Act, **Ramdeo Mahabir v Payne** (1979) 33 WIR 268, **Spiricor of St. Lucia v Attorney-General of St. Lucia and another** (1997) 55 WIR 123, and **Half Moon Bay Ltd v Crown Eagle Hotels Ltd** (2002) 60 WIR 330 and other cases.

Discussion

[53] Although the matter involved much evidence of dealings between Mr Tulloch and JPS, Mr Tulloch did not bring a claim in his personal capacity. Instead, Lethe Estate and Great River Rafting brought the claim against the JPS in June 2011. Lethe Estate, claimed, among other things:

> "(i) An injunction requiring [JPS] to remove the towers with the electrical wires that were erected on the [Lethe's property];
>
> (ii) Damages for the continuing trespass on and over [Lethe's property];
>
> (iii) Damages for the continuing nuisance….;
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> (iv) Damages for deceit;
>
> (v) Damages for breach of contract;
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> (vi) Special Damages;
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> (vii) Loss of sale of lot to Bertram Wright….;
>
> (viii) Loss of sale of lot to Mr and Mrs Shelton….;
>
> (ix) Damages for the loss in value to the subdivision because of the presence of the towers and the

transmission lines in the amount of $6,950,000.00 and continuing;

(x) Mesne Profits…"

[54] Great River Rafting, which is not a party to this appeal, claimed, among other things: damages for deceit; damages for nuisance; and special damages.

[55] Mr Tulloch signed the Claim Form twice. Firstly, as Managing Director and Chief Executive Officer ('CEO') of Lethe Estate and secondly as Managing Director and CEO of the Great River Rafting. In error, the 2nd claimant is named as Lethe Estate on the claim form.

[56] Consistent with his description on the claim form, in the particulars of the claim, Mr Tulloch was described as the Director, Principal shareholder, and CEO of both Lethe Estate and Great River Rafting (see paras. 1 and 2).

[57] At para. 4 of the particulars of claim, Lethe Estate pleaded that Mr Tulloch was the former owner of its property known as New Milns, which it acquired. Paras. 5-11, and 13 of the particulars of claim are very useful in considering the issues.

[58] Lethe Estate pleaded that JPS approached Mr Tulloch in or about 1995 to secure an easement over the lands it owned but which were then owned by Mr Tulloch. Paras. 6-11 and 13 read:

"6. **Tulloch at all material times negotiated with [JPS] on behalf of [Lethe Estate and Great River Rafting]** on the matters set below in this Claim on the basis that any agreement would have to be effected in an agreed manner so as not to damage the businesses operated by either [Lethe Estate or Great River Rafting].

7. In the course of the discussions with Tulloch about the easement, [JPS] requested Tulloch's facilitation for driving through the property now owned by [Lethe Estate] in order to access property which was adjacent to Tulloch's property.

8. **[Lethe Estate] received a sum of Five Million Dollars ($5,000,000) from [JPS] for various purposes** including Three Million Dollars ($3,000,000) paid in respect of considerations **for the future grant of an easement** and other considerations which were agreed as follows:-

(i) **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**;

(ii) The use of the property and subdivision roads during construction of the transmission line. Some of these roads were to be constructed by [JPS];

(iii) The reservation of approximately 1500 feet of subdivision roads, with extensions to the tower sites, to allow JPS permanent access to maintain two of the transmission tower angle stations on Tulloch's property;

(iv) Compensation for JPS cutting of temporary roads on Tulloch's property, inclusive of an access road to a transmission tower site in an adjoining (Mr Allison's) property not belonging to Tulloch;

(v) Compensation related to Tulloch making a road diversion in the banana plantation for the Jitney 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 has been made;

(vi) Compensation for income loss from bananas destroyed in order to place one of the [JPS'] towers;

(vii) **Compensation for relocation of the two lot purchasers whom Tulloch had to relocate on more expensive lots because JPS did not construct roads and extend lines by October 10, 1995;**

(viii) Compensation for nuisance caused to the users of Tulloch's attractions as a result of the roads not being

completed by October 10, 1995 which impacted negatively on the attractions;

(ix) Compensation for diminution in value of a third subdivision lot, approximately 17 acres in size;

(x) Compensation for the loss suffered by Tulloch's environmentally friendly development.

Exhibited hereto marked 'FT1' for identity is a copy of the letter dated March 27, 1996 from [JPS] to [Great River Rafting] which outlines items listed at paragraph 8.

9. In order to ensure that the easement would not take a damaging or inappropriate path, [**Lethe Estate** and Great River Rafting] **effected an Arbitration Agreement that even in the event an agreed path became undesirable**, **the choice of an alternative route should have been put to Arbitration.** Exhibited herewith is the incomplete Grant of Easement with the Arbitration provision at clause 3 marked 'FT2' for identity.

10. After exhaustive discussions, it was also specifically pointed out to [JPS] that the path had to be specific so as not to affect the subdivisions and the finishing point to be used by [**Lethe Estate** and Great River Rafting] for kayaking and tubing among other things, **the parties** could not agree a route acceptable to [**Lethe Estate**] and [JPS].

11. After various efforts to agree a route, [JPS] approached Tulloch indicating by letter dated the 15th March, 1997 a proposed point for the location of one tower. Tulloch refused to sign that letter of March 15, 1997. Exhibited herewith is a copy of letter dated March 15, 1997 marked "FT3" for identity.

12. …

13. **[JPS], without any agreed path, established the transmission system on and over the present path without notification to or reference of any kind to [Lethe Estate** and Great River Rafting's] **representative Tulloch** and not having done a survey previously as they should have in any event." (Emphasis supplied)

[59] At para. 15 of the particulars of claim, Lethe Estate and Great River Rafting indicated that they did not know when the transmission system was installed on Lethe Estate's property and only became aware of it due to a survey in August 2005. Para. 15(i) is important. There, Lethe Estate and Great River Rafting pleaded that:

> "When it was discovered that [JPS] had gone ahead without permission to set up the transmission system on [Lethe Estate's] property, **Tulloch and subsequently his counsel made consistent efforts to elicit from [JPS] the basis of [JPS'] action in establishing the transmission system over [Lethe Estate's] property** without permission **in breach of the contractual arrangements with [Lethe Estate** and Great River Rafting] including affecting the river lots of [Lethe Estate]…" (Emphasis supplied)

[60] At para. 15(ii), Lethe Estate and Great River Rafting pleaded that, in a letter of 9 June 2005, JPS indicated that it would conduct a survey to ascertain the route taken and its impact, in order to discuss the issue with Tulloch. Paras. 15(iii) and (iv) state:

> "(iii) [JPS] having failed to do the survey as agreed, it was agreed that Tulloch engaged Brian Alexander to conduct the survey. This was received in August 2005 and established that the unauthorized installation of the transmission system had not even been on any path which had been the subject of any discussion as one for consideration by Tulloch with [JPS]. The path was not only wholly unauthorized but also in violation of the arrangement to agree a path in relation to the incomplete Grant of Easement.
>
> (iv) [**Lethe Estate** and Great River Rafting] **assert that [JPS] had also used a route which additionally affected six (6) lots as against the three (3) lots which [JPS] indicated would be the maximum number of lots which would be affected in respect of any agreed route**." (Emphasis supplied)

[61] Although the learned judge did not uphold the claim for damages for deceit, the pleadings are useful for the issue we are considering. Among the particulars of deceit for

Lethe Estate and Great River Rafting were the following at para. 18 of the particulars of claim:

> "(i) **Erecting the transmission system without any agreed route with Tulloch on behalf of [Lethe Estate** and Great River Rafting].
>
> (ii) Acting as it did without reference to the Dispute Resolution/Arbitration Agreement.
>
> (iii) **Acting as it did knowing that Tulloch was frequently ill and travelling abroad**.
>
> (iv) **Acting as it did knowing that in addition to his illness, Tulloch was also very busy with his public responsibilities as a member of Parliament**.
>
> (v) …
>
> (vi) …
>
> (vii) **Acting as it did knowing that Tulloch on behalf of [Lethe Estate]** was trying to avoid a Public Health Hazard and Nuisance by the selection of a route which would not create any harm to visitors and other persons to [Lethe Estate's and Great River Rafting's] tours and activities or affecting any property development by [Lethe Estate] and or others in any way." (Emphasis supplied)

[62] It was JPS, in its amended defence filed 15 October 2013, that insisted that it did not enter an easement agreement with Lethe Estate and Great River Rafting. Paras. 4-6 reflect the following:

> "4. In response to Paragraph 5, [JPS] will say that Mr. Francis Tulloch on the 4th April 1996 executed a Grant of Easement over lands situated at New Milns, Hanover…Attached and marked '1' is copy of the executed Grant of Easement dated 4th April 1996.
>
> 5. **[JPS] will further state that it did not enter into a Grant of Easement with [Lethe Estate** and Great River Rafting] and also at the material time [Lethe Estate

and Great River Rafting] neither held a beneficial interest in nor were they the registered proprietors of the lands. [JPS] on the 4th April 1996 entered into a Grant of Easement over lands situated at New Milns, Hanover…This Grant of Easement states that the Grantor

> 'HEREBY GRANTS to the Company the easement liberties and rights set out in the Second Schedule hereto in through and over the said land TO HOLD same UNTO and TO THE USE of the Company its successors and assigns to the intent that the grant hereby made shall run with the said land and be binding on the owner or owners for the time being of the said land or any part thereof.

As Mr Francis Tulloch subsequently bought a portion of the land registered at Volume 618 Folio 45 which said land was subject to an easement, he as a subsequent purchaser would be bound by the easement, which runs with the land.

6. [JPS] will further state in response to Paragraph 5 of the Particulars of Claim that Mr. Francis Tulloch was paid Five Million Dollars ($5,000,000.00) being consideration for the Grant of Easement granted on the 4th April 1996." (Emphasis supplied)

[63] Mr Tulloch, in cross-examination, insisted that he was never saying that Lethe Estate was not bound by what he did. In addition, in his witness statement filed 30 January 2017, Mr Tulloch identified himself as the CEO of Lethe Estate. In para. 15 of his witness statement, he stated that after the transfer of the Lethe Lands and New Milns Land from himself to Lethe Estate and Great River Rafting, he "communicated with JPS on their behalf as director and [CEO]". In para. 54 of his witness statement, Mr Tulloch stated:

> "Whilst [**Lethe Estate** and Great River Rafting] **and I accept that the 27th March 1996 letter sets out the commercial terms of agreement for an "easement",** it does not specify the route of the 'easement' which is the all-important term, as no route was agreed, **hence why I insisted** that **I** was still prepared to go to arbitration which

> would be upon the issue of the route of the 'easement'." (Emphasis supplied)

[64] In para. 109 of this witness statement, Mr Tulloch complained that JPS' wrongs were "**concealed from me and [Lethe Estate** and Great River Rafting]" (emphasis supplied). Further, in para. 111, Mr Tulloch stated that, in 2011, his attorneys advised him to file a claim, and he hired a land surveyor, Mr Ramharrack. Mr Tulloch then indicated that Great River Rafting "through [him]" paid Mr Ramharrack. At para. 126 of this witness statement, Mr Tulloch stated "**it was of particular concern to [Lethe Estate** and Great River Rafting] **(and to me, as their chief executive officer)** to secure JPS' agreement that the eventual 'easement' path should not affect any of the riverside lots…" (emphasis supplied). Then, in para. 149, Mr Tulloch referred to "**my companies and I**" (emphasis supplied).

[65] How should the pleadings and evidence be viewed? In my opinion, JPS is correct when it asserts that Lethe Estate held the property on trust for Mr Tulloch. This is consistent with the legal principles established in **Prest v Petrodel Resource Limited and others**. The facts in that case are complicated. I hope I may be forgiven for utilising the very useful headnote:

> "The wife issued a claim for ancillary relief under section 23 of the Matrimonial Causes Act 19731 against her husband, who was the sole owner of a number of complexly structured offshore companies. The wife alleged that the husband had used the companies to hold legal title to properties which belonged beneficially to him. However, the husband failed to comply with orders for the full and frank disclosure of his financial position and the companies, which were joined as parties to the proceedings, failed to file a defence or to comply with orders for disclosure. The judge rejected the wife's submission that the husband had been guilty of any impropriety in relation to the companies such as would ordinarily entitle the court to pierce the corporate veil, but held that, in matrimonial proceedings for ancillary relief, section 24(1)(a) of the 1973 Act conferred a wider jurisdiction to pierce the corporate veil. The judge concluded that, since the

> husband had the practical ability to procure the transfer of the properties, he was 'entitled' to them within the meaning of section 24(1)(a), giving the court jurisdiction to make a transfer order in respect of them. Accordingly, he ordered the husband to transfer or cause to be transferred to the wife six properties and an interest in a seventh which were held in the name of two of the husband's companies. The Court of Appeal by a majority allowed an appeal by the companies, holding that the Family Division's practice of treating the assets of companies substantially owned by one party to the marriage as available for distribution under section 24(1)(a) was beyond the jurisdiction of the court unless the corporate personality of the company was being abused for a purpose which was in some relevant respect improper or, on the particular facts, it could be shown that an asset legally owned by the company was held in trust for the husband and that, since the judge had rejected both of those possibilities, he ought not to have made the order."

[66] On the wife's appeal, the Supreme Court recognised that the court had a limited power to pierce the corporate veil and disregard the separate legal personality of a company in 'carefully defined' circumstances. One such circumstance was where a person was subject to a legal obligation, and he deliberately evades or frustrates the enforcement of the obligation by interposing a company under his control. In such circumstances, the court would pierce the corporate veil to deprive the company or its controller of the advantage they would otherwise obtain as a result of the company's separate legal personality. The Supreme Court concluded that while the legal interest in the properties in question was vested in the companies, there was no evidence that the husband organised the companies' affairs in the way he did to avoid any obligation relevant to the proceedings. As a result, there was no justification "as a matter of general legal principle" to pierce the corporate veil of the companies.

[67] The court also concluded that there was no special and wider principle applied in matrimonial proceedings under the Matrimonial Proceedings Act that empowered the judge to order the husband to transfer to his wife property to which he was not entitled in law.

[68] The court, however, allowed the appeal, concluding that the companies could be ordered to convey the disputed properties to the wife under the Matrimonial Proceedings Act if the husband was the beneficial owner due to the particular circumstances that led to them being vested in the companies' names. This, however, required the examination of the evidence. After doing so, the court concluded that the companies held the seven disputed properties in trust for the husband. As a result, the order by the judge at first instance requiring the properties to be transferred to the wife was restored (see pages 415-417 of the judgment).

[69] Lord Sumption, whose analysis was adopted by the other members of the court, on the finding that the companies held the properties in trust for the husband, noted, for example, that one of the companies acquired a legal interest in six London properties before it started to operate commercially and generate earnings. Three properties were acquired for a nominal consideration of £1.00. He stated that since there was no explanation for the "gratuitous transfer", there was nothing to rebut the presumption of equity that the company was not to hold the beneficial interest. Another property was transferred to one of the companies by the husband, who had bought it before the company was incorporated. This meant that there was a resulting trust back to the husband. One company bought one property from the husband for an expensive price. Lord Sumption stated that since the company had not begun operations at that stage, he inferred that the purchase money must have come from the husband (see paras. 48-51). Lord Sumption emphasised at para. 52 of the judgment:

> "**Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue**. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts." (Emphasis supplied)

[70] In this case, the timelines are helpful:

a. Great River Rafting was incorporated 11 October 1985;

b. The letter dated 27 March 1996 reflected the agreement between Mr Tulloch and JPS for the grant of an easement and compensation for various matters;

c. JPS and Mr Tulloch signed an easement agreement dated 4 April 1996;

d. Lethe Estate was incorporated on 11 September 1996; and

e. Mr Tulloch transferred the New Milns property to Lethe Estate on 4 November 1996. The Transfer document reflected a sale price of $1,290,000.00. Mr Tulloch and Doreen Tulloch signed the Transfer as Directors of Lethe Estate.

[71] I agree with the submissions of counsel for JPS that there was no evidence of Lethe Estate carrying on any business between the time of its incorporation and, less than two months later, when the New Milns property was transferred into its name. There was also no suggestion that the company was able to or did in fact pay Mr Tulloch for the property from its own funds. Throughout the pleadings, Mr Tulloch referred to himself as inextricably linked with Lethe Estate and as the one making all the company decisions.

[72] It is clear that Lethe Estate wholly accepted Mr Tulloch's actions as its own. It is also important to note, that although the company was not incorporated at the time of the letter agreement in March 1996, Lethe Estate stated that it received the $5,000,000.00 compensation and claimed for losses that occurred when it had not yet owned the property. In addition, Lethe Estate referred to the Grant of Easement that Mr Tulloch signed as an agreement that it had with JPS, although it referred to it as incomplete.

[73] This was not a case in which Mr Tulloch sought to avoid any legal obligations by interposing Lethe Estate. On the contrary, he fully embraced the fact that Lethe Estate was one of his companies and acted and made decisions for it. This theme was consistent

throughout the pleadings and the evidence. In fact, Mr Tulloch's witness statement revealed that he was very anxious to follow the correct procedures and comply with the law due to his position as a politician. The learned judge was correct when she concluded that there was no basis for lifting the corporate veil.

[74] On the other hand, although the learned judge concluded that there was no resulting trust, with respect, the learned judge failed to properly analyse the evidence and pleadings before her.

[75] In addition, respectfully, had the learned judge properly interpreted and applied **Prest v Petrodel Resource Limited and others**, she would have concluded that Lethe Estate held the property in trust for Mr Tulloch. It was not only proof of where the funds came from to purchase the New Milns property that could have indicated a resulting trust. What was required was a detailed review of all the facts and pleadings before her.

[76] In **Industrial Chemical Co (Jamaica) Ltd v Ellis**, the Privy Council ruled that it is only in cases where the evidence does not support the findings of the tribunal, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Similarly, in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, it was stated, in part, at para. 12:

> "... It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in *Thomas v Thomas* [[1947] AC 484] at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record

> of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence:** *Choo KokBeng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169." (Emphasis added)

[77] It is noteworthy that it was JPS that, in its pleadings, raised the separate legal personality issue. This position contributed to a legal finding which, though initially sought by JPS, was repented of very vigorously later in the proceedings; JPS then, almost in an about turn, sought to argue that Lethe Estate was bound by the wayleave agreement that Mr Tulloch had signed with it. Lethe Estate's claim was filed on this basis, and the evidence led in the claim supported this position.

[78] Another issue must now be considered. Lethe Estate has argued in this appeal that since there was no agreement as to the route of the transmission towers and lines, the installations on the property constituted trespass. Further, since the route was an essential feature of the easement or wayleave agreement, the agreement is not binding. In support of this argument, Dr Barnett contended that the term "as built" in the wayleave agreement/easement should be interpreted as "as provided to built".

[79] The learned judge assessed the oral and documentary evidence and concluded that Mr Tulloch was a credible witness. She accepted his evidence that no route was agreed. The learned judge considered the issue as to whether there was a valid wayleave agreement between Mr Tulloch and JPS. She noted that the agreement provided for a payment of $5,000,000.00 in compensation to Mr Tulloch and had certain conditions contained in the 27 March 1996 letter. In addition, there was no dispute that Mr Tulloch received the funds, and Lethe Estate stated that it also received them, (see para. [94] of the judgment). The learned judge noted that JPS agreed that the use of the term easement was technically incorrect and, instead, the agreement should be seen as a wayleave agreement under section 41 of the Electric Lighting Act. As noted earlier, the learned judge concluded that registration of a wayleave agreement is optional, and the

absence of registration does not affect its validity. At paras. [98]-[100] of the judgment, the learned judge wrote:

> "[98] In the instant case, having found that there was no agreement on the complete route of the transmission line on the New Milns land, the agreement between Mr Tulloch and [JPS] would without more be incomplete.
>
> [99] That is not however, the end of the matter. The case of **Jamaica Public Service Company Limited v Rose Marie Samuels** [2012] JMCA Civ 42 has been of great assistance in respect of the issues that have arisen in this case. In that case, the Court of Appeal examined the effect of a document entitled Grant of Easement which was defective as there was no plan attached. In that case as in the case at bar, construction had already taken place and consideration paid. The court in those circumstances [said] the contract was [an] executed one and not executory. Brooks JA said:-
>
> > 'Where the contract has been acted upon by the parties, the court is prepared to find that any term, which may have been too uncertain to constitute a binding contract, has been clarified or made specific by the actions of the parties.'
>
> [100] The transmission line that is the subject of the instant case has been completed and as such the agreement has been executed. It [sic] therefore find that the agreement is valid and binding between Mr Tulloch and JPS."

[80] As the learned judge noted, in **JPS v Samuels**, Brooks JA (as he then was), in writing the court's judgment, considered whether a document that had gaps and omissions constituted a binding agreement with Mr Melville, a previous owner of the property in question. At para. [13] of the judgment, he wrote:

> "[13] There is no dispute that the document contained gaps and omissions. Firstly, the land was described in only the most general terms and the places reserved, on the document, for the insertion of the volume and folio numbers for the title, were left blank. Secondly, there was reference to a plan, which should have been attached to the document, and there was no such plan attached. Thirdly, there was a marginal note

> in handwriting which stated 'easement signed subject to signing of drawing'. There was no drawing attached. Nor was there any evidence that such a drawing either existed or had been signed."

[81] Brooks JA noted that consideration had been paid to allow the construction to take place. The construction took place and existed for years for all to see. He also stated that where the parties have acted upon a contract, the court is prepared to find that any term which may have been too uncertain to constitute a binding contract had been clarified or made specific by the actions of the parties.

[82] In this case, similarly, consideration was paid to allow the construction of the transmission towers and lines. The construction took place and has been in existence for years. The location of the towers and lines, where the parties could not agree on their location, ought to have been arbitrated, but it was not. Nevertheless, as the learned judge found, a binding contract was created. I do not see any legal or factual error in this finding by the learned judge. There is, therefore, no need to make a final ruling on the arguments as to the meaning of the term "as built". Suffice it to say, however, that it appears to mean exactly what it says. The agreement is entered into when the route is not usually finalised, the towers and transmission lines are not yet built, and so when these have been built, the diagram reflecting the actual route "as built" will be appended to the agreement. This is consistent with the evidence the learned judge referred to in para. [76] of her judgment, where Mr Gordon stated that "as built" simply means we give you a drawing of how the line has been placed. This means the transmission towers and lines are built before the survey reflecting the actual route.

[83] In resolving the first issue on appeal, it is my view that Lethe Estate held the New Milns property in trust for Mr Tulloch, considered itself bound by the easement/wayleave agreement, and was bound. In addition, the learned judge was correct in finding that a binding agreement was created with Mr Tulloch, although the transmission lines and towers route was not agreed upon.

[84] The question remains, was there a proper basis to award damages to Lethe Estate? If yes, was the award correct?

Issue (ii): Whether the learned judge erred in awarding damages on the basis and in the amounts indicated in the judgment.

The approach of the learned judge

[85] As it concerns the measure of damages to be awarded, the learned judge adopted the principles enounced in the case of **Whitwham v Westminster Brymbo Coal and Coke Company** [1896] 2 Ch 538 that where land is used without permission, then payment should be made for that use. The learned judge found, however, that in the case before her, there was no evidence of the value for the purpose the land was used (that is, the construction of the transmission system).

[86] In evaluating Mr Langford's evidence as to the value of the property, the learned judge considered that Mr Langford had used a comparable assessment method but had not stated the comparable properties. She found that this omission was not fatal to the reliability of his report. Importantly, the learned judge indicated that Mr Langford was certified as an expert, and unless it was shown by evidence that he was required to list comparable properties, his professionalism could not be impugned. The learned judge also accepted Mr Langford's testimony that although he used the comparative method of assessment, the presence of a river on the New Milns property placed it in a different category from the other properties.

[87] The learned judge also considered that during cross-examination Mr Langford gave evidence that, in arriving at the starting point for his valuation of the lots, he considered that Mr Tulloch had been offered US$30,000.00 per acre from a purchaser (Monica Eschenbach). The learned judge noted that the sale was for 10 acres.

[88] Noting that a restrictive covenant on the New Milns registered title, provided that the land was to be held for agricultural purposes, the learned judge highlighted that Mr Langford's professional opinion regarding property values across the island was that the

value for an acre of agricultural lot in Hanover, which is away from the main road and away from water, is $150,000.00 or $200,000.00 depending on the size of the land.

[89] The learned judge rejected JPS' submission that the lots should be valued solely on the basis that they were agricultural land. She accepted Mr Langford's evidence that all lots in the subdivision were affected by the presence of the transmission line. She proceeded to attach a diminution in value in respect of the lots that the transmission towers and lines did not directly affect: lots 2b, 3, 4, 5a, 5c, 9, 10a, 11, 12, 13, and 14. Using the figures provided by Mr Langford and applying **Whitwham v Westminster Brymbo Coal and Coke Company** value of assessment, the learned judge awarded $58,150,000.00 as compensation for all the lots except those directly affected.

[90] In so far as the lots that were directly affected were concerned, it is an inescapable inference that since the learned judge excluded the lots that were directly affected from her award, she treated the $5,000,000.00 payment that Mr Tulloch received and that Lethe Estate said had been handed to it, as the relevant compensation.

[91] The learned judge made various findings on the claim for special damages, and these are not challenged on appeal.

The expert evidence

[92] The learned judge relied on the expert evidence of Mr Gordon Langford, who Lethe Estate called. Mr Langford prepared a report to determine the marketability and value of the New Milns property in circumstances where either (i) the court granted an injunction for the removal of the JPS' transmission system and equipment and or (ii) the court refused to grant the injunction and other orders sought.

[93] He described the New Milns property as Lot 1. To appreciate the evidence before the learned judge as to the characteristics and value of the New Milns property, though somewhat lengthy, the following sections of the report are quoted below:

"12. TOPOGRAPHY/ SITE FEATURES: Lot 1's terrain is undulating with steep and gentle hills alongside valleys along the western parameters with lands closer to eastern border with Great River gently sloping to flat. The soil type is predominantly limestone which is ideal for development activity. The land is covered with heavy vegetation of forestry, fruit trees, shrubs and grass.

The hillside affords for a commanding view of the river and the hills of Eden.

13. SERVICES: The area should enjoy urban facilities such as domestic water supply, electricity, post office, fire, Police protection. However, due to the lack of services in the parish there are deficiencies.

14. ZONING: **The area is zoned for agricultural (homestead) purposes under the Town and Country Confirmed Development Order.**

15. NEIGHBOURHOOD ANALYSIS: The Lethe Community along with neighbouring districts of Copse and New Milns in Hanover; Eden and Childermas in St. James is situated in a valley along the St. James/ Hanover border separated by the Great River. The lot sizes range from small farms (1 to 10 acres) to larger lots of 50 to over 100 acres.

The area is considered rural. Whereas the soil type and excessive rainfall is not considered ideal for farming, the predominant economic activity is farmstead, animal rearing and tourism related activity of rafting, tubing and sightseeing. Residents also commute to work in Montego Bay (11 km/7 miles away), parish capital of St. James. The educational facilities are sparse and basic, with community facilities limited to churches, shared Post office in Anchovy, police station, retail shopping, gas stations, and primary and high schools.

Recent developments in the area [sic] is marking a transition to semi-rural, suburban; mostly upper income residential development such as Ellis Piece on the St. James border which offers luxury riverside residences with contemporary

architecture. Comparable developments would be Kempshot in South St. James and Tamarind Hill in Hanover (bordering Round Hill).

The Great River rafting is a licensed recreational river activity which is approximately 2.4 km (1.5 miles) from starting point (Copse/ Lethe to finishing point (New Milns). This attraction has won numerous international awards and commendations over the years. Immediately opposite the attraction across the river is the Nature Village Farm in Eden St. James; a 40 acre/ 16ha development which also recently received a number of approvals for residential subdivision.

16. **Highest and Best Use: The highest and best [sic] of the lots situated along the river banks with close proximity to the 'Finishing Line' of the river rafting tour would be deemed commercial use as a tourist attraction/recreational facility. Other lots within the approved upper income sub-division would be homestead.**

17. **APPROVED SUB-DIVISION:** is registered as Lot 1, part of New Milns in the parish of Hanover, the subdivision commences near the end of the parochial road some 150 meters from cul-de-sac. The sub-division adjoins the River Rafting 'finishing point'. The development features include some 5km/3 miles of rough cut reserved roadways.

The approved sub-divided includes 19 lots as follows:

Lot number	Size Hectares	Size Acres
2a*	2.013	4.973
2b	1.997	4.935
3	2.086	5.155
4	2.020	4.991
5a	2.107	5.206
5b	2.270	5.609
5c	0.970	2.396
6a*	7.251	17.917

6b*	0.794	1.963
7a *	1.931	4.771
7b*	1.708	4.219
8*	2.133	5.272
9	2.086	5.155
10a	2.070	5.115
10b	4.336	10.714
11	2.107	5.207
12	2.166	5.356
13	4.340	10.724
14	4.120	10.18
Roads etc.	3.983	9.842
Total	52.488	129.700

*Indicates lots with transmission line/ towers directly affected by surface and overhead easements.

As displayed in the table above, of the Whole Property, these six (6) lots (2a, 6a, 6b, 7a, 7b & 8) are severely affected by the Easements/Partial Acquisition with the Remainder Property also suffering from the high visibility of the towers and power lines (Project Influence).

The residential sub-division approval was granted by the Hanover Parish Council (local planning agency) and National Environmental Planning Agency (NEPA) on November 1st, 2003. Electricity is available along the northern boundary and water supply services the rafting attraction on the property.

18. **EASEMENT**: The 'Grant of Easement' dated 4th April 1996 between Francis Tulloch and Jamaica Public Service (JPS) Company, outlines among other things that no tree or vegetation can be planted within 50 feet of either side of the centre line, nor any building erected. **The parcel of land is dissected by the JPS 69kv high tension wire which has a direct impact on 6 lots. With the standard width of 30.4 metres (100 feet), the lines seriously**

compromises [sic] those lots (2a, 6a, 6b, 7a, 7b & 8) rendering them sterile and unusual except for the grazing of livestock.

The impact of the Easement on the burdened property is significant as **the Remainder Property also suffers from the project influence because the high visibility of the transmission towers and power lines. A development such as this would attract the environmentally conscious discerning investor; with the river, the sound of the river permeating the lots, the solitude, the forestry and large lot sizes. The view of the river from the hillside would be a major selling point. The high visible transmission lines and tower would affect the value and the major selling point of the development.**

19. **ASSESSMENT APPROACH:** Subject to legal action by Lethe Estate Limited, there was no choice but to accept the nuisance in perpetuity as the Grant of Easement offered does not have a specified time line attached. **Future development prospects of the land will be restricted. The value of this type of restriction is reflected in a reduction in the price a buyer will pay.** The real compensation that is due is therefore the loss of value of the land overall. In other words, the compensation is the value of the land before the nuisance caused by the easement, less the value after the easement is in place.

In addition, regardless of the compensation, the landowner will suffer loss of value in perpetuity caused by the unsightly towers and power lines on prime real estate.

The diminution of value is comprised of both the easement acquisition and damage to the remainder property after imposition of the easement. The lost [sic] to the encroachment is calculated on the overall land value using the market rate per acre applied to the area that has been lost. This market value must be before the loss in value due to the unsightly transmission towers and power lines.

20. **ASSESSMENT of LOSS:** Subject to legal action by the owner of Lot 1, he has no choice but to accept the nuisance in perpetuity. Future development prospects of his land will be restricted. The measure and impact of an easement is the loss in value to the remainder property along with the partial acquisition of the rights to the designated path/ Rights of way.

Consideration will be given to the whole Property before any consideration of the imposition of the easement. The whole property will not be burdened by the project in this assessment. The partial acquisition area will be accessed [sic] for value before the project and then after the project as the area has now become sterile and unfit for any future development. The remainder property is valued as per market value before the trespass and market value after the Trespass.

We are aware that the equivalent of six (6) serviced lots will become sterile. Values below are ascribed to these lots.

The full compensation that is due is the loss of value of the land overall and the benefits that have accrued and will continue in perpetuity to JPS through the use of Lethe Estate's land.

In addition, regardless of the compensation, the landowners will suffer loss of value due to the unsightly transmission towers and power lines.

On the table of the above, we are of the opinion that the relative values, before the Trespass and after the Trespass are:

LOT NO.	VALUE BEFORE (J$)	VALUE AFTER (J$)	COMPENSATION (J$)
2a***	32,000,000	750,000	31,250,000
2b**	19,000,000	13,300,000	5,750,000
3**	20,000,000	14,000,000	6,000,000
4**	19,000,000	13,300,000	5,700,000

5a**	20,000,000	14,000,000	6,000,000
5b**	21,500,000	15,000,000	6,500,000
5c**	9,000,000	6,300,000	2,700,000
6a***	46,000,000	23,000,000	23,000,000
6b***	7,600,000	300,000	7,300,000
7a ***	18,500,000	715,000	17,785,000
7b***	27,000,000	600,000	26,400,000
8***	20,000,000	800,000	19,200,000
9**	16,500,000	11,500,000	5,000,000
10a**	20,000,000	14,000,000	6,000,000
10b*	27,500,000	24,750,000	2,750,000
11*	20,000,000	18,000,000	2,000,000
12*	17,000,000	15,300,000	1,700,000
13*	41,500,000	37,350,000	4,150,000
14*	39,500,000	35,550,000	3,950,000
Total	441,600,000	258,515,000	183,085,000

Footnotes

*** lots directly affected by surface and overhead easement (with transmission line/ towers). Declared sterile - valued as rural pasture land.

**** Lots neighbouring on easement – discounted at 30% as unsightly easement depreciate the value for discerning investor.

***Lots further away but easement still visible - discounted 10%.

The compensation as to loss of value due to the presence in perpetuity of the Transmission line is **J$183,085,000**.

In the event that the lines were instructed to be removed from the land by the Court, the compensation would be the as follows:

…

21. Summary of the Values

Assuming that the Court orders the removal or the electricity lines and all trespass is terminated in 2017:

...

Assuming that the trespass remains. Compensation for the diminution in value of the complete development.

Full and final Settlement J$183,085,000

I understand my duty to the court as set out in Rules 32.13, 32.3 and 32.4 of the Civil Procedure Rules. I have complied with this duty. I have included all matters within my expert knowledge and area of expertise relevant to the issue on which the expert evidence is being given. I certify that I have received no other instructions than those disclosed herein from the claimant, the claimant's attorneys at law." (Emphasis supplied)

[94] The appendices to the expert report included images of various areas on the property, the registered title, the instructions that Mr Langford received as an expert, and the 1995 agreement for sale between Mrs Eschenbach and Mr Tulloch. An explanation for the reference to Mrs Eschenbach is required. Mr Tulloch had agreed to sell her 10 acres of the property, part of which bordered the river. At para. 18 of his witness statement, he indicated that Mrs Eschenbach offered to pay US$30,000.00 per acre for the 10 acres; however, the purchase was not completed because JPS had not fulfilled its agreement to construct a road and install electricity leading to the property.

[95] Under cross-examination, Mr Langford testified that the transmission lines crossed three sections within the development: "riverfront, non-riverfront but smaller, and furthest from the river and a larger lot over 10 acres". Each section had different values per acre. He stated that he looked at the premium value "without the lines" and then the property's value with the lines, in which case the property could only be used for pasture grazing. He acknowledged that he had not set out any comparable property sales in the report, and he could not cite any in his evidence. According to the notes of evidence, he stated: "[b]are price used was in the region of $15m per acre as $150,000 for land that can be used commercially. [$]250,000 for pasture lands". He also stated that he used land values for other areas in Jamaica and opined that residential, development, and

farmlands are "basically the same value across the island". He emphasised, however, that the land in question was special because of the river.

[96] While acknowledging that the property was an agricultural subdivision, he stated that the best use of the property was not restricted to agriculture, and in arriving at a value, "you take a view as to what value would be modified". Furthermore, some of the lots had river frontage and commercial potential. He indicated that the values in the report were predicated on no compensation being paid for the easement path. He had, however, been advised of the compensation of $5,000,000.00 and the uses of compensation.

[97] In speaking to his ascribed values, he reiterated "[i]t is my opinion - I don't have the list of comparable properties". Mr Langford testified that sometimes, when a valuation report is being done, he would include the purchase price of other properties, and then the court would assess the evidence. He explained that he included "Miss Eschenbach because that was on the land. Other properties used for comparison would be elsewhere. Not all were zoned for agriculture". He further indicated that he assumed some lots could be used commercially. He also stated that the values of the lots were not affected by the restrictive covenant.

[98] The parties disagreed on whether the learned judge should have accepted and relied on Mr Langford's evidence.

Submissions for JPS

[99] Counsel for JPS submitted that Mr Langford confirmed in cross-examination that he used the comparison method of valuation and indicated that he could give values for 10 or 15 such comparable properties. However, he did not include any of these comparable properties in his report. Counsel noted that the learned judge concluded that this failure was not fatal to Mr Langford's report. Counsel submitted, however, that when Mr Langford failed to include these details in his report, he did not follow his usual valuation practices. Had he included the information on comparable properties, the court

would have been assisted in deciding how much weight to accord to his opinion and whether it was reliable.

[100] Counsel complained further that the learned judge quoted Mr Langford's evidence with approval, which was a further error, as Mr Langford thought he was an assessor instead of an expert witness providing an opinion to the court.

[101] Counsel submitted that although the learned judge's acceptance of Mr Langford's evidence was a matter of discretion having regard to the soundness of his evidence, Mr Langford's evidence was not supported by proper reasoning and so ought properly to have been disregarded. In support of that submission counsel relied on the cases of **Woolley v Essex County Council** [2006] EWCA Civ 753, **Kennedy v Cordia (Services) LLP** [2016] 1 WLR 597 and **Griffiths v TUI (UK) Ltd** [2021] EWCA Civ 1442.

[102] In expounding on the argument that Mr Langford's valuation report did not apply the usual valuation practices, counsel submitted that Mr Langford did not take adequate account of the restrictive covenants placed on the properties, in that the land was limited to agricultural use and was zoned by the planning authorities for agricultural purposes. Counsel averred that the valuation report was further invalidated by Mr Langford's evidence that the New Milns property being limited to agricultural use, did not impact the value of the property, as that restriction could be modified. Counsel further submitted that Mr Langford erroneously compared the New Milns property to surrounding properties, which were not restricted to agricultural use.

[103] Counsel argued that the learned judge erred in accepting Mr Langford's evidence that there was a diminution in value to the lots that the transmission system had not traversed, as this was not sound reasoning. Counsel noted that the lots ranged from 4 acres to 10 acres in size and that Mr Langford's reason for this position was the high visibility of the transmission towers and power lines. It was argued that Mr Langford did not explain how mere visibility affected the value of the properties, and his contention

was not reasonable, as not all the lots could have been affected by the presence of the transmission lines, especially those that were not contiguous to the lots over which the line traversed. Counsel urged that the size of the subdivision, the size of the individual lots, and the distance of the lots from the transmission lines demonstrated the incredulous nature of Mr Langford's conclusion. As a result, the learned judge should have rejected his evidence as being totally unreliable.

[104] Counsel contended that the learned judge incorrectly awarded damages for diminution in value for lots 2b, 3, 4, 5a, 5b, 5c, 9, 10a, 10b, 11, 12, 13 and 14, which the transmission lines did not traverse and so JPS did not commit any trespass on them.

[105] Counsel also argued that the court ignored or failed to consider the fact that the parties had agreed that three lots in the subdivision would be directly affected. Counsel referred to the evidence of Mr Tulloch and claimed that he indicated that lots 6a, 8 and 7b were the three lots that were agreed. Counsel stated that the dispute arose because the transmission line affected more lots than had been agreed by Mr Tulloch and in particular, lot 2A, a riverside lot.

[106] Finally, counsel submitted that if the learned judge had found that the agreement bound Lethe Estate, she would also have found that no compensation should have been awarded for diminution in value of the lots that were not traversed by the transmission lines and towers, as item 10 of the 27 March 1996 letter indicated that the $5,000,000.00 compensation that JPS paid to Mr Tulloch, and which Lethe Estate stated that it had received, covered "loss suffered by your environmentally friendly development". That sum, therefore, included compensation for any adverse effect of the transmission line to the other lots in the development.

Submissions for Lethe Estate

[107] Counsel submitted that the award of damages made by the learned judge was appropriate in circumstances where JPS would continue occupying the land. Moreover,

where JPS had not called an expert witness or produced an expert witness report on damages, its appeal against the award of damages was without merit.

[108] Counsel urged that the learned judge's award of damages was premised on a careful consideration of the evidence, law, and submissions made by the parties. Furthermore, counsel posited, the learned judge had arrived at her own figures rather than merely adopting the figures advanced by Mr Langford. Therefore, there was no basis to challenge the quantum of damages awarded.

[109] In continuing his submission, counsel labelled as erroneous, JPS' submission that Mr Tulloch had testified that only three lots would have been affected in the subdivision, lots 6a, 8, and 7b. According to counsel that could not have been the case because there was in fact no agreement as to which lots would have been affected and the "fax plan" dated 31 August 1995 referred to lots 6a, 8, and 10a.

[110] In further endorsing the award for diminution in value of lots by the learned judge, counsel posited that the expert report prepared by Major Aiken and Mr Saunders demonstrated that JPS had deviated from the proposed agreement in the letter dated 27 March 1996. In that regard, counsel posited that the total area occupied by the easement path was 6959.72 feet, which exceeded the 2700 feet that was originally proposed[1]. Additionally, counsel submitted, six lots were affected by the presence of transmission lines - lots 2a, 6a, 6b, 7a, 7b, and 8, instead of the three lots, which were previously proposed. Further, counsel submitted that approximately 4750 feet of the subdivision road was utilised by JPS, which exceeded the proposed 1500 feet to be utilised. Counsel further posited that the damage caused to the riverside lots was such that the award made by the learned judge was proper and appropriate.

[1] Pages 315-316 of R2

Discussion

[111] Although JPS did not call a witness to contradict Mr Langford, it asserts that the learned judge should not have accepted his evidence. JPS has relied on **Griffiths v TUI (UK) Ltd** to support its submissions, stating that it was entitled to submit that Mr Langford's evidence was unreliable and should not be relied on. Importantly, JPS cross-examined Mr Langford.

[112] **Griffiths v TUI (UK) Ltd** was an appeal by TUI UK Ltd to the Court of Appeal of England and Wales from a judgment of the High Court of England and Wales. The High court had allowed Mr Griffith's appeal and overturned the decision of Her Honour Judge Truman.

[113] Mr Griffiths purchased an all-inclusive holiday from TUI (UK) Limited ('TUI'). During that holiday, he suffered a severe gastric illness that he claimed was because of consuming contaminated food or drink, which resulted in long-term ailments. At the time, he was staying at a hotel in Turkey on an all-inclusive package holiday provided by TUI. Mr Griffiths subsequently brought a claim for damages against TUI in contract and under the Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288. At trial, Mr and Mrs Griffiths gave uncontested evidence of the underlying facts. Mr Griffiths also relied on evidence from an expert witness, Professor Pennington, a microbiologist, who concluded that the likely cause of Mr Griffiths' stomach upset was the food and drink served at the hotel.

[114] TUI confirmed that it did not intend to rely upon expert evidence from a microbiologist. TUI did not cross-examine Professor Pennington, nor did it present any expert witness evidence of its own on the central question of causation. Instead, in its closing submissions, it argued that deficiencies in Professor Pennington's report, such as incomplete explanations and a failure expressly to discount other possible causes, meant that Mr Griffiths had failed to prove his case. Her Honour Judge Truman agreed with TUI. She criticised Professor Pennington's report and found that it did not show that it was more likely than not that the food and drink at the hotel had caused Mr Griffiths' stomach

upset. She, therefore, concluded that the fact that Mr Griffiths had been ill was not by itself sufficient for him to succeed in his claim. On a balance of probabilities, he had not shown that his illness was caused by contaminated food or drink supplied by the hotel. She dismissed his claim.

[115] Mr Griffiths appealed this decision to the High Court of England and Wales, Martin Spencer J allowed Mr Griffiths' appeal and set aside Her Honour Judge Truman's order. Subsequently, TUI appealed that judgment, and the Court of Appeal of England and Wales found in TUI's favour.

[116] The decision of Martin Spencer J was reversed.

[117] By majority decision, Asplin LJ, with whom Nugee LJ agreed, indicated that there is no rule that an expert's report which is uncontroverted and which complies with the Civil Procedure Rules Practice Direction 35 ('CPR PD 35') cannot be impugned in submissions and ultimately rejected by the judge. The majority stated that it all depends upon the circumstances of the case, the nature of the report itself, and the purpose for which it is being used in the claim. The court stated that there is no strict rule that prevents the court from assessing the content of an expert's report that is CPR PD 35 compliant where it has not been challenged by way of contrary evidence and where there is no cross-examination.

[118] In particular, a court may reject a report, even where it is uncontroverted, if it is a bare ipse dixit. Although CPR PD 35 does not state expressly that reasons are necessary in an expert's report, save where there is a range of opinion, if the court is to be satisfied as to the conclusion reached, or that the evidence is sufficient to enable the claimant to satisfy the burden of proof in relation to causation, some chain of reasoning supporting the conclusion is necessary, even if it is short.

[119] Bean LJ disagreed with the majority. It was his view that Mr Griffiths did not have a fair trial of his claim, and the courts should not allow litigation by ambush. He would have dismissed TUI's appeal.

[120] Mr Griffiths then appealed to the UK Supreme Court. The court unanimously allowed Mr Griffith's appeal in a judgment written by Lord Hodge. Lord Hodge identified the principal questions that arose in the appeal as follows: "(1) what is the scope of the rule, based on fairness, requiring a party that intends to impugn evidence in its submissions at the end of a trial to challenge that evidence by cross-examination, (2) whether the rule extends to challenges to the reliability of a witness's memory and the reasoning of an expert witness, and (3) if it did was the trial judge unfair in the way that she conducted the trial in the case".[2]

[121] Lord Hodge wrote that it was trite law that in civil proceedings, a claimant has a burden of proof to establish his or her case. It was also trite law that an expert is to help the court with scientific, technical or other specialised knowledge that is outside of the judge's expertise. The expert gives evidence of fact or opinion but is not to usurp the functions of the judge because the judge is the decision-maker on matters central to the outcome of the case. The judge has the role of assessing the evidence of an expert and must determine its "adequacy and persuasiveness". Lord Hodge emphasised, however, that English law operated on an adversarial system, parties outline the issues for the judge to decide in their pleadings and how the trial is conducted, and the trial judge must ensure that the proceedings are fair. Since the expert is to assist the judge in matters about which the judge is not an expert, and the judge is to decide the case, "the quality of an expert's reasoning is of prime importance" (see paras. 36 and 37 of the judgment). In continuing at para. [37], Lord Hodge wrote:

> "37..... This court gave guidance on the role of the expert in *Kennedy v Cordia*, in which, in the judgment of Lord Reed and Lord Hodge with whom the other Justices agreed, it was stated:
>
> > '48. **An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or 'bare ipse dixit' carries little weight**, as

[2] **Griffiths v TUI UK Ltd** [2024] 2 All ER 185, para. [34].

> the Lord President (Cooper) famously stated in *Davie v Magistrates of Edinburgh* 1953 SC 34, 40. **If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless.** Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352, 371:
>
> 'an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. **Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.**' As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604: 'As with judicial or other opinions, what carries weight is the reasoning, not the conclusion.'" (Emphasis added)

[122] After an extensive review of case law, Lord Hodge summarised the relevant law in the following terms:

> "(i) The general rule in civil cases, as stated in Phipson, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.
>
> (ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.

(iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

(vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of *Phipson* recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

(viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances."[3]

[123] Note that at paras. 61 – 68 of the judgment, the court gave seven (non-exclusive) instances in which this requirement may be relaxed. Firstly, if the witness does not need any opportunity to respond because the matter being challenged is insignificant or not

[3] **Griffiths v TUI UK Ltd** [2024] 2 All ER 185, para. [70].

directly relevant. Secondly, if what the expert said was obviously so incredible that an opportunity to explain in cross-examination would not make a difference. Thirdly, if the expert boldly insists on an opinion but does not give any reasoning to support, described as a "bare ipse dixit" by the Lord President (Cooper) in **Davie v Magistrates of Edinburgh** 1953 SC 34, 40[4]. However, bare ipse dixit is not the same thing as insufficient or inadequate reasoning. Fourthly, if there is a clear error in the report. Fifthly, if the expert gave a view in the report that is contrary to the facts given by the witness. Sixthly, if the expert got enough opportunity to respond to criticism of the report, other than on cross-examination, for example, responding to questions. Seventhly, if the expert report does not comply with the requirements of Practice Direction on Expert Reports.

[124] In applying these principles to the case, the court found that fairness required Professor Pennington to be allowed to respond to TUI's criticisms. TUI chose not to challenge Professor Pennington's report on cross-examination, nor lodge its own expert report. The court expressed that while Professor Pennington's report was brief and could have included more reasoning, it was not a bare assertion. He also provided further explanation of his reasoning in response to TUI's CPR PD 35 questions. None of the exceptions identified at paras. [61] – [68] applied to Professor Pennington's evidence. The court concluded that in the absence of a proper challenge on cross-examination, it was not fair for TUI to advance the detailed criticisms of Professor Pennington's report in its submissions or for the trial judge to accept those submissions.

[125] The court found that both Her Honour Judge Truman and the majority of the Court of Appeal erred in law significantly. Her Honour Judge Truman did not consider the effect on the fairness of the trial of TUI's failure to cross-examine Professor Pennington. The majority of the Court of Appeal did, but they erred in limiting the scope of the rule to challenges to the honesty of a witness. As a result, neither court properly addressed the application of the rule to the facts of this case. In the court's view, in agreement with Bean LJ's powerful dissent, Mr Griffiths did not have a fair trial. In accepting TUI's

[4] Ibid, para. [37]

criticisms of Professor Pennington's report, the trial judge had denied Mr Griffiths a fair trial. Further, in assessing the evidence that Mr Griffiths presented at trial, including Professor Pennington's evidence, the court concluded that he had shown that it was more likely than not that the food and drink at the hotel had caused his stomach upset.

[126] The Supreme Court handed down its decision on 29 November 2023, overturning the decision of the Court of Appeal. This court completed hearing oral arguments from counsel for the parties in the appeal on 10 November 2023. We invited the parties to make further submissions on what effect, if any, the Supreme Court judgment would have on this appeal.

[127] In further submissions, filed 6 December 2024, counsel for JPS submitted that the Supreme Court decision had no impact on the appeal at bar for several reasons. Counsel highlighted a significant difference between this matter and **Griffiths v TUI UK Ltd**, in that, in this case, the appellant challenged the respondent's expert in cross-examination on the matters it subsequently raised in its closing arguments. These were:

a. That the relevant subdivision lots were zoned for agricultural purposes and use of the lots was limited by restrictive covenants;

b. That Mr Langford did not include the values of any comparable properties in his report and was unable to do so during cross-examination;

c. That Mr Langford described the lots that were directly affected as sterile although crops were seen on the land and the land was being put to other use including zip line operations and rafting; and

d. That Mr Langford concluded that the lands not directly affected/traversed by the transmission line were diminished in value.

[128] Counsel also submitted that Mr Langford's evidence had bold assertions without any reasoning to support them, including his conclusion that the lots over which the lines

did not traverse had diminished in value regardless of their size when such lots ranged from 4 acres to 10 acres in size. Counsel also contended that his conclusion that the lands over which the lines traversed and on which towers were located were sterile also flew in the face of logic in light of the activities carried out on the properties.

[129] Importantly, counsel submitted that Mr Langford's evidence did not comply with rule 32.13 of the Civil Procedure Rules, 2002, as amended ('CPR') which requires the expert to provide details of any literature or other material which the expert witness has used in making the report. Counsel argued that Mr Langford used the comparative method of assessment to arrive at the values stated in his report but did not include references or information about the comparable properties which he used to arrive at the starting values in his report. As a result, the court was unable to independently test his comparisons. Counsel reiterated their position that the learned judge ought to have rejected Mr Langford's evidence.

[130] Counsel for Lethe Estate filed submissions in response on 19 December 2024. Counsel argued that counsel for JPS' submissions ignored the essential factor that caused the UK Supreme Court to reverse the decision of the Court of Appeal. The factor involved was that a trial judge is not entitled to find that a claimant had not proved his case when the claimant's expert had given uncontradicted evidence which was not illogical, incoherent, or inconsistent, based on any unrealistic misunderstanding of the facts or unrealistic assumptions. Counsel referred to Lord Hodge's statement that there may be a bold assertion of opinion in an expert's report but reasoning which appears to be inadequate is open to criticism for that reason is not the same as a bare ipse dixit. As a result, a party who challenges the trial judge's acceptance of that assertion without adducing any evidence in contradiction cannot succeed on appeal.

[131] Counsel for Lethe Estate acknowledged that counsel for JPS challenged Mr Langford in cross-examination but argued that the mere suggestion in cross-examination that Mr Langford's opinion was unreasonable did not mean that the trial judge had to reject the opinion. Instead, as the learned trial judge did in this instance, a judge must

assess the reason given for the opinion, the nature of the subject matter, the competence of the expert to make an assessment of the factors, and the absence of any evidence or opinion to the contrary.

[132] In so far as counsel for JPS criticised Mr Langford's opinion on the basis that he had not sufficiently taken into account the existence of restrictive covenants on the properties, counsel for Lethe Estate referred to the evidence in the report concerning the soil type and excessive rainfall making the property not ideal for farming, as well as recent developments showing a transition in the use of the properties to mostly upper income residential developments. Counsel submitted that, in those circumstances, it was reasonable for Mr Langford to proceed on the basis that the restrictive covenants could be easily modified and the learned trial judge was entitled to accept his evidence.

[133] Counsel for Lethe Estate also challenged JPS' complaint that Mr Langford opined that lots not traversed by the transmission line and towers diminished in value just because the lines or towers could be seen. Counsel submitted that Mr Langford was speaking as a person who was active in the field of real estate appraisal and he could speak to public perception and aesthetic considerations which would affect the market, and the appellant did not provide any contrary evidence.

[134] In concluding their submission, counsel for the respondent submitted that JPS conceded that Mr Langford's evidence was not contradicted and, while JPS challenged Mr Langford in cross-examination, it did not present to him any concrete case or material in support of the position it advanced. Therefore, following the decision of the UK Supreme Court, the learned trial judge was entitled to accept Mr Langford's evidence, which was not illogical, incoherent, or based on a misunderstanding of the facts or unrealistic assumptions. Further, the learned judge was not required to reject Mr Langford's evidence merely because it was contended that the explanations given were incomplete or that he had failed to discount other possible factors.

[135] I am grateful to counsel for these very helpful submissions. Counsel for JPS are correct that, in this case, JPS was entitled to criticise Mr Langford's expert evidence. JPS' counsel cross-examined him on the matters that its counsel later raised in their closing submissions. Lethe Estate does not challenge this. Mr Langford had the opportunity to defend his evidence and his approach to preparing the report. There was no unfairness when counsel for JPS raised their concerns during their closing submissions. This placed the learned judge in a position to assess Mr Langford's evidence to achieve justice. The question to now consider is whether any of these criticisms ought to have led the learned judge to reject his evidence as being unreliable in full or in part.

[136] Mr Langford was an expert witness. Part 32 of the CPR addresses the expert witness's duty and how the duty is to be carried out. It provides:

> "**Expert witness's overriding duty to court**
>
> 32.3 (1) **It is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise.**
>
> (2) This duty overrides any obligations to the person by whom he or she is instructed or paid.
>
> **Way in which expert witness's duty to court is to be carried out**
>
> 32.4 (1) Expert evidence presented to the court must be, and should be seen to be, the independent product of the expert witness uninfluenced as to form or content by the demands of the litigation.
>
> (2) **An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within the expert witness's expertise.**
>
> (3) **An expert witness must state the facts or assumptions upon which his or her opinion is based.** The expert witness must

not omit to consider material facts which could detract from his or her concluded view.

(4) An expert witness must state if a particular matter or issue falls outside his or her expertise.

(5) Where the opinion of an expert witness is not properly researched, then this must be stated with an indication that the opinion is no more than a provisional one.

(6) Where the expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report.

(7) Where after service of reports an expert witness changes his or her opinion on a material matter, such change of view must be communicated to all parties." (Emphasis supplied)

[137] Rule 32.13 of the CPR addresses the contents of the expert's report. It provides:

"32.13 (1) An expert witness's report must -

(a) give details of the expert witness's qualifications;

(b) give details of any literature or other material which the expert witness has used in making the report;

(c) say who carried out any test or experiment which the expert witness has used for the report;

(d) give details of the qualifications of the person who carried out any such test or experiment;

(e) where there is a range of opinion on the matters dealt within in the report-

(i) summarise the range of opinion; and

(ii) give reasons for his or her opinion, and

(f) contain a summary of the conclusions reached." (Emphasis supplied)

[138] The expert provides his or her opinion to the court, and the court assesses it to determine whether to accept it or rely on it in full or part.

[139] I have considered the criticisms levelled by counsel for JPS at Mr Langford's evidence. I agree with counsel for Lethe Estate that it was not illogical, incoherent, based on a misunderstanding of the facts, or unrealistic for Mr Langford to assert that although the lots were zoned for agricultural purposes and their use limited by restrictive covenants, their highest and best use was not agricultural. Mr Langford referred to recent developments in the area that indicated a transition of property in the locality becoming "semirural" and "suburban". He took note of the fact that Great River Rafting was licensed as a recreational river activity with a finishing point in the New Milns property. He gave examples of "upper income residential developments" that offered "luxury riverside residences". He noted in his report that there was property immediately opposite the Great River attraction that had recently received approvals for residential subdivision.

[140] Indeed, Mr Tulloch, Great River Rafting and Lethe Estate, had commenced tourist attractions on parts of the property. It was also quite understandable that river lots would be seen as quite valuable and distinguishable from land-locked lots. His description of the properties directly impacted by the transmission lines as sterile and best used as pasture land also did not appear inherently illogical. While JPS' witness, Mr Bret Bennett, testified that, on a visit to the New Milns property, he saw some persons coming on the property for zipline activities, tubes for tubing on the river, bamboo rafts for rafting, and tour guides, the evidence from Mr Tulloch indicates that he and his companies were trying to see what they could earn regardless of the impact of the transmission powers and lines. It was not a comfortable situation. Neither was Mr Langford's conclusion that the lots not directly traversed by the lines could also have diminished in value due to the impact of the sight of the power lines and transmission towers, as the respondent's counsel

submitted, he would be aware of public perception and "aesthetic considerations" in the field of real estate. It was, therefore, open to the learned judge to accept and rely on Mr Langford's expert opinion on these issues and his assessment approach as the evidence supported his opinion.

[141] Mr Langford opined that the measure and impact of the easement was the loss in value to the remainder of the property, along with the partial acquisition of the rights to the right of way. In his report, he stated that the partial acquisition area (that the easement traversed) would be assessed for value before and after the project, as the land had become "sterile and unfit for any future development". This meant that the court needed to be given expert advice on the value of the property and its individual lots, and for the learned trial judge to be able to test the evidence.

[142] At para. [214] of her judgment, the learned judge set out what she described as a "telling exchange" during the trial:

> "Q. So in arriving at these values before, Jamaican currency, that is the, you have here, eighteen million five hundred dollars for 7A, twenty seven million for 7B, and in respect of 2A, thirty two million. What I wish to know, Mr. Langford, is how did you arrive at the base price for these lots, what did you compare them to?
>
> A. **My knowledge of how the comparable properties any [sic] in some other areas --**
>
> **Q. Where?**
>
> **A. I haven't gotten the history with me, but –**
>
> Q. Can't recall any of your research at all?
>
> A. Yes, this sort of land was would [sic], these kind of levels, 50,000 per acre. You're not going to find anything directly comparable because of the aspect of the river, but generally land can be used commercially --
>
> Q. I am not hearing you.

A. **It is my opinion.**

Q. But I want to find out on what your opinion is based, what properties did you compare these lots to arrive as those values?

A. **I haven't gotten the list here or in my head, but I can run off values of 10 or 15 properties** –

Q. And you don't -- can't recall anything at all?

A. **Just in my opinion that** those at this levels would be appropriate.

Q. **In your usual valuation reports, do you not usually put photographs and pictures and references to other comparable properties?**

A. Depending on the type of report that I do, yes.

Q. And you didn't consider it important to put it in this report?

A. **For the scope of this report it would just confuse matters, because it's going to then ask the Court to be their own assessor in judging how you compare different properties,** and -- or this one, you can't compare with that one, and it's simpler to just leave it like this." (Emphasis supplied)

[143] I agree with the complaint of JPS' counsel that, although Mr Langford stated that he used the comparison method of assessment, Mr Langford did not include the values of any comparable properties in his report, and was not able to provide any such information during his cross-examination although he mentioned that he could run off values of 10 or 15 properties. In his analysis of the neighbourhood in his expert report, Mr Langford referred to recent developments in the area such as Ellis Piece on the Saint James Border which offers luxury riverside residences, and comparable developments, such as Kempshot in South Saint James and Tamarind Hill in Hanover (bordering Round Hill). He also referred to Nature Village Farm in Eden Saint James, that had recently received several approvals for residential subdivision. He did not provide any evidence to the court on the value of these properties.

[144] In cross-examination, he stated that residential, development, and farmlands were basically of the same value across the island. He also indicated that different sections of the New Milns property would have varying lot values depending on where the lots were located. He did not, however, provide the court with any evidence on the potential market value of these properties. He stated, "[b]are price used was in the region of $15m per acre as $150,000 for land that can be used commercially…[$]250,000 for pasture lands". It is not easy to understand what this evidence meant. Although Mr Langford provided these figures, there was no data to assist the court as to whether these values were reasonable market values. True, he referred to the sale agreement with Miss Eschenbach, however, that was only one agreement and would not satisfy the requirement for the comparative assessment that he said he had carried out. She might have been willing to pay a premium price above the normal land value. In addition, Mrs Eschenbach was prepared to pay that price, assuming that certain infrastructure had been put in place.

[145] Interestingly, Mr Langford agreed that depending on the type of report that he was doing, he would usually refer to comparable properties. He asserted that due to the scope of the report in this matter, he felt that it would confuse the court and ask the court to be its own assessor in judging how to compare different properties. With respect, Mr Langford was mistaken in his understanding of his role. It may very well have been, as JPS suggested, that Mr Langford saw himself as an assessor and not an expert. He was however an expert, and it was left to the court to assess his evidence and determine what to accept.

[146] The learned judge, in accepting the values that Mr Langford provided in his report as well as his general opinions, noted that Mr Langford had been certified as an expert and opined that unless it was shown by evidence that he was required to list the properties, his professionalism could not be impugned.

[147] The learned trial judge was placed in a difficult position to assess damages. She had only the testimony of one expert witness to assist. While it was open to the learned judge to accept and rely on Mr Langford's assessment approach, in my view, his failure

to provide concrete evidence on the comparative values of relevant properties that he took into account, placed the court in a position where it relied on his bare ipse dixit, (that is, he himself said it) on the question of property values. I agree with counsel for JPS that, in this regard, his report was inadequate and unreliable, especially in a context where there was the possibility of a substantial award of damages. It is also arguable that on the matter of property values, he did not provide adequate details of the material he used in making the report, contrary to rule 32.13(1)(b) of the CPR. In all the circumstances, the learned judge erred in law as she ought to have rejected as inadequate and unreliable the assessment of loss that Mr Langford presented on the basis of his asserted but unsupported property market values. His expert report and expert evidence were deficient on the issue of property value. This was not a matter of merely his credibility and reliability.

[148] The question remains whether the learned judge was correct concerning the basis on which she awarded damages.

[149] At para. [218] of her judgment, the learned judge indicated:

> "[218] Therefore, using the ***Whitwham*** basis of assessing damages, the diminution in value would be in respect of the lots **that the line or towers have not directly affected** [Lots 2b, 3, 4, 5a, 5b, 5c, 10a, 10b, 11, 12, 13 and 14]. Using the figures provided by Mr Langford, I would therefore award the sum of Jamaican fifty eight million one hundred and fifty thousand dollars (J$58,150,000.00) to [Lethe Estate] (the compensation for all lots except the ones directly affected and lot 6A for which compensation was already paid." (Emphasis supplied)

[150] It appears that, in error, the learned judge did not refer to lot 9, which was also not directly affected. The figure to which she arrived $58,150,000.00 is also slightly incorrect as it would have been $58,200,000.00, including lot 9. This is not crucial, as the discussion below will demonstrate.

[151] At the outset, it is vital to consider whether the learned judge was correct to award damages for the lots that were not directly affected by the transmission lines and towers. In my view, the learned judge erred in doing so. I agree with the submissions of counsel for JPS that para. 7 of the March 1996 letter, in referring to "compensation for loss suffered by your [Mr Tulloch's] environmentally friendly development", was meant to address a diminution in the value of the subdivision as a whole due to the presence and sight of the transmission lines and towers. Of the $5,000,000.00 compensation paid to Mr Tulloch and handed over to Lethe Estate, as pleaded by Lethe Estate, $3,000,000.00 was allocated to payment for the easement, while the balance covered "other considerations". The result is that the learned judge erred when she made an award for diminution in the value of the lots that were not directly affected by the transmission lines and towers. However, that is not the end of the matter.

[152] It is noteworthy that earlier in her reasons, the learned judge had found that Lethe Estate was not bound by the easement/way leave agreement that Mr Tulloch signed with JPS and due to which he received $5,000,000.00 compensation for the future grant of easement and compensation for other matters. However, the learned judge, by inference, concluded that Lethe Estate had already received compensation for the lots directly impacted by the transmission towers and lines. This is a reasonable inference since she awarded damages for the lots that were only indirectly affected because the transmission towers and lines did not pass on or through them. Arguably, it was inconsistent for the learned judge to find that the easement agreement did not bind Lethe Estate and then to fail to order compensation for all the lots that were directly impacted by the transmission towers and lines. However, in light of my earlier conclusion on this issue, this issue is resolved.

[153] The evidence before the court is that the $5,000,000.00 consideration in the March 1996 letter agreement between JPS and Mr Tulloch included compensation for the easement to traverse and impact three subdivision lots. As six lots were directly impacted, and not three as was agreed, the learned judge erred when she did not make an award compensating Lethe Estate for the three additional lots that were impacted. JPS does not

dispute that six lots, not three, as agreed, were directly impacted by the transmission towers and lines.

[154] A list of the impacted lots appears below:

> Lot 2a - 2.013 hectares, 4.973 acres, **(not agreed, Riverside)**
> Lot 6a - 7.251 hectares, 17.917 acres, (suggested as part of the route by Mr Tulloch)
> lot 6b - 0.794 hectares, 1.963 acres,
> lot 7a - 1.931 hectares, 4.771 acres,
> lot 7b - 1.708 hectares, 4.219 acres, **(not agreed, Riverside)**
> lot 8 - 2.133 hectares, 5.272 acres (suggested as part of the route by Mr Tulloch)

[155] Mr Tulloch, on behalf of Lethe Estate, insisted that two of the directly affected lots were riverside lots that he had insisted should not have been impacted as this would be disastrous for the tourism-related plans for the property. These were lots 2a (approximately 5 acres) and 7b (approximately 4 acres). He also testified that his suggested route for the easement would have only affected lots 6a, 8, and 10a. In the end, lot 10a was not impacted.

[156] The question remains: Which other lot is to be regarded as covered by the compensation in the March 1996 letter? The parties will need to address this issue in due course. There is no direct evidence as to any potential agreement on a third lot apart from 10a that was not impacted. In reviewing Mr Tulloch's evidence, however, it is noted that during cross-examination, he insisted that the transmission line was to skirt lots 2A, 7A, and 7B (see page 346 volume 2 of the Record of Appeal).

[157] In resolving this matter, the $5,000,000.00 compensation that Lethe Estate said it received from Mr Tulloch covered three lots. The transmission lines and towers impacted a total of six lots, three more than the compensation covered, which would be the trespass for which compensation ought to be awarded.

[158] It now remains for this court to determine the approach to be taken to determine the outstanding issue between the parties concerning the three additional lots. The Court of Appeal Rules ('CAR') outline some of the powers of this court on the hearing of a civil appeal. It states at rule 2.15 of the CAR:

> "In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition –
>
> (a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and
>
> (b) power to -
>
> (a) affirm, set aside or vary any judgment made or given by the court below;
>
> (b) give any judgment or make any order which, in its opinion, ought to have been made by the court;
>
> (c) remit the matter for determination by the court below;
>
> (d) order a new trial or hearing by the same or a different court or tribunal;
>
> (e) order the payment of interest for any period during which the recovery of money is delayed by the appeal;
>
> (f) make an order for the costs of the appeal and the proceedings in the court below;
>
> (g) make any incidental decision pending the determination of an appeal or an application for permission to appeal; and
>
> (h) make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal.
>
> (3) The court may reduce or increase the amount of any damages awarded by a jury.

(4) The court may exercise its powers in relation to the whole or any part of an order of the court below."

[159] It would not be possible to remit this matter to the learned judge, as she is now serving elsewhere. Since the appeal is a re-hearing, it is best that this court makes orders to address this outstanding issue between the parties. I note that in **Garfield Segree v Jamaica Wells and Services Limited and National Irrigation Commission Limited** [2017] JMCA Civ 25, this court invited the parties to provide the court with written submissions on damages and assessed the damages to be awarded to the appellant. I propose that this court take a similar approach regarding the damages to be awarded to the respondent.

Conclusion

[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.

[161] Regarding costs, I suggest that the parties make submissions for the court's consideration. Submissions should also be made on the issue of the pending stay of execution.

[162] I propose that the following orders be made:

i. The appeal is allowed in part.

ii. Judgment in favour of Lethe Estate is affirmed.

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, appealed against, 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.

DUNBAR GREEN JA

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

G FRASER JA (AG)

[164] I too have read the draft judgment of Foster-Pusey JA and agree with her reasoning and conclusion.

FOSTER-PUSEY JA

ORDER

i. The appeal is allowed in part.

ii. Judgment in favour of Lethe Estate is affirmed.

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