IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016 CD 000112

BETWEEN	**LETHE ESTATE LIMITED**	**1ST CLAIMANT**
AND	**GREAT RIVER RAFTING AND PLANTATION TOUR LIMITED**	**2ND CLAIMANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**DEFENDANT**

Mr. Hugh Small Q.C and Mr. Weiden Daley instructed by Hart Muirhead Fatta for the claimants

Mrs. Simone Mayhew and Miss Kimberley Morris for the defendant

January 30 and 31, February 1, 2 and 3, September 20 and November 27, 2017 and February 23, 2018

Land law – Easement - Validity

Wayleave agreement – Effect of non registration – Electric Lighting Act s.41

Trespass to land- Acquiescence - Damages

Company law – whether the veil of incorporation ought to be lifted

Interest – whether interest at a commercial rate ought to be awarded

Rule 26.1 (7) of the Civil Procedure Rules, 2002 - Application to vary order or revoke order – draft judgment – overriding objective

SIMMONS J

[1] This claim arises from the construction of a part of the defendant's 69KV Bogue to Orange Bay transmission line and related equipment(the transmission line) over and on property located at New Milns in the parish of Hanover.

The Background

[2] In November 1994 the defendant approached Mr. Francis Tulloch, who is a director and Chief Executive Officer of both claimants, with a view to using lands situated at Brookeville, Lethe in the parish of St. James registered at Volume 1285 Folio 345 of the Register Book of Titles for the erection of transmission towers and power lines.

[3] At that time, Mr. Tulloch was also the registered proprietor of lands situated at Lethe in St. James registered at Volume 1284 Folio 535 (the adjoining property). He also owned two parcels of land situated at New Milns in the parish of Hanover which are now registered at Volume 1283 Folio 504 and Volume 1283 Folio 505 of the Register Book of Titles. Those lands were originally part of all that parcel of land registered at Volume 618 Folio 45 (the parent property).

[4] The correspondence between the parties reveals that although the defendant had initially approached Mr. Tulloch with a view to using his Lethe lands in St. James, it subsequently entered into negotiations with him for a Grant of Easement in respect of the parent property.

[5] A document titled 'Grant of Easement' was eventually signed by Mr. Tulloch in respect of the parent property and consideration of five million dollars ($5,000,000.00) paid by the defendant to Mr. Tulloch as settlement for the "easement" in April 1996.

[6] On April 10, 1996 the defendant lodged a caveat in respect of the land for which it had secured the easement.

The Claim

[7] The first claimant which was incorporated on September 11, 1996 is the owner of all that parcel of land registered at Volume 1283 Folio 504 (the New Milns land).

[8] The second claimant which was incorporated on October 11, 1985 is said to be entitled to possession, use and development of the New Milns land.

[9] The claimants allege that the transmission line was erected on and over the New Milns land without their agreement and now seek various relief against the defendant.

[10] The first claimant has asked the court to grant an injunction requiring the defendant to remove the towers and wires which have been erected on the New Milns land. It is also seeking an order to stop the continuing trespass by the defendant's servants, agents or contractors.

[11] The first claimant has also claimed damages for continuing trespass, continuing nuisance, breach of contract and deceit. It has also claimed special damages in the sum of seven million four hundred and twenty-six thousand nine hundred and thirty dollars. ($7,426,930.00).The second claimant has claimed damages for deceit and continuing nuisance. It has also claimed exemplary damages and special damages for loss of profits in the sum of six million dollars ($6,000,000.00) up to the date of filing of the claim.

[12] The claim for damages for deceit has been withdrawn.

The Pleadings

[13] The particulars of claim state that the defendant approached Mr. Tulloch in or about the year 1995 in order to secure an easement for a path over land now belonging to the first claimant which was then owned by Mr. Tulloch.

[14] It further states that Mr. Tulloch negotiated with the defendant on the claimants' behalf on the basis that the easement, if granted, would not damage the businesses operated by them.

[15] It also states that the first claimant received money from the defendant in respect of considerations for the future grant of an easement and other considerations which were agreed.

[16] The particulars indicate that after exhaustive discussions the defendant was informed that the path of the easement should not affect the subdivisions and the finishing point to be used by the claimants' kayaking and other activities.

[17] According to the claimants, Mr. Tulloch and the defendant failed to arrive at an agreement in respect of a route acceptable to both of them.

[18] The claimants have also asserted that after various efforts to arrive at an agreement in respect of a route, the defendant by letter dated March 17, 1997 made a proposal for the location of one of its towers. Mr. Tulloch declined to sign the letter to signify that he was in agreement with that proposal. Mr. Tulloch subsequently fell ill and frequently had to travel overseas for medical treatment.

[19] The claimants contend that the defendant without having done a survey and in the absence of any agreement between the parties established the transmission line on and over the New Milns land.

[20] The claimants have asserted that they are unaware of when the transmission line was installed. The pleadings state that it was after a survey was done in August 2005 following their complaint to the defendant, that they became aware of the nature and implications of the defendant's actions. Specifically, it was stated that the path of the transmission line affected six (6) of the lots in the first claimant's

subdivision and not a maximum of three (3) as was agreed between the defendant and Mr. Tulloch.

The Amended Defence

[21] The defendant in its amended defence states that Mr. Tulloch executed a Grant of Easement over the New Milns land and that at that time, the claimant was not the registered owner of the land and did not hold a beneficial interest.

[22] Notwithstanding that, it asserts that Mr. Tulloch and any subsequent owners are bound by the terms of the Grant of Easement as it runs with the land.

[23] The defendant has also stated that the full terms and conditions of the agreement between itself and Mr. Tulloch can be found in a letter dated, March 27, 1996 written by Mr. J.E. Murray, the defendant's Manager of Engineering Services, and signed by Mr. Tulloch.

[24] The defendant also relies on clause 3 of the Grant of Easement which provides for referral to arbitration if the agreed route of the transmission line needed to be altered and the parties could not agree on a new location. Paragraph 11 of the amended defence states that Mr. Tulloch did not exercise the option to go to arbitration.

[25] The defendant also states that a letter dated, March 15, 1997, signed by Mr. Murray further speaks to matters agreed between it and Mr. Tulloch.

[26] The defendant also asserts that Mr. Tulloch agreed to and/or acquiesced to the routing of the transmission line. The amended defence also states that its towers and transmission lines are visible and as such Mr. Tulloch had constructive notice that they were on the property.

[27] The defendant further states that it acted in accordance with the Grant of Easement, and as such, the claimants have not suffered any loss or damage and are not entitled to an award of exemplary damages.

[28] It has also been pleaded that the matter which is now before the court is statute barred.

The Issues

[29] The issues that arise for the court's determination are as follows:

(i) Whether there was an agreement between Mr. Tulloch and the defendant on the pathway or route for the transmission line?

(ii) Whether there was a valid wayleave agreement between Mr. Tulloch and the defendant?

(iii) If so, whether the agreement binds the first and second claimants?

(iv) Whether or not the defendant is liable for breach of contract

(v) Whether or not the defendant is liable for trespass

(vi) Whether or not the defendant is liable for nuisance

(vii) In the event that Court finds that the establishment by the defendant 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 the defendant;

The evidence

[30] The claimants' called four witnesses: Mr. Tulloch, Mr. Michael Gordon and Mr. Llewelyn Allen. They also relied on Mr. Gordon Langford, a Chartered Valuation Surveyor, for his expert opinion. The defendant called three witnesses: Mr. David Lawrence, Mr. Blaine Jarrett, and Mr. Brett Bennett. The expert report of Retired Major Patrick Aiken was also tendered into evidence.

[31] A number of agreed documents were tendered and admitted into evidence.

The Chronology

[32] In order to resolve the issues between the parties the contents of the various documents pertaining to the construction of the transmission line must be examined. The chronology of events as revealed by the documents is as follows:-

November 1994	The defendant approached Mr. Tulloch with a view to erecting transmission towers and power lines on his properties situated at Brookeville, Lethe in the parish of St. James registered at Volume 1285 Folio 345 and Lethe in the parish of Hanover registered at Volume 1284 Folio 535.
March 27, 1995	Letter from Mr. Francis Tulloch to the defendant indicating that the easement over 5 acres owned by himself and Mr. Lobban (Volume 618 Folio 45 now registered at Volume 1283 Folios 504 and 505) could not be accommodated as a cable car system was planned for that area. There was also an objection on the basis that Tower As 12B would run through the living room of the house which was to be constructed by Mr. Lobban. Mr. Tulloch proposed that in light of the difficulty that the defendant may encounter in trying to find an alternative route that special damages be paid and the general damages for the easement, loss of the house spot and the cable car venture be put to arbitration.
March 30, 1995	Letter from Mr. Francis Tulloch to the defendant indicating that the towers could not be placed on the property.
April 4, 1995	JPS Internal memorandum from Mr. John Murray to the Chief Engineer (Transmission & Civil) indicating that Mr. Tulloch had indicated his preference for the transmission line to be relocated completely outside of his property. It also indicates “We have secured some relevant plans with cadastral information for the area and forwarded

	same to your Mr. David Lawrence on Monday April 3, 1995, for relocation of the transmission line outside of Mr. Tulloch's property."
May 8, 1995	JPS Internal memorandum from Mr. David Lawrence enclosing the cadastral map with Diversion #1 which bypassed Mr. Tulloch's property.
May 18, 1995	Letter from Mr. Derrick Dyer, Chief Executive/Managing Director of the defendant to Mr. Tulloch indicting that if it is unsuccessful in its attempt to develop an alternative routing of the transmission line, it would contact him "with a view to re-opening negotiations".
May 19, 1995	JPS Internal memorandum from Mr. John Murray which indicates that a section of Diversion #1passed through Mr. Tulloch's property. It also states that towers 68, 69 and 70 (as 12B) were to be relocated and that such action would require that the defendant abandon the easement already obtained through Eden.
June 2, 1995	JPS internal memorandum from Mr. John E. Murray which states that inquiries were be conducted to determine easement prospects for the latest diversion from Mr. Tulloch's property.
July 27, 1995	Letter from the defendant to Mr. Tulloch which referred to a meeting and telephone discussion where it was agreed that the cable car project was abandoned and as a result Mr. Tulloch had no objection to the grant of the easement. The letter also states that the proposed easement path would be a slight deviation from that originally surveyed in order to "better accommodate future development of the land".

July 31, 1995 Letter from Mr. Tulloch to the defendant for the attention of Mr. John Murray. That letter states that Mr. Tulloch was now prepared to consider a grant of easement as the cable car project was not being pursued. Mr. Tulloch also indicated that he agreed to grant an easement over another piece of land in St. James which adjoined property owned by the Crichton's. That agreement was contingent on the verification of the route that the transmission line would take over his property. He also pointed out that it was after agreeing to the grant of that easement that the defendant was informed that he had purchased Mr. Lobban's interest in the New Milns land and would be putting in a subdivision. The letter also states that when asked by Mr. Gordon, the defendant's representative, whether he would grant an easement over those lands he indicated that he would consider it.

August 30, 1995 Letter from Mr. Tulloch to the defendant indicating that he had not heard from Mr. Murray and as such was not in a position to consider granting the easement and would proceed with his own plans.

September 28, 1995 The minutes of a meeting of the defendant's board of directors state that the grant of the easement from Mr. Tulloch was approved but settlement should not exceed three million seven hundred thousand dollars ($3,700,000.00). It was also stated that Mr. Dyer would seek a reduction of that amount.

October 25, 1995 Letter from the defendant to Mr. Tulloch which indicates that the parties agreed that the construction of the transmission line would proceed prior to completion of the legal

documentation to reflect the agreement between the parties. It also states that the defendant would be allowed immediate access to proceed with the necessary works on the property to facilitate the construction. The writer also stated that the contents of the letter “constitute our understanding and final agreement with regards to the obtention of the Easement Rights over the property at Lethe”.

December 29,1995 Letter from Mr. Tulloch to the defendant which indicates “I have no objection if you wish to proceed with construction of the transmission line on my property but I do not wish for you to do anything further from which I might personally benefit until the relevant reports are received. Kindly bear in mind that although we have a general idea of what route your line will take, we have not finalised the specific route as the path pointed out to me by a surveyor from ABB encroached upon the finishing point of my rafting attraction. He also told me that it might be possible to move the tower in the banana plantation closer to the road and thereby avoid passing over the finishing point.”

February 27, 1996 Letter from the defendant to Mr. Francis Tulloch which indicates that the parties had agreed to the use of a maximum of three towers pending the preparation of the actual plan and profile surveying. It also states that the use of the third tower was predicated upon actual surveys and the need to skirt the “Green” with the transmission lines.

March 27, 1996 Letter from the defendant to Mr. Tulloch in which Mr. Murray states that the parties had agreed that the path of the easement would be 2700 ft long by 100ft wide and contain three transmission tower locations. It also states that only

three of the subdivision lots would be affected by the presence of the transmission lines. It also stated that the sum of five million dollars ($5,000,000.00) would be accepted in full and final settlement and that Mr. Tulloch was still prepared to go to arbitration.

April 4, 1996 **A "Grant of Easement" indicating that in return for the payment of five million dollars an easement was granted to the defendant which covered 2,700 feet A/E and 100 feet wide.** It is also noted on that document that the easement drawing is to be prepared and signed "as built".

September 11, 1996 **The first claimant is incorporated.**

November 4, 1996 **The New Milns land is transferred to the first claimant**.

March 6, 1997 A telefax from the defendant to ABB-Jamaica which states that a sketch which shows the relocation "the 69 KV Bogue-Orange Bay Transmission Line (tower 71 to tower 73)" is attached. There is a handwritten note on that document, addressed to Mr. Murray, which states that the sketch plan is to be incorporated in a written agreement which is to be "signed off by JPS Co and Tulloch confirming Mr. Tulloch's acceptance .....Mr. Tulloch will be shown the pegs on the ground (by me et al".

March 11, 1997 JPS internal memorandum from R.S Robinson which indicates as follows: -

1."The sketch shows Towers 71 (ie. T71) and the centre line of the Transmission Line. There is no indication of Towers 72&73.

2. **The sketch does not show clearly what ground features are being avoided for passage of the line path.**

3.The sketch should show the re-routed line (presently purposed) across new lots in the Eden sub-division.

4. **Showing the pegs on ground (for the new towers) to Mr. Tulloch is likely to leave JPSCo.in the position experienced in the past where he can challenge the line location as not following the path as discussed or anticipated.**

5. **A strip map of the corridor should be prepared and the line path chosen and agreed with Mr. Tulloch before final tower locations are pegged".**

[My emphasis]

March 15, 1997 Letter from the defendant to Mr. Tulloch indicating that the section of the transmission line that was being constructed on his property Lethe in St. James would have to be relocated to ensure better clearance from his tourism attraction as well as "the Green". It also states that the defendant had flagged on the ground the proposed new routing which was stated to have been inspected and approved by Mr. Tulloch. A copy of the drawing was attached. The letter also stated that the defendant would proceed with construction activities based on his acceptance of the new route.

Mr. Tulloch was asked to sign a copy of the letter indicating his agreement. No letter signed by Mr. Tulloch has been produced and he has denied accepting the new route.

June 6, 2005	Letter from the first claimant to the defendant indicating that it is the owner of the land on which transmission line has been built. Mr. Tulloch in that letter requests a meeting and the production of the “Grant of Easement”. The letter also stated that the first claimant was not aware how many lots were affected by the route and that the subdivision was approved in November 2003.
June 7, 2005	Letter from the first claimant to the defendant indicating that it had changed the conditions of the “Easement” by altering the path of the transmission line. It also states that the first claimant became the owner of the New Milns property in November 1996 and has never accepted the new route. It also set out the basis on which its claim would be made.
December 2, 2005	Letter from the first claimant’s attorney-at-law to the defendant indicating that his instructions were that Mr. Tulloch had signed the “Easement” after he had agreed on a route and had indicated that on site to the defendant’s representatives.

Whether there was an agreement between Mr. Tulloch and the defendant on the pathway or route for the transmission line?

[33] The claimants have asserted that there was no agreement in respect of the path of the transmission line. The defendant has maintained that as at April 4, 1996 the parties had reached an agreement.

[34] An easement drawing which indicates that a survey was conducted on April 11, 1994 shows a proposed route for the transmission line and towers. On this drawing one (1) tower (tower #69) can be seen on property owned by Mr.

Tulloch. The document indicates that Mr. Tulloch was served with notice and someone appeared on his behalf. This document establishes that since 1994 the defendant was interested in using property owned by Mr. Tulloch for the placement of its transmission line and towers.

[35] A subsequent easement drawing which indicates that between January 1, 1995 and January 16, 1995 a survey was conducted and which bears the words, 'Plan Showing Centre of Proposed 69KV transmission line through Lethe Estate & Eden Estate Diversion No 1', shows another proposed route for the defendant's transmission lines and towers. Two (2) towers (#69A and #70A) can be seen on this drawing and the document indicates that Mr. Tulloch was served with notice and he appeared. Significantly, this drawing shows a proposed cable car route and makes mention of a house dwelling.

[36] At paragraphs 12 and 13 of Mr. Tulloch's witness statement it is stated as follows:

> *"**I also owned land in New Milns in the parish of Hanover, which I owned jointly with Mr. Loren Lobban...Mr. Lobban and I had agreed to purchase 140 acres of land from Mr. Ewart English being part of lands registered at Volume 618 Folio 45 of the Register Book of Titles, to grow flowers for export and put in a cable car tourist attraction** as I was operating a very successful bamboo rafting attraction along with a Banana Plantation Tour at Lethe and the cable car attraction would be a third attraction.*
>
> ***When the New Milns Land was splintered from Mr. English's parent title it turned out to be a bit less than the 140 acres which Mr. Lobban and I had agreed to purchase, and was instead about 138 acres** which was transferred to me in two (2) Certificates of Title and which are now registered at Volume 1283 Folio 504 and Volume 1283 Folio 505 of the Register Book of Titles...*
>
> [My emphasis]

[37] An undated typewritten letter (which bears the date March 22, 1995 in pencil in the upper left corner)composed by Mr. Tulloch to the Managing Director of the defendant states as follows:-

> *"Re Easement Orange Bay to Bogue Transmission Line*
>
> ***Land owned by Francis Tulloch and Loren Lobban**.*
>
> *I have been having discussions with your Messrs S. Kassim and M. Gordon re the acquisition of an easement over approximately five (5) acres of land, **part of 138 acres parcel owned by Mr. Loren Lobban and myself**."*
>
> [My emphasis]

[38] The said letter also states:

> *"This easement is in direct conflict with a cable car system which Mr. Lobban and I are planning to put into place and have in fact progressed to a stage where we have already incurred….*
>
> *The situation is aggravated by the fact that Mr. Lobban would have been (sic) building his house upon the proposed line route and one of the Towers (Tower AS 12B) runs through the proposed living room.*
>
> *It would appear that the possibility of finding an alternate route is remote and so I am making the following proposal:*
>
> *That the Jamaica Public Service pays whatever special damages we can prove and the general damages for the Easement, Loss of the House Spot and the Cable Car Venture be put to arbitration.*
>
> *If this is acceptable to you, I am asking you to fax your acceptance by Monday March 27, 1995"*

[39] It is therefore evident that the correspondence refers to the New Milns land as this was the land which was owned by Mr. Tulloch and Mr. Lobban who together had plans to put in place a cable car project. This is also the land, based on Mr. Tulloch's evidence where Mr. Lobban intended to build a house.

[40] I am therefore satisfied that before the 27th March 1995 Mr. Tulloch and the defendant were having discussions with respect to the defendant's acquisition of an easement over the New Milns property.

[41] It is not disputed that Mr. Tulloch indicated to the defendant that he had a difficulty with the route that was being proposed. In a letter dated 30th March 1995, he stated:-

> *"I have already informed the Jamaica Public Service that for many reasons the high tension wires cannot be placed on any of the lands owned by Mr. Lobban and/or myself.*
>
> *The Jamaica Public Service has agreed to relocate these towers off the property owned by Mr. Loren Lobban and/or myself. "*

[42] Based on an internal memorandum dated the 4th April 1995, from Mr. John E. Murray (exhibit 3), the defendant understood that Mr. Tulloch did not wish for the transmission line to be on his property. That memorandum was addressed to the Chief Engineer –Transmission & Civil. It states: -

> *"In our latest telephone discussion of April 3, 1995, with Mr. Francis Tulloch, he stated that he would prefer if JPS relocate the transmission circuit completely outside of his property.*
>
> *Based on Mr. Tulloch's prior discussions with his partners, great concern was expressed about the viability of a tourism attraction (cable car) being in close proximity to a high voltage power line, and their latest position is that JPS must relocate outside of their property..."*

[43] By way of a memorandum dated the 8th May 1995 Mr. David Lawrence (Senior Transmission Engineer) indicated that a new route that bypassed M. Tulloch's property was being proposed. It also stated that Mr. Tulloch had indicated that that route would affect properties which were owned by the Wilsons and the Crichton's who were likely to object to the placement of the transmission line or the cost of the easement may be expensive.

[44] This was followed by a letter dated, May 18, 1995, addressed to Mr. Tulloch in which Mr. Derrick Dyer (Chief Executive/Managing Director) of the defendant indicated: -

> *"We have outlined to you our attempts to develop an alternate routing of the line so as not to disturb your proposed project. In the event that we are unsuccessful, we will contact you with a view to* ***re-opening negotiations****".*
>
> [My emphasis]

[45] In the defendant's memorandum dated, May 19,1995, it is stated that Diversion# 1 passes through Mr. Tulloch's property and that towers 68 – 70 would have to be relocated. It is also stated that the easement obtained through Eden would have to be abandoned and that prospects for easement procurement were being researched.

[46] A memorandum dated, June 2, 1995, indicates that enquiries were being conducted to determine easement prospects for the latest diversion from Mr. Tulloch's property.

[47] This was followed by the defendant's letter dated,July 27, 1995 addressed to Mr. Tulloch which referred to a site meeting and telephone discussions. The letter states, in part: -

> *"Re: Easements for Orange Bay- Bogue Transmission Line*
>
> *Further to our site meeting of Thursday 13th July, 1995 and subsequent telephone discussions, this is to document our present position.*
>
> *With plans for the cable car project abandoned you now have no objection to a grant of easement to Jamaica Public Service Company Limited (JPSCo.)*
>
> *The proposed easement path will show a slight deviation from that originally surveyed on your property to better accommodate future development on the land..."*

This letter also makes mention of easement compensation.

[48] Mr. Tulloch's response to the above is contained in his letter dated the 31st July 1995. It states, in part: -

> *"I agree that I am now prepared to consider a Grant of Easement to the Jamaica Public Service Company Limited and that one of the considerations is that the cable car project which Mr. Loren Lobban and I had proposed to put in place will not be pursued.*
>
> *I must however, point out the following;*
>
> *1) That on the 13th July you and other officials of the Jamaica Public Service Co. came to see me about an easement over another piece of land I own in St. James adjoining the Crichtons* ***which I agreed to let you have subject to the verification of the route the line would travel over my property****.*
>
> *2) That it was after this that I mentioned that I had purchased Mr. Lobban's interest in the New Milns land was putting in a subdivision. I was asked by your Mr. Gordon if I would consider a Grant over the lands now that I was the sole owner.* ***I stated that I was prepared to consider it and we started discussing possibilities…****"*
>
> [My emphasis]

[49] That letter in my view refers to two different parcels of land. Paragraph (1) speaks to officers of the defendant approaching Mr. Tulloch about an easement over a piece of land in St. James adjoining the Crichton's for which he was the owner. He stated that he agreed to let the defendant have the property subject to verification of the route the line would travel over the property. Paragraph (2) speaks to property he owned with Mr. Lobban.

[50] Paragraph 22 of Mr. Tulloch's witness statement supports this. It reads:-

> *"Mr. Michael Gordon ("**Mr. Gordon**"), the Supervisor of the Easement Section of the Engineering Services Department at JPS and the said John Murray ("**Mr. Murray**") the Manager of the Engineering Service Department at JPS, visited me on 13th July*

1995 to discuss an "easement" over my Lethe Lands. During that visit, Mr. Gordon, Mr. Murray and I agreed on ground a route on this property which adjoins the Crichton's Family land in St. James. The said route on ground also crossed the Lethe Land in Hanover. ***The said agreement on ground was subject to verification (by plan) of the route which the line would travel over my Lethe Lands...That route agreed on ground (subject aforesaid) was well south of the New Milns Land, and was over the Lethe Lands."***

[My emphasis]

[51] It seems that although the defendant had been seeking a route outside of Mr. Tulloch's property, it still kept the lines of communication open. When a site meeting took place, officers of the defendant were then informed by Mr. Tulloch that he had purchased Mr. Lobban's interest in the New Milns property and the cable car project would not be pursued. Mr. Tulloch informed the defendant that he would be putting in a subdivision.

[52] Following this, by way of letter dated 30th August 1995 Mr. Tulloch indicated as follows:

"In a telephone conversation between your Mr. John Murray and the writer, I told Mr. Murray that because of certain commitments, I had to know exactly what JPS was doing by Thursday 31st August when I returned from my vacation. I have been calling Mr. Murray since Monday 28th August and leaving messages but to date I have not heard from him.

It is with regret that I have to inform you that I will not be in a position to consider the easement to your Company as I have to proceed with my own plans in order to keep the commitments I made to others*."*

[My emphasis]

[53] Mr. Tulloch commented on this letter in his witness statement. At paragraph 27 he stated:-

> *"After my letter to JPS dated July 31st 1995 I spoke to Mr. Murray by telephone telling him that because of certain commitments I had to know exactly what JPS was doing by Thursday 31st August 1995. Notwithstanding my having told Mr. Murray this, I did not hear from him. Having not heard from JPS, by letter dated 30th August 1995 I wrote to JPS stating that I had made attempts to contact them and was unable so to do, and so I was informing them that I will not be in a position to consider granting an "easement" as I have to proceed with my own plans in order to keep the commitments I made to others.* ***I therefore, by that letter cancelled the 13th July 1995 agreement on ground (subject as stated in paragraph 22 above) which was the only "agreement" of a route (albeit incomplete) I had with JPS****."*
>
> [My emphasis]

[54] I accept Mr. Tulloch's evidence that the August 30 letter cancelled any agreement in respect of the route for the transmission line.

[55] Following the August 30 letter, an engineering sketch or contour map dated August 31, 1995 was faxed by the defendant to Mr. Tulloch. This map showed a number of routes, the routes which were labelled as "original", "diversion 1", "suggested routes 1 and 2 JPS" and "suggested route Mr. F. Tulloch". This action on the part of the defendant, in my view, reopened the negotiations between the defendant and Mr. Tulloch.

[56] This map shows some suggested routes which were not documented in correspondence between the parties. It was Mr. Tulloch's evidence that while he did in fact suggest a route to the defendant, the route outlined on the map is not quite what he had suggested.

[57] In September 1995, the defendant's board approved the acquisition of an easement over the property at Lethe, St. James.

[58] On October 4, 1995, the defendant contacted the Hanover Parish Council and informed the Council that construction pre-checks had recently been completed at Lethe. The defendant made certain proposals to the Council, one of which was

that it would finance and complete road improvements provided that it would be reimbursed.

[59] This was followed by a letter from Mr. A.B Dietrich, the defendant's Senior Director (transmission system), to Mr. Tulloch dated October 25, 1995. The letter states in part:-

> *"Re: Easement Settlement for Property at Lethe, Orange Bay/Bogue Transmission Line*
>
> *We refer to your letter of July 31, 1995 to our John Murray and also telephone conversations with officers of the Company ….*
>
> *Set out hereunder is our confirmation of the terms of the settlement agreed:*
>
> *(i) Jamaica Public Service Company Limited (JPS) will design and construct the extension of a primary electrical distribution circuit to your proposed subdivision at Lethe for the purpose of providing the subdivision with electrical power. The cost of carrying out this aspect of work will be approximately $500,000. This will be borne by JPS.*
>
> *(ii) JPS will complete repairs and upgrading of the parochial road leading to Rhea's World at a cost of $2.2M. This cost will be borne by JPS initially.*
>
> *It is expected that JPS will be re-imbursed by the relevant Parish Council responsible for parochial road upgrading.*
>
> *(iii) JPS will complete repairs and upgrading of a subdivision road on your property which has been identified and agreed upon between yourself and our representative at a cost of $1.45M which cost will be borne by JPS. The upgrading of roads on your property will be to your benefit and will also facilitate our construction and maintenance activities.*
>
> *(iv) JPS will make a cash payment to you of J$1M.*
>
> ***(v) JPS will proceed with construction of the Transmission Line on your property prior to completion of the relevant***

legal documentation to reflect the understanding set out above.

(vi) JPS will be allowed immediate access to proceed with the necessary works on your property to facilitate the construction of our Orange Bay/Bogue Transmission Line.

The above constitute our understanding and final agreement with regards to the obtention of the Easement Rights over your property at Lethe."

[My emphasis]

[60] The defendant, in this letter, indicates that it will proceed with the construction of the transmission line on Mr. Tulloch's property prior to the completion of the relevant legal documentation.

[61] The following portion of Mr. Tulloch's cross-examination is relevant to the issue.

Q. As at October 25, 1995, did you arrive at an agreement with the JPSCo.as to the route the line would take across your New Milns property and across the river to go to Eden?

A. No route was arrived at.

Q. Did you arrive at any general - even if you didn't arrive at the specific route, did you arrive at an agreement for that general...

A. The only route that still existed was the route on the Lethe land.

Q. But Mr. Tulloch as at October, 1995, it was clear that that route was not going to work?

A. Not at all, not at all, they were still discussing on the easement with the tribunal about where my next neighbour on my land in St. James.

[62] Mr. Tulloch's cross-examination continued. He was asked to read the portion of the letter that has been emphasised. (See paragraph 58).The evidence elicited is as follows:-

Q. Please pause. Did you agree to this?

A. I did.

Q. Now, in proceeding to construct the transmission line did you know where the transmission line was going to be constructed over your property?

A. It was on a neighbour's land, by the name of Mr. Allison.

Q. But Mr. Tulloch, JPS will continue with the construction of the transmission line prior to completion of the relevant legal documentations to reflect the understanding set above. My question to you, did you understand when you received this, that JPS was going to proceed with the construction of the line over your property?

A. No, no, they were going to proceed with the construction of other towers on adjoining properties because that was the easiest way to get to those properties.

Q. I see. But the legal documentation that was to be prepared related to an easement that they could secure over your property?

A. Yes, but not that paragraph.

Q. And you had already agreed a cash payment of $1 million, for the easement to traverse your property at New Milns?

A. Plus all the other things that they were go to do for the subdivision.

[63] I have noted that in a letter dated 29th December 1995 Mr Tulloch wrote to the defendant stating, among other things, the following:-

> *"I have no objection if you wish to proceed with construction of the transmission line on my property but I do not wish for you to do anything further from which I might personally benefit until the relevant reports are received.*
>
> ***Kindly bear in mind that although we have a general idea of what route your line will take, we have not finalized the specific route as the path pointed out to me by a surveyor from ABB encroached upon the finishing point of my Rafting Attraction. He also told me that it might be possible to move the tower in the Banana Plantation closer to the road and thereby avoid passing over the Finishing Point."***
>
> [My emphasis]

[64] During the trial, Mr. Tulloch maintained that the only route ever agreed upon was the route over his property in Lethe, St James. It was also his evidence that this agreement on ground was subject to verification (by a plan) of the route the line would travel over his property. Therefore, before the route could be established verification was required. There is no indication that any such route was so verified.

[65] It is clear from the contents of the above letter that as far as Mr. Tulloch was concerned there was no agreement regarding the *specific* route of the transmission line. Mr. Michael Gordon who was the head of the defendant's easement section at the time, stated in his evidence that the defendant did not provide Mr. Tulloch with a sketch of the entire route of the transmission line for his approval. He also stated that the provision of the sketch would have enabled Mr.Tulloch to see how many of the subdivision lots would be affected. His evidence was that no route had been agreed up to the year 2000 when he left the defendant company. He did however admit in cross examination that he did not lead all negotiations.

[66] A document dated 22nd February 1997 was sent to the defendant from the contractor via telefax. It concerns the relocation of Towers T72 and T73. Another document dated 6th March 1997 similarly sent to the defendant from the

contractor via telefax concerns the relocation of line T71to T73. A handwritten note on that document indicates that an attached survey sketch plan showing proposed route across Tulloch's property is to be incorporated in a written agreement which is to be signed off by JPSCo& Tulloch to confirm his acceptance of the location. The note stated that Mr. Tulloch would be shown the pegs on the ground by the writer. The identity of the writer is unclear[1].

[67] The attached survey only shows one tower, tower 71. Evidence was given that only tower 71 is located on the New Milns property[2]. Towers 72 and 73 are located elsewhere.

[68] Mr. David Lawrence, who was the defendant's Senior Director of Engineering, testified that he did not supervise the preparation of a document that showed the pegs on the ground in relation to the path discussed. He also testified that he did not prepare a strip map of the line path chosen before final locations were pegged.

[69] Mr. Murray wrote a letter to Mr. Tulloch dated 15th March 1997. It reads in part:-

> *"Re: Relocation of Orange Bay-Bogue 69KV Line Section.*
>
> *The section of the Orange Bay- Bogue 69KV Transmission Line which was being constructed in your property located at Lethe St. James will have to be relocated for better clearance from your tourism attraction, including the area known as "the Green" ....*
>
> *Based on your acceptance of this new route, JPSCO. will presently proceed with construction activities.*

---

[1]Mr. David Lawrence gave evidence that it looks like Mr. Nembhard's handwriting.

[2]See paragraph 26 of the witness statement of David Lawrence dated and filed January 10, 2017

Please sign below to indicate your agreement with the new route shown to you on ground and depicted in the drawing #JPS/tl2/FTull-15/3/97.

[70] At the trial, Mr. Small objected to the reliance on this document for the truth of its contents. So I will tread cautiously. The letter speaks to a line section relocation.

[71] Mr. Tulloch's evidence is that having seen the survey sketch plan he did not sign the letter because it only showed one of the three towers that were to be constructed and not the proposed route. He also said that the letter falsely stated that he had *"inspected and approved"* the new route. It must also be borne in mind that at that time, title had passed to the first claimant.

[72] It is however important to note that the letter asked for Mr. Tulloch's signature as an indication of agreement and he did not sign it. His evidence is that the letter was asking for his permission to commence construction and if he had signed it, it would have given the defendant the right to do so.

[73] He also gave evidence that he was not aware when JPS built the transmission lines on the New Milns property.

[74] When Mr. Tulloch's evidence is assessed in light of the defendant's internal memorandum dated the 11th March 1997 which states that the sketch plan did not show clearly what ground features were being avoided and only showed tower 71, I am inclined to believe him when he said that he did not agree for those very reasons. I have also considered that the same memorandum states "*Showing the pegs on ground (for the new towers) to Mr. Tulloch is likely to leave JPSCo. in the position experienced in the past where he can challenge the line location as not following the path as discussed or anticipated".* That statement, to my mind demonstrates some level of exasperation on the part of the defendant arising from the failure to agree the path of the transmission line.

[75] The March 15 letter does however suggest that construction had already commenced. It does however seek Mr. Tulloch's approval of the proposed

relocation of the transmission line. Counsel for the defendant argued that the proposed relocation was for Mr. Tulloch's benefit, notwithstanding that, it is my view that the defendant ought to have ensured that it obtained his approval before proceeding with the relocation.

[76] An easement drawing which indicates that a survey was conducted between November 6 and 11, 1997 bears the words 'Plan Showing Centre Line of *As Built* Survey of 69 KV Transmission Line Through Lethe Estate and Eden Estate'. Mr. Gordon's testimony was that *"'as built' simply means, we give you drawing how the line has been placed".* In other words, the drawing is prepared after the line has been built. At paragraph 7 Mr. Llewelyn Allen's witness statement dated and filed January 9, 2017 he states, among other things, that the term 'as built' means that the transmission towers and lines were built *before the survey was done*. In paragraph 5 of the witness statement of Blaine Jarrett dated and filed January 10, 2017 he states, among other things, that the transmission line was built in 1997[3].

[77] The correspondence between Mr. Tulloch and the defendant to my mind, suggests that there was an agreement in principle that the transmission line could traverse his property. The exact route that the line was however still in issue.

[78] My conclusion is that the defendant did not get Mr. Tulloch's agreement for the line relocation and unilaterally implemented the alterations outlined in the March 15, 1997 letter. The "Grant of Easement" provided that in the event that it became necessary to alter the route of the transmission line for any reason beyond the defendant's control, the parties should seek to agree on a new location and in the absence of agreement the matter should be referred to

[3]See also paragraph 20 of said witness statement

arbitration.[4] The claimant's have taken issue with the section of the transmission line from tower 70 to 71. That section affects lots 8, 7B and 2A. Neither party referred the matter to arbitration.

[79] Having assessed the evidence given in respect of this issue and the documentary evidence I have found Mr. Tulloch to be a credible witness. I accept his evidence that no route was agreed.

Which property: New Milns in Hanover or Lethe in St. James?

[80] Mr. Tulloch stated in his witness statement that the route agreed on ground on July 13. 1995 was well south of the New Milns Land and was over the Lethe lands. In his letter dated 29th December 1995, he indicates that "*the path pointed out to me by a surveyor from ABB encroached upon the finishing point of my Rafting Attraction*". In paragraph 16 of Mr. Tulloch's witness statement the following statement appears:-

> *"Adjoining the New Milns Land is the said land registered at Volume 1283 Folio 505 consisting of 8 acres 27 perches and 8/10th of a perch of land.* ***Having bought this land, I was able to make and did make the bamboo rafting tour of a longer distance by removing the Finishing Point of the Bamboo Rafting from other lands I own at Lethe Estate (registered at Volume 1366 Folio 381) to this land registered at Volume 1283 Folio 505, which I will hereinafter refer to as the "Bamboo Rafting Finishing Point Land".***
>
> [My emphasis]

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[4]See Clause 3 of document titled 'Grant of easement' dated April 4, 1996. See also paragraph 80 of the witness statement of Mr. Tulloch dated and filed January 30, 2017.

[81] It is important to point out that Mr. Tulloch's evidence was that that he is the owner of lands situated at Brookeville, Lethe, in the parish of St. James, registered at Volume 1285 Folio 345 of the Register Book of Titles which adjoins the Crichton family land and which extended across the Great River to his land at Lethe in Hanover registered at Volume 1284 Folio 535. He referred to these lands as his Lethe lands.

[82] On his evidence, the finishing point of his rafting attraction was on property registered at Volume 1283 Folio 505. Therefore, in the letter dated 29th December 1995, when Mr. Tulloch stated that the route pointed out to him encroached on the finishing point of his rafting attraction it does not appear that such a route would have been in respect of his Lethe lands.

[83] After the series of events outlined above, the Hanover Parish Council, in a letter dated 18th January 1996, accepted the previously mentioned proposal of the defendant (see paragraph 57).

[84] Mr. Murray wrote to Mr. Tulloch by way of letter dated 27th February 1996. That letter reads, in part, as follows:

> *"This is to acknowledge receipt your (sic) letters of December 29, 1995 and February 15, 1996*
>
> *Regarding the number of towers to be sited on your property, please recall that once you had decided on our relocation from the proposed house spot overlooking the Great River to John Crow Hill,* ***we had discussed and agreed the use of a maximum of three (3) towers pending actual plan and profile surveying****. In fact the engineering sketch sent via telefaxed (sic) to your office on August 31, 1995 for our meeting which included our Mr. Gordon, showed the proposed route in John Crow Hill and indicated two (2) single situation towers.* ***The use of the third tower was to be predicated upon actual surveys and the need to skirt the "Green" with the transmission lines.*** *The fact that three towers are required is as a result of the topography through the route approved by you."*

I can understand the possible effects of having your tourism activities and our construction work occurring simultaneously on your property, we have since a previous discussion advised our construction personnel to make prior arrangements for work on your property."

[My emphasis]

I have noted that tower 69 is situated on lot 6A, tower 70 on lot 8 and tower 71 on lot 7B. The transmission line traverses lots 6A, 6B, 8, 7B and 2A before crossing the river. It is north of the Green.

[85] The above letter refers to the engineering sketch dated 31st August1995. The expert report of Mr. Langford states that the New Milns property is located in the Lethe Valley on the border of St. James and Hanover. It is located in Hanover to the immediate west of the Great River. The engineering sketch shows the original route, diversion no. 1 and routes suggested by the defendant and Mr. Tulloch. All these routes seem to be, more so to the west of the Great River.

[86] It appears to me that the discussions between the parties centred around the New Milns property; however, up to the 27th February 1996 there was still some uncertainty regarding the route. The use of the third tower was being considered and the actual plan and profile surveying was not yet done.

[87] In a letter dated 27th March 1996 written by Mr. Murray to Mr. Tulloch, Mr. Murray states:-

"Further to our meeting of February 28, 1996, and also subsequent discussions, this is to document the items you require as consideration for settlement of the easement and property damages and other encumbrances.

Items of Consideration/Encumbrances

1. *Compensation for grant of easement for the Orange Bay-Bogue transmission line, the easement path being approximately 2700 feet long by 100 feet wide (approximately 6.2 acres) and containing three*

transmission tower locations. ***It is recognised and agreed that three subdivision lots will be affected by the presence of the transmission lines.***

2. *The use of the property and subdivision roads during construction of the transmission line. Some of these roads were to be constructed by JPSCo.*

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

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

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

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

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

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

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

10. *Compensation for the loss suffered by your environmentally friendly development.*

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

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

You had stated that you required a settlement of $6 million for all the items of consideration and encumbrances listed herein. However, subject to JPS Board of Directors approval, for a speedy conclusion you will accept a total of $5 million as full and final settlement, to be paid by March 31, 1996.

JPS understands that you are still prepared to go to arbitration.

Please sign the enclosed copy of this letter to confirm your receipt and also that you are in agreement with the contents. *The contents of this letter is in addition to the rights accruing to JPS consequent upon the execution of the easement."*

[My emphasis]

[88] Mr. Tulloch signed the letter as requested.

[89] Mrs. Mayhew asked Mr. Tulloch if he could assist the court with how the 2700 feet approximation of the easement path was arrived at. Mr. Tulloch stated that he could not assist. He was then asked if he had made any inquiries at the time and Mr. Tulloch indicated that he did not make any inquiries as to how the 2700 feet approximation was arrived at. Miss Mayhew asked Mr. Tulloch if he had any idea over which section the 2700 ft would pass. Mr. Tulloch responded that he had an idea that it could have been going over two sections. One on the Lethe side (St. James) and one on the New Milns side.

[90] Mr. Michael Gordon was a witness for the claimant at the trial[5].During Mr. Gordon's cross-examination, the following exchange took place:

Q. ...That letter - before I go to the letter - please explain what does the 2700 feet area encroachment by 100 feet wide, what does that refer to as?

A. The distance of the line across the property and the width which the line traverses.

Q. So, would you agree with me, Mr. Gordon, that if the document refers to the distance and a width, that must relate to something on ground?

A. Yes.

[91] Mr. Tulloch also signed a document titled 'Grant of Easement' which is dated April 4, 1996. This document indicates that a plan should be annexed. However, no such plan was annexed. It speaks to similar aerial encroachments as the March letter. These were typewritten on it and signed. There is no indication as to when this was done. Mr. Tulloch was paid five million dollars ($5,000,000) by the defendant on April 4, 1996.

[92] I have however considered that Mr. Tulloch's evidence is that the subdivision was to be done in respect of the New Milns land. The above mentioned letter, particularly items one and nine, also confirms that the discussion between the parties centred around the New Milns property and not some other property owned by Mr. Tulloch. The reference to payment for diminution in value of a subdivision lot approximately 17 acres in size (which Mr. Tulloch has given

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[5]The gist of Mr. Gordon's evidence upon cross-examination was that he was not always involved in discussions regarding the 'easement' acquisition and it is quite possible that decisions would have been made, to his exclusion, by more senior employees of the defendant.

evidence is lot 6A), the reference to compensation for loss of income from bananas along with the statement in the letter that *'it is recognised and agreed that three subdivision lots will be affected by the presence of the transmission lines'* suggests, in my opinion, also relates to the New Milns land.

[93] I am therefore satisfied that the reference to the path of the "easement" being discussed was situated on and over the New Milns land.

Whether there was a valid wayleave agreement between Mr. Tulloch and the defendant?

[94] The agreement which is at the centre of this dispute is contained in the document entitled "Grant of Easement" which is dated April 4, 1996. It provides for the payment of the sum of five million dollars ($5,000,000.00) in compensation to Mr. Tulloch and incorporates certain conditions contained in a letter dated March 27, 1996. There is no dispute that Mr. Tulloch received the sum that was agreed.The first claimant in the pleadings has also stated that it received of those funds.

[95] The claimants submitted that that the use of the term easement in reference to the agreement between Mr. Tulloch and the defendant is technically inappropriate. The defendant conceded that this is in fact so as in this case, there was no dominant or servient tenement which are essential characteristics of an easement[6].

[96] It was stated that the agreement should be construed in accordance with section 41 of the ***Electric Lighting Act*** (***ELA***). That section refers to an agreement with an owner or occupier of land for an undertaker (in this case the defendant) to lay, place or carry on, under or over land, any supply line posts or apparatus as a wayleave agreement.

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[6]See in Re Ellenborough Park [1955] 3 WLR 892

[97] Such agreements according to section 41 (2) of the ***ELA*** may be registered in accordance with the ***Registration of Titles Act*** *(**ROTA***) as an encumbrance. The section states as follows: -

> *"Where a wayleave agreement is made in respect of land the title of which is registered under the Registration of Titles Act, the wayleave agreement **may** be registered in accordance with the provisions of that Act as an encumbrance affecting the registered title of the land, and the provisions of the said Act Shall have effect accordingly".*

The use of the word "may" in the above section, in my view indicates that registration is optional and does not affect the validity of a wayleave agreement.

[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 the defendant 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 the contract was 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."*[7]

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[7]Paragraph 18

[100] The transmission line that is the subject of the instant case has been completed and as such the agreement has been executed. It therefore find that the agreement is valid and binding between Mr. Tulloch and the defendant.

Whether the agreement binds the first and second claimants?

[101] The defendant failed to register the wayleave agreement as an encumbrance. Our system of land registration which is based on the Torrens system, is based on the paramountcy of title. Therefore, once property is registered a person dealing with that property is entitled to rely on the information that appears on the face of that title.

[102] Counsel for the claimants made the point that the agreement between the parties was not registered. Reference was made to section 70 of the ***ROTA*** which states that that a proprietor of land holds the land described in the certificate of title, subject to any encumbrances noted on that title. It was also pointed out that registered land may be subject to certain encumbrances which are not noted on the title.

[103] It is clear to this court that 41 (2) of the ***ELA*** was designed to ensure that the provision of electricity to the Jamaican populace would not be subject to any change in the ownership of the land on or over which the undertaker's line posts or apparatus were situated. The ***ELA*** has therefore provided protection for the undertaker in that it will not have to "pull up stumps" each time the ownership of the property changes. According to Brooks JA in ***Jamaica Public Service Company Limited v Rose Marie Samuels*** (supra)"*...the intention of the*

legislature that there should be some permanence to structures by which public utilities provide their services".[8]

[104] It must however be borne in mind that it is not the defendant's case that the agreement with Mr. Tulloch was registered as an encumbrance.

[105] So far, the discussion has centred on Mr. Tulloch himself and his dealings with the defendant. However, the claimants in the instant case are companies for which Mr. Tulloch is a Director, Chief Executive Officer and majority shareholder. His evidence is that the first claimant was incorporated on September 11, 1996 and the second claimant was incorporated on October 11, 1985.This is supported by the relevant Certificates of Incorporation (exhibits 64 and 65).

[106] In the particulars of claim, it is stated that the second claimant was at all material times entitled to possession and the use and development of the New Milns property for its business by virtue of the contractual relationship between it and the first claimant. It is also stated that Mr. Tulloch at all material times negotiated with the defendant on behalf of both claimants with a view to ensuring that any agreement reached would not cause any damage to their respective businesses.

[107] The defendant has submitted that it entered into negotiations with Mr. Tulloch and compensation was paid to him. It was also submitted that neither claimant was the registered owner of the land or had a beneficial interest at the material time.

[108] I have noted that although the second claimant has been in existence since 1985,there is no mention of its right to possession in the correspondence between the parties. In addition, no document has been produced which indicates that the second defendant was entitled to possession of the New Milns land.

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[8]Paragraph 64

[109] During Mr. Tulloch's cross-examination the following exchange took place:

Q. And the first claimant's, Lethe Estate Limited, that's the company that is owned by yourself and your wife?

A. No, me alone, I have 999 shares and my sister has one.

Q. And that company part with possession of the New Milns property during the period 1995 -2005, any part of it?

A. None at all.

[110] The evidence given by Mr. Tulloch during cross-examination, in this respect, somewhat qualifies the claimants' pleadings that at all material times the second claimant was entitled to possession. However no issue has been taken by the defendant in respect of this aspect of the case.

[111] Having regard to the first claimant's date of incorporation the company would not have been in existence throughout most of Mr. Tulloch's dealings with the defendant. It was not in existence when the document entitled 'Grant of Easement' was signed and it was not in existence when money was paid over to Mr. Tulloch.

[112] On the certificate of title of the New Milns property the following appears:

> *"Transfer No. 954074 registered on the 4th of November, 1996 to LETHE ESTATE LIMITED at Lethe, Hanover. Consideration money One Million Two Hundred and Ninety Thousand Dollars."*

[113] It is clear from this endorsement that the first claimant was in existence when the defendant sent a letter to Mr. Tulloch informing him that a line relocation was necessary (March 1997) and was also the registered proprietor of the property at that time.

[114] In ***Jamaica Public Service Company Limited v Rose Marie Samuels***(supra) Miss Rose Marie Samuels (the respondent) entered into an agreement to

purchase land at Rhymesbury in the parish of Clarendon. During the course of the transaction she became aware that there were wires and towers traversing a portion of the land. These wires and towers were owned by the Jamaica Public Service Company Limited (the appellant) and were for the transmission of electricity.

[115] The appellant asserted that its equipment was on the land by virtue of an agreement it had entered into with Mr. Hubert Melville, a previous owner of the land. It was Mr. Melville's widow, who was his successor in title, with whom the respondent had contracted to purchase the land. The respondent, having been made aware of the presence of the equipment, discovered that there was nothing registered on the title for the land, which addressed that presence. She completed the purchase and filed a claim against the appellant for damages for trespass and for the removal of its equipment from the land.

[116] The appellant in its Defence denied that it was trespassing and relied on the agreement with Mr. Melville. It asserted that the respondent, having purchased the land with knowledge of its presence on the land was estopped from denying its right to remain.

[117] The appeal was dismissed. The Court of Appeal found that although Mr. Melville had entered into a binding agreement with the appellant, that agreement did not give it an interest in land which would bind the respondent.[9]

[118] That was not however the end of the matter as the court went on to consider the effect of the non registration of a wayleave agreement. The court stated:-

> *"[25] In the absence of registration, the tenets of the system of registration of land, pursuant to the Torrens system, upon which the Registration of Titles Act is based, must apply. The essential*

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[9]Paragraph 21

principle that is relevant for these purposes, is that a person dealing with the registered proprietor is, normally, only bound by that which appears on the face of the registered title. That principle can be extracted from the decision of their Lordships in the Privy Council in ***Gardener and Another v Lewis*** *(1998) 53 WIR 236 at page 239 c – f. A number of sections of the Registration of Titles Act exemplify the position. The first is section 63 which prevents any instrument, until registered, from passing any estate in registered land:*

> *"63. When land has been brought under the operation of this Act,* ***no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land,*** *or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title." (Emphasis supplied)*

The second is section 68, which alludes to the indefeasibility of a registered title:

> *"68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations,* ***be conclusive evidence that the person named in such certificate as the***

> ***proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."*** *(Emphasis supplied)*

The third is section 70, which speaks to the title, mirroring the interests in the land:

> *"70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority,* ***the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever****, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:..." (Emphasis supplied)*

The fourth section is section 71 which addresses the protection of persons dealing with the registered proprietor:

> *"71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which*

> *such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money,* ***or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding;*** *and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." (Emphasis supplied)*
>
> *[26] These sections of the Registration of Titles Act demonstrate firstly, that JPS, by virtue of failing to register the document on the certificate of title to Mr Melville's land, failed to secure any interest or right in respect of that land, which, by itself, could bind any person other than Mr Melville. The second significant element contained, especially in section 68, is Ms Samuels' status as registered proprietor. The agreement with Mr Melville remained a personal contract and did not, by itself, bind any person succeeding Mr Melville. Authority for this finding may be found in* ***Barclays Bank v Administrator General for Jamaica and Another*** *(1973) 12 JLR 1223."*

[119] The court also examined the law contractual licences and stated that a person who takes title may be bound if his conscience is bound. The court cited with approval the following extract from ***Ashburn Anstalt v Arnold and another*** [1989] Ch 1where Fox LJ said:-

> *"The far-reaching statement of principle in* ***Errington*** *was not supported by authority, not necessary for the decision of the case and per incuriam in the sense that it was made without reference to authorities which, if they would not have compelled, would surely have persuaded the court to adopt a different ratio. Of course, the law must be free to develop. But as a response to problems which had arisen, the Errington rule (without more) was neither practically necessary nor theoretically convincing. By contrast, the finding on*

appropriate facts of a constructive trust may well be regarded as a beneficial adaptation of old rules to new situations."[10]

In ***Errington v Errington and Woods***[1952] 1 KB 290 the court held that a contractual licence created an equitable interest in land which would bind all persons except a bona fide purchaser for value without notice.

[120] In ***Ashburn Anstalt v Arnold and another*** (supra) it was held that a contractual licence to occupy land was not binding on a purchaser even if the said purchaser had notice of the licence. The court however expressed the view that a constructive trust may arise where it would be inequitable to allow the new owner to deny the licensee an interest in the land. In other words, where his conscience would be bound.

[121] The defendant based on the ***Rose Marie Samuels*** case acquired a contractual licence from Mr. Tulloch. This is not in dispute.[11] The claimants are companies and it is trite law that they have a separate identity from their shareholders. They do however act through their directors and Mr. Tulloch is a director of both claimants. They assert that he is their agent.

[122] Whilst Mr. Tulloch had knowledge of the licence he has maintained that he did not approve the variation of the route and did not know when it was constructed. His evidence is that the area of land is very large and he did not find out that the transmission line was built until the 6th June 2005 when he was having the land bulldozed to accommodate the finishing point of new attractions for the second claimant. He also gave evidence that he was appointed as Minister of Tourism in

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[10]Page 22c - d

[11]Counsel for the claimant has agreed with the position that Mr. Tulloch granted a licence to the defendant in paragraph 59 of his submissions.

April 1997 and was busy campaigning until December 1997. After that he asserts that he was busy carrying out his ministerial duties. He also gave evidence that in April 1998 he was diagnosed with prostate cancer, diabetes, hypertension, high cholesterol and Paget's disease which resulted in his having to undergo a "protracted period of medical treatment" locally and overseas. He also stated that he had given the defendant free access to the first claimant's property and had informed his family and employees.

[123] However, as was stated in the ***Rose Marie Samuels*** case, a mere contractual licence to occupy land is not binding on a purchaser even where the purchaser had notice of its existence. It was also stated that the appropriate facts may give rise to a constructive trust where the court is satisfied that the conscience of the new owner had been so affected that it would be inequitable to deny the licensee an interest.

[124] Brooks JA in addressing the issue the circumstances in which a purchaser's conscience would be affected, referred to the case of ***Chaudhary v Yavuz*** [2012] 2 All ER 418 where the court stated that the answer to that question was dependent on whether the purchaser had undertaken a new obligation. Lloyd LJ in that case, referred to ***Lloyd v Dugdale*** [2001] EWCA Civ 1754 in which Sir Christopher Slade said:-

> *"There is no general principle which renders it unconscionable for a purchaser of land to rely on a want of registration of a claim against registered land, even though he took with express notice of it. A decision to the contrary would defeat the purpose of the legislature in introducing the system of registration embodied in the 1925 Act. Nevertheless, the authorities show that, in certain special circumstances the court will impose on a purchaser, who has taken a disposition expressed to be subject to specified incumbrances or prior interests, a constructive trust obliging him to give effect to*

them, if it considers it unconscionable for him to do otherwise, in the particular circumstances of the case."[12]

[125] Lloyd LJ in ***Chaudhary v Yavuz*** (supra) also referred to the following principles that were formulated by the court in the above case. They are:-

"(1) Even in a case where, on a sale of land, the vendor has stipulated that the sale shall be subject to stated possible incumbrances or prior interests, there is no general rule that the court will impose a constructive trust on the purchaser to give effect to them.

(2) The court will not impose a constructive trust in such circumstances unless it is satisfied that the conscience of the estate owner is affected so that it would be inequitable to allow him to deny the claimant an interest in the property …

(3) ***In deciding whether or not the conscience of the new estate owner is affected in such circumstances, the crucially important question is whether he has undertaken a new obligation, not otherwise existing, to give effect to the relevant incumbrance or prior interest. If, but only if, he has undertaken such a new obligation will a constructive trust be imposed****…*

(4) Notwithstanding some previous authority suggesting the contrary, a contractual licence is not to be treated as creating a proprietary interest in land so as to bind third parties who acquire the land with notice of it, on this account alone: see Ashburn Anstalt v Arnold (supra) at pp 15H and 24D.]

(5) Proof that the purchase price by a transferee has been reduced upon the footing that he would give effect to the relevant incumbrance or prior interest may provide some indication that the transferee has undertaken a new obligation to give effect to it: see Ashburn Anstalt v. Arnold … However, since in matters relating to the title to land certainty is of prime importance, it is not desirable

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[12]Paragraph 50

that constructive trusts of land should be imposed in reliance on inferences from 'slender materials'."

[My emphasis]

[126] Brooks JA in the ***Rose Marie Samuels*** case also referred to paragraph 66 of ***Chaudhary v Yavuz***(supra) where the court referred to and approved paragraph 8.2.24 of Gray and Gray, Elements of Land Law (5th ed, 2009), which states: -

> ***"It is a standard feature of land registration the world over that a disponee's mere knowledge of a protectable, but unprotected, interest does not normally affect the title derived from registration****. This reluctance to allow the traditional doctrine of notice to intrude upon registers of title lies deeply embedded in the origins of the Land Register and has persisted to the present day. As Cross J observed in [**Strand Securities Ltd v Caswell** [1964] 2 All ER 956 at 965, [1965] Ch 373 at 390], it is "vital to the working of the land registration system that notice of something which is not on the register should not affect a transferee unless it is an overriding interest". **Title registration is intended to mark a "complete break" from the equitable rules which formerly governed land law priorities****. In consequence there has been a general rejection, no less so in England than elsewhere, of any temptation to qualify the system of title registration by the importation of an equitable doctrine alien to its central purpose."*

[127] It was held in the ***Rose Marie Samuels*** case that although the respondent had notice of the presence of the wires and towers traversing the land her conscience would only be affected if she had undertaken a new obligation to give effect to the prior interest.

Has the first claimant undertaken some new obligation to give effect to the licence?

[128] The letter dated 7th June 2005 clearly states that the first claimant has never accepted the new route proposed by the defendant in its letter to Mr. Tulloch dated the 15thMarch1997. The letter does however, claim compensation in respect of the defendant's alleged failure to fulfil its contractual obligations to Mr.

Tulloch. This letter does not in my view, satisfy the requirement for first claimant to have undertaken a new obligation to give effect to the licence.

[129] Counsel for the defendant argued that the conscience of both claimants must be affected by the document entitled 'Grant of Easement' because the considerations for the wayleave and property damages and other encumbrances negotiated by Mr. Tulloch was, as stated in the claimants' particulars of claim, for their benefit. The first claimant was however not in existence at the time and there was no indication from Mr. Tulloch that he was acting on behalf of a company that was to be incorporated.

[130] No evidence has been presented which suggests that the first claimant had "undertaken a new obligation". I therefore find that the licence between Mr. Tulloch and the defendant is not binding the first claimant.

What is the effect of the caveat?

[131] The defendant in the case at bar appears to have sought to protect its position by lodging a caveat. That caveat which was lodged in respect of the parent property indicates that the defendant lodged it under and by virtue of a grant of easement dated 4th April 1996.

[132] Mr. Tulloch has given evidence that he did not know of the existence of the caveat until 2008 when a copy was sent to him by his attorney. His evidence is that even at that time there was no route attached to the "Grant of Easement" that was lodged by the defendant with the caveat. In ***Rose Marie Samuels*** no caveat had been noted on the certificate of title.

[133] It is well established that a caveat confers no proprietary interest itself. It simply means that the caveator is claiming an estate or interest in the land.[13]

[134] In ***EngMee Yong and Others v V. Letchumanans/o Velayutham***[1980] A.C. 331, Lord Diplock stated:-

> *"The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. Nevertheless, their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued ex parte by the registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all"*[14]

[135] Additionally, in ***Half Moon Bay Ltd v Crown Eagle Hotels Ltd*** [2002] UKPC 24, Lord Millett asseverated that:

> *"…the entry of a caveat merely operates to prevent the registration of a transfer or dealing without the consent of the caveator or the removal or withdrawal of the caveat. It does not of itself subject the title of the transferee to the interest or incumbrance which the caveat serves to protect."*[15]

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[13]See ***Barrington Dixon v Angella Runte and Anthony Depaul*** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No.105/08, judgment delivered 17 July 2009

[14]Pages 335 - 336

[15]Paragraph 30

[136] I therefore find that the caveat did not give the defendant an interest in the area of land referred to in the wayleave agreement.

Whether the defendant is liable to the first claimant for breach of contract

[137] The first claimant cannot in my view maintain an action for breach of contract as it was not in existence when the agreement was made between Mr. Tulloch and the defendant. Mr. Tulloch's answer *"no, no"*, to the question *"were you on behalf of Lethe Estate saying that Lethe Estate was not bound by what you had done on your own?"* is insufficient to ground such an action.

[138] In any event, the evidence is that the construction of the transmission line was completed in 1997. The "as built" survey of the transmission line speaks to the survey having been conducted between the 6th and 11th of November 1997. This would have been approximately one year after the first claimant became the registered proprietor of the New Milns land. The survey document also indicates that Mr. Tulloch was notified but did not attend. Mr. Jarrett also gave evidence that the transmission line was built in 1997. This action was filed approximately eighteen years after the date of completion. Time would therefore have run against the first claimant even if it was in existence at the time when the agreement was signed between Mr. Tulloch and the defendant.

Whether or not the defendant is liable for trespass?

[139] Mr. Small Q.C. submitted that by virtue of the combined effect of sections 2 and 36 through 42 of the ***ELA,*** the continued presence of the defendant on the New Milns land could only be considered a trespass when the first claimant demanded the removal of the transmission line and it either failed or refused to accede to that demand. He relied on paragraphs 68 of the ***Rose Marie Samuels*** case in support of that submission. That demand, he said, was made by the service of these proceedings which seek an injunction for the removal of the transmission line. He argued it is for that reason and the provisions of the ***Prescription Act***, that no issue of the claim being statute-barred arises.

[140] It was further submitted that in any event, since section 40 of the ***ELA*** gives a landowner the right at any time (without limitation as to time) to require that the defendant removes or relocates its towers and power lines, the ***Limitation of Actions Act*** is irrelevant. Learned Queen's Counsel also submitted that the claim was not statute barred as the claimants could not have with reasonable diligence discovered the wrong complained of before they did and brought the claim within six (6) years of that discovery.

[141] The defendant's position is that it is not a trespasser in light of the agreement between itself and Mr. Tulloch.

[142] In the ***Rose Marie Samuels*** case Brooks JA stated that trespass to land has been defined as any unjustifiable intrusion by one person upon land in the possession of another. Trespass may also result from a continued presence on land without authority. The learned Judge of Appeal also referred to case law which established that the conveyance of a parcel of land terminates a licence granted in respect of that land.[16]

[143] In fact, in that case Brooks JA stated that the contractual licence ceased immediately upon the land being transferred to the respondent and that appellant then became a trespasser. The court held that she was entitled to possession.

[144] The claimants submitted that they became aware of the trespass in June 2005. In fact, the first claimant by letter dated, June 6, 2005, which was signed by Mr. Tulloch, indicated that it was the owner of the New Milns land on which the transmission line was built. The writer also indicated that he would like to discuss the matter with the defendant. In addition, the first claimant asked if the defendant could locate the Grant of Easement made between it and Mr. Tulloch.

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[16]See paragraph 55 of the judgment of Brooks JA.

[145] This was followed by a letter dated the 7th June 2005 from the first claimant to the defendant. It states in part:-

> *"Further to my discussion with your Mr. Wilbert Cain yesterday, I now write to set out the basis of the claim by Lethe Estate Limited.*
>
> *Mr. Francis Tulloch signed a Grant of Easement with the Jamaica Public Service on the 4th day of April 1996 which included the conditions listed in a letter dated 27th Mach 1996 from the Jamaica Public Service to the said Francis Tulloch.*
>
> *After this Grant of Easement was signed the conditions of the Easement were varied a number of times as Jamaica Public Service kept changing the route of the easement.*
>
> *These conditions were never committed to writing.*
>
> *It was not until March 15th 1997 almost one year after the Grant of Easement was signed that the Jamaica Public Service finally wrote to Francis Tulloch asking him to accept the new route and telling him that on his acceptance the Jamaica Public Service would proceed with construction activities.*
>
> *The land changed ownership in November 1996 and was now owned by Lethe Estate Limited. I am a shareowner in Lethe Estate Limited.*
>
> *Lethe Estate Limited has never accepted the new route...*
>
> *Notwithstanding the fact that the route was never agreed upon by Lethe Estate Limited, JPS proceeded to construct the line...."*

The letter also stated that the defendant was a trespasser and that its actions had caused substantial loss and damage to Lethe Estate Limited. It also listed several things that were to be done by the defendant as part of its contractual obligations Mr. Tulloch. The first claimant alleged that these failures caused damage for which it ought to be compensated.

[146] By letter dated the 9thJune 2005 the defendant promised to provide a detailed response to the claim by the end of that month. The first claimant's Attorney-at-

Law wrote to the defendant on the 2nd December 2005 and again on the 10th March 2006. The defendant responded by letter dated the 15th March 2006 which states in part:-

> *"Note that subsequent to the meeting with Mr. Tulloch, the matter was referred to a valuator for certain course of conduct to be pursued. We will seek an update from said valuator and provide a detailed response to Mr. Tulloch's claim as set out in your letter."*

[147] These letters indicate that the first claimant had not accepted the new route that was proposed by the defendant.

[148] When the principles enunciated in the ***Rose Marie Samuels*** case are applied to the instant case, it is clear that as at 4th November 1996 when the New Milns land was transferred to the first claimant, the defendant was occupying the land without the first claimant's permission..

Acquiescence

[149] In Halsbury's Laws of England[17], the following appears under the heading 'Acquiescence as a defence to trespass to land':

> *"Mere delay by the claimant in complaining of the defendant's actions is not of itself sufficient to establish the defence of acquiescence or estoppel. It must further be shown that the defendant had been misled to his detriment so that it would be unconscionable for the claimant to assert his rights. However, the claimant is not debarred by acquiescence from enforcing legal rights of which he was unaware at the relevant time."*

[150] In this matter there is no evidence that the defendant was misled to its detriment and that it would therefore be unconscionable for the claimants to assert their rights. I also bear in mind Mr. Tulloch's evidence that he was appointed as

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[17]See Halsbury's Laws of England, Volume 97 (2015) para. 584

Minister of Tourism in April 1997 and became engulfed in political affairs. He also gave evidence that in April 1998 he became ill and had to undergo medical treatment for a protracted period of time locally and overseas. That evidence, which I accept, does not in my view connote acquiescence. In addition, in the ***Rose Marie Samuels*** case it was stated that the doctrine of notice does not apply to registered land. The defendant having not received a signed copy of the letter of March15, 1997 ought to have ensured that all was well before proceeding.

[151] I agree with counsel for the claimants that the claim is not statute barred. The contractual licence enjoyed by the defendant having come to an end, defendant in my view, is currently a trespasser.

Whether or not the defendant is liable for nuisance?

[152] The claimants have claimed damages for the continuing health hazard over the New Milns land as a result of the presence of the transmission line.

[153] In private nuisance claims, only those with an interest in the land can sue. As was previously stated, the evidence does not on a balance of probabilities establish the second claimant's interest. The first claimant is, however, the owner of the property and can maintain an action in nuisance.

[154] In the 17th edition of **Clerk and Lindsell on Torts**, on page 909, it is stated as follows:-

> *"The distinction between trespass and nuisance is the old distinction between trespass and case.* ***Trespass is a direct entry on the land of another, and is actionable per se, without proof of special damage, but nuisance is the infringement of the plaintiff's interest in property without direct entry by the defendant****, and generally actionable only on proof of special damage…"*
>
> [My emphasis]

[155] In ***Esso Petroleum Co. Ltd v Southport Corporation*** [1956] 2 WLR 81 an oil tanker was stranded in a river estuary and, to prevent her breaking her back, the master jettisoned 400 tons of her oil cargo which the tide carried to a foreshore, occasioning damage. The foreshore owners brought against the ship-owners an action based on trespass, nuisance and negligence alleging that the stranding was caused by faulty navigation.

[156] The matter went to the Court of Appeal and then to the House of Lords. Lord Radcliffe said:-

> *"It is true that the fact that the oil spread itself over the respondents' foreshore was the subject of alternative claims in nuisance and in trespass. So far as nuisance goes, I share the view of Denning L.J. in the Court of Appeal that the appellants were not responsible for a private nuisance in any ordinary sense."*[18]

[157] In the Court of Appeal, Denning LJ had stated the following:

> *"In order to support an action on the case for a private nuisance the defendant must have used his own land or some other land in such a way as injuriously to affect the enjoyment of the plaintiff's land. "The ground of responsibility," said Lord Wright in Sedleigh-Denfield v. O'Callaghan*, *"is the possession and control of the land from which the nuisance proceeds." Applying this principle, it is clear that the discharge of oil was not a private nuisance, because it did not involve the use by the defendants of any land, but only of a ship at sea…"*[19]

[158] Also, in ***Hussain and another v Lancaster City Council*** [1999] 4 All ER 125 Hirst LJ said:-

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[18]Page 91

[19][1954] 2 All ER 561 at 570

> *"So far as the scope of the tort is concerned, Professor Newark's statement of general principle that its essence is that the defendant's use of the defendant's land interferes with the plaintiff's enjoyment of the plaintiff's land is amply vindicated not only by Lord Goff's approval in Hunter v Canary Wharf Ltd, but also by the passages I have quoted above from* the *Sedleigh-Denfield* case*, where Lord Wright refers to the 'interference by the defendants* in *the user of their land' and Lord Porter to the occupier's liability for 'a nuisance existing on his property (see [1940] 3 All ER 349 at 365, 375, [1940] AC 880 at 904, 919; my emphasis)…In the present case the acts complained of unquestionably interfered persistently and intolerably with the plaintiffs' enjoyment of the plaintiffs' land, but they did not involve the tenants' use of the tenants' land and therefore fell outside the scope of the tort".*[20]

[159] No evidence has been presented in support of the claim that the presence of the transmission line constitutes a health hazard.

[160] It follows that, in my judgment, the claimants do not have a viable cause of action in nuisance.

What are the appropriate remedies, given the nature of the structures and the impact of the activity carried on by the Defendant?

[161] The first claimant has established a case for equitable relief. It has proved its legal right and it has also proved an actual infringement by the defendant.

[162] The first claimant has asked for the grant of an injunction to remove the towers and wires on its property and to stop the continuing trespass of the defendant over its property. However, this is a case in which the interest of the public looms large.

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[20]Page 144

[163] Learned Queen's Counsel has submitted that a permanent injunction should be granted for the removal of the transmission line. He relied on ***Whitwham v. Westminster Brymbo Coal and Coke Co.*** [1896] 2 Ch. 538; ***Stoke-on-Trent City Council v. W. & J. Wass Ltd.***[1988] 1 W.L.R. 1406; ***Jaggard v. Sawyer and another*** [1995] 2 All E.R. 189 in support of that submission.

[164] The defendant has submitted that the detriment that would be caused to the defendant is greater than that which would be suffered by the claimants. Reference was made to ***Shepherd Homes Ltd v Sandham*** [1971] Ch 340 in support of that submission. In that case, Megarry J indicated that the court must consider whether there exists a disproportion between the detriment that the grant of the injunction would inflict on the Defendant, and the benefit that it would confer on the plaintiff.

[165] Mrs. Mayhew also referred to ***Wrotham Park Estate Co. Ltd. v Parkside Homes Ltd.& others*** [1974] 1 WLR 798 where the principle was applied. In that case, the court refused to grant a mandatory injunction to knock down a housing estate built in breach of a restrictive covenant and instead awarded damages as an adequate remedy. She also referred the court to the evidence of Blaine Jarrett. She also stated that the transmission line has been in place over the claimant's property for approximately twenty (20) years and no issue was raised until eight (8) years after its construction.

[166] Blaine Jarrett's evidence is that the transmission line facilitates the transmission of electricity to the western parishes and that its removal would have "dire" consequences.

[167] He said that the removal of the transmission line would involve a re-design of a major section of the entire line which runs for seventeen (17) miles. His evidence is that the removal of the transmission line would result in power outages on the transmission system which could result in a "major system outage on the JPS Transmission Grid, possibly affecting thousands of customers in the Western region of the island, which may also escalate to an entire system shutdown."

[168] He stated that the estimated cost for reconstruction is United States four million two hundred thousand dollars (US$4,200,000.00). In addition, he said that it would take approximately seven (7) months to one year to procure the material necessary to reconstruct the line as much of the equipment has to be built to the defendant's specifications.

[169] In ***Shelfer v City of London Electric Lighting Co***, ***Meux's Brewery Company v City of London Electric Lighting Co***[1895] 1 Ch 287, Smith LJ set out what has been described as a good working rule as to how the discretion to award damages is to be exercised. It was stated that 'if the injury to the plaintiff's legal right is small and is one which is capable of being estimated in money and is one which can be adequately compensated by a small money payment and the case is one in which it would be oppressive to the defendant to grant an injunction then damages in substitution for an injunction may be given'.[21]

[170] Following the pronouncements of the learned Lord Justice it has been emphasised that it needs to be remembered that the working rule does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction.[22]

[171] I have once again found ***Halsbury's Laws of England*** instructive[23]. It provides as follows:-

> *"**The exercise of the discretion to award damages in substitution for an injunction**.*
>
> *Where the claimant seeks an injunction to prevent a wrongful act, the court's power to refuse the injunction and award damages in*

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[21]Page 322

[22]See ***Jaggard v Sawyer*** [1995] 2 All ER 189 per Millett LJ

[23]See Halsbury's Laws of England, Volume 29 (2014)) para.616

> *lieu is discretionary and not lightly exercised. Once a claimant establishes a wrong, such as a nuisance, he is prima facie entitled to an injunction to suppress it. The courts are not generally inclined to allow the law of injunctions to be used to authorise the commission of a wrong for payment or substantially to expropriate the claimant's rights.*
>
> *However, the strength of the presumption in favour of an injunction should not be over-emphasised. It was once thought that an injunction was available almost as of course, and that it should be refused only if the injury to the claimant's legal rights was small, estimable and easily compensable in money, such that it was oppressive to the defendant to grant specific relief. But in 2014 the Supreme Court roundly discountenanced this view. The discretion under the Senior Courts Act 1981 was, it was said, one that should not be fettered by such constraints.* ***The merits of the parties and, more importantly, the general interests of third parties and the community needed to be brought into the equation, and there was no reason why in a suitable case these should not be capable of tipping the balance in favour of denying an injunction and awarding damages in lieu."***

[My emphasis]

[172] The Supreme Court decision of ***Coventry and others v Lawrence and another*** [2014] UKSC 13 is the decision to which the foregoing extract directs the reader's attention.

[173] In ***Jamaica Public Service Company Limited v Enid Campbell and Marcia Clarke*** [2013] JMSC Civ 22, judgment delivered 17 April 2013, Mangatal J indicated that the court would not exercise its discretion to grant injunctive relief because the Owners had been somewhat dilatory and had allowed many years to pass before actively pursuing the matter through the courts. The same could be said of the claimants in the case before me. Furthermore, the evidence before this court is that the transmission line facilitates the transmission of electricity to western parishes. Mr. Jarrett averred that if the line was removed this would result in outages on the transmission system posing a risk of major system

[174] outage on the defendant's transmission grid possibly affecting thousands of customers in the Western region of the island.[24]

[175] I am aware that in ***Shelfer*** it was stated that the case of ***Imperial Gas Light and Coke Company v. Broadbent*** (1859) 7 H.L.C. 600, 11 ER 239 is an authority which shows that an injunction would not be refused on the ground that the public might be inconvenienced if an injunction were granted. However, I am also mindful of the guidance given in the aforementioned portion of Halsbury's Laws.

[176] I am therefore inclined to withhold injunctive relief and award damages instead[25]. Having decided that I will not grant injunctive relief the appropriate measure of damages must be determined.

Damages

Claimants' submissions

[177] Mr. Small Q.C. submitted that if the injunction is granted the court should accept the evidence of Mr Langford Gordon, who has submitted a report that has estimated the loss at United States four hundred and five thousand dollars (US$405,000.00) for the defendant's use of the land to-date.

[178] It was submitted that an award of damages, in the sum of United States four hundred and five thousand dollars (US$405,000.00) would be appropriate.

[179] In the event that injunctive relief is not granted it was submitted that as Mangatal J stated in ***Jamaica Public Service Company Limited v. Enid Campbell and***

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[24]See paragraph 21 of the witness statement of Blaine Jarrett dated and filed January 10, 2017

[25]See ***Albert Fernando Rose and Wilbert Charles Hanchard v Patrick Wilkinson Chung and Patrick City Limited*** (1978) 16 JLR 141 (SC) where Allen J discussed the jurisdiction of the Supreme Court to award damages in lieu of specific performance.

Marcia Clarke (supra), the measure of damages is the diminution in the value of land arising from presence of the towers and power lines. [26]

[180] It was submitted that the court should accept the evidence of Mr. Langford Gordon who has estimated the loss for the diminution in the value of land arising from presence of the towers and power lines at Jamaican one hundred and eighty three million and eighty five thousand dollars (J$183,085,000.00).

Defendant's submissions

[181] Counsel submitted that in assessing damages for trespass, it is open to the court to use either the (i) diminution in value principle or the (ii) user principle.

[182] Mrs. Mayhew submitted that the facts in the instant case can be distinguished from those in ***Jamaica Public Service Company Limited v. Enid Campbell and Marcia Clarke*** (supra) as no compensation had been agreed on and paid to Enid Campbell arising from the grant of easement. She argued that in the case at bar there was an agreement, payment and expectation that the transmission line would traverse the property. She stated that any award of damages should therefore be on the basis that the defendant acted otherwise than was agreed.

[183] It was further submitted that Mr. Francis Tulloch and the defendant agreed the sum of Jamaican five million dollars (J$5,000,000.00) as compensation for the grant of easement and in full and final settlement of property damages and encumbrances as set out in the March 27, 1996 letter. In those circumstances it was argued that compensation has already been paid for an easement over the property and specified losses. Mrs. Mayhew stated that any compensation to be awarded now must be for any trespass that the court finds arising from non-compliance with the agreement.

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[26] Paragraphs 71 and 84

[184] Counsel also reminded the court that the claimant had already been compensated for the easement path (2700 feet long and 100 feet wide) and it had been contemplated that three subdivision lots would have been affected. She submitted that any compensation for trespass could only be for one lot, being the additional lot affected by the transmission line. It was submitted that having regard to Mr Tulloch's evidence that he agreed for towers to have been placed on lot 6 (his largest lot), lot 8 (on which John Crow Hill is located) and lot 7 (where the banana plantation is located and in respect of which compensation was already agreed and paid for loss of bananas) the only lot for which compensation could arise would be lot 2.

[185] She also stated that no evidence has been adduced to support compensation on the basis of the user principle.

[186] Counsel also submitted that the evidence of Mr. Gordon Langford, Chartered Valuation Surveyor is not reliable and ought to be rejected. She stated that his evidence was rife with inconsistencies which showed that in arriving at his valuation he departed from and/or failed to adequately apply proper valuation practices.

[187] She stated that although he said that he used the comparison method of valuation, that is, he compared the claimants' properties with properties that would yield a similar value, he failed to identify any of these comparable properties in his report while admitting under cross examination that he would normally include references to comparable properties in his reports. No reason was given to the court for this failure. She further stated that that when pressed, he was unable to name any of those comparable properties and to cite their values.

[188] She submitted that the reason why his report did not refer to comparable properties and his inability to name the properties with which comparisons were made is that he did not make any such comparisons in arriving at his valuation. It was further submitted that Mr. Langford based his assessment of the value of the

New Milns land primarily, if not solely on the sale price quoted in the agreement for sale between Mr. Tulloch and Mrs. Eschenbach, which was annexed to his report.

[189] This she said, was insufficient for the purposes of carrying out a valuation which he knew was intended to be relied upon by the court as an impartial representation of the values of the lands. She referred to Mr. Tulloch's evidence that Mrs. Eschenbach "would leave no stone unturned to purchase the ten acres of land part of which was on the river" and submitted that it was clear from that statement that Mrs Eschenbach was prepared to pay premium price for the particular land that she intended to buy, and so the price she was prepared to pay may well have been above market value and in any event would not necessarily have been reflective of the values of the other lots. Mrs. Mayhew submitted that it was clear from Mr Langford's evidence that he did not consider this possibility.

[190] Counsel also stated that it was also clear that Mr. Langford did not take any or any adequate account that the New Milns land was restricted to agricultural use. In addition, he expressed the view it did not affect its value as the covenant could be modified to permit other uses. She submitted that such modification is not guaranteed and is subject to a judicial process and objections by persons entitled to the benefit of the covenants.

[191] Mrs. Mayhew also dealt with Mr. Langford's classification of the lots over which the transmission lines traversed as being 'sterile'. She pointed out that he defined sterile as lands that could not be used at all or which could only be used as pasture lands but when pressed in cross examination he admitted that they could be used for planting various crops that would not interfere with the height and width restrictions imposed by the Grant of Easement. He also admitted that a house could be built on lot 2A, away from the transmission line.

[192] She submitted that in arriving at the conclusion that the lots were sterile, Mr. Langford totally ignored the fact that the sub-division lots were zoned for

agricultural purposes and that agricultural and eco-tourism activities existed on some of the lots, e.g zip lining, river rafting, jitney tour and a banana plantation. She pointed out that the very photographs exhibited in his report show bananas growing on the property. In the circumstances, it was submitted that the lots are far from sterile.

[193] Counsel argued that based on his report, Mr Langford's sole reason for ascribing diminution in value to other lots within the subdivision, over which the transmission line does not traverse, is what is referred to as the "high visibility" of the transmission towers and power lines. Mr. Langford did not explain how that visibility affects the value of the properties. She asked the court to take a reasonable common sense approach in assessing Mr. Langford's evidence and to find that mere visibility of the lines from other properties are not likely to affect their values. It was further submitted that visibility of the transmission line is not relevant in assessing compensation in this case, as item 10 of the Consideration in the March 1996 letter spoke to *"Compensation for loss suffered by your environmentally friendly development".*

[194] Counsel stated that Mr. Langford admitted that the values in his report were predicated on there having been no compensation paid to date for the Grant of Easement and also stated that even if he were advised of such compensation, this would not affect his valuation. She directed the court's attention to his evidence where he asked "Why should I take that into account?" It was submitted that his unwillingness to take account the compensation paid is a clear indication that his independence and impartiality as an expert is in question.

[195] She therefore urged the court to reject his evidence as set out in his report as being "extremely exaggerated, unreliable, poorly researched and lacking in independence". Counsel stated that the court will therefore have to carry out its own assessment of the diminution in value of lot 2A. She stated that Mr. Langford in his evidence stated that lots in the rural area away from water and the main road are valued in the range of Jamaican one hundred and fifty thousand dollars

(J$150,000.00) to two hundred thousand dollars (J$200,000.00) per acre. It is reasonable to assume that lot 2A, being close to water would be more valuable per acre.

[196] Counsel stated that lot 2A which is approximately 5 acres is not likely to be valued at more than two million dollars (J$2,000,000.00). She pointed out that no tower was erected on this lot and the transmission line only crosses over a small portion of the lot. In the circumstances, it was submitted that the value of this lot was not likely to have been diminished by more than 30% making the sum of six hundred thousand dollars (J$600,000.00) more than adequate compensation.

[197] It was submitted that no award should be made for the alleged loss to the value of the subdivision, loss of sale to Bertram Wright, and Mr. and Mrs. Seth Shelton, and loss of sale to Mrs. Eschenbach as these were covered by item 7 of the March 26, 1996 letter. In addition, the alleged loss of sale to Mrs. Eschenbach was never pleaded. I agree with that submission.

[198] In closing, Mrs. Mayhew stated that no compensation should be awarded to the claimants on account of loans taken out by and on behalf of the claimants, as there is no clear nexus between them and any action of the defendant. Any loss allegedly incurred would therefore be too remote. In addition, no documentary evidence has been submitted to substantiate any of these alleged losses.

Discussion

[199] The subdivision on the New Milns land is comprised of fourteen (14) lots, the largest being 6A. Compensation for the diminution in the value of that lot was already paid to Mr. Tulloch.

[200] The case of ***Whitwham v Westminster Brymbo Coal and Coke Company*** [1896] 2 Ch 538 is relevant to the issue of damages for trespass. In this case the defendants trespassed on the plaintiffs' land by tipping spoil thereon from their colliery. It was held that the amount of damages was not to be assessed by

ascertaining merely the diminution in value of the plaintiff's land. The court stated that the principle which is applicable to way-leave cases ought to be employed. The principle was stated to be as follows:-

> *"if one person without leave of the other uses the other's land for his own purpose he ought to pay for such user; therefore, as to so much of the land as was covered with spoil, the value of the land for the purpose for which it was used by the wrongdoers ought to be taken into account; and that as to the rest of the land the measure of damages was the diminution of the value thereof to the plaintiffs by reason of the wrongful acts of the defendants."*

[201] No evidence has been presented which speaks to the value of the land for the purpose for which it was used by the defendant.

[202] The New Milns land by virtue of restrictive covenant number 7 is agricultural land. It states:-

> *"The land shall be held for agricultural purposes"*

[203] The first claimant relied on the expert report of Mr. Gordon Langford, Chartered Valuation Surveyor in support of its losses and in particular to show the diminution in value of all the lands within the subdivision. Mr. Langford assessed the loss as being Jamaican one hundred and eighty-three million and eight five thousand dollars ($183,085,000.00).

[204] His report states that the New Milns development would attract *"the environmentally conscious discerning investor"* and *"the highly visible transmission lines and tower would affect the value and major selling point of the development".* The report also states that real compensation is the loss of value of the land overall and that in order to arrive at that figure, the value of the land after the installation of the transmission line must be deducted from its pre-installation value.

[205] During cross-examination Mr. Langford gave evidence that in arriving at the starting point for his valuation of the lots he took account of the fact that Mr.

Tulloch had been offered United States thirty thousand dollars (US$30,000.00) per acre from a purchaser (Monica Eschenbach). That contract as can be gleaned from the exhibit was for the sale of ten (10) acres.

[206] Mr. Langford informed the court that in arriving at the values in his report he used the comparison method of assessment. He testified that he used the value of comparable land outside of Montego Bay. Those properties were not listed in his report. However, I do not consider that omission to be fatal to its reliability. Mr. Langford has been certified as an expert and unless it is shown by evidence that he was required to list those properties his professionalism cannot be impugned.

[207] The following exchange took place:-

Q. And you agree with me, sir, that in arriving at the value of land an important factor that is taken into consideration is the price at which lands in the neighbourhood is being sold for voluntarily?

A. Yes, but you -- that land has to be comparable, so we need to find, compare it with lands next to river.

Q. And are you able to tell us what evidence you found of the values of comparable lands that you used in arriving at your assessment as set out in your report?

A. It doesn't form part of this and I can't really help you. You mean for current values, means --

Q. For any point in time?

A. No, I am not able to quote actual sales.

[208] Mr. Langford stated that the base price is in the region of about Jamaican fifteen million dollars ($15,000,000.00) per acre or roughly, United States one hundred and fifty thousand (US$150,000.00) for land which can be used commercially and at the other end of the scale is Jamaican two hundred and fifty thousand

(J$250,000.00)or two hundred thousand dollars (J$200,000.00) for uncultivated pasture land. He stated that the base prices were arrived at using his expert knowledge of land generally across Jamaica.

[209] Mr. Langford testified that in arriving at values he also researched the restrictive covenants endorsed on the title. When questioned about restrictive covenant number 7 which states that the New Milns land is to be used for agricultural purposes, he indicated that restrictive covenants can be changed. He indicated that his assessment was based on the potential use of the New Milns land.

[210] Mr. Langford described the lots below the transmission line as sterile and opined that they could only be used for raising cattle. When asked by Mrs. Mayhew whether crops such as pumpkin, sweet pepper and potatoes could be cultivated on those lands he confirmed that that was possible but indicated that they are low value cash crops. By way of clarification, he indicated that the word 'sterile' was not used in a medical sense but in a value sense. In other words, the land being sterile does not mean that it cannot grow crops.

[211] Mr. Langford stated that all lots have been affected by the presence of the transmission line. It is my understanding that for some lots not traversed by the transmission line, its visibility could have a negative impact on their desirability to prospective purchasers. He said "…*you are allowed to build a house on agricultural land, because you see, these 10-acre lots, some people call the homestead or farmstead lots where you will build a big house, maybe a smaller one, for your granny for someone and the aspects are still the same, no one wants to build a house where they are going to live and having to stare at those lines, you see*".

[212] Mr. Langford stated that based on his experience and knowledge of values across the island, the value for an acre of agricultural lot in Hanover which is away from the main road and away from water is Jamaican one hundred and fifty thousand (J$150,000.00) or two hundred thousand dollars (J$200,000.00) depending on the size of the land.

[213] Mrs. Mayhew submitted based on Mr. Tulloch's evidence that he agreed to have towers placed on lots 6, 8 and 7 compensation would only arise in respect of lot 2. It was submitted that Jamaican six hundred thousand dollars ($600,000.00) would be more than adequate compensation.

[214] During the trial a telling exchange took place. It is as follows:

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 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, 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.

[215] My understanding of that Mr. Langford's evidence is that although he used the comparison method of assessment, the presence of the river on the New Milns land placed it in a different category from other properties. He also stated in his report that there are recent developments in the area and that it is making a transition to a semi-rural, suburban community. The report also indicates that there are developments on the St. James border which offer luxury riverside residences and comparable developments would be Kempshot in St. James and Tamarind Hill in Hanover which borders Round Hill.

[216] I also bear in mind the fact that with respect to the assessment of the diminution of the value of the land, Mr. Langford's evidence stands alone. I cannot agree with Mrs. Mayhew that the value of the subdivision ought to be assessed on the sole basis that it is stated to be agricultural purposes.

[217] Mr. Langford described the area as being zoned for agricultural (homestead) purposes. However, tourism related activities also take place in the area. His report also states that the highest and best use of the lots situated along the river bank would be commercial (tourist attraction or recreational facility). Where the other lots are concerned he stated that they would be suited for homesteads in the upper income bracket.

[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[27]. 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 the first claimant (the compensation for all lots except the ones directly affected and lot 6A for which compensation was already paid).[28]

Mesne Profits

[219] With respect to the first claimant's claim for mesne profits I have found the following passage in ***Halsbury's Laws of England***[29] to be a useful summary of the law:-

> *"Where a defendant has been in wrongful occupation of the claimant's land, the claimant has a specialised action for trespass known as the action for mesne profits. The normal measure of recovery in an action for mesne profits, savouring more of restitution than damages for loss, is the market rental value of the property for the period of wrongful occupation, without any deduction for the fact that the claimant might not have been able to let the property or otherwise profit from it had the defendant not been there. But this may be varied if the occupation is against the background of a previous or contemplated agreement for a concessionary rent at below the market value, or if for some other reason the accommodation is worth less to the defendant.*
>
> *The claimant suing for wrongful occupation is not bound to claim on this basis: it always remains open to him to elect to prove loss in a greater amount (for example, by showing that property originally let*

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[27]Lots 2b, 3,4,5a, 5b, 5c, 9, 10a, 10b, 11, 12,13 and 14

[28]The first claimant's claim for damages for loss in value to the subdivision would fall within an award for damages in respect of trespass. (See ix of Particulars of claim)

[29]See Halsbury's Laws of England, Volume 29 (2014) para. 421.

at a concessionary rent would otherwise have been successfully let on the open market).

Where there has been trespassory use (as opposed to occupation) of land, a similar principle applies. As an alternative to suing for actual damage done or loss suffered, damages can be claimed on the basis of the benefit gained by the defendant from his use of the claimant's land*. The benefit is normally reckoned by what would have been a reasonable charge, taking some account of the relative position of the parties and of the possibility of obtaining compulsory rights …"*

[My emphasis]

[220] Mrs. Mayhew submitted that in light of the fact that compensation was already paid to the claimants, for the transmission line and towers over the property and that the line "as built" is within the agreed area for the easement path, no mesne profits should be awarded. She stated that if an award is made under this head it would result in the claimants being doubly compensated.

[221] As I have previously stated, no evidence was adduced regarding the benefit gained by the defendant from the use of the first claimant's land. Accordingly, no award is made under this head.

Exemplary Damages

[222] Mr. Small Q.C. submitted that exemplary damages should be awarded to the claimants if the Court finds that the defendant acted in a manner which was calculated to derive a profit or benefit which would exceed any compensation payable. He suggested that the sum of Jamaican two million dollars (J$2,000,000.00) would be appropriate.

[223] Reference was made to ***Jamaica Public Service Company Limited v Enid Campbell and Marcia Clarke***(supra) in which Mangatal J stated that the case was one in which the actions of the Jamaica Public Service Company were

"motivated by profit-making concerns and purposes"[30] and may have attracted an award of exemplary damages had the parties not agreed to the original easement. Mr. Small Q.C. argued that in the instant case, there is no agreement with the first claimant and as such an award of exemplary damages would be appropriate. He relied on the cases of ***Rooks v Barnard*** [1964] 1 All E.R. 367 and ***Delia Burke v Deputy Superintendent Carol McKenzie and The Attorney General of Jamaica***[2014] JMSC Civ139 in support of that submission.

[224] Mrs. Mayhew submitted that such an award should not be made. She stated that exemplary damages may be awarded where the actions complained of fell within the following criteria:-

(i) Oppressive arbitrary or unconstitutional actions by servants of the government;

(ii) The defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff;

(iii) Where there is express authorisation by statute.

[225] Learned counsel stated that the only category that could possibly relate to this case is category (ii). It was also submitted that the circumstances of the instant case can be distinguished from those in ***Jamaica Public Service Company Limited v Enid Campbell and Marcia Clarke***(supra). She pointed out that although the court made an award of two million five hundred thousand dollars ($2,500,000.00) for aggravated damages, no award was made for exemplary damages due to the fact that a Grant of Easement existed that "was freely and voluntarily entered into by the owners". She indicated that the reason for the award of aggravated damages in that case was on account of the court's view

[30]Paragraph 94

that the actions of the Jamaica Public Service Company were*" bizarre, slip-shod, unprofessional, high-handed, reckless and aggressive"*. Counsel stated that no evidence has been adduced by the Claimant in this case to suggest that the facts case are similar to which occurred in ***Enid Campbell***, and as such no award of exemplary damages should be made.

[226] Exemplary damages are designed to punish the tortfeasor. In ***Kuddus v Chief Constable of Leicestershire Constabulary***[2001] 3 All ER 193.Lord Nicholls of Birkenhead described such damages in the following terms:-

> *"Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a claimant fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter.*
>
> *Punishment is a function par excellence of the criminal law, rather than the civil law. But in Rookes v Barnard the House recognised that there are circumstances where, generally speaking, the conduct is not criminal and an award of exemplary damages would serve a useful purpose in vindicating the strength of the law. This purpose would afford 'a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal' (see [1964] 1 All ER 367 at 410, [1964] AC 1129 at 1226 per Lord Devlin)."*[31]

[227] Such an award is discretionary and may only be made where the defendant's actions falls within one of three categories listed by counsel for the defendant[32]: This principle was endorsed in ***Kuddus*** where it was stated:-

> *"Lord Devlin identified two sets of circumstances ('categories of case') where this was so: oppressive, arbitrary or unconstitutional*

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[31]Page 207

[32]See ***Rookes v Barnard*** [1964] AC 1129

> *acts of government servants; and wrongful conduct calculated to yield a benefit in excess of the compensation likely to be payable to the claimant. A further, self-evident category, on which nothing turns, comprises cases where exemplary damages are expressly authorised by statute."*[33]

[228] I agree with Mrs. Mayhew that the allegations against the defendant are to be considered under category (ii). In this matter it was contemplated between the defendant and Mr. Tulloch that the transmission line would traverse the New Milns land at some point. The defendant did not barge in on land and trespass upon it. In ***Jamaica Public Service Company Limited v Enid Campbell and Marcia Clarke***(supra), Mangatal J declined to make an award under this head on the basis that it was *"not a case where the Owners were never going to have transmission lines traversing their land..."* and *"the use of the altered route area therefore does not amount to exploitation in the same degree, as would have been otherwise been the case had they trespassed in circumstances where there had never been an easement agreement."*[34]

Special Damages

[229] The first claimant has also claimed special damages in the amount of seven million four hundred and twenty-six thousand nine hundred and thirty dollars (J$7,426.930.00). The claim is particularized as follows:-

(i)	Cost of building alternative road to join property with land leased from Darrington Birch	$1,200,000.00
(ii)	Cost of report of George Gregg	$52,930.00
(iii)	Cost of survey of Brian Alexander	$39,000.00

[33]Page 207

[34]Paragraph 77

(iv)	Cost of estimate for installation of gabion baskets	$35,000.00
(v)	Cost of leasing land from Darrington Birch to use as finishing point of river for Tubing on the River and Kayaking on the River	$ 100,000.00
(vi)	Damages for preventing the operation of the river tours for two years	$6,000,000.00
		$7,426,930.00

[230] The second claimant has claimed special damages in the sum of Jamaican six million dollars (J$6,000,000.00)

[231] In ***Caribbean Cement Company Limited v Freight Management Limited*** [2016] JMCA Civ 2, judgment delivered 15 January 2016, Brooks JA said the following:

> *"There is a principle that special damages, such as the damages claimed by FML, must be specifically pleaded and strictly proved. This court has accepted that principle in many cases, including* ***Robinson and Co and Another v Lawrence****. In that case, this court set aside an award of special damages on the basis that the claimant had not proved his claim"*[35]

[232] He continued:-

> *"Exceptions to the principle are allowed where it would be unrealistic to require a claimant to have records to substantiate a claim for special damages. This was acknowledged in Walters v Mitchell (1992) 29 JLR 173, where this court accepted that in certain cases the principle could not properly apply…*
>
> *FML could not claim to fall within the category of persons contemplated by the court in Walters. It is expected that a corporation, especially one in an enterprise subject to regulation,*

[35] Paragraph 64

> *such as shipping is, would necessarily have records of its income and expenditure to allow it to demonstrate its loss with "mathematical precision".* [36]

[233] In that case, Counsel had argued that the respondent should be denied any award of damages. Brooks JA was of the view however that such a result would not meet the justice of the case. After assessing damages Brooks JA declared:-

> *"This approach should be regarded as relating to the facts of this case and should not be taken to be an acceptance of claimants disregarding the principle of strictly proving their losses."*

[234] I've also considered the case of ***Grant v MotilalMoonan Ltd and Another*** (1988) 43 WIR 372 a vehicle driven by the second respondent and owned by the first respondent crashed into a house occupied by the appellant. The appellant's household furniture and a number of other articles belonging to her were damaged beyond repair. She sued the respondents for negligence and claimed twenty thousand dollars ($20,000.00) in damages. The special damages were particularised in the pleadings. The respondents did not enter an appearance, nor file any defence. The appellant was granted judgment in default.

[235] Her damages were assessed by a master. At the hearing before the master she produced a list of damaged articles which she had compiled on the day after the accident; against each article she had noted its price. The respondents did not challenge the prices, but the appellant admitted that she no longer had receipts for the articles, nor could she state when they had been purchased. She also admitted that she had not engaged the services of a valuator to value the articles. The respondents did not call any evidence but submitted that she was required to prove the value of the articles strictly. The master held that the value had not been so proved and awarded the appellant an 'ex gratia' payment of six thousand dollars ($6,000.00).

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[36] Paragraphs 66 and 67

[236] The appeal was allowed. The court held that although special damages must be pleaded, particularised and strictly proved, the appellant had prima facie, established the cost of the articles and as it was not challenged by the respondents the only courses of action properly open to the master were to accept the appellant's claim in full or to apply her mind judicially to each item and its value. The court also allowed the claim in full as the values were not unreasonable.

[237] Mrs. Mayhew has not challenged the items claimed as special damages. She did, however submit that Mr. Tulloch, on behalf of the claimants purported to give detailed evidence in his witness statement of various loans taken out by and on behalf of the claimants. She argued that it is unclear whether this evidence is intended to show the claimant's loss. She submitted that no compensation should be awarded to the claimants on account of these loans on the basis that there is no clear nexus between them and any action of the defendant; accordingly, they are remote. She also submitted that no documentary evidence has been submitted to substantiate any of these alleged losses.

[238] Having regard to the particulars of special damages, there is no obvious claim in respect of loans obtained by the claimants.

[239] In the absence of express agreement I would however expect the claimants to lead evidence in order to substantiate their claim. Items (i) and (vi) require more than their "say so". The claimants are not in the same position as the "sidewalk vendor" in ***Desmond Walters v Carlene Mitchell*** (1992) 29 J.L.R 173. In that case the court adopted the reasoning of Bowen L.J. in ***Ratcliffe v Evans*** [1892] 2 Q.B. 524 who said:-

> *"As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist on more would be the vainest pedantry."*

[240] I am therefore of the view that in the absence of any evidence, the first claimant's claim for cost of building an alternative road and damages for preventing the operation of the river tours and the second claimant's claim have not been proved.

[241] The claim for damages in respect of the estimate for installation of gabion baskets seems to be linked to the breach of contract claim and not the trespass claim. There was no contract between the first claimant and the defendant and as such, no award is made in respect of that claim.

[242] The first claimant is entitled to compensation for the cost of Mr. George Gregg's report, Mr. Brian Alexander's survey and the cost of leasing land from Darrington Birch. These damages amount to Jamaican one hundred and ninety-one thousand nine hundred and thirty dollars (J$191, 930.00).

Damages for loss of sale

[243] The first claimant has also claimed damages for loss of sale of a lot to Bertram Wright and loss of sale of a lot to Mr. and Mrs. Seth Shelton. In paragraph 26 of Mr. Tulloch's witness statement, it is stated as follows:-

> *"...the improvements and installation had to be in place by October 1995 because I had to have the road and electricity leading to the 10 acres Mrs. Eschenbach was purchasing in place by October for her to sign the formal Agreement for Sale and for her to pay me the other US $120,000.00 payable on the signing of the agreement. In addition, I had two other purchasers (Mr. Bertram Wright, who was living in one of my apartments, and Mr. Seth Shelton, my wife's brother-in-law who was living in South Korea) to purchase smaller lots of the New Milns Land. The lots that Mr. Bertram Wright and Mr. Seth Shelton agreed to purchase would also be accessed by the use of the same road and electricity extension that JPS has*

agreed to take to the 10 acres being purchased by Mrs. Eschenbach..."

[244] In the letter dated 27th March 1996, item number seven states that Mr. Tulloch would receive compensation for the two purchasers he had to relocate on more expensive lots as a result of the defendant's failure to construct roads and extend the lines by the 10th October 1995.

[245] During cross-examination, Mr. Tulloch confirmed that the cash payment he had received included compensation in relation to the two purchasers. This matter was between Mr. Tulloch and the defendant. I am also mindful of the fact that the first claimant was not in existence at the time.

[246] I therefore make no award in respect of this aspect of the claim.

[247] On September 20, a draft judgment was delivered in the following terms:-

"In light of the foregoing, judgment is awarded to the first claimant 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 the first claimant to be taxed, if not agreed."

[248] The court invited the parties make submissions in respect of interest. Written submissions were filed and counsel for the claimants requested that the court consider their submissions in respect of costs as well. That request was granted.

Interest

Claimant's submissions

[249] Learned Queen's Counsel submitted that the court has a wide discretion with respect to the award of interest for the pre-judgment period. Reference was made to section 3 of the ***Law Reform (Miscellaneous Provisions) Act*** in support of that submission.

[250] He stated that the purpose of an award of interest is restitution and that interest should be awarded in this case at a commercial rate. He urged the court to be guided by the principles in ***Tate & Lyle Food Distribution Ltd. v Greater London Council & another*** [1981] 3 All E.R. 716 where Forbes J said:-

> *"...I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognised is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money".*[37]

[251] Reference was also made to ***British Caribbean Insurance Company Limited v Delbert Perrier*** (1996) 33 JLR 119 at 127, where Carey JA said:-

> *"This leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me clear that the rate awarded must be a realistic rate if the award is to*

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[37] Page 722

serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award. I can see no objection to documentary material being properly placed before the judge. Statistics produced by reputable agencies could be referred to the judge to enable him to ascertain and assess an appropriate rate."

[252] Statistics from the Bank of Jamaica were attached to the submissions in order to assist the court to determine the appropriate rate of interest. Reference was made to ***Peter Williams (snr.) et al v United General Insurance Company Limited*** SCCA No. 82 of 1997, judgment delivered November 30, 1998, ***National Commercial bank Jamaica Limited & another v Donovan Foote*** claim no. C.L. 2000/N 145, and ***Casilda Silvest& another v Rupert Ellis & another*** [2015] JMSC Civ 63 in support of that approach.

[253] Mr. Small Q.C. submitted that based on the statistical digest published by the Bank of Jamaica an award of 17% would be appropriate.

[254] With respect to the period for which interest should be awarded, it was submitted that interest on the general damages should be awarded from July 11, 2011 (the date of service of the claim). Where interest on the special damages is concerned, it was submitted that the award should be from the date when the trespass arose[38]. It was suggested that that would be January 1, 1998 as the precise date in 1997 when the trespass started is not known.

Defendant's submissions

[255] Mrs. Mayhew submitted that the court may award interest "if it thinks fit" for the entire or part of the period between the date when the claim arose and the date of judgment. She stated that section 3 of the ***Law Reform (Miscellaneous***

[38] Jefford v Gee [1970] 2 WLR 702

Provisions) Act confers on the court, the unfettered discretion to determine whether interest should be awarded and the period for which it should be done.

[256] She submitted that the purpose of an award of interest on general damages is to compensate a claimant for being kept out of the capital sum between the date of service of the claim and judgment.[39] It was therefore submitted that interest should be awarded from June 14, 2011.

[257] Where the rate of interest is concerned, Counsel stated that no evidence was presented to the court to substantiate an award in excess of the statutory rate, and as such, interest should be awarded at the rate of 3% per annum. She also indicated that this was the approach adopted by Mangatal J in ***Jamaica Public Service Company Limited v. Enid Campbell and Marcia Clarke***(supra). Mrs. Mayhew urged the court to adopt a similar approach in respect of interest on the special damages.

[258] Counsel also submitted that although the instant case was tried in the Commercial Court, it is not a "commercial matter" in the true sense. She stated that the issue was primarily one of trespass to land and the first claimant was successful on that issue. Mrs. Mayhew also stated that the matter was not determined on the basis of the construction of business documents and as such there was no wrongful withholding of money as in ***British Caribbean Insurance Company Limited v Delbert Perrier*** (supra). She indicated that Mr. Tulloch was paid by the defendant for the wayleave but the court found that the first claimant was not bound by that agreement. In those circumstances, she urged the court to find that an award of interest at a commercial rate would not be appropriate.

Discussion

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[39]Pickett v British Rail Engineering Ltd. [1980] AC 136 and Freight Management Limited v Caribbean Cement company Limited [2013] JMSC Comm 2

[259] The first claimant has been awarded damages in this matter. Such an award is intended to compensate the claimant for any damage, loss or injury which he has suffered as a result of the defendant's actions. Damages were described by Lord Blackburn in ***Livingstone v. Rawyards Coal Co.*** (1880) 5 App Cas. 25 at 39 as:-

> *"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."*

[260] The court's power to award interest on damages is also based on the principle of *restitutio in integrum.* An award of interest is therefore not designed to punish the paying party, nor should it represent a windfall to the claimant. The objective is to do justice. Lord Wilberforce in ***General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd*** [1975] 2 All ER 173 at 192 stated the principle in the following terms:-

> *"Where a wrong-doer has failed to pay money which he should have paid, justice, in principle, requires that he should pay interest over the period for which he has withheld the money."* [40]

[261] Section 3 of the ***Law Reform (Miscellaneous Provisions) Act,*** gives the court a wide discretion in the award of interest. The section states:-

> *"In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment...".*

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[40] Page 836

[262] This statute represents an acceptance of the following views expressed by Lord Herschell LC in ***London, Chatham & Dover Railway Co. v South Eastern Railway Co.*** [1893] AC 429:-

> *"But, my Lords, the appellants contended that even although they might not under the terms of Lord Tenterden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of their debt. I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; and for this reason, that* ***I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use****. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events. But I have come to the conclusion, upon a consideration of the authorities, agreeing with the Court below, that it is not possible to do so, although no doubt in early times the view was expressed that interest might be given under such circumstances by way of damages".*[41]
>
> [My emphasis]

[263] Rule 8.7 (3) of the ***CPR*** states that where interest is being claimed, the claimant must:-

> *"(a) say so in the claim form, and*
>
> *(b) include in the claim form or particulars of claim details of -*

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[41]Page 437

(i) the basis of entitlement;

(ii) the rate;

(iii) the date from which it is claimed; and

(iv) the date to which it is claimed;..."

[264] Section 3 of the ***Law Reform (Miscellaneous Provisions) Act*** which is identical to the Act of the same name that was passed in the United Kingdom in 1934 has been given a wide interpretation. In ***BP Exploration v Hunt*** (supra) the words "debt or damages" were stated to include *"any sum of money which is recoverable by one party from another, either at common law or in equity or under a statute..."*.[42]

[265] The general rule is for interest to be awarded to a successful party who has been adjudged to have been kept out of money due to him.[43] However the power to award interest is discretionary and is dependent on the circumstances of each case. This view was expressed in ***Tate & Lyle Food Distribution Ltd. v Greater London Council & another*** (supra) where Forbes J said:-

> *"An award of interest in these cases is a discretionary matter and, in approaching the task of deciding on such an award, I think judges are entitled to adopt a very broad approach".*[44]

[266] This point was also made by Goff J in ***BP Exploration v Hunt*** (supra). The learned Judge said:-

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[42]Page 992

[43]Pickett v British Rail Engineering [1980] A.C. 136 at 151; Jefford v Gee [1970] 1 All ER 1202; Central Soya of Jamaica Limited v Junior Freeman 91985) 22 J.L.R. 152

[44]Page 724

“But the power to award interest is discretionary, and there is certainly no rule that interest will invariably run from the date of loss. It is no part of my task to attempt to define the circumstances in which the court will depart from the fundamental principle; indeed, since the discretion to award interest is unfettered, it would be improper to do so. There appear, however, to be three main groups of cases in which, in the exercise of its discretion, the court may depart from the fundamental principle.

The first group of cases concerns the position of the defendant. The court may consider, in the light of all the circumstances, that his position was such that it would not be just to make the defendant pay interest from the date of loss. It may do so if, for example the circumstances were such that the defendant neither knew, nor reasonably could have been expected to know, that the plaintiff was likely to make a claim, and so was in no position either to tender payment, or even to make provision for payment if the money should be found due. In such a case, the court may in its discretion only grant interest from the date of the plaintiff's claim, or even from such a date as will allow reasonable investigation of the claim. Again, to quote from Lord Wilberforce's speech in the Firestone *case [1975] 2 All ER 173 at 188, [1975] 1 WLR 819 at 836:*

> *'In a commercial setting, it would be proper to take account of the manner in which and the time at which persons acting honestly and reasonably would pay.'*

On that principle, the majority of the House took account of a normal commercial practice under which royalties in respect of use before grant of a patent are not expected to be paid until grant, and so awarded interest only from the date of the grant. There are no doubt other examples.

The second group of cases concerns the conduct of the plaintiff. If, for example, the plaintiff has been guilty of unreasonable delay in prosecuting his claim, the court may decline to award interest for the full period from the date of loss. This may be to encourage plaintiffs to prosecute their claims with diligence, and also because such conduct may lull a defendant into a false sense of security, leading him to think that the claim will not be pursued against him.

> *Again, there are no doubt other cases: for a recent example, see Business Computers Ltd v Anglo-African Leasing Ltd [1977] 2 All ER 741, [1977] 1 WLR 578.*
>
> *The third group consists of other cases in which it would be unjust, in all the circumstances, to award interest from the date of loss. Into this group fall those cases on which an assessment of damages is made on such a basis that it would be just to award interest from a later date, as for example was held in Jefford v Gee, in respect of interest on general damages (on which see also Pickett v British Rail Engineering Ltd [1979] 1 All ER 774, [1980] AC 136)".*

[267] The claimant in this matter has asserted that interest ought to be awarded at a commercial rate. Counsel for the defendant has argued that interest should not be awarded on a commercial basis because the action is not "truly" commercial. She has also argued that this is not a case where the first claimant has been kept out of money due to him.

[268] A commercial claim as defined by rule 71.3 of the ***CPR*** includes "any case arising out of trade and commerce in general". It also includes any case relating to the "*construction and performance of business documents and contract including agency"* and *"any other matter or any question of facts or law which is particularly suitable for decision by a judge of the Commercial Division".*

[269] In the instant case, despite the matter having been transferred to the Commercial Division of this Court, it must be determined whether an award of interest at a commercial rate will achieve a just result.

[270] The general damages in the case at bar, have been awarded to the first claimant based on the diminution in the value of certain lots occasioned by the defendant's trespass. The first claimant's evidence is that those lots were part of a subdivision and that tourism attractions were being operated in the area.

[271] I am however mindful of the fact that the lots in question are zoned for agricultural purposes. In addition, the damages awarded do not relate to any

past economic loss, such as the loss of a sale. Nor do they relate to any adverse effects on the first claimant's business operations.

[272] I am also mindful of the fact that an award of interest is designed to achieve restitution. The successful claimant is as far as possible to be restored to the position that he enjoyed prior to the wrong.

[273] Whilst no issue has been raised as to whether an award of interest is awardable, the particular circumstances of this case to my mind do not support an award of interest at a commercial rate.

[274] Accordingly, it is my view that interest for the period prior to judgment should be awarded at the rate of 3% per annum.

Costs

Claimants' submissions

[275] Mr. Small Q.C. commenced by referring to the case of ***Sans Souci Limited v VRL Services Limited*** [2012] UKPC 6, in which it was stated that the court ought to give a litigant the opportunity to be heard on any relevant matter. Particular reference was made to the judgment of Lord Sumption who stated:-

> *"22. It is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard. The Court of Appeal included an order for costs in their Judgment of 12 December 2008 without hearing either party upon it. The Practice Direction in Jamaica assumes that submissions on costs, if any, will be made before the Court rises after giving Judgment, a course which it would have been impossible for the Manager's representatives to follow in this case because they had had no advance notice of the contents of the judgment and only one day's notice of the fact that it was to be delivered. This procedure may nevertheless be perfectly acceptable, provided that the order included in the Judgment is provisional, and that parties are given a reasonable opportunity to address the Court on costs later.*

> *23. The importance of finality in litigation has been emphasised by generations of common lawyers. Ultimately there must come an end to the parties' opportunities for reopening matters procedural or substantive which have been judicially decided. This principle is, however, founded on an assumption that they were decided in accordance with the rules of natural justice. Notwithstanding the importance of finality, the rule of practice is that until either (i) a reasonable time has elapsed, or (ii) the order has been perfected, a party who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard. Thereafter, the Court still has an inherent jurisdiction to hear him, but the test is more exacting...".*

The above submission was made against the background of the court's invitation to the parties to make submissions in respect of interest. However, they also wished to address the court on the issue of costs.

[276] Having referred to rules 64.6 (1) and (2) of the ***CPR***, learned Queen's Counsel submitted that the making of an appropriate award for costs is dependent on the identification of the successful party. Reference was made to the case of ***Gordon Stewart v Goblin Hill Hotels Limited &ors***[2016] JMCC Comm 39 in which Sykes J stated:-

> *"**[5]** Rule 64.6 (1) captured the starting point of the common law. This is supported by Morrison JA (now President) in **Capital & Credit Merchant Bank Ltd** v **Real Estate Board** [2013] JMCA Civ 48 who said at paragraph 10:*
>
> > *[10] The question of whether to make any order as to costs — and, if so, what order is therefore a matter entrusted to the discretion of the court. The starting point under the rules, reflecting the longstanding position at common law, is that costs should follow the event. The court may nevertheless make different orders for costs in relation to discrete issues. It should in particular consider doing so where a party has been successful on one issue but unsuccessful on another issue. In that event, the court may make an order for costs against a party who has been generally successful in the litigation.*

[6] *What does giving effect to the rule look like in practice? Waller LJ in* ***Straker*** **v** ***Tudor Rose (a firm)*** *[2007] EWCA Civ 368 gave good practical advice on this matter. He set out a methodology which should be followed. His Lordship said at paragraphs 11 – 13:*

> *…The court must first decide whether it is case where it should make an order as to costs, and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must take into account all the circumstances including (a) the parties' conduct, (b) whether a party has succeeded on part even if not the whole, and (c) any payment into court .*
> *12. Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include (a) a failure to follow a pre-action protocol; (b) whether a party has unreasonably pursued or contested an allegation or an issue; (c) the manner in which someone has pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part .*
> *13. Where, particularly in a commercial context, the claim is for money, in deciding who is the successful party, I agree with Longmore LJ when he said in* ***Barnes v Time Talk (UK) Ltd.*** *[2003] EWCA Civ 402 para 28 that "the most important thing is to identify the party who is to pay money to the other". In considering whether factors militate against the general rule applying, clear findings are necessary of factors which led to a disapplication of the general rule, e.g. if it is to be said that a successful party "unreasonably" pursued an allegation so as to deprive that party of what would normally be his order costs, there must be a clear finding of which allegation was unreasonably pursued*."

[277] Reference was also made to ***Travellers' Casualty v Sun Life*** [2006] EWCA Civ 402 where it was held that where a claimant was not successful on a number of issues, it may be inappropriate to make separate orders for costs in respect of those issues unless they were unreasonably taken. Learned Queen's Counsel

urged the court to adopt the reasoning of Longmore LJ in ***A L Barnes Ltd v Time Talk (UK) Ltd*** [2003] EWCA Civ 402, who said:-

> *"In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure".*[45]

He also pointed out that a similar approach was taken by the court in ***Day v Day***[2006] EWCA Civ 415 where Ward LJ said:-

> *"I would go further and say that in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case..."*[46]

[278] Mr. Small Q.C. submitted that since it is the defendant who will have to write the cheque in this case, it is clearly the unsuccessful party. He stated that there is no reason to depart from the general rule that it is the unsuccessful party who ought to pay the costs of the litigation.

[279] It was also submitted, that no costs should be paid by the second claimant to the defendant as its evidence was no different from that given by the first claimant. Learned Queen's Counsel also stated that no documents were prepared which specifically dealt with issues raised only by the second claimant. It was also argued, that based on the fact that the issue was one of trespass and that was the basis of both claims, the substratum of the second defendant's claim was made out. In those circumstances, it was stated, the second defendant did not unreasonably pursue any issue and ought to be awarded twenty percent (20%) of its costs.

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[45]Paragraph 28

[46]Paragraph 17

[280] In closing, Mr. Small Q.C. submitted that the defendant should pay twenty percent (20%) of the second claimant's costs or at the very least, there should be no order as to costs.

Defendant's submissions

[281] Mrs. Mayhew submitted that although the general rule is that "costs follow the event", the court may, in appropriate circumstances award a portion of a successful party's costs. Reference was made to rule 64.6 (2) of the ***CPR*** in support of that submission.

[282] Counsel argued that where a claimant enjoys partial success, the proper approach is for the court to award only a portion of its costs. She stated that in such circumstances the court is required to assess whether that party ought to have pursued certain issues. Reference was made to ***Mears Ltd v Leeds City Council*** [2011] EWHC 2694 and ***Civil Procedure Rules 1998*** (UK) paragraphs 44.2.6 – 44.2.8 in support of that submission.

[283] She stated that the claim was for damages arising from breach of contract and continuing trespass. Mrs. Mayhew pointed out that the first claimant sought fourteen remedies and the second claimant seven. She described the remedies and relief sought as "extensive". She reminded the court that the first claimant sought an injunction for the removal of the defendant's towers and transmission lines, damages for trespass, nuisance, deceit and breach of contract. Special damages were also claimed in the sum of seven million four hundred and twenty six thousand nine hundred and thirty dollars ($7,426,930.00).

[284] The second defendant sought damages for deceit, nuisance and special damages in the sum of six million dollars ($6,000,000.00). She stated that the claim for deceit was withdrawn at the stage of closing arguments and that the first claimant only succeeded in its claim for trespass and was awarded for some of the items of special damages. The second claimant was unsuccessful in its claim.

[285] It was submitted that in light of the first claimant's failure to establish three of the four causes of action claimed, the question arises as to whether they ought to have been pursued. By way of example, Mrs. Mayhew referred to the claim for loss of sale of lots in respect of which its principal, Mr. Tulloch, had already received compensation. In those circumstances, it was submitted that the court should only award a portion of its costs. She suggested that the first claimant should not be awarded more than seventy per cent (70%) of its costs.

[286] Where the second claimant is concerned, it was submitted that as the unsuccessful party, it should pay the defendant's costs. It was however acknowledged that due to the overlap of the issues in respect of both claimants those costs ought to be reduced. Counsel indicated that the second claimant's interest was different from that of the first claimant and the defendant was required to specifically defend that claim. She also stated that it is clear that the second claimant ought not to have pursued the claim. In the circumstances it was submitted that the second claimant should pay at least one half of the defendant's costs consequent on its unsuccessful claim against the defendant.

Discussion

[287] Costs are that sum of money which the court or a judge orders one party to the litigation to pay to the other. It seeks to compensate that party for the expense which he has incurred in conducting the litigation. The general rule is that costs follow the event. In ***Re Elgindata Ltd. (No 2)*** [1992] 1 WLR 1207, Nourse J said:-

> *"(i) Costs are in the discretion of the Court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made..."*

[288] The above principle is encompassed by rule 64.6 (1) of the ***CPR*** which states:-

> *"If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."*

[289] The court does however, have the discretion to depart from this rule depending on the circumstances of the case. Rules 64.6 (2), (3) and (4) of the ***CPR*** speak to that issue. They state:-

> *"(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.*
>
> *(3) In deciding who should be liable to pay costs the court must have regard to all circumstances.*
>
> *(4) In particular it must have regard to –*
>
> *(a) the conduct of the parties both before and during the Proceedings;*
>
> *(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;*
>
> *(c) .....*
>
> *(d) whether it was reasonable for a party –*
>
> *(i) to pursue a particular allegation; and/or*
>
> *(ii) to raise a particular issue;....".*

Other factors which are to be considered by the court include the manner in which a party has pursued the claim, whether a successful claimant exaggerated his or her claim and whether there was any offer to settle.

[290] In this matter, the claim was made in respect of trespass, nuisance, deceit and breach of contract. The first claimant sought a number of remedies including injunctive relief. Damages were also claimed for loss of sale as a consequence of the alleged breach of contract.

[291] The defendant has urged the court to find that the first claimant should not be awarded its full costs as it failed to prove its case in respect of three of the four causes of action pursued.

[292] Where the claim for breach of contract is concerned, it is clear to this court that there was no contract between the first claimant and the defendant. With respect to nuisance, no evidence was presented to the court to substantiate that claim. The claim for deceit was withdrawn at a very late stage. However, it is my view that the major issue was whether the defendant has trespassed on the land. It was successful on that issue. It is the defendant who has "to write the cheque".

[293] In the circumstances, it is my ruling that the first claimant is entitled to its full costs.

[294] Where the second claimant is concerned, it is clearly the losing party. Whilst it is true that there was not much difference between its case and that of the first claimant, the defendant clearly had to address its claim. However, in light of the close alignment between the claims of the first and second claimants, I am of the view that the defendant ought to be awarded thirty per cent (30%) of its costs against the second claimant.

Application to revoke or vary orders in draft judgment

[295] On November 23, 2017 the defendant filed an application to vary or revoke the orders set out in paragraph 245 of the draft judgment. It also made an application for damages for trespass to be assessed in respect of lot 2 on the first claimant's sub-division plan.

[296] The application is based on the following grounds:-

(i) Rule 26.1 (7) of the ***Civil Procedure Rules*** gives the court the power to vary or revoke an order;

(ii) A judgment can be varied by the court at any time before the perfection of the formal order having regard to all the circumstances of the case and the overriding objective;

(iii) A draft judgment was delivered on September 20, 2017;

(iv) There are relevant points of law relating to lifting and/or piercing the corporate veil which were not brought to the attention of the court prior to the delivery of the draft judgment and which in the interest of justice, ought to be considered before the judgment is perfected. Such consideration may result in a variation/revocation of the draft order;

(v) The corporate veil in this case should be pierced/lifted based on the first claimant's pleadings and the evidence adduced at the trial so that the wayleave agreement entered into between Francis Tulloch and the defendant binds the first claimant;

(vi) The award of damages should be consequently reduced to reflect trespass to only the subdivision lots affected by the transmission line and in respect of which the court has found that there was no agreement or for which no compensation was already paid to Francis Tulloch by the defendant; and

(vii) The overriding objective.

[297] The application is supported by the affidavit of Mr. David Flemming. Mr. Flemming states that at the trial Mr. Tulloch confirmed that he was the majority shareholder of the first claimant and its Chief Executive Officer and a Director.

[298] He also referred to the pleadings in which it is stated that Mr. Tulloch negotiated with the defendant on behalf of both claimants with a view to ensuring that any agreement reached would not cause any damage to their respective businesses.

[299] Mr. Flemming also stated that Mr. Tulloch, during cross examination, said that he was not saying that the first claimant is not bound by the letter dated June 5, 2005 from the first claimant to the defendant which was signed by him.

[300] In paragraphs 7 to 9 of his affidavit, Mr. Flemming states:-

> *"7. I am advised by Mrs. Mayhew and do verily believe that the Court did not accept the submission that the conscience of the 1st*

Claimant was bound because the considerations for the wayleave and property damages and other encumbrances negotiated by Mr. Tulloch were for the benefit of the Claimants as stated in their Particulars of Claim. I am further advised that one of the bases on which the Court did not accept the submission was because the 1st Claimant was not in existence at the material time. Further that the Court recognized the separate identify and personality between the Claimants and their shareholder, Mr. Tulloch.

8. There are relevant principles of law on corporate personality and piercing the corporate veil which were not brought to the Court's attention by either the Claimant or the Defendant and which principles the Court should consider prior to the finalization of the judgment as these principles of law may affect the Court's decision ultimately on whether the 1st Claimant should be bound by the wayleave agreement entered into between Mr. Francis Tulloch and the Defendant

9. These principles and relevant authorities were not cited in view of the Claimant's express pleadings and the Defendant's and Mrs. Mayhew's understanding of Mr. Tulloch's statement in cross-examination that he was not contending that Lethe Estate was not bound by the Agreement which he entered into with the Defendant on April 4, 1996. Accordingly, it was thought that the primary issue was one of fact i.e. whether the actual route for the transmission line was agreed at all or in its entirety."

Defendant's/applicant's submissions

[301] Mrs. Mayhew in her written submissions stated that the court was being asked to revisit its finding that the first claimant was not bound by the wayleave agreement on the basis that certain principles of law were not brought to the court's attention.

[302] She stated that an order may be varied or withdrawn at any time before it has been perfected. The case of ***Re Harrison's Share Under a Settlement, Harrison v Harrison*** [1955] Ch. 260, was relied on in support of that submission.

[303] Reference was also made to the judgment of Clarke LJ in ***Stewart v Engel*** [2000] 1 WLR 2268 in which the view was expressed that the starting point when addressing the issue is whether it is in keeping with the overriding objective of dealing with cases justly. Counsel stated that this approach was adopted by Baroness Hale in ***Re L and another (children) (Preliminary Finding: Power to Reverse)*** [2013] UKSC 8.

[304] The learned Judge stated as follows:-

> *"17. The modern story begins with the Judicature Acts 1873 (36 & 37 Vict c 66) and 1875 (38 & 39 Vict c 77), which amalgamated the various common law, chancery and doctors' commons jurisdictions into a single High Court and created a new Court of Appeal for England and Wales. In In re St Nazaire Co (1879) 12 Ch D 88, the Court of Appeal decided that there was no longer any general power in a judge to review his own or any other judge's orders. Malins V-C had permitted a petition to proceed which sought to vary an earlier order which he had made and which had been unsuccessfully appealed to the Court of Appeal. The Court of Appeal held that he had no power to do so. Sir George Jessel MR explained that the Judicature Acts had changed everything. Before they came into force, the Lord Chancellor, Vice-Chancellor and Master of the Rolls had power to rehear their own decisions and, indeed, the decisions of their predecessors. He remarked that "the hope of every appellant was founded on the change of the judge": p 98. (An example of Jessel MR revisiting one of his own orders is In re Australian Direct Steam Navigation (Miller's Case) (1876) 3 ChD661.) But such an application was in the nature of an appeal and jurisdiction to hear appeals had now been transferred to the Court of Appeal. Thesiger LJ added that, "whatever may have been the practice in the High Court of Chancery before the Judicature Act as to the review of their decisions or the rehearing of their decisions, nothing can be clearer than that there was nothing analogous to that in the Common Law courts"12 ChD88, 101. The court's conclusions harmonised the practice in all Divisions of the newly amalgamated High Court.*
>
> *18. Nothing was said in In re St Nazaire about the position before the judge's order was perfected. In In re Suffield and Watts; Ex p*

Brown (1888) 20 QBD 693, a High Court judge had made an order in bankruptcy proceedings which had the effect of varying a charging order which he had earlier made under the Solicitors Act 1860 (23 & 24 Vict c 127). All the members of the Court of Appeal, citing In re St Nazaire, agreed that he had no power to do this once his order had been drawn up and perfected. Unlike the bankruptcy jurisdiction, the Solicitors Act gave no power of variation. As Fry LJ put it, at p 697: "So long as the order has not been perfected the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end." [2013] 1 WLR 634 at 641 Strictly speaking, the reference to what may be done before the order is perfected was obiter, but that this was the law was established by the Court of Appeal no later than Millensted v Grosvenor House (Park Lane) Ltd[1937] 1 KB 717, where the judge had revised his award of damages before his order was drawn up and the court held that he was entitled to do so.

19. Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under CPR r 40.2(2)(b), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal. On any view, therefore, in the particular circumstances of this case, the judge did have power to change her mind. The question is whether she should have exercised it."

[305] Counsel also directed the court's attention to rule 26.1 of the ***Civil Procedure Rules (2002) (CPR)*** which states:-

"*A power of the court under these rules to make an order includes a power to vary or revoke that order."*

[306] Reference was also made to the judgment of Mangatal J in ***Petrojam Ltd v Sea Ventures Shipping Limited & Others*** [2013] JMCC Comm. 16 where the learned Judge stated at paragraph 19:-

"An Order or Judgment made by a Judge should usually follow after very careful and thoughtful consideration of the facts and law. Nevertheless, Rule 26.1(7) affords recognition that the Court is not rigid in its decision-

making process and there may be occasions where justice would require revocation of an order."

[307] Counsel listed the various circumstances which may be considered as a basis for the exercise of the court's discretion. She submitted that in the instant case, there relevant principles of law that were not brought to the court's attention. It was stated that this was one of the circumstances which was noted by Neuberger J in **Re Blenheim** and approved in ***Re L and another (children) (Preliminary Finding: Power to Reverse)*** (supra). Mrs Mayhew argued that in light of the fact that the first claimant's statement of case drew little distinction between itself and Mr. Tulloch, the main focus of the case was whether the route of the transmission line was agreed. She stated that it was only when the witness statements were filed that the defendant learned that at the time when the wayleave agreement was concluded, the first claimant did not exist.

[308] She stated that the court in its consideration of the matter recognised the separate legal personality of the first claimant and found that it was not bound by the agreement between Mr. Tulloch and the defendant. She submitted that where it is appropriate, the court will look beyond the corporate veil in order to do justice. It was also submitted that the court would have made different orders, particularly where damages for trespass are concerned, had it had the benefit of submissions on whether the veil of incorporation should be lifted.

[309] Mrs. Mayhew referred to the well known principle in ***Salomon v Salomon and Co. Ltd.*** [1895 – 99] All ER 33, that a company enjoys a separate and distinct identity from its members.

[310] Counsel submitted that although the court may not formally pierce the corporate veil, it will, in appropriate circumstances, apply other applicable principles in order to achieve justice where the observance of the ***Salomon*** principle may lead to an injustice. Reference was made to ***Jones v Lipman*** [1962] 1 All ER 442; ***Donovan Crawford v Financial Institutions Limited*** [2005] UKPC 40;

Agip (Africa) Limited v Jackson [1990] EWCA Civ 2; and ***Prest v Petrodel Resources Limited*** [2013] UKSC 34 in support of that submission.

[311] Specific reference was made to paragraphs 27 and 28 of ***Prest v Petrodel Resources Limited*** (supra) where Lord Sumption SCJ said:-

> *"**[27]** In my view, the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities. It is true that most of the statements of principle in the authorities are obiter, because the corporate veil was not pierced. It is also true that most cases in which the corporate veil was pierced could have been decided on other grounds. But the consensus that there are circumstances in which the court may pierce the corporate veil is impressive. I would not for my part be willing to explain that consensus out of existence. This is because I think that the recognition of a limited power to pierce the corporate veil in carefully defined circumstances is necessary if the law is not to be disarmed in the face of abuse. I also think that provided the limits are recognised and respected, it is consistent with the general approach of English law to the problems raised by the use of legal concepts to defeat mandatory rules of law.*
>
> ***[28]** The difficulty is to identify what is a relevant wrongdoing. References to a 'façade' or 'sham' beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'façade', but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's*

involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil.

[312] Counsel also referred to paragraph 81 where Lord Neuberger P, said :-

"Having read what Lord Sumption says in his judgment, especially at [17], [18], [27], [28], [34] and [35], I am persuaded by his formulation at [35], namely that the doctrine should only be invoked where 'a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control."

[313] Mrs. Mayhew submitted that the instant case falls to be considered under the evasion principle. She referred to various parts of the evidence in support of that position. They are:-

(i) At the time of the execution of the "Grant of Easement" between Mr Tulloch and the defendant Mr Tulloch was the beneficial owner of the New Milns land.

(ii) Mr Tulloch was paid $5,000,000.00 for the right to construct the transmission line over property which was then registered at Volume 618 Folio 45 of the Register Book of Titles.

(iii) On April 10, 1996 the defendant lodged a caveat in respect of further dealings in the property registered at Volume 618 Folio 45 citing "its interest in the property by virtue of the Grant of Easement" and which noted that any intended dealing in the property should be expressed to be subject to its claim.

(iv) Mr. Tulloch did not disclose to the JPS at the time he signed the "Grant of Easement" and received the $5,000,000.00 that changes were being made to the relevant Certificates of Title then registered at Volume 618 Folio 45. Reference was made to paragraph 45 of his witness statement.

(v) Mr Tulloch sought and obtained new titles for the land formerly registered at Volume 618 Folio 45 and they were now registered at Volume 1283 Folio 504 and Volume 1283 Folio 505.

(vi) Mr. Tulloch was registered as owner of the property on August 29, 1995.

(vii) The property was subsequently transferred from Mr Tulloch to the 1st claimant on 4th November 1996, which was 6 months after Mr Tulloch had agreed with the defendant for its transmission line to traverse the property. It was submitted that even if there was no agreement as it relates to the actual route there was an agreement in principle, as the court has found and the actual area for the easement path was agreed.

(viii) It appears from paragraph 45 of Mr. Tulloch's witness statement that had he known of the defendant's intention to lodge the caveat, he would have advised it of the changes to the title references and ownership so that the proper endorsements could be made.

(ix) The 1st claimant was incorporated on the 11th of September 1996.

(x) Mr. Tulloch owns 999 of the 1000 shares in the 1st claimant.

(xi) Mr. Tulloch is the Chief Executive Officer and Director of the 1st claimant.

(xii) In 2005 when the 1st claimant wrote to JPS about the presence of the transmission line over the property the letter was under the hand of Mr. Tulloch;

(xiii) In his evidence Mr Tulloch and in cross examination when asked whether when he wrote the letter of June 7, 2005[47] he was contending that 1st claimant was not to be bound by the agreement for the easement that he had entered into with JPS, Mr Tulloch responded in the negative.

[314] Counsel also submitted that based on the evidence Mr. Tulloch is the controlling mind of the first claimant. She also stated that there is no evidence that up to March 1997 when the defendant and Mr. Tulloch were still having discussions concerning the route of the transmission line, that he informed the defendant of the transfer of the property to the first claimant.

[315] It was also submitted that Mr. Tulloch having entered into a wayleave agreement with the defendant in his personal capacity, interposed the first claimant as the new registered owner. This she said has resulted in Mr Tulloch being able to evade the agreement that he made with the defendant. Mrs. Mayhew argued that this is a classic example of the abuse of the separate legal personality of a company in order to evade an obligation. She stated that the defendant has been denied its rights under the wayleave agreement by the interposition of the company. It was also argued that such action fits squarely within the evasion principle described by Lord Sumption in ***Prest v Petrodel Resources Limited*** (supra).

[316] Mrs. Mayhew submitted that the effect of the interposition of the corporate entity is the same as that which occurred in ***Jones v Lipman*** and invited the court to lift the corporate veil in order to achieve justice. She stated that the first claimant should not be allowed to rely on its separate legal personality to deny the defendant of its rights under the wayleave agreement.

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[47] Page 320 Agreed Bundle of Documents

[317] Counsel also raised the issue of whether a resulting trust could be implied in favour of Mr. Tulloch. This submission was made in the event that the court finds that there is no basis on which to pierce the corporate veil. Mrs. Mayhew argued that Mr. Tulloch is the beneficial owner of the property. This she said is based on the fact that he is sole shareholder of the first claimant and spoke of the property as if it belongs to him.

[318] Mrs. Mayhew submitted that if the first claimant is bound by the wayleave agreement, the court should take a similar approach to that of Mangatal J in ***Jamaica Public Service Company Limited v Enid Campbell and Marcia Clare***. [2013] JMSC Civ 22. In that case, the learned Judge said:-

> *"I also, take into account, as JPS' Attorneys point out, that this is a case in which, the Owners had contracted with JPS for an easement. That situation is distinguishable to my mind from one where JPS had simply barged in on land and trespassed upon it. In this case, even if there had been no breach of the agreement for an easement, the Owners would still have had premises with lines running across it."*[48]

Counsel stated that in the instant case, what was not agreed was the proposal contained in the letter dated March 1997 concerning the relocation of the transmission line. She argued that the compensation for trespass would therefore be limited to those lots over which the line traverses that were not agreed. She also reminded the court that compensation had been paid to Mr. Tulloch for the easement path. Counsel also stated that if the wayleave agreement is found to be binding on the first claimant, there would be no diminution in the value of all of the subdivision lots as a result of the "unsightly easement". Mrs. Mayhew stated that only lot 2 would fall into the category of lots for which there was no

[48] Paragraph 88

agreement. She argued that if the first claimant is compensated for the diminution in the value of all lots it would be receiving double compensation.

Claimant's/respondent's submissions

[319] The claimant has submitted that the defendant's application ought refused on the following bases;-

(i) It is an attempt to re-argue the case in respect of findings of law and fact that ought to have been addressed during the trial;

(ii) There is no basis on which to pierce the corporate veil; and

(iii) The matters being raised by the defendant ought to be the subject of an appeal.

[320] Mr. Small Q.C. referred to the principles which distinguish the role of a trial court from an Appeal court. He made specific reference to the case of ***Fage UK Limited v Chobani UK Limited*** [2014] EWCA Civ 5 which identified some of reasons why an appellate will not interfere with a trial Judge's findings of fact. They are:-

> *" (i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.;*
>
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
>
> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."[49]

[321] Learned Queen's Counsel stated that there is no dispute that where appropriate, a court may exercise its jurisdiction to vary an order before it's perfected. Reference was made to the case of ***Smith v New South Wales Bar Association*** (1992) 108 ALR 55 in support of that submission. He also stated that the exercise of that discretion is governed by the overriding objective of dealing with cases justly. Reference was also made to paragraph 23 of the judgment of Mangatal J in ***Petrojam Limited v Sea Ventures Shipping Limited and others*** [2013 JMCC Comm 16, who stated that:-

> *"The court could consider whether there are any compelling reasons justifying the court revisiting its orders or judgment."*

[322] Reference was also made to paragraph 25 of the judgment of Baroness Hale in ***Re L and another (Children) (Preliminary Finding: Power to Reverse)*** (supra) where the learned Judge said:-

> *"In Cie Noga d'Importation et d'Exportation SA v Abacha [2001] 3 All ER 513, para 42 Rix LJ, sitting in the Commercial Court, referred to the need to balance the concern for finality against the "proper concern that courts should not be held by their own decisions in a straitjacket pending the formality of drawing up the order". He went on, at para 43:*
>
> > *"Provided that the formula of 'exceptional circumstances' is not turned into a straitjacket of its own, and the interests of justice and its constituents as laid down in the overriding principle are held closely to mind, I do not think that the proper balance will be lost. Clearly, it cannot be in every*

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[49] Paragraph 114

> *case that a litigant should be entitled to ask the judge to think again. Therefore, on one ground or another, the case must raise considerations, in the interests of justice, which are out of the ordinary, extraordinary or exceptional. An exceptional case does not have to be uniquely special. 'Strong reasons' is perhaps an acceptable alternative to 'exceptional circumstances'. It will necessarily be in an exceptional case that strong reasons are shown for reconsideration."*

[323] Mr. Small Q.C. also referred to Baroness Hale's statement that each case is dependent on its own fact and a carefully considered change of mind may be sufficient to invoke the exercise of the court's discretion.

[324] He asked the court to consider whether a grant of the application would subvert the appeal process in this case. He stated that parties are not permitted to re-argue the case or try to persuade a judge to change his or her mind.

[325] He also stated that the defendant is seeking to raise issues that were not pleaded and did not form the basis of cross-examination. He said that the submissions of the defendant are based on its reassessment of the case and recognition that the argument for piercing the corporate veil was not advanced by either party in the pleadings. It was submitted that the defendant at paragraphs 5, 69 -72 and 79 of its closing arguments adopted a contrary position. Mr. Small Q.C. stated that the claimants had no obligation to raise that issue.

[326] Learned Queens Counsel also stated that the principle of separate corporate personality between a director and the company is well preserved and has been repeatedly applied. Reference was made to ***International Hotels (Jamaica) Limited v Proprietors Strata Plan No. 461*** [2013] JMCA Civ 45 and ***Dave Persad v Anirudh Singh*** (2017) UKPC 32.

[327] Specific reference was made to paragraph 17 of ***Dave Persad v Anirudh Singh*** where Lord Neuberger stated as follows:-

> *"As the Court of Appeal rightly acknowledged, piercing the veil is only justified in very rare circumstances, a point which was implied in the UK Supreme Court's decision in VTB Capital Plc v Nutritek International Corpn [2013] 2 AC 337, paras 127, 128 and 147, and was expressed in terms in its subsequent decision in Prest v Petrodel Resources Ltd [2013] 2 AC 415, paras 35, 81-82, 99-100 and 106. As Lord Sumption explained in Prest at para 35, piercing the veil can be justified only where "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control".*

Counsel stated that in this case there is no evidence that the first claimant was being used by Mr. Tulloch in the way described in the above passage. He also stated that if the defendant was of the view that Mr. Tulloch was seeking to avoid liability an ancillary claim could have been brought against him.

[328] Reference was also made to paragraphs 20 to 22 which state:-

> *"20. In the light of the issues before the Judge, the fact that Mr Persad did not produce any documents relating to the creation or constitution of CHTL takes matters no further. The fact that CHTL was a "one man company" is also irrelevant: see Salomon v A Salomon and Co Ltd [1897] AC 22, which famously established the difference between a company and its shareholders. That case also exposes the fallacy of the notion that the court can pierce the veil where the purpose of an individual interposing a company into a transaction was to enable the individual who owned or controlled the company to avoid personal liability. One of the reasons that an individual, either on their own or together with others, will take advantage of limited liability is to avoid personal liability if things go wrong, as Lord Herschell said at pp 43 to 44. If such a factor justified piercing the veil of incorporation, it would make something of a mockery of limited liability both in principle and in practice.*
>
> *21. That passage in Lord Herschell's speech also disposes of the suggestion that CHTL was a "front" for Mr Persad. Such (mildly) pejorative terms can only too easily be invoked to justify a decision which is both unreasoned and wrong. Lord Herschell said, at p 42, that he was "at a loss to understand what is meant by saying that"*

the company was an "alias" for its shareholder and director, as the company "is not another name for the same person; the company is ex hypothesi a distinct legal persona".

22. In the course of his able and spirited submissions, Mr Beharrylal suggested that the facts of this case were comparable with those in Gilford Motor Co Ltd v Horne [1933] Ch 935 and Jones v Lipman [1962] 1 WLR 832, whose facts are respectively set out by Lord Sumption in Prest at paras 29 and 30. The Board considers that those cases are readily distinguishable from the present case. Not only did the person who set up the company in those cases have an existing relevant legal obligation which he was Page 7 trying to avoid by entering into a transaction involving the company, but also the involvement of the company was unilaterally effected by the person concerned, without the knowledge, let alone the consent, of the other party. In this case, as already mentioned, Mr Persad had no relevant obligation to Mr Singh at the time of the transaction involving the company, namely the grant of the lease, and furthermore Mr Singh, the person seeking to pierce the corporate veil, was directly involved in, indeed was a necessary party to, that transaction."

[329] Counsel also relied on section 29 of the ***Companies Act*** which states that a company is not bound by contracts made prior to its incorporation. He made the point that the defendant was seeking to bind the first claimant to a contract that was executed before it was incorporated. Reference was made to paragraph 26 of ***Dave Persad*** which addressed liability where contracts pre-date incorporation. Lord Neuberger stated:-

"The problem for Mr Singh is that, even if the Board was to admit this new evidence, it would get him nowhere. Section 20 of the Companies Act (Chapter 81:01 Page 8 of the Laws of Trinidad and Tobago) deals with "pre-incorporation agreements" by companies. Section 20(1) provides that where an agreement is entered into by a person on behalf of a company which does not exist, that person is bound in place of the company. Section 20(2) states that, in such a case, the company concerned may nonetheless "adopt" a written agreement "by any action or conduct signifying the intention to be bound" within a reasonable time. Section 20(3) provides that, in

such a case, the company can enforce and is bound by the agreement from its inception, and, subject to an irrelevant exception, the person otherwise bound by virtue of subsection (1) ceases to be so bound. The effect of this section therefore is that Mr Singh's argument based on the late incorporation of CHTL must fail because (i) the payment of rent by CHTL in 2004 (and possibly earlier) served to ratify its status as lessee under the lease by virtue of section 20(2), and (ii) even if that were not right, the effect of section 20(1) is that Ms Dass is liable as lessee under the lease, and the issue on this appeal is whether Mr Persad is liable."

[330] Mr. Small also referred to Mr. Tulloch's evidence that he was not asserting that the first claimant was not bound by the agreement. In addressing the consequences of that statement he referred to section 29 of the ***Companies Act*** and the ***Persad*** case.

[331] In those circumstances. It was submitted that the defendant's application ought to be refused and costs awarded to the first claimant.

DISCUSSION

[332] It is common ground that the court has the jurisdiction to vary, withdraw or modify an order before it has been perfected. (see rule 26.1 of the ***CPR, Re Harrison's Share Under a Settlement, Harrison v Harrison*** (supra), ***Stewart v Engel*** (supra)) and ***Re L and another (children) (Preliminary Finding: Power to Reverse)*** (supra)). In ***Re Harrison's Share Under a Settlement, Harrison v Harrison*** (supra) Roxburg J said:-

"In In re Suffield and Watts the order had been perfected; but in the course of his judgment Fry L.J. said: "So long as the order has not been perfected the judge has a power of re-considering the matter, but, once the order has been completed, the jurisdiction of the judge over it has come to an end." This was a dictum, but a weighty dictum; and it is to be noted that the power of reconsidering the matter is not made to depend upon any appeal or application, but simply upon the circumstance that the jurisdiction of the judge which has been invoked by the parties to the suit does not pass away from him until the order has been perfected.

Later cases in the Court of Appeal endorse this dictum. Thus in Preston Banking Co. v. William Allsup & Sons, A. L. Smith L.J. said: "Fry L.J. put the law on the right foundation when he held, in In re Suffield and Watts, that so long as the order has not been perfected, the judge has a power of reviewing the matter, but when once the order has been completed the jurisdiction of the judge over it has come to an end"; and in Millensted v. Grosvenor House (Park Lane) Ld., Farwell J., sitting in the Court of Appeal, treated this matter as settled. In my judgment it has now been settled for a long time.

This being so, I pass to Mr. Jennings' second contention, which was that once an order has been pronounced the judge can only recall it upon the application of a party. He pointed out that there was no reported case in which a judge had acted on his own initiative. But I would reply that as there are few reported cases in which an unperfected order has been recalled (though the power to do this is well settled), and as the cases in which one of the parties would not apply if there was any ground for making an application would be rare, I find nothing strange in this. This power to recall an unperfected order is not appellate in its nature, but exists because the jurisdiction which the parties have invoked is still continuing. There is no suggestion in any of the dicta that an application is necessary to confer or prolong jurisdiction which would otherwise be at an end. Indeed, the contrary seems to me to be implicit in them. Moreover, there are some cases (such as the present) where persons may be affected who are not parties, and it would be strange if the parties could combine by a conspiracy of silence to prevent a judge from correcting a mistake which might operate to the disadvantage of other persons concerned. Moreover, I can think of cases in which the mistake might be known only to the judge himself. Must he then summon the parties before him and invite one of them to make an application to him, confessing that he cannot otherwise rectify his mistake?"[50]

[50] Pages 20 - 271

[333] In ***Re L and another (children) (Preliminary Finding: Power to Reverse)*** (supra), Baroness Hale traced the history of the court's jurisdiction in this area. She stated as follows:-

> *"16. It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected.*
>
> *17. The modern story begins with the Judicature Acts 1873 (36 & 37 Vict c 66) and 1875 (38 & 39 Vict c 77), which amalgamated the various common law, chancery and doctors' commons jurisdictions into a single High Court and created a new Court of Appeal for England and Wales. In In re St Nazaire Co (1879) 12 Ch D 88, the Court of Appeal decided that there was no longer any general power in a judge to review his own or any other judge's orders. Malins V-C had permitted a petition to proceed which sought to vary an earlier order which he had made and which had been unsuccessfully appealed to the Court of Appeal. The Court of Appeal held that he had no power to do so. Sir George Jessel MR explained that the Judicature Acts had changed everything. Before they came into force, the Lord Chancellor, Vice-Chancellor and Master of the Rolls had power to rehear their own decisions and, indeed, the decisions of their predecessors. He remarked that "the hope of every appellant was founded on the change of the judge": p 98. (An example of Jessel MR revisiting one of his own orders is In re Australian Direct Steam Navigation (Miller's Case) (1876) 3 Ch D 661.) But such an application was in the nature of an appeal and jurisdiction to hear appeals had now been transferred to the Court of Appeal. Thesiger LJ added that, "whatever may have been the practice in the High Court of Chancery before the Judicature Act as to the review of their decisions or the rehearing of their decisions, nothing can be clearer than that there was nothing analogous to that in the Common Law courts" 12 Ch D 88, 101. The court's conclusions harmonised the practice in all Divisions of the newly amalgamated High Court.*
>
> *18. Nothing was said in In re St Nazaire about the position before the judge's order was perfected. In In re Suffield and Watts; Ex p Brown(1888) 20 QBD 693, a High Court judge had made an order in bankruptcy proceedings which had the effect of varying a charging order which he had earlier made under the Solicitors Act*

1860 (23 & 24 Vict c 127). All the members of the Court of Appeal, citing In re St Nazaire, agreed that he had no power to do this once his order had been drawn up and perfected. Unlike the bankruptcy jurisdiction, the Solicitors Act gave no power of variation. As Fry LJ put it, at p 697: "So long as the order has not been perfected the judge has a power of re-considering the matter, but, when once the order has been completed, the jurisdiction of the judge over it has come to an end." Strictly speaking, the reference to what may be done before the order is perfected was obiter, but that this was the law was established by the Court of Appeal no later than Millensted v Grosvenor House (Park Lane) Ltd [1937] 1 KB 717, where the judge had revised his award of damages before his order was drawn up and the court held that he was entitled to do so.

19. Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under CPR r 40.2(2)(b), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal. On any view, therefore, in the particular circumstances of this case, the judge did have power to change her mind. The question is whether she should have exercised it."

[334] The issue that arises for consideration is whether such a course is appropriate in the circumstances of this case.

[335] In ***Re L and another (children) (Preliminary Finding: Power to Reverse)*** (supra), Baroness Hale having discussed the decision of the court in ***Stewart v Engel*** (supra) stated:-

"Clarke LJ dissented on this point. He did not think that the court was bound by the Barrell case to look for exceptional circumstances. He clearly took as a starting point the overriding objective in the Civil Procedure Rules of enabling the court to deal with cases justly. He considered that the judge had been right to direct himself that the examples given by Neuberger J in In re Blenheim Leisure (Restaurants) Ltd (No 3) The Times, 9 November 1999—a plain mistake by the court, the parties' failure to draw to the court's attention a plainly relevant fact or point of law and the discovery of new facts after judgment was given—were merely

examples: "How the discretion should be exercised in any particular case will depend upon all the circumstances."[51]

She also went on to state:-

> ***"I would agree with Clarke LJ in Stewart v Engel [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly****. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in In re Blenheim Leisure (Restaurants) Ltd , Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples.* ***A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances****."*[52]

[336] In ***Petrojam Ltd v Sea Ventures Shipping Limited & Others*** (supra), Mangatal J said at paragraph 23:-

> *"In considering whether the overriding objective favours a variation or revocation of the original order, the following are some considerations which may be helpful in the analysis. As stated by Baroness Hale, every case is going to depend upon its particular circumstances.*
>
> *1. The Court could consider whether there are any compelling reasons justifying the Court revisiting its orders or judgment. In the* ***Engel*** *decision, the decision of Neuberger J* ***In re Blenheim Leisure (Restaurants) L td (no.3) The Times****,* ***9th November 1999*** *was cited as setting out justifiable instances of cases where the jurisdiction might justifiably be invoked. These include:*
>
> *i. Plain mistake on the part of the court*

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[51] Paragraph 24

[52] Paragraph 27

ii. Failure of the parties to draw the Court's attention to a fact or point of law that was plainly relevant

iii. Discovery of new facts subsequent to the judgment being given

iv. If the applicant could argue that he was taken by surprise by a particular application from which the court ruled adversely to him and that he did not have a fair opportunity to consider.

*2. In the **Stewart v Engel** case, it was also suggested that where the Court is being asked to revisit its order or judgment in order to allow an amendment to a statement of case, the Court should consider the timing of the application.*

3. Both Clarke L.J. and Baroness Hale in their respective judgments indicated that the Court should also consider whether any party had acted upon the decision to their detriment in deciding whether to grant or refuse the application.

*4. **In Re L and another,** Baroness Hale also pointed out that justice might require the revisiting of a decision, for no more reason than the judge having a carefully considered change of mind."*

[337] This application has been made on the basis that the legal principles applicable to the lifting of the corporate veil are relevant to the issues in this case and ought to have been brought to the attention of the court.

[338] The wayleave agreement which I have found to be binding between Mr. Tulloch and the defendant was entered into on April 4, 1996. The sum of Jamaican five million dollars (J$5,000,000.00) was paid to him as compensation for the defendant's use of an area which was 2700 feet long and 100 feet wide. That sum, according to the pleadings, was given to the first claimant.

[339] The first claimant was incorporated on September 11, 1996, which was approximately five (5) months after the agreement was concluded. The New Milns land on which the transmission line was built was acquired by the first claimant on November 4, 1996. The consideration is stated to be Jamaican one million two hundred and ninety thousand dollars (J$1,290,000.00).

[340] Where a contract is concluded prior to its incorporation a company cannot be made liable as ratification is not possible where the principal was not in existence at the time. (See ***Kelner v Baxter*** (1866) L.R. 2 C.P. 174). The contract will be valid only between the parties who made it. Where the company after formation entered into a new contract the position may be different. (See ***Howard v Patent Ivory Manufacturing Co.*** (1888) 38 Ch. D 156.)

[341] In this case, the first claimant in my view could only be bound by the wayleave agreement if its conscience was affected by the undertaking of a new obligation to give effect to the defendant's licence, it entered into a new agreement with the defendant or if the corporate veil could be lifted on the basis that it is being used by Mr. Tulloch to avoid *"an existing legal obligation or liability".*[53] I have already found that the first claimant did not undertake any new obligation and as such its conscience was not bound. I also found that the first claimant is a separate legal entity and was therefore not bound by the agreement between the claimant and Mr. Tulloch. That issue was not addressed and in my view ought properly to be ventilated.

Should the court exercise its discretion to lift the corporate veil?

[342] In this matter it has been asserted by the defendant that Mr. Tulloch interposed the first claimant between himself and the defendant in order to avoid his legal obligation to the defendant. It is in that context that it has been submitted that the principles applicable to the lifting of the veil of incorporation are relevant and ought to have been addressed by the parties.

[343] It is well settled that subject to a few exceptions, a company is a separate legal entity which is distinct from its shareholders. As a consequence, its rights and

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[53] Prest v Petrodel Resources Limited and others at para. 35

liabilities are separate from those of its shareholders. (See ***Salomon v A Salomon*** [1897] AC 619)

[344] That being said, in ***Prest v Petrodel Resources Limited and others*** (supra) a case which was concerned with the distribution of matrimonial property, it was held that:-

> *"Where a person was under an existing legal obligation or liability or subject to an existing legal restriction which he **deliberately** evaded or whose enforcement he **deliberately** frustrated by interposing a company under his control, the court could pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. If it was not necessary to pierce the corporate veil, it was not appropriate to do so, because on that footing there was no public policy imperative which justified that course. However, the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law could be addressed only by disregarding the legal personality of the company was consistent with authority and long-standing principles of legal policy. In the instant case, although the husband had acted improperly in many ways, he had neither been concealing or evading any legal obligation owed to his wife; nor had he been concealing or evading the law relating to the distribution of assets of a marriage upon its dissolution. It followed that the piercing of the corporate veil could not be justified by reference to any general principle of law."*

[My emphasis]

Lord Sumption also stated that there must be recognition of a limited power to pierce the corporate veil if *"the law is not to be disarmed in the face of abuse".* He was however careful to point out that those circumstances must be carefully defined.

[345] In ***Prest,*** the parties who were married in 1993 lived in London but had other properties in Nigeria and the Caribbean. The husband was a prominent and successful businessman. Following their divorce, the wife applied for ancillary

relief. Her husband and three companies that were under his control were the respondents. The wife claimed that seven properties held by the companies were beneficially owned by the husband. The husband repeatedly failed to give full and frank disclosure of his finances. He breached orders for disclosure and even failed to pay the costs that were awarded against him as a consequence of his breach. The companies did not comply with orders for the production of the documents relating to the purchase of the properties. They also failed to provide evidence of the source of the money used to pay the purchase price. The judge ordered the husband to transfer or cause to be transferred to the wife four London properties held in the name of Petrodel and two London properties held in the name of one of the other companies. The judge at first instance had rejected the wife's submission that the establishment of the companies' structure involved impropriety. He also found that there was no general principle of law which entitled him to reach the companies' assets by 'piercing the corporate veil'. It was however held that the husband's sole control of the companies as their 100 per cent owner enabled him to deal with its assets as he wished and as such there was jurisdiction to disregard the corporate veil. It was also held that the matrimonial home was held by Petrodel on trust for the husband. No such finding was made in respect of the other properties, considering that he did not need to do so in view of his earlier findings. The companies appealed and the decision was reversed by the Court of Appeal. The wife appealed. The court identified three issues. They are as follows: (i) whether under general law the court could disregard the corporate veil in order to give effective relief; (ii) whether s 24 of the Matrimonial Causes Act 1973 conferred a distinct power to disregard the corporate veil in matrimonial cases; and (iii) whether the companies could be regarded as holding the properties on trust for the husband, not by virtue of his status as their sole shareholder and controller, but in the particular circumstances of the case.

[346] In the above case, the court declined to pierce the veil of incorporation. It did find however, that the matrimonial home was held by Petrodel on trust for the husband.

[347] Mr. Tulloch holds nine hundred and ninety nine (999) shares in the first claimant. His sister is the holder of the single remaining share. The evidence also shows that Mr. Tulloch at no time indicated to the defendant that he was conducting negotiations on behalf of the first claimant. In fact, the first time that any mention is made of the first claimant is in the letter dated June 6, 2005.

[348] The question is whether this justifies the court treating Mr. Tulloch and the first claimant as being one and the same.

[349] In ***Woolfson v Strathclyde Regional Council*** 1978 SC (HL) 90, Lord Keith, observed, obiter, that "it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts." This statement found favour with the court in ***Adams v Cape Industries plc*** [1991] 1 All ER 929 where Scott J said that *"...the court is not free to disregard the principle of Salomon v A Salomon & Co Ltd [1897] AC 22, [1895–9] All ER Rep 33 merely because it considers that justice so requires."*[54] The court also stated that where it is being alleged that a company is a mere facade the motive behind its formation is relevant. In this matter there is no evidence which suggests that the first claimant was formed for a dishonest purpose.

[350] Lord Sumption in ***Prest v Petrodel Resources Limited and others*** (supra) referred to the judgment of Munby J in ***Ben Hashem v Al Shayif*** [2009] 1 FLR 115, where the learned Judge set out six principles that are applicable when considering whether it is appropriate to lift the corporate veil. He stated them to be as follows:-

> *"(i) ownership and control of a company were not enough to justify piercing the corporate veil; (ii) the court cannot pierce the corporate veil, even in the absence of third party interests in the company, merely because it is thought to be necessary in the interests of*

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[54] Page 1019

> *justice; (iii) the corporate veil can be pierced only if there is some impropriety; (iv) the impropriety in question must, as Sir Andrew Morritt had said in* Trustor AB v Smallbone (No 2)*, be 'linked to the use of the company structure to avoid or conceal liability'; (v) to justify piercing the corporate veil, there must be 'both control of the company by the wrongdoer(s) and impropriety, that is (mis)use of the company by them as a device or facade to conceal their wrongdoing'; and (vi) the company may be a 'facade' even though it was not originally incorporated with any deceptive intent, provided that it is being used for the purpose of deception at the time of the relevant transactions. The court would, however, pierce the corporate veil only so far as it was necessary in order to provide a remedy for the particular wrong which those controlling the company had done."*

These principles were modified by the court in ***VTB Capital v Nutritek International Corp*** [2012] EWCA Civ 808 where it was stated that it was necessary that there was no other remedy available. The court also said that the wrongdoing complained of *"...must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts."*

Lord Sumption concluded that *"the principle that the court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing is well established in the authorities"*. The learned Judge also recognised that it is oftentimes difficult to identify the *"relevant wrongdoing".* He said:-

> *"References to a 'facade' or 'sham' beg too many questions to provide a satisfactory answer. It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases*

the court is not disregarding the 'facade', but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical. This may be illustrated by reference to those cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil."[55]

[351] The learned Judge also stated:-

"These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement…

[352] In ***International Hotels (Jamaica) Ltd*** (supra) Morrison JA said:-

"64...despite the enduring robustness of the principle of separate legal personality, the courts have, exceptionally, ignored the Salomon principle and "pierced the corporate veil" (Burgess, page 93). But, in common with several judges and other textbook writers (some leading examples are collected in the judgment of Lord Neuberger in Prest v Petrodel Resources Limited and others [2013] UKSC 34; [2013] 4 All ER 673, discussed in paras 76-79 below), Professor Burgess bemoans the fact that "the courts have not done this in any systematic way and it is difficult to find any unifying principle that explains their approach to piercing the veil". Among the instances given by Professor Burgess and other writers are cases in which (i) on the facts, an agency relationship is found to exist between the parent and the subsidiary; and (ii) "special

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[55] Paragraph 28

circumstances exist indicating that [the company] is a mere facade concealing the true facts (per Lord Keith in Woolfson v Strathclyde Regional Council (1979) SLT 159, 161; and see generally Burgess, pages 93-101 and Hannigan, op cit, paras 3-12 to 3-39.

65...Although the court confirmed that there is a limited category of cases in which it might be appropriate to pierce the corporate veil, it squarely located the jurisdiction to do so within the context of cases of abuse of a company's separate legal personality "for the purpose of some relevant wrongdoing". (per Lord Sumption at para [27]). Delivering the leading judgment, Lord Sumption, after a full review of the relevant authorities, said this (at para. [35]):

> *'...there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality…the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy'.*

66. In his concurring judgment, Lord Neuberger accepted (at para [80]) that the doctrine that the court could in an appropriate case pierce the corporate veil "represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available". However, he considered (at para. [81]) that the doctrine should only be invoked where, as Lord Sumption expressed it, "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control". Lady Hale (with whom Lord Wilson agreed), was of the view (at para. [92]) that the cases in which the courts "have been or should be prepared to disregard the separate legal personality of a company...may simply be examples of the principle

that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business"

[353] Mrs. Mayhew has asked the court to exercise its discretion on the basis of the evasion principle. In this regard, she relied on the factors set out in paragraph 313 of this judgment. She stated that having entered into the wayleave agreement with the defendant, Mr. Tulloch interposed the first defendant as the new registered owner of the New Milns land. This she said had the effect of permitting him to evade his obligations under the agreement.

[354] Having considered these points, I have wrestled with the word '*deliberately*' as used by Lord Sumption in his formulation of the legal position. I find myself unable to conclude that Mr. Tulloch's actions in respect of the first claimant were carried out with a view to evade or frustrate the enforcement of his legal obligation.

[355] Mrs. Mayhew relied on Mr. Tulloch's oral evidence in support of her contention that the corporate veil should be pierced, however, it seems to me that Mr. Tulloch's oral evidence actually supports the viewpoint that he was not seeking to abuse the company's separate legal personality for the purpose of some relevant wrongdoing. Notwithstanding his evidence, the court was still left to contend with the law concerning separate legal personality, pre-incorporation contracts and the principle espoused in the ***Rose Marie Samuels*** case.

[356] Due to the fact that the allegations of impropriety were not investigated at trial, I find myself unable to confidently conclude that Mr. Tulloch's actions in respect of the first claimant were carried out with a view to evade or frustrate the enforcement of his legal obligation. In other words, there is no evidence that he is using the *"corporate personality of the company for the purpose of concealing the true facts".*

[357] The result may seem unfair but, it must be remembered that the defendant was not always judicious in its actions. It proceeded with the construction of the

transmission system without securing an agreement on the deviation and it failed to protect its interest by registering the wayleave agreement. The court cannot *"disregard the principle of Salomon v. A. Salomon & Co. Ltd. ...merely because it considers that justice so requires."*

[358] I therefore find that there is no basis on which the court should exercise its discretion to pierce or look behind the veil of incorporation.

Does the first claimant hold the New Milns land on trust for Mr. Tulloch?

[359] The answer to this question is dependent on the facts. A resulting trust may arise by operation of law where a person provides the funds for the purchase of land which is conveyed to another. In the case at bar, there is no evidence pertaining to the source of the funds used to purchase the New Milns land. There is therefore no evidence on which to find that Mr. Tulloch is the beneficial owner of the New Milns land.

[360] The defendant's application to vary or revoke the order is refused.

CONCLUSION

[361] In light of the foregoing, judgment is awarded to the first claimant 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 the defendant against the second claimant with 30% its costs to be taxed if not agreed.