[2013] JMSC Civ. 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

C.L.2001/C-160

BETWEEN	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**ANCILLARY CLAIMANT**
AND	**ENID CAMPBELL**	**1ST ANCILLARY DEFENDANT**
AND	**MARCIA CLARE**	**2ND ANCILLARY DEFENDANT**

IN OPEN COURT

HEARD: 6, 7 June 2011, 8, 9, 10, 11 November 2011, 8 December 2011, 8 February 2013, 21st March 2013, and April 17th 2013.

Mr. Ransford Braham and Mrs. Daniella Gentles-Silvera instructed by Livingston Alexander & Levy appearing for the Ancillary Claimant on the 6th and 7th June 2011. Mr. David Batts and Mrs. Daniella Gentles-Silvera appearing on the remaining hearing dates in 2011 and Mrs. Gentles-Silvera appearing on the 8th February, 21st March and April 17th 2013.

Mr. Huntley Watson instructed by Watson & Watson for the Ancillary Defendants.

EASEMENT/RIGHT OF WAY/WAY-LEAVE – ELECTRIC LIGHTING ACT – SECTIONS 36, 37 – MEANING OF CURTILAGE – TRESPASS TO LAND – ACQUIESCENCE – CIVIL PRACTICE AND PROCEDURE – EQUITABLE DAMAGES ORDERED IN LIEU OF PERMANENT MANDATORY INJUNCTION – DATE FOR ASSESSMENT OF VALUE, DATE OF BREACH OR LOSS OR DATE OF JUDGMENT – CIVIL PRACTICE AND PROCEDURE – DAMAGES – AGGRAVATED DAMAGES

DRAFT JUDGMENT HANDED DOWN-PARTY SEEKING LEAVE TO ADDUCE FURTHER EVIDENCE AVAILABLE AT TIME OF TRIAL, BUT LEFT OUT THROUGH INADVERTENCE-COURT'S POWER TO REOPEN JUDGMENT-WHETHER APPROPRIATE TO DO SO- FACTORS TO BE CONSIDERED OF THE SAME NATURE AS THOSE IN APPLICATION TO ADMIT FURTHER EVIDENCE ON APPEAL-IMPORTANCE OF OVERRIDING OBJECTIVE OF DEALING WITH CASES JUSTLY

MANGATAL J:

[1] In this matter the Claim was struck out by Order dated 8th February 2010. What I therefore have before me for determination is the Ancillary Claim and the Defence and Counterclaim to the Ancillary Claim as amended. The original dispute in this case occurred from as far back as 1994.

[2] I must say that I have found the matter to be convoluted and complicated. I express my gratitude to the Attorneys-at –Law who appeared for both sides for the assistance they provided throughout the matter. Not least of the convolutions were the pleadings as they have been very wordy and complex. Written closing submissions by both parties exceeded a hundred and twenty pages (In the case of the Ancillary Defendants, there were 98 pages) and were also supplemented by oral submissions. There were numerous documentary exhibits and over fifty authorities on a wide range of issues were cited in support of the submissions. I sincerely regret the delay in delivering this judgment, which was due to the sheer volume of my workload and the rather complicated, and if I may so, cumbersome nature of this matter.

THE PARTIES

[3] The Ancillary Claimant, the Jamaica Public Service Company Limited, "J.P.S.", is an undertaker licensed under the provisions of the **Electric Lighting Act** ("the Act") and empowered, subject to the provisions of sections 36 and 37, to lay, place or carry on , under, or over any land, not being land used as a garden, park, or pleasure ground, or land being the curtilage of a dwelling-house or other similar land in the vicinity of any building, such supply lines, posts and apparatus as are necessary or convenient for the safe and efficient supply of electricity in accordance with the licence granted to JPS. Upon the exercise of these powers, JPS is liable to pay compensation to any such landowner, and in default of agreement, the matter is to be referred to arbitration.

[4] The Ancillary Defendants Enid Campbell and Marcia Clare, mother and daughter respectively, (collectively "the Owners"), are the registered owners of all that parcel of land being the land comprised in Certificate of Title registered at Volume 1347 Folio 872 of the

Register Book of Titles, being all that parcel of land part of Rock Spring in the Parish of Hanover containing by estimation 71 acres more or less.

THE ANCILLARY CLAIM

[5] On or about the 29th of October 1992 the parties executed a Grant of Easement,("the Grant") which Grant remained undated, in respect of the Owners' land. The terms of the Grant empowered J.P.S. to, amongst other matters, construct, maintain, repair, inspect, remove, replace and operate an electrical transmission and/or distribution line of towers and/or poles, anchors, guys together with all necessary wires, cables, cable installations and other apparatus necessary for the purpose of the transmission and/or distribution of electricity from any of JPS' generating stations through and over the lands as agreed between the parties.

[6] Clause 3 of the Grant expressly provided as follows:

> *In the event of it becoming expedient to alter the route of the transmission and/or distribution line across the said land by reason of any cause beyond the control of the Company, the Grantor and the Company shall mutually agree upon a new location and the Grantor shall grant such new route to the Company and in the event of their failure to agree, the matter shall be referred to arbitration under the Arbitration Law.*

[7] It was also an express term of the Grant, Clause 2(a), that in the exercise of the rights granted to it, JPS would use its best endeavours to cause as little damage as practicable to the land, and to any trees, vegetation or crops, and to pay the Owners compensation to be agreed between the parties, and, failing agreement, as determined by arbitration.

[8] In the Particulars of its Ancillary Claim, JPS pleads at paragraph 5, that on a proper construction of the terms of the Grant the terms did mean and do mean that JPS had a right of way in erecting, carrying out and operating electrical transmission of distribution lines and towers and other appurtenances over the Owners' Lands. Further, that in the event it became expedient to alter the route of the distribution lines, the parties could agree to a new location and in effect JPS could alter the route of the transmission and transmission lines across the Owners' lands with their agreement.

[9] At paragraph 6, it is averred by JPS that at the time of the Grant JPS' transmission lines were routed with the agreement of the parties across the rear south portion of the Owners' lands. However, it is pleaded, that "due to expediency and the need for the Ancillary Claimant to

comply with required international environmental safety standards, the Ancillary Claimant had no alternative but to re-route the lines on a different path other than the one on which the lines were originally placed, in accordance with clause 3 of the Grant, and in this regard, pursuant to Clause 3 of the Grant, the Ancillary Defendants were duly consulted and advised that the Ancillary Claimant needed to relocate the tower and its lines for environmental reasons and in keeping with international safety standards, and the Ancillary Defendants agreed and acquiesced to the relocation of the lines to its current location on the basis that work on the new location could commence in September 1994. In accordance with that agreement the Ancillary Claimant was duly granted possession of the area of the Grantors' Lands in question by the Ancillary Defendants during the period August-September 1994 and that it was agreed between the parties that construction on the new tower lines would continue pending the preparation of the relevant way-leave documentation and the determination of compensation due to the Ancillary Defendants in accordance with the recommendations of two independent valuators."

[10] Notwithstanding this agreement, the Owners commenced action against JPS on the 10th of August 2001 claiming, amongst other relief, damages for alleged wrongful entry, breach of contract, waste and continuing trespass The Owners were also seeking orders that JPS dismantle and remove all towers, structures, cables and wires alleged to have been unlawfully erected. Subsequent to the filing of the action negotiations, ("tentative", according to JPS), were entered into between the parties, the main area of contention being the basis upon which compensation was to be computed. According to paragraph 7 of the Particulars, two main options were discussed between the parties. Firstly, to have JPS' towers and power lines relocated to another section of the Owners' lands and that they be compensated by a one-time fee and that the new arrangement be confirmed by an way-leave agreement. The second option discussed was to relocate the Owners' dwelling house which would require the construction of a new dwelling house of comparable value and design as well as construction of a road by which to access the new home. JPS has indicated that common to both options was the payment of compensation, which early in the negotiations was estimated to range between $1,500,000.00 to $2,000,000.00. This was based on valuations by D.C.Tavares & Finson Realty Limited which conflicted, (according to the Particulars), with a valuation appraisal prepared by CD Alexander & Co. Realty Ltd. dated respectively October 2004 and January 1995.

[11] It is JPS' assertion that neither option was feasible because the tower lines were placed in accordance with international standards which JPS is required to comply with. That further

attempts to change the alignment of the electric lines would require different and more expensive angle tower types and new way-leave arrangements. It is JPS' position that the difficulty and costs to pursue such an option would have been prohibitive and accordingly, the option to relocate the wires and lines was not feasible. Nor was the option to construct a new dwelling house economically viable. It is maintained, however, that at all material times JPS consistently agreed to compensate the Owners at an amount to be agreed based on the quantification of the value of the loss and the property where the lines were placed. The option to relocate the lines was not feasible for the further reason that relocation would require several power outages on the lines to expedite modification work. Additionally, the placement of the lines was done in accordance with specific international codes adopted by JPS relative to the design, construction and operation of the high voltage power lines to ensure the safety of life and property.

[12] JPS aver that the negotiations concluded when, at a site visit held on 15th May 2007, attended by technical representatives of JPS, JPS' Attorneys, and Ms. Clare, the 1st Ancillary Defendant, the parties agreed in principle that JPS would compensate the Owners for the devaluation in their property resulting from the presence of the transmission lines. Compensation would also be made for the existence of the transmission tower and power lines over the land and for the portion of the land that had been rendered unusable both for the future and for the period of time since the lines had been constructed. The basis of that compensation would be quantified by a valuator to be agreed between the parties.

[13] JPS assert that at no time did the site meeting conclude on the understanding that JPS would either relocate its transmission and tower lines and/or rebuild a new dwelling house for the Owners.

[14] JPS also indicated that it would be willing to pay for the value of the crops and trees as assessed by JPS' personnel at the time the equipment was placed on the Owners' Lands which value amounted to $750.00.Having regard to the time which had elapsed since the apparatus was placed there, JPS was willing to pay interest on that sum at the rate of 12% per annum from 1995 when the lines were installed up to June 2007 when the discussions were taking place.

[15] It is further JPS' pleading that, in accordance with the matters settled at the site meeting, the parties agreed to appoint Messrs. Edwin Tulloch-Reid & Associates to conduct the assessment and valuation of compensation. Such a report was duly prepared dated January 2008 and valued the compensation to be paid at $1,550,000.00. The report also indicated that the measure of compensation is to be determined "based on the diminution in the value of the property due to the Grant of Easement. The amount of compensation represents the difference between the value of the property (before and after) the Grant of Easement for the erection of tower and transmission/distribution lines the extent to which the use and development of the said lands is adversely affected or agricultural operations interfered with are factors to be taken into account." The Report continues, that "...The effect on agricultural operations is minimal as the area within the corridor is not rendered unproductive. The dwelling house is marginally affected due to the height of the transmission lines (approximately 200 ft. above ground level and its distance approximately 100 ft west of the building)".

[16] According to JPS, after repeated requests by its Attorneys-at-Law for a response to the Edwin Tulloch-Reid & Associates Valuation Report so as to bring the matter to a close on the question of compensation, eventually JPS' lawyers received a response in the form of a letter from the law firm Watson & Watson on behalf of the Owners. This letter indicated that they would accept compensation for damage to the property during the period the power lines were installed but that the value of such compensation was still to be agreed. The letter further demanded that the cables and tower installed over the property purportedly without permission or easement be removed within 90 days of the date of the letter (18th June 2009) failing which the Owners would take steps to remove the cable lines and tower if no response was forthcoming. JPS states that it fears that unless restrained the Owners will remove its tower and wires and other apparatus situate on the property with the agreement of the parties to the detriment of JPS.

[17] In the premises, JPS avers that it acquired a right of way by virtue of section 36(1) of the Act to lay, place, carry on, under or over the Owners' lands such supply lines, posts and apparatus as are necessary or convenient for the safe and efficient supply of electricity in accordance with the licence granted to JPS pursuant to the Act.

[18] Further and/or in the alternative JPS states that it is also entitled to a proprietary interest in the section on the Owners' land which is occupied by JPS in accordance with the express

terms of the Grant entered into between the parties on or about 29th October 1992 in respect of the installation of a 69 KV transmission line and related apparatus. Further in accordance with Clause 3 of the Grant JPS was permitted to re-route its transmission wires over the Owners' Lands on the basis of an agreement entered into between the parties in or about August 1994. The Owners, JPS alleges, are now estopped from claiming that they did not agree to either the original Grant or the re-routing of JPS' lines notwithstanding that they acquiesced to such re-routing and in reliance on the 1994 agreement, JPS acted to its detriment in entering into possession and to construct and install such towers, lines and apparatus in accordance with the agreement to vary the route.

[19] JPS further states, that in accordance with section 36(2) of the Act, and in accordance with the terms of the Grant the Owners are entitled to accept compensation in respect of (a) the devaluation in the property resulting from the relocation and the presence of the transmission towers and power lines which has been valued by the agreed valuator in the sum of $1,550,000.00; (b) in relation to that portion of land which, the existence of the transmission towers and power lines, has rendered unusable for the future and for the period of time the lines have been constructed; (c) and for the value of crops and trees as assessed by JPS' personnel at the time the equipment was placed on the land, which value amounted to $750.00 together with interest at the rate of 12% per annum from 1995 until judgment.

[20] At paragraph 18 of the Particulars of Ancillary Claim JPS claims:

"**18. In the premises the Ancillary Claimant seeks the following declaratory and injunctive reliefs and Orders as follows:**

(A) A Declaration that pursuant to section 36 of the Electric Lighting Act the Ancillary Claimant is entitled to a right of way and/or way-leave over a portion of the lands owned and occupied by the Ancillary Defendants being more particularly described as being lands comprised in Certificate of Title registered at Volume 1347 Folio 872 of the Register Book of Titles being all that parcel of land part of Rock Spring in the Parish of Hanover containing by estimation 71 acres (28.7326 hectares) more or less (hereinafter referred to as "the Grantors' lands") in respect of the installation and maintenance of a grant of right of way entered into between the parties on/or about 29th October 1992 bearing reference plan no. 16072.

(B) A Declaration that the Ancillary Claimant has the right of way and/or way-leave conferred by the grant of way (hereinafter referred to as "the Grant") in respect of the re-routing of its transmission wires, material and other apparatus over the Grantors' lands and in exchange for the Grant, the Ancillary Claimant shall pay to the Ancillary defendants compensation to be computed in accordance with the valuation report in respect of the valuation of and compensation for the procurement of the Grant dated January 2008 prepared by valuator Edwin Tulloch-Reid & Associates, Chartered Valuation Surveyors appointed in accordance with the agreement arrived at between the Ancillary Claimant and the Ancillary Defendants during compensation negotiations.

(C) An Order that the Ancillary Defendants execute any and all documents necessary to give effect to the Grant and to take steps to facilitate the registration of the way-leave on the title to the property pursuant to section 41 of the Electric Lighting Act.

(D) An order that the Registrar of the Supreme Court is empowered to execute any and all documents necessary to give effect to the registration of the Grant in the event that the Ancillary Defendants fail and/or neglect to do so.

(E) An Order that the Ancillary Claimants, their agents and/or servants be restrained from removing, destroying, re-routing and/or relocating the Ancillary Claimant's transmission lines and towers, cables, material and other apparatus from the Grantors' lands consequent on the declarations made as aforesaid.

AMENDED DEFENCE TO ANCILLARY CLAIM FORM AND PARTICULARS OF CLAIM

[21] The Owners deny the existence of a Grant of Easement and/or Right of Way and/or Way Leave which bears any reference to the actual physical location of the JPS 69 KV Transmission Line and other transmission lines and apparatus and they say that their only agreement with JPS was in writing as set out in the Grant entered into on or about the 29th of October 1992.

[22] It is the Owners' case that JPS is trespassing on their property by the existence and situation of their 69 KV transmission line and other transmission lines and apparatus in locations on their land which were not provided for in the written and only agreement between them.

[23] The Owners also say that in any event JPS has not adopted, proposed or followed the procedures contemplated by section 36(1) of the Act prior to or during their unauthorised entry on their Lands.

[24] The Owners claim that JPS acted in complete contravention of section 36(1) of the Act by laying, placing, and carrying onto and over the subject land, supply lines, posts and apparatus knowing well that these lines, posts and apparatus were being laid, placed, and carried onto and over lands belonging to the Owners and used as gardens being the curtilage of their dwelling house and being in the immediate vicinity of said dwelling house and appurtenant buildings including a boiling house and mill yard as the property is a historic sugar mill yard.

[25] The Owners insist that it was an integral part of the agreement which they entered into with JPS and its employees and representatives such as Mr. Kassim, who was a party to the original negotiations, as well as their own building contractor Mr. Norman Laing, that the lines would be located on an area of the property lying to the southern part, or rear of the property, which was substantially far removed from the centre of the Owners' activities on the property, which were in the north. The line was not under any circumstances to be visible from the house. The Owners also contend that a literal construction of the language of the second schedule of the grant confirms that any easement was intended to apply to routing JPS' lines over land in agricultural use and could not have been construed to be applied over land used for buildings and their curtilages.

[26] The Owners claim that there was no negotiation, agreement or contract in relation to the northern part of the property which is the part of the property where JPS situated its transmission lines without permission or authority.

[27] The Owners complain that they were approached and advised only after a well defined re-routing proposal was in place for the situating of the connecting towers for use at the proposed new routes and after the lines had already been identified and successfully negotiated with adjoining neighbours. The Owners therefore say that the efforts by JPS to negotiate with them for an easement, were no more than lip service and were never conducted in good faith. Rather, the negotiations were always carried out with the intention to deviate from the negotiated route once access to the Owners' property had been secured.

[28] It was also pleaded that the erection of the transmission tower was never the subject of any discussion, negotiation or agreement. That it was in fact erected upon the subject lands by the admitted error of JPS who had negotiated a site for the tower with neighbouring property owners or occupants. This was because JPS had erroneously believed that the land upon which the tower was sited belonged to these neighbours when it was being erected.

[29] The Owners say that they have not been provided by JPS with any adequate reason or cause beyond the control of JPS which would reasonably provoke the application of Clause 3. It has never been established that the Environmental Impact Assessment ("the EIA") upon which JPS purported to rely (i) exists (ii) was the basis of the decision borne out of expediency to re-route (iii) was limited to the South of the subject property and excluded the re-routed areas along the same property.

[30] They subsequently learnt that it was allegedly due to environmental reasons due to the presence of "green frogs" that were supposedly endemic to the area. However, the Owners claim no knowledge of, or awareness of any such frogs either on or near the property. Additionally, that JPS is incorrect in stating that the Grant spoke to the erection of a transmission tower, as the negotiations, agreement and subsequent Grant has always spoken only to distribution lines.

[31] The Owners rely upon the existence of the transmission lines outside the negotiated route and the situating of the tower on their lands without the benefit of the agreement as unambiguous and incontrovertible proof of trespass.

[32] During the course of the trial, Mr. Watson, in June 2011, sought and obtained permission from the Court to amend the pleadings to plead the Statute of Frauds. The trial then had to be adjourned part-heard to November 2011. Paragraph 15(i) of the Amended Statement of Case states as follows:

> **"15. (1) As to paragraph 6 the Ancillary Defendants deny agreement to the transmission lines being re-routed across any other including the northern portion of their said lands and challenge the Ancillary Claimants to put forward the document to this effect upon which they must be relying to assert a new agreement giving them new property rights over the Ancillary Defendants' land. In particular, the Ancillary Defendants assert that whilst there were inconclusive oral**

discussions relating to the possibility of altering the easement route these did not result in any promise or agreement to grant the route amendment or for the Ancillary Claimant to erect a tower on their land and further, and in any event, there is no note or memorandum in writing as required by the Statute of Frauds evidencing mutual agreement for the conveyance by the Ancillary Defendants to the Ancillary Claimant of the new or varied property rights intrinsic to the lawful deviation of the negotiated easement route or for the assumption or assertion by the Ancillary Claimant of any such new or varied property rights."

[33] At paragraphs 15 (ii), (iii) and (iv), the Owners plead:

"(ii) The Ancillary Defendants will say that they were put under a great deal of pressure from Ancillary Claimant's officers to have the Ancillary Defendants sign agreements ratifying the new proposed route which they claimed could not be altered as agreements were already in place for the relevant connecting towers.

(iii) The Ancillary Defendants out-rightly rejected the new proposed route and stated all their objections regarding the disadvantages of installing the wire over the only inhabited section of their 71 acres of property. They considered the re-routing to be in the worst possible place on the property ruinous to the centre of their existing and planned activities and any proposed development or natural expansion of the property. The Ancillary Defendants also pointed to the agreement they had made with the Ancillary Claimants for placing the wire at the extreme rear of the property.

(iv) The Ancillary Defendants refused to sign any of the proposed agreements pertaining to the re-routing of the wire and were shocked to discover that the Ancillary Claimants had proceeded with advanced work in locating and reaching agreement pertaining to the new site of the towers on either side of the property. (At that point in time Ancillary Defendants were not aware that tower 64N was located on their property as the diagrams presented by the Ancillary Claimants placed it on the neighbouring property).

AMENDED COUNTERCLAIM TO ANCILLARY CLAIM FORM AND PARTICULARS OF CLAIM

[34] The Owners have counterclaimed for damages in respect of the following:

(a) Wrongful entry by JPS, their servants, or agents or invitees upon the Owners lands;
(b) Breach of the contract of easement/Grant;
(c) For waste to the Lands.

[35] The Owners further counterclaim for damages for the continuing trespass and/or alternatively for an order that JPS do knock down, dismantle and remove all towers, structures, cables, lines and things which it has unlawfully erected upon or strung across the aforesaid lands.

[36] The Counterclaim also seeks aggravated and exemplary damages. The complaint is that JPS is a monolithic quasi- public utility monopoly that has acted arrogantly and with contempt of the citizens' rights to have the offending lines removed as is contemplated by section 40 of the Act. This refusal, it is argued, has been without justification save for that of costs and that it is in these circumstances that the assault upon and egregious violation of the Owners' constitutionally guaranteed property rights has been aggravated to the extent that the Court's duty is to consider the merits of making an award for exemplary damages.

[37] In relation to the measure of damage and the report by Edwin Tulloch-Reid & Associates, it is pleaded at paragraphs 22, 23 and 24 of the Amended Defence, and repeated in the Counterclaim, as follows:

> **"22. (i) With respect to paragraphs 7 and 8 of the Ancillary Particulars of Claim the Ancillary Defendants .... say that the Ancillary Claimants have not engaged genuinely in an effort to resolve the dispute as they initially dragged their feet in reliance on the position that a technical assessment which had been prepared by their team had been lost. The Ancillary Claimants then selected Messrs. D.C.Tavares-Finson Realty Company Limited to prepare a further updated assessment and declined to accept the findings and recommendations of that Report on the basis again that it was too costly and finally they instructed Messrs. Edwin Tulloch-Reid to produce a third Report which returned such an extremely low value of compensation as to be utterly unacceptable and calls into issue either the skills which the assessor brought to the matter or (which is more likely) deficiencies in the terms of reference supplied to him by the Ancillary Claimants.**

The appraisal prepared by Messrs. C.D. Alexander & Company Realty Limited has not been produced to the Ancillary Defendants on the basis that it had been mislaid and has formed no part in their negotiations with the Ancillary Claimants.

(ii) The Ancillary Claimants have not entered into genuine settlement negotiations as the report which was commissioned from Mr. Tulloch-Reid :-

(a) Was not accepted;

(b) Did not have the benefit of a shared terms of reference;

(c) There was no formal visit to the property, and if there was, it was certainly not to the knowledge of the Ancillary Defendants who would have wanted to observe the scope of the appraisal.

23. The Ancillary Defendants who suffered a real loss of potential for development of their home and historical working sugar mill yard in a peaceful and serene environment had centred a possible compromise around a Valuation which took into account the following:

(i) The cost of relocating their house and curtilages, including roads, garden and other buildings and graves to a different part of their property, the aesthetics and serenity of which is less violated by the supply lines and tower.

(ii) Reasonable compensation for use of the property up to the date of payment of an easement figure and commencing from the commencement of the unlawful routing of the wires.

(iii) Compensation for valuable lumber trees and tree crops destroyed or damaged during the process of cutting a swathe across their property.

(iv) A current valuation of the swathe of land now inaccessible to them for other than limited use. This would be based on the devaluation in value of the Owners' Lands by the establishment of the transmission line in its current northern position of prominence.

(v) Apology also sought.

24. The expectations of the Ancillary Defendants were based upon their vision for their property supported by recommendations of Messrs. D.C.Tavares-Finson Realty Company Limited which gave a more comprehensive value of the actual

loss to the Ancillary Defendants than that provided by Mr. Tulloch-Reid whose report which was limited to item 4(iv) at paragraph 23 above."

JPS' REPLY AND DEFENCE TO COUNTERCLAIM

[38] In the Reply and Defence to Counterclaim, JPS deny that the Owners are entitled to any of the relief sought and repeat the matters raised in the Ancillary Claim.

THE EVIDENCE

[39] There were two witnesses called on behalf of JPS to give evidence. These were Mr. Michael Gordon, who was between 1991 to the year 2000 employed to JPS as an Easement Negotiator and thereafter an Easement Supervisor. Also, Mr. Lloyd Davis, a Chartered Valuation Surveyor and Partner at Allison Pitter & Co., Chartered (Valuation) Surveyors. Two Reports by Mr. Davis filed respectively on April 8 and November 8 2011 were admitted into evidence as Exhibits. The Owners called three Witnesses to give evidence. These were Ms. Clare, the 2nd Ancillary Defendant, her husband Joseph Richardson, and Mr. Mervyn Downs a Valuer attached to D.C.Tavares & Finson Realty Co Ltd. Three Reports by Mr. Downs, dated 20th October 2010, 1st December 2010 and 11th April 2011 were also admitted into evidence as exhibits. A medical report was admitted which indicated that Mrs. Enid Campbell, the First Ancillary Defendant, was medically, mentally, and physically unfit, the inference therefore being that she was unable to attend court and give evidence. There were many exhibits in this case, including a number of letters issuing between Ms. Clare, the Owners' Attorneys-at-law and JPS and several of its personnel. In addition to an agreed bundle, it was agreed that most of the documents attached to the Witness Statements, would also be admitted as exhibits. I will refer to some of this correspondence and documentation later on in this Judgment.

SOME ISSUES

[40] The following are therefore some of the issues that arise in this rather complicated , convoluted and long-standing dispute:

(a) Whether Jamaica Public Service Company Limited had a valid easement to traverse the land in question.
(b) Whether the Owners had agreed, acquiesced in and/or waived any objection to the change in the route of the power lines.

(c) Whether JPS had reasonable cause in 1994 to reject the Claimants' offer of $3.5 Million.

(d) If the issue at (a) or (b) above are decided against JPS, what is the appropriate measure and basis upon which to assess the quantum of damages to be awarded to the Owners.

ISSUE- WHETHER JPS HAD A VALID EASEMENT TO TRAVERSE THE LAND IN QUESTION

[41] I agree with Counsel for JPS that the evidence does suggest that there was originally a valid and effectual contract of easement, the Grant, entered into between the parties on or about the 29th of October 1992. I further agree that there is no question of the original easement offending the Statute of Frauds because (a) the Grant was a written agreement signed by those granting the easement, the Owners; (b) the consideration was accepted by the Owners; (c) there is a letter from JPS referencing the agreement and (d) the Grant contains a detailed description of the Lands and the easement states the consideration. Alternatively, although at common law the Easement ought to have been under seal, being a deed, an equitable easement will arise in accordance with the **Walsh v. Lonsdale** doctrine and the matters of part-performance and estoppel can be invoked to remedy the lack of seal.

[42] In my judgment, the existence of Clause 3 of the Grant provides for a change of route of the line and in order to change the route of the line from that set out in the original Plan 16072 A, no written variation of the contract of easement, or Grant, was required in order to satisfy the requirements of the Statute of Frauds. However, in order to be enforceable, the changed route would have to be defined, depicted or capable of identification so that the new easement corridor would be defined and clear. The new route is represented in Plan 16072 B. In his submissions for the first time, Mr. Watson argues that the easement ought to be registered. I agree with Mr. Batts that there is no such pleading in the Defence and Counterclaim. Further, equity does look on as done, that which ought to be done. Therefore, if the original route had been the one pursued, the court could have simply ordered it registered. As to the altered route, if JPS can establish that this new route was either agreed to, or acquiesced in, by the Owners, then in that situation also, equity may regard as done, that which ought to be done. The Court could then order the Grant registered with the new route, as depicted in Plan 16072 B. Like a

number of other easements and hereditaments, utility and service easements do not have to be registered or noted on the registered title to be enforceable. However, an easement created in the manner of the Grant, which is by way of private agreement between the Owners and JPS, should be registered or noted on the Title (see sections 63 and 93 of the Registration of Titles Act) in order to bind subsequent owners of the property. In point of fact, section 41(2) of the Act, provides that a way-leave agreement in respect of registered land may be registered under the Registration of Titles Act as an encumbrance and the provisions of that Act shall have effect accordingly. That is not, however, relevant to the factual scenario in the present case. Indeed, in his written submissions at paragraphs 44-49, Mr. Watson points out that, the Owners' land is registered land and that section 63 of the Registration of Titles Act provides that "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". However, Counsel highlights that the fact that the easement was not registered is a point that has not been pursued because at the time of the undated Grant the land had not yet been brought under the operation of the Registration of Titles Act. He therefore makes the point, along with the fact that the Grant was not under seal or executed by an appropriate officer of the incorporated company JPS, mainly to demonstrate and "highlight the reckless lack of attention paid by JPSCO to the formalities of contracting". I agree with Mr. Watson that JPS certainly approached this matter in a very loose and sloppy manner and it is difficult to imagine that this utility company could treat the matter of easements, a fairly basic and plainly recurring aspect of its business, (indeed JPS even has an Easement Department), in such a casual and capricious manner.

[43] Whilst I agree with Counsel for JPS that environmental concerns could be something which made it, as clause 3 states, "expedient to alter the route of the transmission and/or distribution lines across the said land by reason of any cause beyond the control of the company", the issue remains whether JPS have committed a breach of contract because of the procedure adopted before or at the time of effecting the change of route. In my judgment, the question whether JPS did breach the contract of easement does arise. Clause 3 did not allow JPS to unilaterally alter the route. It clearly provided that the Owners and JPS were to mutually agree on a new location. If they were unable to agree upon a new location this was to be referred to arbitration. Under the agreement, it was not merely the question of compensation that was to be referred to arbitration, but also the question of the new route. Indeed, it seems to me, the issue of whether it had really become expedient to change the route by reason of a cause beyond the control of the company, could also arise for consideration in the arbitration. I

will deal with the question of whether the Owners agreed, consented, acquiesced in and/or waived any objection to the change of route under the next heading as a separate issue.

[44] Whilst I appreciate the point argued by Mr. Watson that JPS has really made things more difficult for the Court by relying upon so many different bases, to justify their acts, i.e. (a) the contract in the Grant;(b) the Act or (c) Promissory estoppel, I do not think this undesirable circumstance goes so far as to be impermissible or require JPS, as he submitted, to elect one basis for its claim. However, in my judgment, the reliance upon section 36 is misplaced. First of all, it is quite clear that JPS started the work on the change of route before they discussed it with the Owners, and I so find. In his Witness Statement, which he signed on the 6th of April 2011, Mr. Gordon states expressly, it seems to me, and by necessary implication, that at the time when the site visit with Ms. Clare took place, the work was already in progress- paragraph 7. It is to be noted that in paragraph 6 of his Witness Statement, Mr. Gordon does not say that the elderly Mrs. Campbell agreed to the change of route. He says that she "advised him to speak to her daughter". This is in direct contrast with the letter from JPS dated February 9 1995, where, under the signature of Mr. John Murray, he states that in August 1994 Mrs. Campbell had agreed to the relocation. Quite frankly, that letter's further reference to the site visit at which Ms. Clare was present, and also paragraph 7 of Mr. Gordon's Witness Statement, to the fact that "In fact whilst on the premises JPS sub-contractors were mixing and pouring concrete for the construction of the tower", rather than assisting JPS' case, does quite the contrary. It smacks of the high-handed behaviour complained about by the Owners and corroborates their assertion that by the time the change of route was being discussed with them the change of route was if not as much as, it was tantamount to being a fait accompli.

[45] Either in addition, or in the alternative, JPS relies on provisions of Act as giving JPS a statutory right to acquire an easement upon payment of compensation. Sub-sections 36(1) and (2) and section 42 provide as follows:

> ***36. (1) Subject to the provisions of this section and of section 37, the undertakers may lay, place or carry on, under, or over any land, except land used as a garden, park, or pleasure ground, or land being the curtilage of a dwelling-house or other similar land in the immediate vicinity of any building, such supply lines, posts and apparatus as are necessary or convenient for the safe and efficient supply of electricity in accordance with the relevant licence, order or special Statute.***

(2) There shall be paid by the undertakers to the owner of the land in question by way of compensation such sum as may be agreed between them or, in default of agreement, determined in accordance with section 42.

...

42. Where the undertakers and the owner of any land on which the undertakers have exercised any of the powers conferred by section 36,38 or 39 fail to agree as to the amount of compensation to be paid by the undertakers in respect of the exercise of the said powers, the question shall be referred to arbitration and the provisions of the Arbitration Act shall accordingly apply as if the arbitration were pursuant to a submission (as defined in that Act) agreeing to submit the question to a single arbitrator.

[46] Section 36 does give the undertaker JPS certain rights to lay lines but only in certain places upon an owner's land. Further, section 36 is subject to section 37. Section 37 states:

" 37-(1) Not less than twenty-one days before entering on any land for the purpose of doing any work thereon by virtue of rights conferred by section 36 the undertakers shall give to the owner or occupier of the land notice in the prescribed form <u>of the work proposed to be done on the land.</u>

(2) Where the owner or occupier objects <u>to the doing of the work specified in the notice</u> he may refer the matter to the Minister and the provisions of section 44 shall accordingly apply.

(3) <u>If no objection is made by the owner within the time prescribed,</u> or having been made is withdrawn, <u>the undertakers may enter on the land in question and do the work specified in the notice.</u>

(My emphasis).

[47] I wholeheartedly agree with Mr. Watson as pleaded in paragraphs 19 and 20(1) of the Amended Defence to Ancillary Claim that the only notice given to the Owners such as could satisfy the requirements of section 37 of the Act was given prior to and in reference to the agreement which was in fact negotiated and signed and never acted upon. Thus JPS' letters of 4th August 1993 and 24th February 1994 to the Owners, referred to in JPS' written closing submissions at paragraph 9, do not assist in this regard. Further, I find that no notice, consultation, advice or attempt to secure the agreement of the Owners was given or done prior

to the commencement of the works, if not prior to the virtual completion, thereby depriving the Owners of the relief and right to object referred to in sections 37 and 44 of the Act. Indeed, it seems quite amazing that, JPS would commence the re-routing without producing a new plan to the Owners depicting the new route, and securing their agreement or, at the very least, comments. However, what is even more bizarre is that they should fail to give notice about building on the Owners' Lands what Mr. Watson in his pleading described as "a massively intrusive Tower" when previously this Tower had not at all been referred to on the original route as depicted on Plan 16072 and on the Plan provided with the re-routing, Plan 16072B, Tower 64N was shown as intended to be built upon a neighbour's land. This represented a gross error on JPS' part. In my judgment, for these reasons, JPS is not protected by section 36. In addition, according to Ms. Clare's letter to Mr. Gordon dated January 31 1995 JPS accessed the site where they built the steel tower via a non-right-of –way to the property. She complains that JPS personnel removed fencing in order to gain access to the site, thereby making her property vulnerable to praedial larceny.

[48] It is obvious that the Act does not contemplate JPS proceeding without notice as to the work proposed to be done on the land. It provides for the owner who objects, the right to refer the matter to the Minister, and pursuant to section 44 the Minister responsible for dealing with public utilities and licensing undertakers, shall appoint a Commission to inquire into and determine the referenced matter. (My emphasis) That is one very substantial right. It is obvious that JPS has no right to simply do what it plans to do and then say, "it's alright, we will compensate you." Indeed, by letter dated December 1, 1994, Ms. Clare did write to the then Minister in charge, the Minister of Public Utilities, Mining and Energy, seeking to have a Commission of Inquiry set up. Only problem is, that at that time, JPS had already embarked on the construction and erection of the new route, and indeed, seems to have fully constructed the tower by the time of Ms. Clare's letter to JPS dated January 31 1995. There is no evidence as to what the Minister did thereafter, but in any event, the new route was by then in essence compete or well on the way to completion.

[49] It is also tolerably clear that whilst the undertakers may proceed under section 36, if they have complied with the procedures set out, it is not an absolute, or indeed, a final right. Section 40 bestows on the owner the following rights. It provides:

> **" 40-(1) Where a supply line has been laid or carried, or posts or apparatus have been erected, on, under or over any land by the undertakers under the provisions**

of section 36, or under or by virtue of any other provision of this Act and the owner or occupier of the land desires to use the land in such a manner as to make it necessary or convenient that the supply line, posts or apparatus should be removed to another part of the land or to a higher or lower level, or altered in form, he may require the undertakers to remove or alter the supply line, posts or apparatus accordingly.

(2) If the undertakers fail to comply with the requirement, the owner or occupier of the land, as the case may be, may refer the matter to the Minister and the provisions of section 44 shall accordingly apply.

[50] Additionally, It is evident that the exercise of rights under section 36 is a different thing from the entry into an easement or a way-leave agreement. Section 41 provides that nothing in section 36 precludes JPS from entering into agreement with the owner to lay lines, posts or apparatus over the land. It seems to me that by agreement the owner of land and JPS could also enter into an agreement regarding placing apparatus within the curtilage, if the owner so desires. This is what section 41 provides:

" 41.-Nothing in section 36, 37, 38, 39 or 40 shall-

(a) Preclude the undertakers and the owner or occupier of any land from entering into an agreement for laying, placing or carrying on, under or over such land, and supply line, posts or apparatus (hereafter in this section referred to as a "wayleave agreement"); or

(b) Affect any wayleave agreement subsisting on the 1st day of October, 1958.

(2) 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.

[51] Accordingly, in my judgment, in acting as they did in embarking on the new route without securing the agreement of the Owners, not just to compensation, but also the location of the new route, JPS acted in breach of the Grant, or contract of easement. It should be noted that whilst the Grant did speak to JPS having the right to construct and maintain an electrical

transmission and/or distribution line of towers and /or poles, the original plan 16072 did not show any Tower being built on the Owners land. Indeed, the Tower was supposed to have been built on a neighbour's land, and JPS would have negotiated with that neighbour for an easement which included a Plan of that tower on the neighbour's land! It is clear, even looking at the several valuation reports exhibited in this case, that the value of the easement will be higher where a tower has to be erected on the citizen's land, as it occupies a greater area of land than transmission lines, and indeed, is obviously far more intrusive. Further, in seeking to enforce an easement in an area where none existed by agreement, JPS were guilty of trespass on the Owners' Land. An agreement that one can enter one portion of a person's property, or exercise rights over it, does not translate to an agreement for one to enter or exercise rights upon another portion of property. So for example, an occupier may invite visitors onto portions of his property but not onto others. In respect of the parts where there is no invitation, the person who would be classified as a visitor to the invited property, may become a trespasser in respect of the other. Additionally, in my judgment there is no basis for the operation of the doctrine of promissory estoppel. JPS did not receive, or act upon any promise from the Owners. They did not act to their detriment in reliance on the Owners. Rather, JPS acted at its own risk in proceeding headlong into the realms of trespass.

CURTILAGE

[52] I have already indicated that JPS cannot pray in aid section 36 of the Act since they have not followed or acted in accordance with the procedures set out in section 37. However, in addition, a number of arguments have been addressed by both sides to the question of whether or not the lines, posts and apparatus were placed within the curtilage of their dwelling house. Indeed, at paragraph 4 of the Amended Defence, the Owners describe the location as being on lands **"used as gardens being the curtilage of their dwelling house and being in the immediate vicinity of said dwelling house and appurtenant buildings including a boiling house and mill yard as the property is a historical sugar mill yard."**

[53] In my view, this is relevant to the issue of the level of diminution that has taken place to the value of the Owners' land, their loss of amenity and inconvenience and to the quantum of damages generally. This is because, it is clear that the Act did not contemplate the undertakers simply doing what they pleased, without securing the owner of the land's consent, albeit with compensation, in an area comprising curtilage of a dwelling house or other similar land in the immediate vicinity of any building.

[54] It was argued by Counsel for JPS that where there is no agreement for an easement the statute provides a framework for JPS to still use the land upon payment of compensation which is to be determined. The line, it was submitted, was not run across any garden, park or pleasure ground. However, the Owners contend that the lines had been erected within the curtilage of the dwelling house. Reference was made by Counsel for JPS to **Black's Law Dictionary**, 6th Edition, where "curtilage" is defined as :

> ***... any lands, building immediately adjacent to a dwelling and usually it is enclosed by a fence or shrubs.***

[55] Counsel also referred to **Sinclair- Lockhart's Trustees v. Central Land Board** [1949-51] 1 P.C.R. 195 "curtilage" is defined as :

> ***Ground which is used for the comfortable enjoyment of a house or other building may be regarded in law as being within the curtilage of that house or building and thereby as an integral part of the same, although it has not been marked off or enclosed in any way.***

[56] Mr. Batts submitted that the authorities indicate that the curtilage is the area around the house which serves a necessary and useful purpose. JPS called as a witness Mr. Lloyd Davis, a Chartered Valuator, of Allison Pitter & Co. Mr. Davis expressed views that accord with the definition advanced by JPS. The other expert, on the other hand, called by the Claimants, Mr. Mervyn Down, gave an opinion which Counsel for JPS submit relied on an assumed distance from the house of 10 metres[approximately 30 feet]. However, Counsel submits that the nearest wire was approximately 76 feet from the house [paragraph 14(v) of Expert Report of Earl Spencer dated 5th November 2010]. For this reason and others, JPS submit that the wire was not within the curtilage of the house and therefore that Section 36(1) of the Act applies. It was further submitted that the running of the wire and the agreement of consideration is therefore fully within the statutory power of JPS.

[57] Mr. Watson referred to a number of cases and authorities in support of the Owner's contention that the lines are within the curtilage. Mr. Watson referred to **Black's Law Dictionary**, 6th Edition, at page 384, where, with regard to the word "Curtilage", it is stated:

" A word derived from the latin cohors (a place around a yard) and the old French cortillage or courtillage which today has been corrupted into court-yard. Originally, it referred to the land and outbuildings immediately adjacent to a castle that were in turn surrounded by a high stone wall; today, its meaning has been extended to include any land or building immediately adjacent to a dwelling, and usually it is enclosed some way by a fence or shrubs....

For search and seizure purposes, includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are necessary and convenient and habitually used for family purposes and carrying on domestic employment."

[58] Of particular interest was the relatively more modern case of **Methuen-Campbell v. Walters** [1979] 1 All E.R. 606, where at page 621, having held that the test is not, amongst other matters, whether the enjoyment of one is advantageous or convenient or necessary for the full enjoyment of the other, Buckley L.J. stated:

"In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter. There can be very few houses indeed that do not have associated with them at least some few square yards of land, constituting a yard or basement area or passageway or something of the kind, owned and enjoyed with the house, which on a reasonable view could only be regarded as part of the messuage and such small pieces of land would be held to fall within the curtilage of the messuage. This may extend to ancillary buildings, structures or areas such as outhouses, a garage, a driveway, a garden and so forth. How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending must depend on the character and the circumstances of the items under consideration. To the extent that it is reasonable to regard them as constituting one messuage or parcel of land, they will be properly regarded as all falling within one curtillage; they constitute an integral whole."

[59] Then also in **Skerrits of Nottingham Ltd. v. Secy of State** [2000] 1 All E.R. 511, it was held that the curtilage of a building need not always be small, nor was the notion of smallness

inherent in the expression. It is a question of fact and degree. In **Skerrits** at page 516, Robert Walker L.J. discussed the case of **Attorney- General ex. Rel. Sutcliffe v. Calderdale Borough Council** (1982) 46 P.& C.R. 399 as being "concerned with listed buildings, section 54(9) of the Town and Country Planning Act....The issue was whether the listing of a large five-storey mill building at Hebden Bridge extended to a crescent-shaped terrace of 15 cottages.... linked to the mill by a stone and brick bridge. This court held that the cottages were within the curtilage of the mill. Stephenson L.J....identified three relevant factors in determining whether a structure was within the curtilage of an existing building...:

' (1) the physical 'lay-out' of the listed building and the structure, (2) their ownership, past and present,(3) their use and function, past and present..."

[60] The Report of Mr. Earle Spencer, Commissioned Land Surveyor, in particular paragraph 14, is useful with regard to this question of the lay out. I find that the line does traverse over land being the curtilage of the Owners' dwelling house and being in the immediate vicinity of the dwelling house and appurtenant buildings including a boiling house and mill yard. Amongst the information set out in Mr. Spencer's Report which I find supportive of the Owners' position is the following:

14 (iv). That the centre of the transmission line measures 27.9 metres (91 feet) from the most northerly point of the main building.

(v)The distance of the southern set of wires from main building is approximately 23.2 metres (76 feet).

(vi)The main building is approximately 12.9 metres (42 feet) from the edge of the band of the width of the transmission line.

(vii) The full and actual span of the transmission line crosses the main entrance to the land, and is visibly close to the family graves, the more northerly line being 4.0 metres(13 feet) from the southern side of the graves, which means the graves lie within the 15.0m band

(x) ...it seems safe to accept the evidence of internal roads below and across the transmission line

(xii) The land nearer to the East of the property, within the vicinity of the farm building, but under, and to the North of the transmission line, being gentle terrain, seems fair to be

considered as an area which would have been within the normal usage of the holders of the farmstead, were it in obvious regular operation.

WHETHER THE OWNERS HAD AGREED, CONSENTED, ACQUIESCED IN AND/OR WAIVED ANY OBJECTION TO THE CHANGE IN THE LOCATION OF THE LINE

[61] The main relevance of this issue is as to whether the Owners would be entitled at this stage to obtain the perpetual mandatory injunction which they seek in the alternative in paragraph (4) of the Amended Counterclaim. Although in his written submissions on behalf of the Owners, Mr. Watson has emphasized that his instructions were to stress the fact that the mandatory injunctive relief claimed is the principal relief being sought by his clients, it is interesting to note that this claim comes after the claim for damages stated at paragraphs (2) and (3). Further, this is how the claim is pleaded:

"4. The Ancillary Defendants further counterclaim for damages for the continuing trespass by the Ancillary Claimant in respect of the aforesaid lands and/or alternatively for an order that the Ancillary Claimant do knock down, , dismantle and remove all towers, structures, cables, lines and things which it has unlawfully erected upon or strung across the aforesaid lands.

(My emphasis).

[62] This is somewhat of a peculiar issue. This is partially because of the twists and turns that the matter has gone through, and also the length of time that has elapsed between the original events in issue and this trial. The evidence from the parties on this point differs, for example, in relation to the site visit in September 1994. Mr. Gordon stated that the Owners did not object to the change in route and that they were mostly concerned about compensation. He referred to a conversation which he claims to have had with Joe Richardson, where Mr. Richardson said that they would accept enough money to buy two (2) coaster buses. Indeed, in his Witness Statement paragraph 25, Mr. Richardson states "A figure of $3.5 Million was mentioned by myself at this meeting simply to illustrate the derisory nature of their suggested compensation - $3.5 Million being mentioned at the time as the price of two new basic pick-up trucks, a minimum tangible unit of value which might be meaningful to all concerned....". However, it has been Ms. Clare's position and that of Mr. Richardson that they had no interest in compensation and did not under any circumstances want the route changed. At paragraphs 61, 62, and 63 of her Witness Statement Ms. Clare puts the matter in this way:

“First Formal Correspondence to JPS re Trespassing & Compensation...

61. As requested, a letter dated November 30, 1994 was written by us addressed to JPS for the attention of Mr. Michael Gordon. It outlined our concerns and confirmed the current situation as it existed then.

62. The letter reminded JPS that no further work should take place until a compensation of $3.5 million was received as settlement of their damage. JPS was given 5 days from the date of the letter to respond, failing which legal action would be taken against them.

(It should be noted that this offer was subsequently withdrawn under legal and financial advice, since it was considered inadequate and had not been accepted by JPS....)

63) On receipt of the letter, Mr. Gordon called me and refuted one point-the matter of ceasing work whilst compensation was being negotiated (I recall being put on a speaker-phone without being told). I reminded him that I had repeatedly refused to entertain such a request at the meeting we attended on November 28, 1994. I impressed upon him then that JPS should not enter my property nor carry out any further work thereon.”

[63] Ms. Clare’s letter of November 30, 1994, which was an exhibit in the case, and which she claims outlined her concerns and confirmed the current situation as it existed then, reads in part as follows:

“Re: Encroachment on lands at Upper Rock Spring, Hanover

....I wish to confirm that the situation at present is as follows:

1. **That Jamaica Public Service now proposes to use a route to cross my land other than that which was discussed with and agreed by me.**
2. **That the new proposed route is extremely inconvenient and distressing to me as it is too close to my house and also spoils the view from the house. The house was specially built in that position to take advantage of that natural and unspoilt view and I was assured before when the easement was signed that the line would not cause such a problem.**
   The entrance to my property is also directly in the line of this proposed route.
3. **The view is also a centre point for our future plans to develop the lands as a tourist attraction and the existence of the line will cause us much loss of profit if we are unable to pursue our plans.**

4. **That construction of a steel tower has commenced on my property in accordance with this new route without my permission.**

   Trees and other shrubs have also been cleared with a view to erecting the line in this new route. This has also been done without my previous knowledge and consent.

   Your Mr. Gordon has informed me that:

   1. **You are aware of the error made.**
   2. **The new route will involve cutting more trees etc. than the original route would have required.**
   3. **You will cease all work until the matter is sorted out.**
   4. **You are prepared to negotiate a quick settlement of the matter.**

Based on the above I wish to state that I am prepared to allow you to proceed with the proposed route upon the payment to my co-owner and myself of compensation in the sum of Three and a Half million dollars.

In the meantime I must insist that no further work be carried out on my property. I am prepared, if necessary to commence legal action against you if we are not able to amicably settle the matter.

Your answer must be received by me by the 5th December, 1994."

Mr. Gordon responded to Ms. Clare's letter by letter dated December 12, 1994 as follows:

"Your letter of November 30, 1994, refers.

It must be noted that at no time during our discussions, myself or any other JPSCo. Personnel present, did we agree to cease all work on your property at Rock Spring.

What was agreed, is that while the work continues we will further discuss the amount to be paid for another easement which would resolve this matter.

I must inform you that in order for us to arrive at a reasonable settlement, two (2) firms of Appraisers namely: C.D. Alexander & Co. And D.C.Tavares & Finson Co. Ltd. are being contracted to carry out valuation of the portion of your property over which our lines will pass and its impact (if any at all) on your concerns."

[64] There is also other relevant correspondence. I must say that I thought Ms. Clare and Mr. Richardson far more credible than Mr. Gordon. I believe Ms. Clare when she says that initially she objected strenuously to the new proposed route. Mr. Gordon, in his evidence, made a number of telling responses. Firstly, at the time of the site meeting JPS was obviously pressing ahead with the work. Mr. Gordon in cross-examination, was asked whether it isn't the case that when JPS are re-negotiating easements, JPS requires these to be in writing? His response was "Ideally, yes, but there were continued negotiations with Ms. Clare re compensation." Mr. Gordon was asked whether he had told his superiors that he had successfully re-negotiated this re-routing. His answer was that he did not. He was then asked, what then, had he told his superiors in relation to the negotiations with Ms. Clare. His response was that he had told them everything pertaining to the case apart from cost was concluded. Mr. Gordon was asked whether, at the time of his letter of December 12, 1994, whether the Tower had been completed and the line strung? He said that he did not recall whether it was finished, but he knew it was an active worksite. However, Mr. Gordon also claims that he gave instructions for the work to stop, and that it had stopped "in part". The following interchange between Mr. Watson and Mr. Gordon during cross-examination immediately after is of interest:

" Question: Did Ms. Clare agree to a resumption of the work?

Answer: As far as I understand it, my reply to her letter, December 12, 1994, stated that we had no such agreement, hence the second to last paragraph, leading up to us getting appraisals to work out the compensation.

Question: You pressed on, heedless of her position?

Answer: Not my take on it, not how I view it.

Question: Did you agree to pay her $3.5 M?

Answer: No

Question: You knew it was her price?

Answer: Yes.

.....

.....

Question/Suggestion: You wanted a quick settlement to tidy up your mistake in allowing JPS to have gone so far without following JPS guidelines?

Answer: Let me tell you, I did not make a mistake and it was in everybody's interest to have the matter settled quickly, everybody, meaning everybody concerned. I gave a basis upon which we could arrive at a settlement. I wanted a basis upon which we could arrive at a settlement to satisfy my superiors when making an assessment. Ms. Clare's offer was not acceptable to me in that context.

Question/Suggestion: Ms. Clare was being pressured by you to arrive at an agreement?

Answer: The pressure was both ways.

Question/Suggestion: Your statement that you had an agreement re the easement without arriving at a price was fallacious?

Answer: All our discussions were an endeavour to arrive at a purchase price.

[65] In my judgment, the Owners had not in fact initially agreed or acquiesced in the change of Route. In that regard, I accept the evidence of Ms. Clare and Mr. Richardson as to what transpired at the site visit in preference to the account given by Mr. Gordon. I did form the impression that Mr. Gordon was under pressure to get the Tower and transmission lines completed.

[66] However, the position and stance of the Owners did not remain static. Indeed, that seems understandable since I agree with Mr. Watson that the manner in which JPS approached the situation plainly was to present the Owners with pretty much a fait accompli. I accept that JPS does appear to have taken the Owners' consent for granted. This is where the pressure exerted by JPS came into play. I find it perplexing that Mr. Gordon could have given instructions for the work to stop, yet, strangely, the Tower and the lines got completed. In my judgment, the Owners ultimately resigned themselves to the fact that the JPS Towers and lines were already in place and after that, the focus definitely seems to have been on compensation. Although Ms. Clare at paragraph 85 of her Witness Statement claims that a Writ of Summons was filed in the Supreme Court to protect the position, there does seem to be a prolonged period of time that the Owners allowed to elapse before seeking to have the Towers and transmission lines taken down or removed. As Mr. Batts stated at paragraph 17 of JPS' written submissions, it was not until 2009 that an application was made for an injunction, years after the erection of the Tower

and installation of line took place. I accept that prior to that, the Owners had agreed with JPS about Valuations to assess the compensation. In paragraphs 85 and 86 of her Witness Statement, as an example of the ultimate acceptance, Ms. Clare admits that between 1996 and 1999 there was a period of inactivity. Further, I agree with Counsel for JPS that Ms. Clare's evidence about how concerned she was from the very inception about health risks associated with high tension wires wasn't very credible. When cross-examined about the fact that none of her letters written in 1994 or 1995 by herself or her lawyers referred to the health risks, she proffered the explanation that this was because she did not plan to live on the premises. When asked whether she had no regard for the health of others, Ms. Clare stated that no one was intended to live there. I agree that this directly contradicts her own Witness Statement as well as the evidence of Mr. Richardson, which is that they all intended to live on the property.- Witness Statement of Ms. Clare, paragraphs 3, 12 (ii) and (vii) of the summary and paragraph 2(i) of her Supplemental Witness Statement and Witness Statement of Mr. Richardson, paragraphs 16, 32 and 33. However, I think this has more to do with, and goes more towards assessing the Owners' credibility and sincerity in terms of how the presence of the power lines adversely affect them, as opposed to whether or not the consented to the new route.

[67] Consent or acquiescence under pressure or in the face of a fait accompli is really no consent at all. As stated sagely by Millett L.J. in **Jaggard v. Sawyer** [1995] 2 All E.R. 189, at page 209 d-g:

"In considering whether the grant of an injunction would be oppressive to the defendant, all the circumstances of the case have to be considered. At one extreme, the defendant may have acted openly and in good faith and in ignorance of the Plaintiff's rights, and thereby placed himself in a position where the grant of an injunction would either force him to yield to the plaintiff's extortionate demands or expose him to substantial loss. At the other extreme, the defendant may have acted with his eyes open and in full knowledge that he was invading the plaintiff's rights, and hurried on his work in the hope that by presenting the court with a fait accompli he could compel the plaintiff to accept monetary compensation. Most cases, like the present, fall somewhere in between.

In the present case, the defendants acted openly and in good faith and in the not unreasonable belief that they were entitled to make use of Ashleigh Avenue for access to the house that they were building. At the same time, they had been warned by the plaintiff and her solicitors that Ashleigh Avenue was a private road, that they were not

entitled to use it for access to the new house and that it would be a breach of covenant for them to use the garden of No. 5 to gain access to No. 5A. They went ahead, not with their eyes open, but at their own risk. On the other hand, the plaintiff did not seek interlocutory relief at a time when she would almost certainly have obtained it. She should not be criticised for that, but it follows that she also took a risk, viz that by the time her case came for trial the court would be presented with a fait accompli..."

[68] In my judgment, the Owners really ultimately agreed to accept compensation only after being presented with the new route already being embarked upon by JPS. They only agreed to waive their rights, or acquiesce in JPS implementing, maintaining and operating the new route on a conditional basis. That basis was that JPS should compensate them reasonably. The Owners have really been somewhat dilatory and in their efforts to have the matter adjudicated, allowing many years to pass before actively pursuing the matter through the courts. In my judgment, this simply means that the Court would not exercise its discretion to grant injunctive relief. In **Halsbury's Laws of England,** 4th Edition, Reissue, Volume 12(1) , under the subject "Damages", at paragraph 1123, under the heading **" The jurisdiction to award damages in addition to or in substitution for an injunction"** it is stated :

"Acquiescence may be an entire bar to all equitable relief or a ground inducing the court to award equitable damages. Thus the plaintiff's failure to seek interim relief may well induce the court to refuse an injunction and award damages."

[69] Also of relevance on this point is the decision of the Judicial Committee of the Privy Council in **Pell Frischmann Engineering Ltd. v. Bow Valley Iran Ltd. et al** [2009] UKPC Case ref. 45, at paragraph 54. In my judgment, the Owners in this case should be left to their remedy in damages. However, this remedy would be damages in lieu of an injunction, and hence equitable relief, and not relief at common law. This is because I think that the Owners did strenuously oppose the re-routing. However, the manner in which JPS approached the situation forced them to consider other options such as compensation. I do not think that the Owners ought to suffer because they took notice of, the pleading and insistence by JPS. Nor should the fact that they were influenced by JPS stressing their need to complete the project and their characterization of the Owners' objections as being against the national interest-see paragraphs 18-22 of Ms. Clare's Witness Statement, operate against them.

(c)Whether JPS had reasonable cause in 1994 to reject the Claimants' offer of $3.5 Million.

[70] It does appear as if neither party really made much of an effort to initiate the procedure provided for in the Grant for arbitration or in section 42 of the Act to determine the compensation. The Valuation Report by C.D Alexander & Co. date of inspection, January 1995, assessed fair compensation as $257,000.00. This Report was exhibited to the Witness Statement of Mr. Gordon. However, this measure appears to have been premised upon some sort of rental value based upon the area occupied by the land where the proposed easement would be, including where tower and lines would run. This Report does seem to me to have been more a measure of what a reasonable cost for an easement along these lines would have been. It does not seem to have addressed the question of any diminution in value of the property. On the other hand, given the fact that in March 2011, many years after the initial issue had arisen, Allison Pitter & Co., retained by JPS, was assessing the diminution in value at between $1,000,000.00 to $1,100,000.00, and D.C.Tavares & Finson, retained by the Owners in October 2010 assessed the diminution in value at between $2,200,000.00 to $5,500,000.00, it does seem that the figure of $3.5 Million proposed by Ms. Clare in her letter of November 30 1994, may well have been a little high if diminution in value were the only basis of compensation to which the Owners should be entitled. However, it seems to me that JPS was approaching the matter simply as if they were pricing a mutually agreed route, which this clearly was not. In my view, JPS did not take a reasonable approach in dealing with the figure of $3.5 Million put on the table by the Owners. Indeed, Mr. Gordon was only prepared to offer $100,000.00, or at any rate, started the negotiations ball rolling, at a compensation range which was in my view clearly inadequate.

(d)If the issue at (a) or (b) above are decided against JPS, what is the appropriate measure and basis upon which to assess the quantum of damages to be awarded to the Owners.

[71] I have in fact decided issue (a) against JPS and thus the question is, having decided that the Owners are not entitled to injunctive relief, and that damages should be awarded in their favour, what should be the measure of damages.

The way-leave cases provide some guidance on this issue. In my judgment, although JPS has been guilty of a breach of the contract of easement, the grant, the loss here really falls to be treated on the basis of trespass to land. This is because the loss and damage occasioned to the Owners arises outside of the subject of the contract. One of the contracting parties, JPS, has wrongfully, and in breach of the Grant, sought to unilaterally vary the contract. In so doing, JPS'

actions are unauthorised by the Grant and they have committed trespass to the Owners' land. Hence, the loss here is to be calculated on a tortious measure of damages. Many cases have been cited to me by both sides, and it would be impossible, and indeed, unnecessary for me to refer to all of them. However, I found the cases of **Stoke-on-Trent City Council v. W.& J. Wass Ltd.** [1988] 1 W.L.R. 1406, cited by Counsel for JPS, particularly useful, as well as **Jaggard v. Sawyer and another** [1995] 2 All E.R. 189, which was cited by both sides. Both cases consider **Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.** [1974] 2 All E.R. 321 upon which Mr. Watson relied quite heavily. I have decided that the **Wrotham Park** principles are not the ones to be applied here. Rather, it is the principle in the way-leave cases, in particular the approach taken in **Whitwham v. Westminster Brymbo Coal and Coke Co.** [1896] 2 Ch. 538, that is applicable. This is because the factual scenario in this case, albeit it does involve the court considering what it should assess as damages in lieu of a permanent mandatory injunction, as was considered in **Wrotham Park**, is closer to the way leave cases and trespass to land than the breach of restrictive covenant which was under consideration in **Wrotham Park**.

[72] In **Stoke-on-Trent**, at page 1410 G-1411E, and 1412D, Nourse L.J., sitting in the English Court of Appeal summarizes thus:

"The general rule is that a successful plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages. A second general rule is that where the plaintiff has suffered loss to his property or some proprietary right, he recovers damages equivalent to the diminution in value of the property or right. The authorities establish that both these rules are subject to exceptions. These must be closely examined, in order to see whether a further exception ought to be made in this case.

The first and best established exception is in trespass to land. It originated in the way-leave cases, where the defendant trespassed by carrying coals along an underground way through the plaintiff's mine. Although the value of his land had not been diminished by the trespass, the plaintiff recovered damages equivalent to what he would have received if he had been paid for a way-leave: see *Martin v. Porter* (1839) 5 M. & W. 351; *Jegon v. Vivian* (1871) L.R. 6 Ch. App. 770. The principle of those cases was applied in *Whitwham v. Westminster Brymbo Coal and Coke Co. Ltd.* [1896] 2Ch. 538, where for six years the defendants had trespassed by tipping refuse from their colliery onto part of the

plaintiff's land. The official referee found that the defendants had thereby rendered the whole of the land valueless for any but tipping purposes and he assessed its diminution in value at £200. But the plaintiffs contended that the proper measure was the reasonable value to the defendants of the land for tipping purposes and the official referee found that on that footing the damages were £963. It was held by Chitty J. and this court that as to that part of the land which had been used for tipping the defendants must pay on the footing of the value of the land to them for tipping purposes, but without interest; and as to the rest of the land that they ought to pay on the diminished value of the land to the plaintiffs. That decision was applied by Lord Denning M.R. , sitting as a judge of the Queen's Bench Division in *Penarth Dock Engineering Co. Ltd. v. Pounds* [1963] 1 Lloyd's Rep. 359 and by this court in *Swordheath Properties Ltd. v. Tabet* [1979] 1 W.L.R. 285. In the latter case it was held that a defendant who had occupied residential premises as a trespasser was liable to pay damages calculated by reference to the ordinary letting value of the premises even where there was no evidence that the plaintiff could or would have let the premises to someone else. With the partial exception of *Whitwham's* case, all those were cases where the plaintiff had suffered no loss.

The second exception is in detinue.....

(1412D)**..... The third exception is in infringement of patents....."**

Then at page 1412 H-1413C and 1413 F-1414B, his Lordship stated:

"To these exceptions to the general rules in tort must be added the decision of Brightman J. In *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. .....* In that case the first defendants had erected houses and constructed roads in breach of a restrictive covenant which was binding on them and other defendants who had purchased houses from them. The writ was issued shortly after building works were begun, but the plaintiffs did not seek an interlocutory injunction to restrain them. By the date of the trial the works had been finished, the purchases completed and the purchasers had moved in. The plaintiffs sought a mandatory injunction for the demolition of the buildings. Brightman J. held that there was jurisdiction to grant such an injunction, against the first defendants in respect of the roads and against the defendant purchasers in respect of the houses. But he declined to do so. He then considered what damages should be awarded in substitution for injunctions under the Chancery Amendment Act 1858 (Lord Cairn's Act). Notwithstanding the fact that there had been no diminution in the value of

the plaintiff's land to which the benefit of the covenant was annexed, and founding himself on the trespass, detinue and patent infringement cases, he awarded the plaintiffs damages equivalent to the sum which they might reasonably have demanded as a quid pro quo for relaxing the covenant had the first defendants applied to them for relaxation.....

(1413F)

That was a case (Wrotham) **where the plaintiffs had suffered no loss.**

The same approach to the assessment of damages awarded in lieu of a final injunction was adopted by Graham J. In *Bracewell v. Appleby* [1975] Ch. 408 (where the burden of an easement was wrongfully increased) and by Millet J. in *Carr-Saunders v. Dick McNeil Associates Ltd.* [1986] 1 W.L.R. 922 (where a right to light was wrongfully obstructed). In each of those cases the plaintiff's case lay in nuisance, of which tort damage is an essential ingredient. Indeed, it is clear that in each case the plaintiff had suffered loss and was therefore entitled to substantial damages.

As I understand these authorities, their broad effect is this. In cases of trespass to land and patent infringement and in some cases of detinue and nuisance the court will award damages in accordance with what Nicholls L.J. has aptly termed "the user principle". On an analogous principle, in a case where there was a breach of a restrictive covenant the court has, in lieu of a permanent mandatory injunction to restore the breach, awarded damages equivalent to the sum which the plaintiffs might reasonably have demanded for a relaxation of the covenant. But it is only in the last-mentioned case and in the trespass cases that damages have been awarded in accordance with either principle without proof of loss to the plaintiff. In all other cases, the plaintiff having established his loss, the real question has not been whether substantial damages should be awarded at all, but whether they should be assessed in accordance with the user principle or by reference to the diminution in value of the property or right. In other words, these other cases are exceptions to the second, but not to the first, of the general rules stated above."

[73] The importance of the decision in **Whitwham** in my view is that it recognises that in the circumstances of that case compensation arises under two heads. This is because the landowners have been injured in two ways. Firstly, they have had the value of their land

diminished. Secondly, they have lost the use of their land, and the defendants have had it for their own benefit. –per Lindley L.J. page 541.

[74] However, it is important to note that in the instant case, there has, as Mr. Batts and Mrs. Silvera submitted, been no evidence presented such as to apply the user principle. There has not been any evidence proferred as to what is the benefit/value to JPS as regards the purpose to which the land was put. To that extent, therefore, i.e. a want of evidence, those tort cases applying the user principle, and those cases applying **Wrotham Park** , and the more recent cases such as the decision of the Judicial Committee of the Privy Council in **Pell Frishchmann Engineering Ltd. v. Bowvalley Iran Ltd. et al** (2009) U.K.P.C. Case Ref. 45, are of no real assistance. In the latter, at paragraph 49 of the judgment delivered by Lord Walker, it was stated:

"Several of the recent cases have explored the nature of the hypothetical negotiation called for in the assessment of *Wrotham Park* damages. It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored: *Wrotham Park* at p. 815, *Jaggard* at pp 2882-283."

[75] No evidence has been presented upon which one could flesh out what such a hypothetical negotiation would reasonably have yielded. No evidence has been presented as to the value/benefit of the land for the purpose JPS used it for.

[76] Mr. Watson, in his submissions, has referred to paragraph 12 of Mr. Gordon's Witness Statement, where Mr. Gordon says that the reconstruction and relocating of the towers and equipment would cost an estimated U.S.$ 6.9 Million. Counsel sought to argue that (paragraphs 217, 218, 221 and 223 in particular), that applying, **Wrotham Park** , "it is clear that the Ancillary Defendant would have negotiated from the perspective that JPSCO hopes to gain by saving the cost of relocation of its lines and it would have been prepared to pay a premium price in order to keep them." Mr. Watson submits that the Court should make an award of US $6.9 Million or a premium calculated with reference to that amount. One of the suggestions is to use a 20 % premium, which would be in the region of US$1.38 Million. I am of the view that this premise is faulty. The cost of relocation cannot equate to the value/benefit to JPS of using the land. This is a completely different piece of information.

[77] Further, this case has a unique twist. This is not a case where the Owners were never going to have transmission lines traversing their land. Indeed, they had agreed to such an occurrence under the Grant. Thus, JPS would have been using some portion of the Owners' land to obtain value/benefit even if they had stuck to the original route. The use of the altered route area therefore does not amount to exploitation in the same degree, as would have otherwise been the case had they trespassed in circumstances where there had never been an easement agreement. This seems to me to be all the more reason why the cost of relocation cannot assist as to the proper measure of damages.

[78] I found it interesting to observe how very differently all of the valuators and assessors have approached the matter. I will set out the main ones below in summary:

(a) Valuation by C.D.Alexander January 1995, on basis of rental value, Fair Compensation $257,000.00.

(b) "Letter of Opinion" by DC Tavares Finson October 2004,
Reduction in value of property-$1,500,000.00-$2,500,000.00.
Cost to relocate the residence on another portion of the property-$11,600,000.00

(c) Valuation by Edwin Tulloch-Reid & Associates- dated February 2008

" PURPOSE OF VALUATION

To determine the value of easement and the amount of compensation payable for the procurement of easement over the subject property by the Jamaica Public Service Company Limited"

Value of Corridor including Tower Site (after adjusting for Owner's continued use of land falling within the easement corridor----------$ 175,000.00

Assessment of Compensation

Compensation includes

i)	value of land on which Tower #66A is located	$ 50,000.00
ii)	corridor (100 feet wide) over which the transmission lines run	$ 375,000.00
iii)	diminution in the value of the dwelling house with curtilage (approximately 1 acre) due to the relative proximity of the transmission lines, that is,	

value of dwelling house 'before & after' procurement
of easement for the transmission lines;
assume a value for house with curtilage of $7.5 M
before easement $ 1,125,000.00
Total **$1,550,000.00**

(d) Reports of D.C Tavares & Finson October and December 2010
Without high tension wires passing very close to residence-
Value of property- $15,000,000.00-$16,000,000.00
High tension wire has direct influence on overall value of
Property, therefore current market value- $10,500,000.00-
$12,800,000.00
Reduction/Diminution in Value **$2,200,000.00-$5,500,000.00**

Replacement cost to relocate dwelling house
On another portion of the property **$20,000,000.00**

(e) D.C.Tavares Finson Letter 11th April 2011-

(f) Compensation based on value of rental/lease of Tower in perpetuity
Drawing analogy to cell phone rentals
Computation of Accumulated Rental for Tower from 1994 to 2011,
including interest **$29,229,345.00**
Present value of Tower Rental in Perpetuity **$ 25,500,000**

(g) Reports of Allison Pitter and Co. March and June 2011

In the March Report, Mr. Lloyd Davis had stated the probable
diminution in value to be **$1,000,000.00-$1,100,000.00.** However,
Mr. Davis had not stated the market value of the property on
the assumption that the easement did not exist.
In the Report or Addendum, or letter of June 2011, Mr. Davis
states that his company's assessment of the value of the property
on the assumption that the easement did not exist is $15,000,000.00-
$15,500,000.00. In its current state, with the easement, expected market
Price would be in the order of $14,000,000.00-$14,400,000.00.

[79] In the letter dated June 2011, Mr. Davis states as follows with regard to the findings of D.C Tavares Finson & Co :

> **" The findings of the Valuer from D.C.Tavares Finson & Co. appear to concur substantively with ours in terms of the inventory, physical characteristics and the subject of the material negative effects of the easement, that is, its presence in proximity to the house. However, it is our considered opinion that having observed this, the level of depreciation should not apply evenly across the whole land. Hence, it is our opinion that of the One Million One Hundred Thousand dollars ($1,100,000.00) diminution in value of the property some Eight Hundred and Fifty to Nine Hundred Thousand Dollars ($850,000-$900,000) applies to the house and assumed curtilage and the other approximately Two Hundred Thousand Dollars ($200,000) would apply to the remainder of the property.**
>
> **With respect to the calculations of rents for the Tower Site, even though we consider the imput of rental values somewhat high given the comparison with Cell Sites which are rented on shorter terms, we hold that this approach is inappropriate given that the easement grants permission or licence to perform certain acts including the construction of Towers. Hence to assume a rent for the Tower site would be double counting."**

[80] In my judgment, the approach taken by Allison Pitter & Co. is to be preferred to that taken by D.C.Tavares Finson & Co. for a number of reasons, save that I am of the view that the latter Report's conclusion that the line was within the curtilage was correct:

(a) It does seem logical that the level of depreciation and diminution in value would be higher relative to the house and curtilage rather than across the whole land evenly.

(b) Tavares Finson took into account ;

- (I) Health fear factors;
- (II) Closeness of wires to the house;
- (III) Projected earnings from an aborted ecotourism project.

[81] The issue of health appears to have been based upon mostly speculative considerations. Even if Tavares Finson is correct and that, real risk-factor or not, there is a negative impact on saleability of the property it would appear they treated it as too significant a

factor in reducing the value of the property. At page 5 of the Report, it is stated: “What, in our opinion, has a significant influence on the overall value of the property, is the present location of the tower/line, right beside the dwelling. This, in our opinion has had a very negative effect on the desirability of the property and the fact that the power lines run just a few metres away effect on the desirability of the property and the fact that the power lines run just a few metres away are not only an aesthetic problem but also a health hazard, whether perceived or actual.”

[82] It would appear that Mr. Downs’ report was predicated on an erroneous estimate of the distance from the house. In cross examination Mr. Downs admitted that his report estimated the distance at 10 metres (approximately 30 feet) from the house, when in fact, the closest distance to the house, as ascertained by the very detailed report of Mr. Earle Spencer, Commissioned Land Surveyor, dated November 2010, is that the nearest set of wires to the building are 23.2(approximately 76 ft.) away. On the other hand, I do accept that in fact the line does fall within the curtilage.

[83] Mr. Downs also increased his assessment of compensation payable to take into account the Clares’ ecotourism project. I am prepared to accept Ms. Clare and Mr. Richardson’s evidence that this project was a reality, and indeed, that, as stated in paragraph 12(h) and 15 of the Amended Counterclaim to Ancillary Claim, the Owners presented a detailed business plan including a five year financial projection to JPS. Further, that JPS admitted to having misplaced this Business Plan, which is quite outrageous. However, I agree with JPS’ submissions that the Owners have failed to prove that the new route for the wires reasonably or on a balance of probabilities caused the abandonment of this project. It is significant that the evidence from all parties, including the expert called on behalf of the Owners, Mr. Downs, is that the presence of the wires does not affect the ability to cultivate gardens and reap fruit. Nor does it impact the operation and presence of the Mill. I accept that the lines for the most part traverse the grave site, family plot, and the gully and the least desirable portion of the property of 71 acres-Allison Pitter Report. Mr. Downs agreed in cross-examination that the line traverses the most undesirable portion of the property and that the presence of the graves would have a depressing effect on the market value of the property. The visitors who signed the visitor’s book, which was an exhibit, clearly enjoyed the Owners’ property. They mainly spoke of the fruits, the gardens and the hospitality. None of them, as Mr. Batts and Mrs. Silvera pointed out in their written submissions, spoke of the view of the sea. Thus, these visitors’ ability to enjoy the property has not been proven to have been destroyed or diminished. There has been no independent expert opinion for example, from a tourism consultant or project appraiser to say

that they advised the Owners not to proceed with the venture due to the presence of the lines. Nor, importantly, was there evidence as to the feasibility of such a project. I accept Mr. Davis' evidence that there are a number of similar properties in the area and that over time and in Jamaica, a number of eco-tourism projects have been tried and failed. It is not as if the evidence shows that this project has been tried and failed, and nor has there been any effort to mitigate by establishing the alleged proposed cabins elsewhere on this large property. I agree with Counsel for JPS that the ecotourism venture is too remote and has not been established.

[84] The assessment basis of the cost of relocation of the house is to my mind completely inapplicable. I accept as logical and convincing, Mr. Davis' evidence in amplification on this issue. Mr. Davis stated that what one is seeking to determine is the compensation for a loss suffered. It therefore seems to him that the correct approach is to try and establish what is the diminution in the value of land arising from presence of those lines. As a result, he would not support the idea of a relocation because that is a separate matter altogether unless it could be established that the residence is no longer suitable to be used as a residence or its use has been so impaired that in order to justify compensation the occupier would have to move. In any event, in those situations one would have to value the structure that exists in order to achieve compensation.

[85] With respect to the calculations of rents for the Tower Site carried out by Mr. Downs, I agree with, and accept Mr. Davis' view that this approach is inappropriate given that the easement grants permission or licence to perform certain acts including the construction of Towers. Hence to assume a rent for the Tower site would be double counting. It also cannot be forgotten that in fact the Owners had in fact contracted with JPS for an easement. And the Grant referred to JPS' power to erect Towers, albeit the Plan 16072 did not have any indication of a Tower on the Owners' land.

[86] In their submissions, JPS' Attorneys argued(at paragraph 34 of their written submissions) that in assessing what is a reasonable sum to compensate the Owners that assessment should be at the date when they lost their rights which was at 1994 or 1995 when it was valued at $257,000.00. From this, they submit, is to be subtracted the $21,000.00 already paid. However, in my judgment, the correct value to be used is not that at the date of loss, but the date of judgment, or in any event, as close as possible thereto, which in this case is the assessment of diminution based on a value of $15,000,000.00-$15,500,000.00 in March 2011

by Allison Pitter & Co, with which D. Tavares Finson & Co. more or less agreed. This is because here, the Court is granting damages in lieu of a perpetual mandatory injunction. Therefore damages under this Court's equitable jurisdiction may take account of the future as well as the past since the court can assess damages as at the date when a mandatory permanent injunction could have been ordered –see **Jaggard v. Sawyer** [1995] 2 All E.R. 189, at 211 and **Wroth v. Tyler** [1973] 1 All E.R. 897, therein referred to.

[87] In my judgment, the approach taken by Edwin Tulloch-Reid and Associates has much to recommend as a base for assessing compensation, save for the calculation of diminution in value of the property only being applied to the dwelling house and curtilage of approximately one acre which was assumed as being only $7.5 Million in 2008. It is not clear to me exactly how that one acre value would relate to the total value of the property assesses by Allison Pitter & Co. and by Tavares Finson & Co. of $15M-$15.5M in 2011 and 2010 respectively.

[88] The reason that I think that the Edwin Tulloch-Reid and Associates approach is to be recommended is because, not only have they assessed the diminution in value of the rest of the land, but they have also assessed the value of the easement. In this case, as stated before, there is no evidence that has been presented in relation to the benefit or value of the land to JPS for the purpose for which it is being used. 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. In the pricing of the Grant of easement, and the Owners agreeing to the $21,000.00, it seems clear that that sum was not predicated on any percentage of profit of JPS. In **Whitwham**, in addition to awarding damages for the diminution in value of the rest of the land, the court was able to award on the basis of the value of the piece of land the use of which was lost to the Owners on the basis of the benefit or value to the trespasser. Here, as appropriately assessed by Edwin Tulloch-Reid and Associates, what falls to be valued is the value of the easement corridor, plus the diminution in value of the rest of the land. If a higher value is taken for the purposes of calculating the diminution, or if the diminution factor is applied across the property, (but not evenly, as recommended by Allison Pitter, and accepted by this court as the correct approach), and further, it is taken into account that the line traverses the curtilage of the dwelling house and

appurtenant buildings, then a compensation figure closer to the lower to mid- range of the assessment by Tavares Finson & Co would be approached.

[89] In my judgment, damages for trespass to land should be assessed in favour of the Owners the Ancillary defendants on their Counterclaim to Ancillary Claim in the sum of Three Million Seven Hundred and fifty dollars, including damage to crops and trees, subject to deduction of the sum of $21,000.00 already paid in respect of the Grant.

[90] The Owners have also sought aggravated and exemplary damages awards from the Court. It is clear, that if damages were being awarded for breach of contract there could be no award of aggravated damages- see paragraph 1112 of **Halsbury's Laws of England**,4th Edition Re-Issue, Volume 12(1)-Damages. However, aggravated damages can be ordered in actions for trespass to land. At paragraph 1114 of the **Halsbury's**, it is stated:

> **"Aggravated damages in tort. In actions in tort, where the damages are at large, the court may take into account the defendant's motives, conduct and manner of committing the tort, and, where these have aggravated the plaintiff's damage by injuring his proper feelings of dignity and pride, aggravated damages may be awarded. The defendant may have acted with malevolence or spite or behaved in a high-handed , malicious, insulting or aggressive manner. ....**
>
> **Aggravated damages are designed to compensate the plaintiff for his wounded feelings; they must be distinguished from exemplary damages which are punitive in nature and which may be awarded only in a limited category of cases...."**

[91] In my judgment, JPS has aggravated the Owners' damage. They have committed this trespass by proceeding about the re-routing of the transmission lines in a bizarre, slip-shod, unprofessional, high-handed, reckless, and aggressive manner. The conduct of this utility company has been abusive of the rights of the Owners and completely irresponsible in at least the following ways:

(a) It has approached the question of contractual relations and agreement in a capricious and reckless manner.

(b) JPS made the preposterous mistake of concluding that where they proposed to build or did build the imposing steel Tower was on a neighbour's land when instead it was in fact located on the Owners' Land.

(c) JPS commenced and/ or rushed on with the new Route without securing the agreement of the Owners so as to finish the erection for its own financial gain and purposes.
(d) JPS personnel gave the owners no proper notice before embarking on an alternate route.
(e) They tore down fences and erected the steel tower through areas which were not rights of way, or authorised access ways.
(f) To this date JPS have never produced to the Owners the alleged Environmental Impact Assessment ("EIA") upon which JPS purported to act by necessity and because of expediency.
(g) They have inexplicably lost/misplaced many documents pertaining to this case, including Valuation Reports, the Owners' Business Plan and the EIA.

[92] Such behaviour on the part of JPS must have caused the Owners stress, worry, distress and anxiety. Further, in addition to the direct damage to the Owners' property, as JPS' Counsel indicate in their written submissions, it is admitted that the lines are visible from the Owners' dwelling house. Indeed, although in Allison Pitter's Report it is stated that the line is not negatively impacting the land in any substantive way so far as its use as agricultural land is concerned, the Report goes on to state that the line's " presence is most apparent from the immediate curtilage of the house." It is obvious that this is extremely distressing to Ms. Clare and her husband. Indeed, I accept Ms. Clare's evidence that in the initial negotiations carried out on behalf of JPS by Mr. Kassim, it was made clear that the line was not to be visible from the house. Indeed, JPS did not call Mr. Kassim as a witness. By the time of trial he was no longer employed to JPS. Mr. Gordon, who was himself no longer employed to JPS at the time of giving evidence admitted in cross-examination that he was not there when Mr. Kassim negotiated the original Grant. Further, that he was unable to contradict Ms. Clare's evidence that it was verbally agreed between herself and Mr. Kassim that the lines and apparatus should present no visible obstruction to her view, and should not be seen from the house. Under this head of inconvenience and distress I am of the view that the Owners are entitled to considerably more than the figure of $100,000.00 suggested by Counsel for JPS as damages under this head. I think that this aspect of the matter can be covered under the head of aggravated damages.

[93] In addition, I am of the view that the whole trespass and adverse effect on the aesthetics of the property, and the tarnishing of the view from the dwelling house by virtue of the lines,

must be seen against the backdrop of this being the Owners' ancestral home. There is plainly great sentimental value attached to the property. Indeed, as Ms. Clare repeatedly points out in her Witness Statement, and which has not been disputed by JPS, her grandfather Dougal Campbell worked long and hard to make the property what it was; a farm with history, with various plants and trees in a relatively unspoilt setting. Ms. Clare even alludes to the fact that her grandfather in his Will expressed the desire that the property not be sold after his death. JPS must contend with the circumstances and characteristics of the Owners and their unique attachment to the property as they exist.

[94] The Owners are in my view entitled to a substantial award for aggravated damages. In my judgment, aggravated damages can properly do what the law needs to do as discussed in **Rooks v. Barnard** [1964] 1 All E.R. 367, and in this case it would not be appropriate to award exemplary damages. As JPS was clearly setting about its actions motivated by profit-making concerns and purposes, my view as to the appropriateness of exemplary damages may well have been different were it not for the existence of the original Grant of Easement freely and voluntarily entered into by the Owners.

APPLICATION TO ADDUCE EVIDENCE AFTER DRAFT JUDGMENT HANDED DOWN

[95] On the 8th of February 2013 I handed down a draft judgment in favour of the Owners, the Ancillary Defendants. Copies of the draft were distributed to the Attorneys-at-Law for the respective parties for the limited purposes of considering the wording of some of the orders, what was then specifically paragraph 95(5) and 95(6), now paragraph 110(5) and (6), and also for the purpose of correcting or pointing out any obvious typographical and/or grammatical or drafting errors.

[96] Some time after I had handed down Judgment in draft on the 8th February 2013, Mr. Watson indicated that he wished to make an application to adduce further evidence. The application was formally filed on the 21st of February 2013 and seeks "..... an order granting the Ancillary Defendants leave to adduce evidence limited to the assessment of damages in relation to damage or destruction of trees and crops by the Ancillary Claimant its servants agents in the course of erecting transmission lines and pylons over or upon the Ancillary Defendants lands at part of Rock Spring in the Parish of Hanover registered at Volume 1347 Folio 872 of the Register Book of Titles."

[97] The stated grounds of this very unusual application are as follows:

" i) The question of damages flowing from the construction of the said pylons and transmission lines across the Ancillary Defendants said property was always pleaded by both parties and loss to the Ancillary Defendants can be taken as given and admitted.

ii) The quantum of loss flowing from such admission of liability has never been established before the Court as no evidence has been given in this respect by either party.

iii) The Ancillary Claimant has pleaded loss of $750.00 which was denied by the Ancillary Defendants in their Defence and issue was clearly joined by the parties.

iv) There can be no prejudice to the Ancillary Claimant if this head of damages were to be assessed at this time which could not be compensated for by an award of costs, particularly as this is not a head of claim to which they could claim to be taken by surprise.

v) If damages under this head are not assessed there is a real danger that the Ancillary Defendants will be deprived of damages and that no evidence was presented under this head.

vi)The quantum of particulars of the Ancillary Defendants claim for damages was contained in a schedule to correspondence between the parties which was not admitted in evidence amongst a bundle of correspondence between the parties exchanged in the course of negotiations and by the oversight of the Ancillary Defendants it was not introduced in the viva voce evidence of the 2nd Ancillary Defendant who had prepared the schedule."

[98] The application was supported by an Affidavit by Marcia Clare sworn to on the 15th March 2013. Ms. Clare's affidavit, amongst other matters, states the following:

> "5. It has been a feature of this case that no evidence was led by either party as to the value of the trees and crops damaged.
>
> 6.On the part of my mother and myself, this was an oversight. The oversight occurred in circumstances where during the course of negotiations which spanned over a decade I had compiled a schedule of the trees and crops which were damaged by the contractors, agents or servants of Jamaica Public Service Company Limited and sent it to them.

.....

> 8. The correspondence comprising these negotiations were omitted from the relevant documents admitted in evidence by the oversight of both parties.

9. My Attorney-at-Law had indicated that he intended to put in evidence of damages generally through me at the close of Trial during what he indicated would be an assessment of damages. Unfortunately, the aspect of damages was not reserved for assessment as anticipated and the parties were required to make closing submissions earlier than he had planned."

[99] I really do not wish to spend a lot of time on the point, but I must say that I find it regrettable that anyone involved in this trial could have participated in it or alternatively have left with the impression that there would be some other date and time for assessing damages. The matter was fixed for trial once and for all, and that was supposed to be that, just like any other case set for trial. It is unfortunate that one could have felt that there would be room for coming back to prove damages regarding trees and crops when every effort was made by the Owners to prove and have assessed, other aspects of the claim, for example the value of trespass to the land. There would be no logical basis for carving out a special later date for the assessment of damage to trees and crops. It simply was not so. Whilst Mr. Watson indicates that in citing the **Wrotham Park** principles, this indicated that the issue of assessment of damages would be reserved, I do not agree. In any event, Mr. Watson concedes that he at no time made a formal application for any issue of assessment to be reserved. In addition, Mrs. Silvera agrees that the matter was simply fixed for trial with finality and has also been taken by surprise by the assertion that a further assessment of damages was contemplated. What is more, I have also already indicated that I am of the view that the **Wrotham Park** principles are inapplicable here. The possibility of my ruling this way was an obvious outcome and therefore all evidence relevant to the claims should have been led at the trial.

[100] Mr. Watson cited a number of authorities, including **Re Suffield & Watts, Ex parte Brown & Others** [1886-1890] All E.R. 276, and the decision of Anderson J. in **Caribbean Outlets Limited et al v. Mas Investments et al** consolidated with C.L.2002/M181, judgment delivered in or about November 2004, and cases therein referred to. Counsel made thorough submissions as to why his clients should be allowed to reopen their case for this limited purpose.

[101]The application was roundly opposed by Mrs. Gentles-Silvera on behalf of JPS. In comprehensive written submissions, Mrs. Silvera conceded that until an order is drawn up and sealed (perfected) a trial judge has jurisdiction to permit pleadings to be amended, to hear further evidence and to reconsider or review the judgment already given. This jurisdiction must be cautiously exercised and only in exceptional cases as it is in the interest of the public and the

interest of litigants that there should be a reasonable degree of finality in litigation. Counsel referred to a number of cases, including **Stewart v. Engel** [2000] 1 W.L.R. 2268, **Fisher v. Cadman** [2005] EWHC 2424; and **Navitaire Inc. v. Easyjet Airline Company Limited.** [2005] EWHC 282.

[102] In **Navitaire** it was held that the kind of factors to be taken into account when deciding whether or not to exercise the discretion to permit further evidence to be adduced after judgment are the same as those to be considered in an application to admit further evidence on appeal as established in the well-known case of **Ladd v. Marshall** [1954] 1 W.L.R. 1489. Only exceptionally should the court be prepared to accede to an application where the applicant cannot satisfy the conditions spelt out in **Ladd. V. Marshall**. In **Navitaire** reference was made to **Townsend v. Achilleas** (unreported: 1 July 2000) and **Charlesworth v. Relay Roads Ltd.** [2000] 1 W.L.R. 230 , where it was pointed out that in exceptional circumstances there might be a good case for the cautious application of a slightly more flexible test than when approached on appeal because the trial judge would have seen the witnesses and be in a better position to look at the evidence as a whole closer to the trial.

[103] In **Ladd v. Marshall**, Lord Denning M.R. stated at page 1491:

> **"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."**

[104] At paragraph 39 of **Navitaire** Pumfrey J. discussed the decision of Mummery L.J. in the unreported decision in **Townsend v. Achilleas** as follows:

"**39. Mummery L.J. emphasizes the dual requirements of caution and flexibility. The trial judge has a real advantage in assessing the impact of new evidence on the result of the case. At the same time, I do not regard the second *Ladd v. Marshall* condition as reduced in force. As this case illustrates, the potential consequences of admitting evidence may be serious. Witnesses will have to be recalled, further expert evidence assembled, and the factual basis for the judgment already delivered reviewed.**

The expense may be substantial. The other party in the litigation, who has *ex hypothesi* been successful thus far, is entitled to the satisfaction of knowing that the evidence could not have been obtained earlier when it is confronted with this additional burden."

[105] As to the first condition, I agree with Mrs. Gentles-Silvera that no evidence has been placed before the court to establish that the Owners could not have obtained for the trial the evidence of damages for the trees and crops destroyed. The pleadings by both parties spoke to this loss as did the evidence. In fact the evidence demonstrates that the Owners were aware that this was a loss that needed to be established and could have attempted to establish it but through oversight they failed to lead evidence as to the value of the loss. This is not a case where some new fact has been discovered.

[106] The second criteria examines whether the evidence was such that if given, it would probably have an important influence on the result of the case. The evidence if given may increase the quantum of damages already ordered by the court but it would not otherwise have any great influence on the result of the case. However, this factor overlaps with the third criteria, which has to do with apparent credibility.

[107] The original dispute in this matter arose from 1994, over 17 years before the trial. Regarding the third criteria that the evidence must be apparently credible, I agree with Mrs. Gentles-Silvera that the Reports by D.C.Tavares & Finson dated 29th October 2004 and 11th April 2011, under the signature of Mr. Mervyn Down, do state that he was unable to do a valuation in relation to the trees that were removed and destroyed because such a valuation would normally be done by an Agricultural Expert. One of the mandates of the April 2011 Report was specified to be for Mr. Down to clarify his earlier report of 1st December 2010 and in particular to provide a valuation of trees removed or destroyed when the tower and lines were erected. In the April 2011 report Mr. Down stated: "We understand that no detailed count or valuation was made at the time of the cutting of the "path" for the cable way so no appropriate compensation was made." Now Ms. Clare wishes to produce evidence from a list produced by her to her Attorneys-at-Law two years after Mr. Down's 2004 Report, and some twelve years after the incident. Further, Ms. Clare is not been proven to be nor has she been approved by the Court as an agricultural expert and she would be giving evidence that could possibly be viewed as self-serving. In the circumstances, it does seem that this evidence is not particularly credible, rendered at this stage. It would appear that even if the evidence that the Owners seek to

adduce was to be allowed, there is a strong possibility that it would not provide a proper evidentiary basis upon which the court could be moved to award more damages.

[108] At paragraph 14 of her written submissions Mrs. Gentles-Silvera makes one of the most persuasive points upon this issue and it has to do with the overriding objective set out in the Civil Procedure Rules 2002 "the CPR". The paragraph states, amongst other things, the following:

> **"Since the introduction of the Civil Procedure Rules the court is stipulated to give effect to the overriding objective in the exercise of its discretion (Civil Procedure Rules Rule 1.1 and 1.2). The overriding objective is to enable the court to deal with cases justly which includes saving expense, dealing with each matter fairly and expeditiously and allotting to each matter an appropriate share of the court**('s) **resources, while taking into account the need to allot resources to other cases. The court is no longer obliged to consider the position of the parties to the litigation alone but must also now consider the administration of justice as a whole. The Ancillary Defendants have received much of the court's time in this matter. This case originates from an easement entered into in 1994 in relation to which suit was filed in 2001 and the matter was tried in 2011 and Judgment was handed down in February 2013. This matter has been in the courts for twelve years. After a long trial comprising seven days with copious documentation and viva voce evidence, the Ancillary Defendants have had more than ample time to put in all of their evidence and ought not to be allowed at this stage to have a second bite of the cherry and reopen the case and adduce further evidence. It was their duty to bring forward their entire case which they could have done. It is in the public's interest and that of the litigants for there to be a reasonable degree of finality in litigation. To reopen the case at this stage would give the Ancillary Defendants more of the court's resources where we submit more than enough has been allocated to this case. Further, the fact that the litigation will be reopened if your Ladyship grants the application means inevitably witnesses will have to be called to give their evidence, which may include expert witnesses, who will then have to be cross-examined. Further, it may become necessary on seeing the witness statement or expert report, for the Ancillary Claimant to also call an expert or other witness to counter the evidence of the Ancillary Defendants. All of this will increase the cost of this litigation."**

[109] I could not agree with Mrs. Gentles-Silvera more. The Court's resources are spent, having already been stretched to the limits. Indeed, this case has even had the unusual history where the Ancillary Defendants had made a claim which was automatically struck out under an order of Edwards J. (Ag) (as she then was) pursuant to the Transitional Provisions of the CPR. By virtue of the same order the Ancillary Defendants were permitted to file a "Counterclaim" and the Ancillary Claimant was permitted to file a "Defence to the Defence and Counterclaim", all of which have been filed. Further, the jurisdiction to reopen a case and to allow a party to adduce fresh evidence must (with good reason) be cautiously and sparingly exercised. In my judgment, the Owners, the Ancillary Defendants have failed to satisfy the criteria laid down in **Ladd v. Marshall**. Thus although as the trial judge I may have had the advantage of looking at the evidence as a whole and to see whether I should allow for fresh evidence to be led that could avoid the expense and delay of an appeal, this case and the nature of the application involved do not warrant the exercise of this jurisdiction in favour of the Owners. It is true that as Mr. Watson submits, JPS had indicated its acknowledgement that it was bound to provide compensation in respect of the destroyed trees and crops, but this was long known to the Owners. Whilst JPS provided some figure or basis upon which the court could make an award, albeit a very small award, the Owners have through admitted inadvertence provided none. I have to bear in mind that this loss took place from as far back as 1994. This is not a circumstance where the powerful corporate entity, JPS has sought to extract some unfair advantage against the less powerful parties, the Owners. With all due respect, the Ancillary Defendants have on their side to own authorship for the situation. Indeed they have over-all done so. Inadvertence does happen from time to time, especially in a case as convoluted as this one. However, there are in my view no exceptional circumstances that would qualify the situation for permission where the factors outlined in **Ladd v. Marshall** have not been satisfied. Recent cases have pointed to the need for fairness to be considered not just in the interests of one party, but of all involved in the case. Further, whilst not the main factor, the needs of other litigants and their cases "waiting in the wings" of the court to be tried, have also to be taken into account. It is a difficult and delicate balancing exercise. The balance lies in favour of refusing the application set out in Notice filed February 21st 2013 on behalf of the Ancillary Defendants. In my judgment, there just simply is not a justifiable basis for allocating any more of the court's scarce resources to this case.

[110] There will therefore be judgment for the Ancillary Defendants on the Ancillary Claim, with costs to be taxed if not agreed. Further, there will be Judgment for the Ancillary Defendants on the Counterclaim, with damages for trespass to land assessed as follows.

(1)In respect of the value of the easement- $175,000.00, less $21,000.00 already paid, equals $154,000.00 ;

(2) In respect of the diminution in value of the land-$2,825,000.00;

(3) In respect of damage to crops and trees-$750.00,

Totalling **$2,979,750.00**

(4) Aggravated Damages- **$2,500,000.00**

TOTAL GENERAL DAMAGES -$5,479,750.00

With Interest on the Sum of $750.00 at the rate of 12 % per annum from 1st February 1995 to April 17 2013.

(5) Within 60 days of payment of compensation, damages and interest, the Ancillary Claimant and the Ancillary Defendants shall execute a Grant of Easement/ Right of Way/ Way-Leave Agreement being in respect of the Ancillary Defendants' lands comprised in Certificate of Title registered at Volume 1347 Folio 872 of the Register Book of Titles.

(6) Further to paragraph 5 above, the parties are to take all steps to facilitate the registration of an Easement/ Right of Way/ Way-Leave which accords with what is on the ground, and accords with the route traversed by the transmission lines and Tower, as a miscellaneous endorsement on the Title to the property pursuant to section 41 of the Electric Lighting Act.

(7) In the event that the Ancillary Defendants fail, neglect or refuse to execute the Grant of Easement/Right of way/Way Leave Agreement, the Registrar of the Supreme Court is empowered to execute on behalf of the Ancillary Defendants any and all documents required to be executed by the Ancillary Defendants for the purpose of giving effect to this Order.

(8) Permission granted to the parties generally to apply

(9) Costs to the Ancillary Defendants on the Counterclaim to Ancillary Claim to be taxed if not agreed.