JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV00077

APPLICATION NO COA2020APP00188

BETWEEN	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**APPLICANT**
AND	**ROSEMARIE SAMUELS**	**RESPONDENT**

Patrick Foster QC, Miss Tavia Dunn and Francois McKnight instructed by Nunes, Scholefield, DeLeon & Company for the applicant

Sean Kinghorn instructed by Kinghorn & Kinghorn for the respondent

24 November 2020 and 26 May 2021

IN CHAMBERS (BY TELECONFERENCE)

SIMMONS JA

[1] This is an application by the Jamaica Public Service Company Limited, the applicant, for a stay of the execution of the judgment of Nembhard J delivered in the Supreme Court on 25 September 2020, pending the outcome of the appeal in these proceedings. The application was supported by the affidavit of David Fleming filed on 23 October 2020 and his supplemental affidavit filed on 23 November 2020. The respondent, Rosemarie Samuels, opposed the application as set out in her affidavit filed 19 November 2020.

[2] On 24 November 2020, having heard counsel's submissions, I made the following orders:

> " 1. The application for a stay of the judgment of Justice Nembhard J dated 25 September 2020 is granted on condition that the appellant pays over to the respondent the sum of 20 million Jamaican dollars on or before 23 December 2020.
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> 2. The order for costs made in the judgment is not stayed and the respondent is permitted to proceed to taxation of those costs if they are not agreed.
>
> 3. Costs of this application to be costs in the appeal. "

[3] On that occasion, I indicated that my brief reasons in writing would be provided for my decision. This judgment is a fulfilment of that promise.

Background

[4] The applicant is the only entity licensed under the Electric Lighting Act which is authorised to generate, transmit, distribute and supply electricity in Jamaica. The respondent is the registered proprietor of property comprised in Certificate of Title registered at Volume 1213 Folio 789 of the Register Book of Titles, being, Lot 46 part of Rhymesbury in the parish of Clarendon ('the property').

[5] On 3 April 2008, the respondent filed a claim against the applicant claiming damages for trespass to the property. It was the respondent's complaint that the applicant trespassed on a portion of the property by unlawfully erecting and maintaining overhead power lines and poles across its perimeter. The respondent, in her affidavit filed on 19 November 2020, stated that prior to her acquisition of the property, she noted that the said overhead power lines and poles had been erected across the perimeter of the property. She later learnt that no easement had been granted to the applicant.

[6] It was also indicated in that affidavit that the respondent had purchased the property for the purpose of rearing chickens in "modernized chicken houses". The respondent indicated that the presence of the applicant's power lines and poles were not "of any great concern" to her until she tried to use the property for the purpose for which it was bought. Her evidence was that when she attempted to utilize the property as planned, she was prevented from doing so by representatives of the applicant. This

conduct, the respondent said, deprived her of the full benefit and enjoyment of the property in that she was constrained to construct four instead of six chicken houses. It was noted by Nembhard J that the loss being claimed by the respondent included: (i) future economic loss; (ii) loss of use of the property; (iii) loss of house appreciation; and (iv) flood protection.

[7] On 29 January 2010, F Williams J (as he then was) granted summary judgment in the respondent's favour as the applicant was deemed to have no reasonable prospect of successfully defending the claim. The applicant appealed. The appeal was refused on the basis that the document which authorized the applicant to enter the property was a contractual licence and had not been registered on the duplicate Certificate of Title for the property. As such, it did not bind the licensee's successors in title and the applicant lost its entitlement to occupy the property on its transfer to the respondent.

[8] The matter was subsequently set down before Nembhard J for damages to be assessed. On 25 September 2020, damages were assessed as follows:

> "(1) The Claimant, Rosemarie Samuels, is awarded Damages in Trespass against the Defendant, Jamaica Public Service Company Limited, in the sum of Sixty-Five Million Dollars ($65,000,000.00), with interest thereon at the rate of three percent (3%) per annum, from 9 April 2008 to the date hereof;
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> (2) The Claimant is awarded Damages against the Defendant in the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00), representing the market value of the area of the land situate at Rhymesbury, in the parish of Clarendon, being the land comprised in Certificate of Title registered at Volume 1213 Folio 789 of the Register Book of Titles, on which the Defendant's equipment was located, as at 20 April 2018, with interest thereon at the rate of three percent (3%) per annum, from 21 April 2018 to the date hereof;
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> (3) Costs are awarded to the Claimant against the Defendant and are to be taxed if not sooner agreed; a

(4) The execution of this Judgment is stayed for a period of twenty-eight (28) days from the date hereof; and

(5) The Claimant's Attorneys-at-Law are to prepare, file and serve the Orders made herein."

[9] The applicant, aggrieved by this outcome, filed its notice and grounds of appeal on 23 October 2020 seeking the following orders:

"a. The appeal is allowed.

b. The order that the Claimant, Rosemarie Samuels is awarded Damages in Trespass against the Defendant, Jamaica Public Service Company Limited, in the sum of Sixty-Five Million Dollars ($65,000,000.00), with interest thereon at the rate of three percent (3%) per annum, from 9 April 2008 to the date hereof be set aside.

c. Damages to be assess[ed] by this Honourable Court of Appeal.

d. That the costs of the Appeal [be awarded] to the Appellant/Defendant.

e. Such further and/or other relief as this Honourable Court deems just."

[10] The grounds of appeal are as follows:

(i) "The learned judge erred as a matter of fact and/or law in failing to consider that though the claim was for loss of use of land, occasioned by trespass, such a claim included a claim for loss of past income incurred to the date of the assessment and/or completion of the assessment of damages.

(ii) The learned judge erred as a matter of fact and/or law in finding that the claim for loss of past income was not a specie of special damages and consequently that the said claim for loss of past income need not be specifically pleaded.

(iii) The learned judge misdirected herself in awarding the sum of Sixty Five Million Dollars ($65,000,000.00) in that she

failed to indicate the basis upon which the said sum was arrived at in circumstances where such an award was not supported by the evidence.

(iv) The learned judge misdirected herself and/or erred in awarding interest on the sum of Sixty Five Million Dollars ($65,000,000.00) from April 9, 2008, in circumstances where she accepted the Respondent/Claimant's evidence that a fourth chicken house was built in 2017 and therefore, the irresistible inference from that evidence was that the Respondent/Claimant would only have been in a position to construct two additional chicken houses from 2017 onwards and consequently, any loss of past income could only have occurred from that year going forward.

(v) The learned judge erred as a matter of fact and/or law by failing to take into account the Respondent/Claimant's liability to pay income tax in assessing the damages for loss of income and any obligation to pay said tax would be the responsibility of the Respondent/Claimant as required by relevant legislation.

(vi) The learned judge [erred] as a matter of fact and/or law in failing to consider that the measure of damage for trespass to land is either diminution in the value of the land or the cost of reinstatement.

(vii) The learned judge having awarded a sum for the diminution in the value of the land misdirected herself in concluding that the Respondent/Claimant was entitled to a further head of general damage [sic] for loss of use in the sum of Sixty Five Million Dollars ($65,000,000.00)."

[11] On the same date, the applicant filed the notice of application for a stay of the execution of the judgment of Nembhard J. The grounds on which the application is based are as follows:

" a. Pursuant to Rules 2.10 (1) and 2.11(1)(b) of the Court of Appeal Rules, 2002, an application may be made to a single judge of the Court of Appeal for a stay of execution on any judgement or order against which an appeal has been made pending the determination of the appeal.

b. The stay is necessary to preserve the status quo and the Applicant's interest therein pending the determination of the appeal.

c. That the Applicant will suffer irreparable harm and loss if the stay of execution is refused since payment of the judgement sum at this stage would imperil the existence and validity of the Appellant company.

d. That if the judgement sum is paid to the Respondent and the Appellant is successful in its appeal, it is highly likely that it will not be able to recover the said judgement sum from the Respondent.

e. That the interest and administration of justice will not be compromised by the stay of the judgement pending the determination of the appeal.

f. That the Applicant has a real prospect of success in the appeal and it is in the interests of justice that the judgement of the Honourable Ms Justice A. Nembhard be stayed until this Honourable Court determines the appeal."

Proceedings in the court below

[12] At the hearing of the assessment of damages it was noted that the trespass had ceased on 11 October 2019. Two witnesses were called on behalf of the respondent and one called on behalf of the applicant. For the respondent, evidence was given by two actuaries who had been appointed as experts. Permission was granted for the Actuarial Report of the Estimate of Loss dated 27 February 2017 ('the actuarial report') to be admitted in evidence as an expert's report. At paragraph [10] of her judgment, Nembhard J indicated that the applicant did not present any evidence to contradict the findings in the actuarial report. A valuation report was received in evidence on behalf of the applicant.

[13] In her assessment of the damages, the learned judge identified three issues for her consideration. They were stated to be:

(i) What is the basis on which the court is to assess the quantum of damages to be awarded to the claimant?

(ii) What is the appropriate measure of damages to be awarded to the claimant? and

(iii) What weight, if any, is to be attached to the actuarial report and the valuation report?

[14] She treated with issue (iii) before embarking on an examination of issues (i) and (ii). The learned judge stated, quite correctly, that the court was not obliged to accept the views of an expert even where that evidence was not contradicted.

[15] Where issue (i) is concerned, Nembhard J examined the claims for loss of use of the property, loss of house appreciation and flood mitigation. She stated that in an action for trespass to property, where that trespass is proved, a claimant is entitled to recover nominal damages, even if he has not suffered any actual loss. Where he suffers loss or damage, he will be entitled to receive an amount that will compensate him for his loss. The learned judge also stated that where a defendant had used the claimant's land without his permission, the claimant is entitled to receive a reasonable sum for that use.

[16] In respect of issue (ii), the learned judge indicated that the actuarial report showed the estimated value of the lost opportunity to use the property for the purpose for which it was bought. She found that this was not an item of special damages as was argued by the applicant and as such, there was no requirement for that sum to be specifically pleaded. She also inferred that the respondent, having built two chicken houses in 2008, a third in 2013 and a fourth in 2017, would have been in a position to build the other two after 2017. She found that their construction would have resulted in "greater income" being earned by the respondent and that having been deprived of the full use of the property, the respondent suffered a loss of income as at 2017.

[17] The learned judge rejected the applicant's submission that in calculating damages, the Real Adjusted Net Income (real ANI) per square foot of chicken house, as at 2016 was to be used. The total loss of income based on the 2016 figure would have amounted to $31,296,000.00 for the years 2018 and 2019, before tax.

[18] The real ANI for the years 2008 – 2015 was considered by Nembhard J, who concluded based on that information, that the sum proposed by the applicant would have to be adjusted upwards. She found that an award of the sum of $65,000,000.00 before tax, for damages for trespass was appropriate. An award of $1,500,000.00, was made for loss of house appreciation based on the market value of the area of the property on which the power lines and wires were located.

Principles relevant to a stay of execution

[19] The jurisdiction of a single judge of appeal to grant a stay of execution is governed by rule 2.11(1)(b) of the Court of Appeal Rules, 2002 ('CAR'), which provides that:

> "A single judge may make orders…
>
> (a) …
>
> (b) for a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal."

[20] It is well established that the grant of a stay of execution is a discretionary power which is to be exercised having regard at all times to the interests of justice. The starting point in the determination of where the interests of justice lies, is the question of whether there is a good reason for a claimant to be deprived of the fruits of his judgment. As was explained by Morrison JA (as he then was) in **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16 ('**Channus'**) at paragraph [10]:

> " [10] The jurisdiction of a single judge of appeal to grant a stay of execution is, as Phillips JA observed in **Reliant Enterprise Communications Ltd v Twomey Group and Another** (SCCA 99/2009, App 144 and 181/2009, judgment

> delivered 2 December 2003, para [43]) 'absolute and unfettered'. The starting point is, in my view, the well established principle that there must be a good reason for depriving a claimant from obtaining the points of a judgment… It is, in my view, essentially a balancing exercise, in which the courts seek to recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay."

[21] In balancing the interests of justice, this court has explained that the essential question is whether there is a risk of injustice to one or both parties if it grants or refuses a stay. In resolving this issue, the court, is required to consider the questions set out in **Sagicor Bank Jamaica Limited (formerly known as RBTT Bank Jamaica Limited) v YP Seaton, Earthcrane Haulage Limited and YP Seaton & Associates Company Limited (Sagicor Bank Jamaica Limited) et al** [2015] JMCA App 18, at paragraph [51], which states:

> "[51] Some material questions identified by the authorities as having a bearing on this question of risk of injustice are as follows:
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> (a) If a stay is refused what are the risks of the appeal being stifled?
>
> (b) If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?
>
> (c) If a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?'"

[22] In **ADS Global Limited v Fly Jamaica Airways Limited** [2020] JMCA App 12, McDonald-Bishop JA, in addressing the applicable principles, stated:

> "[23] The law governing a stay of execution of a judgment is well-settled and, by now, fast becoming trite. There is, therefore, no need for any detailed exposition on the

> applicable law. It suffices to say that the liberal approach laid down by Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and another** [1997] EWCA 2164, has been consistently adopted and applied by this court. See, for instance, **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30. The proper approach, according to Phillips LJ in Combi is for the court to make the order which best accords with the interests of justice, once the court is satisfied that there may be some merit in the appeal.
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> [24] In **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3, Morrison JA (as he then was), having had regard to previous authorities, including, the well-known authority of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, stated that the threshold question on these applications is whether the material provided by the parties discloses at this stage an appeal with some prospect of success. Once that is so, the court is to consider whether, as a matter of discretion, the case is one fit for the grant of a stay, that is to say, whether there is a real risk of injustice, if the stay is not granted or refused."

[23] Based on the above cases, two questions arise in my consideration of whether a stay of execution ought to be granted. The first question is whether the appeal is one with some prospect of success. Secondly, I must determine whether the case is one fit for the grant of a stay, that is, whether there is a real risk of injustice if the stay is granted or refused.

Whether the appeal has a good prospect of success?

Applicant's submissions

[24] Counsel for the applicant, Mr Patrick Foster QC, indicated at the outset that he would not be pursuing ground (c) as, although the applicant will experience financial hardship if the judgment is not stayed, it will not be ruined. He then proceeded to give a brief outline of the facts of the case and made specific reference to the cessation of the trespass following the order of Nembhard J on 26 September 2019, permitting the applicant to remove its equipment from the property.

[25] It was submitted that in considering whether or not to grant an application for a stay of execution, the court is required to balance the respondent's right to enjoy the fruits of his judgment vis-a-vis the applicant's prospects of success on appeal, as well as the risk of injustice and/or irremediable harm to the parties. It was submitted that the court should first consider whether the appeal has a reasonable prospect of success and if the answer is in the affirmative, to make the order which best accords with the interests of justice. Reference was made to **Marilyn Hamilton v Advantage General Insurance Company Limited (formerly United General Insurance Company Limited)** [2019] JMCA Civ 48 and **Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ 2065, in support of that submission. This approach, it was submitted represented a departure from that in **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887, which required proof of ruin.

[26] It was, however, further submitted that the court, in its determination of whether an appellant has a reasonable prospect of success on appeal, must not readily scrutinize or dissect the grounds of appeal to determine if the appeal is of merit. Reference was made to paragraph [47] of **Reliant Enterprise Communications Limited v Twomey Group Limited and Infochannel Limited (Reliant Enterprise)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 99/2009, Application Nos 144 & 181/2009, judgement delivered 2 December 2009, where Phillips JA stated:

> "[47] … I am mindful of the caution given by McGaw LJ in the **Sewing Machines** case that it would be wrong for the court to give any view on the merit of the claims in fact or in law, at this stage of the proceedings, as the issues are the subject of appeal to the court and will have to be determined at a later date…McGaw L.J. stated:
>
> > 'The court, as I see it and as has, I think, always been its practice, is prepared to take into account on an application for a stay of execution on an appeal from the High Court or a county court a view that it may form as to whether the appeal is one that is wholly unmeritorious or wholly unlikely to succeed'."

[27] Secondly, the court must consider whether the appeal will be rendered nugatory if the stay is refused, thus destroying the substratum of the appeal. That is, would the refusal deprive the appellant of the results of the appeal if successful. If the refusal would have such an effect, the court should find in favour of granting the stay. Reference was made to **Polini v Gray** (1879) 12 Ch D 438 in support of that submission. Mr Foster also argued that if the payment of the judgment sum is not stayed and the applicant is successful in its appeal, it would be meaningless if the respondent disposes of same and the applicant is unable to recover it from the respondent. He submitted that it was risky to place such a large sum or a substantial portion of that sum in the hands of an individual before it is determined whether that person is entitled to it.

[28] It was submitted that the appeal has some prospect of success on the following grounds:

> (i) the judge erred in awarding $65,000,000.00 for loss of past income based on her finding that the respondent was unable to build the two additional chicken houses for the period 2018-2019 as a result of the applicant's trespass;
>
> (ii) loss of past income was an item of special damages, which needed to be specifically pleaded and proven and not general damages;
>
> (ii) the judge was incorrect to award interest on the sum of $65,000,000.00 for loss of income for the period 2008- 2019, despite having found that the loss occurred during the period 2018-2019, when the respondent would have been in a position to build the two other chicken houses; and

(iii) the judge awarded $65,000,000.00 for damages for trespass without indicating how she arrived at that figure.

[29] Learned Queen's Counsel submitted that where a court has employed an incorrect method of calculation in its determination of the judgment sum, that is an excellent basis on which this court should grant a stay of execution of the judgment. Reference was made to **Sagicor Bank Jamaica Limited** in support of that submission. He argued that the judgment sum was exorbitant and the issue of whether Nembhard J was entitled to use the method, which she adopted to calculate the damages, must properly be considered on appeal. Mr Foster stated that there was no expert evidence for the years 2018 and 2019 on which the award for loss of income could have been based and the learned judge appeared to have doubled the figure for the real ANI for 2016 that was provided in the actuarial report. This aspect of the appeal, it was submitted has a real prospect of success as the actuarial report indicated that there were fluctuations in the real ANI for the period 2008-2016.

[30] It was also submitted that where a trespass occurs and it is alleged that as a direct consequence, income was lost, such a claim ought to have been particularized and the respondent had not done so.

[31] Where the award of interest is concerned, Mr Foster submitted that interest on the sum awarded for loss of income was incorrectly awarded from 2008, when the loss did not arise until 2018. He argued that the respondent was building the chicken houses in a phased manner and was not in a position to build the additional two chicken houses until 2018. In those circumstances, there could be no loss of income until 2018.

[32] In the circumstances, it was submitted that the appeal has a good prospect of success.

Respondent's submissions

[33] Counsel for the respondent, Mr Sean Kinghorn, submitted that the principles which guide the court in its consideration of an application for a stay of execution were well

settled. Reference was made to **National Commercial Bank Jamaica v NCB Trust and Merchant Bank Jamaica Limited and Robert Forbes** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 128/2007, Application No 182A/2007, judgment delivered 13 February 2008. In that case Harris JA stated that the grant or refusal of a stay of execution is a discretionary power. The learned judge of appeal also stated that where the refusal of a stay would ruin the applicant and he has a good prospect of success on appeal, that is a legitimate ground on which to grant a stay. Harris JA indicated that the court, in the exercise of its discretion, ought to "embark on a balancing exercise and weigh up the inherent risks or dangers consequential upon the grant or refusal of a stay" and that "[the] focus of the court must be placed on the risk of injustice to either party". Counsel also referred to **Reliant Enterprise**.

[34] Counsel submitted that the appeal against the order for costs has no real prospect of success as costs follow the event. Reference was made to **VRL Operators Limited v National Water Commission et al** [2014] JMSC Civ 84 in support of that submission. Mr Kinghorn stated that there is nothing exceptional to warrant departure from this rule and the grounds of appeal do not reveal any challenge to the said order. Moreover, given the financial inequity between the parties, it would be unfair to deny the respondent who has had to expend serious resources in continuing the litigation. The applicant being a financial giant, he said, should have no difficulty in settling an order of costs in the interests of justice. Additionally, counsel submitted that, as the applicant has been granted two stays of execution in the lower court, the matter should not be allowed to be delayed any further to frustrate the respondent, especially after the respondent has suffered 16 years of trespass. Counsel further argued that, in any event, the applicant cannot meet the threshold to show that Nembhard J was plainly wrong or had misdirected herself as to the evidence before the court. He stated that the learned judge, in making her assessment, was left to rely heavily upon the respondent's expert evidence, which remained largely unchallenged.

[35] In respect of the basis on which this court can set aside an award of damages, reference was made to the case of **Richard Sinclair v Vivolyn Taylor (Richard Sinclair)** [2012] JMCA Civ 30, in which the court relied on **Flint v Lovell** [1935] 1 KB 354. At paragraph [27] of **Richard Sinclair** it was stated that the court should be convinced "that the judge acted on some wrong principle of law, or the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled". It was submitted that the applicant has failed to provide this court with any facts sufficient to prove that Nembhard J committed any such error.

[36] Reference was also made to **Godfrey McLean v The Attorney-General** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 43/1998, judgment delivered 3 June 1999 ('**Godfrey McLean**') and **Stephen Clarke v Olga James-Reid** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 119/2007, judgment delivered 16 May 2008 ('**Stephen Clarke**'). Counsel submitted that this court will have to consider whether the award of damages was "wholly erroneous". Additionally, this court will have to consider whether the award of damages was "either inordinately high or inordinately low, or there is a breach of some other principle of law" (see **The Attorney General v Derrick Pinnock** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 93/2004, judgment delivered 10 November 2006 at paragraph 6). The grounds of appeal, counsel stated, do not address that issue. It was also submitted that the judgment of Nembhard J was "very lucid and measured" and that this aspect of the appeal has no real prospect of success.

[37] Mr Kinghorn, however, stated that the parties have accepted, in principle, that the respondent is entitled to compensation. The applicant has suggested $31,000,000.00 as being appropriate if the court agrees with the respondent that the claim for loss of past income did not need to be specifically pleaded and the respondent maintains that $65,000,000.00 is an appropriate award. He stated that an order could be made that the

execution of the judgment with the exception of the costs order be stayed on condition that the applicant pays the sum of $30,000,000.00 to the respondent.

Applicant's response

[38] Mr Foster indicated that the applicant was not appealing the award of costs but there are issues with the sum awarded as damages, which need to be addressed by this court.

Discussion and analysis

[39] The main issues in dispute between the parties are:

(i) whether the learned judge erred in treating the claim for loss of past income as an item of general damages;

(ii) whether the learned judge erred in awarding damages for trespass in the sum of $65,000,000.00; and

(iii) whether the learned judge erred in awarding interest on that sum from 9 April 2008.

[40] It is well settled that a successful litigant ought not to be deprived of the fruits of his judgment without good reason (see **Channus Block**). It was, therefore, incumbent on the applicant to demonstrate that such reasons exist.

[41] The starting point was the determination of the "threshold question" of whether on the material provided, the appeal has some prospect of success. However, as stated by Phillips JA in **Reliant Enterprise**, the court at this stage of the proceedings is not required to give any view on the merits of the claim as the issues are the subject of an appeal and will have to be determined at a later stage (see also **Sagicor Bank Jamaica Limited**). There was, therefore, no need for me to embark on an extensive analysis of the issues at this stage and it would, indeed, have been inappropriate for me to do so. The contentions of each party, however, had to be examined in order to ascertain whether the applicant satisfied the threshold test.

[42] In assessing the applicant's prospects of success, I remained mindful of the role of an appellate court in its review of damages awarded by a lower court. Those principles are well established. In **Flint v Lovell** [1935] 1 KB 354 at page 360 Greer LJ stated as follows:

> "… I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

[43] These principles were endorsed by this court in **Richard Sinclair** and **Godfrey McLean** and **Stephen Clarke**. In **Stephen Clarke**, Harrison JA stated the principle at paragraph 5 as:

> "5. We commence with the presumption that the decision on quantum made by the trial judge is a correct one. For the Appellate Court to vary the assessment of the trial judge it must be satisfied that the judge made a 'wholly erroneous estimate of the damage'. This means that the damage has varied too widely from the maximum or minimum figures awarded in similar cases by the Courts and therefore the Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. The exercise of looking at decided cases with the necessary adjustments, having regard to inflation and any special features of the injury or other assessable factors of the particular case, is directed at achieving uniformity."

[44] This court in **Jamaican Redevelopment Foundation, Inc v Clive Banton and Sadie Banton** [2019] JMCA Civ 12, applied dicta from the decision of **Cadet's Car Rentals and another v Pinder** [2019] UKPC 4, which was said to set out the most

recent guidance on how this court ought to treat with an appeal from an assessment of damages. At paragraph [108], McDonald-Bishop JA stated as follows:

> "[108] In the Bahamian case of **Cadet's Car Rentals and another v Pinder** [2019] UKPC 4, the Privy Council gave the most recent guidance to an appellate court in treating with an appeal from an assessment of damages. Their Lordships restated the applicable law in these terms:
>
> > '7. An appellate court will not, in general, interfere with an award of damages unless the award is shown to be the result of an error of law or so inordinately disproportionate as to be plainly wrong. In **Flint v Lovell** [1935] 1 KB 354 Greer LJ referred (at p 360) to the power of an appellate court to reverse a decision on quantum of damages in the following terms:
> >
> > > '[T]his Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.'
> >
> > Similarly, in **Nance v British Columbia Electric Railway Co Ltd** [1951] AC 601 the Board observed (at pp 613-614):
> >
> > > '… before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly

> erroneous estimate of the damage (Flint v Lovell [1935] 1 KB 354, approved by the House of Lords in **Davies v Powell Duffryn Associated Collieries Ltd** [1942] AC 601)'."

[45] In **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 at paragraph 12, the role of the appellate court in reviewing the findings of fact of a court at first instance was said to be as follows:

> "It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in **Watt (or Thomas) v Thomas** [1947] 1 All ER 582 at 590, [1947] AC 484 at 491 and Lord Hope of Craighead in **Thomson v Kvaerner Govan Ltd** [2003] UKHL 45, 2004 SC (HL) 1 (at [16]–[19]). This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: **Piggott Brothers & Co Ltd Jackson** [1991] IRLR 309 at 312, [1992] ICR 85 at 92 (Lord Donaldson of Lymington MR). Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: **Choo Kok Beng v Choo Kok Hoe** [1984] 2 MLJ 165 at 168–169 (Lord Roskill)."

[46] The applicant contended that the learned judge erred in law when she found that the respondent's loss of past income arising from the trespass did not need to be specifically pleaded or proven as it was not an item of special damages. It was argued by the applicant that the loss of past earnings was clearly calculable and ought to have been pleaded and particularized in the statement of claim. This ground is, in my view, arguable

as the respondent would have been in a position to provide an estimate of her loss based on the earnings from the other chicken houses.

[47] Where the award of the sum of $65,000,000.00 for loss of past earnings is concerned, it is my view that the basis on which the learned judge arrived at the award is unclear. Having indicated that the actuarial report showed varying sums for the real ANI per square foot for the years 2008-2016, she concluded at paragraph [46] that in order to assess the damages for 2018-2019, an upward adjustment was appropriate. In this regard, I have noted that for the period 2008-2016, the real ANI fluctuated upwards and downwards. This was captured in paragraph [45] of the judgment which states:

> "[45] An examination of the Actuarial Report reveals that the Real ANI per square foot for the year 2008 was Ninety-Eight Dollars and Fifty Cents ($98.50); for the year 2009 that figure was Four Hundred and Twenty-Seven Dollars and Fifty-Four Cents ($427.54); for the years 2010 and 2011 that figure remained at Three 14 Hundred and Sixty-Seven Dollars and Thirty-One Cents ($367.31); for the year 2012 that figure was Four Hundred and Forty Dollars and Seventy-Three Cents ($440.73); while for the year 2013 that figure was Four Hundred and Four Dollars and Eighty Cents ($404.80); for the year 2014 that figure was Three Hundred and Fifty-Four Dollars and Seventeen Cents ($354.17); and for the year 2015 that figure was Three Hundred and Eighty Dollars and Forty-Six Cents ($380.46)."

[48] The learned judge at paragraph [47] stated that any award that was made must be fair and equitable and should put the respondent in the position in which she would have been had the trespass not occurred. She then concluded at paragraph [48] that the sum of $65,000,000.00 was appropriate in the circumstances. There is, however, no indication of the sum used as the real ANI. This ground in my view has some prospect of success.

[49] Where the period for which interest was awarded is concerned, I have noted that although the learned judge concluded that the loss of income would have arisen from the

inability to build the two chicken houses in 2018 and 2019, she, nonetheless, awarded interest from 2008 on the $65,000,000.00 that was said to represent loss of past income. The applicant argued that interest should not have been awarded from that date as the loss had not yet occurred. This ground, in my view, has some prospect of success.

Whether there is a real risk of injustice if the stay is not granted

Applicant's submissions

[50] Mr Foster submitted that the determination of whether to grant a stay is a balancing exercise in which the court has to consider the right of the successful litigant to enjoy the fruits of his judgment as well as the rights of an appellant whose appeal has some prospect of success. He argued that if the stay is not granted and the judgment sum is paid by the applicant, it is unlikely to recover those sums from the respondent if it is successful in its appeal. In such circumstances, the appeal would be rendered nugatory. This, he said, was to be contrasted with the position of the applicant which is an organization registered in Jamaica, which could easily be located in order for the respondent to enforce her judgment.

[51] It was, however, accepted by Queen's Counsel that the matter had been before the court for a considerable time and the respondent had not yet received any part of the judgment sum. He stated that any order that is made has to be fair to both parties. As such, he suggested that an order could be made for the payment of a part of the judgment sum. In this regard, Queen's Counsel submitted that the sum of $15,000,000.00 would be appropriate. He, again, indicated that there was no application for a stay of the order for costs.

Respondent's submissions

[52] Mr Kinghorn submitted that the assertion that the respondent will be unable to repay the judgment sum, if execution is not stayed, was baseless. He stated that based

on the actuarial report, the respondent was not destitute and was more than capable of repaying any part of the judgment in the unlikely event that the appeal is successful.

[53] It was further submitted that since the parties have accepted, in principle, that the respondent was entitled to compensation for the trespass, any stay of execution of the judgment should be a conditional one. He suggested that an order for a stay of execution could be granted on condition that the applicant pays $30,000,000.00 to the respondent. Mr Kinghorn stated that the matter has been before the courts for 12 years and whilst the respondent is not destitute, she does not have the financial power of the applicant. It was argued by counsel that a conditional order would do justice between the parties as that sum was less than one half of the judgment sum. Counsel also stated that in light of the fact that the appeal was in respect of the entire judgment, it ought to be made clear that the order for costs was not being stayed.

Discussion and analysis

[54] This second hurdle requires the court to consider the risk of injustice to each party. In doing so, this court ought to balance the interest of the parties so as to make an order which would cause the least injustice. In order to do so the questions posed in **Sagicor Bank** (see paragraph [21] above) need to be answered. The applicant has contended that, in the circumstances, there is a real risk of injustice as the refusal of the stay could render the appeal nugatory. That is, the refusal of the grant would have the effect of depriving the applicant, if successful, of the results of the appeal. The court in **Polini v Gray,** at page 446, concluded that in those circumstances "it is the duty of the court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights".

[55] Mr David Flemming, in his affidavit filed in support of the application, asserted that the judgment sum inclusive of interest is in excess of $88,000,000.00. That sum, he stated, does not include costs. At paragraphs 11 and 12, he stated:

> "11. That I verily believe that JPSCO's operations would be severely affected by the payment of the judgment sum in full, or at all, since the company currently has a reduced amount of resources at its disposal and would therefore be incapable of settling its debts as they fall due.
>
> 12. That having regard to the current state of the economy particularly in light of the novel coronavirus (Covid-19) pandemic and increasing financial obligations faced by JPSCo, it is in a precarious financial position and is unable to generate the requisite income to meet the demands of the judgment sum."

[56] He also stated that it was likely that the respondent would attempt to levy on the assets of the applicant, if the judgment sum was not paid, and that would render the appeal nugatory. In addition, he asserted that there was a real likelihood that if the judgment sum or any part of it was paid to the respondent, the applicant may be unable to recover those sums if its appeal is successful.

[57] The respondent in her affidavit indicated that there have been 12 years of litigation in this matter and no legal fees have been paid to her attorneys-at-law or the actuaries who gave expert evidence. In this regard, she exhibited letters from her attorneys-at-law and Actuarial Solutions. The letter from her attorneys-at-law indicated that fees in the sum of $35,000,000.00 were owed, whilst that from Actuarial Solutions indicated that fees of J$3,203,750.00 and US$18,640.00 were outstanding.

[58] The respondent stated that she was advised to retain Queen's Counsel to assist in defending the appeal and could not afford to do so and was also at risk of losing legal representation if the judgment sum was not paid. The respondent also indicated that she was at risk of being sued by the actuary who gave expert evidence on her behalf in the court below. She denied being destitute and indicated that the value of her farm is five times the judgment sum. The respondent also sought to refute the applicant's assertion that its income had been reduced as a result of the pandemic. She stated that the demand for electricity has increased as more persons have had to stay home.

[59] Both parties agreed that a conditional order for a stay would be appropriate. I commend them both for their balanced and mature approach to this issue. I have borne in mind the fact that the litigation has been traversing our courts for approximately 12 years and that the respondent has a judgment in her favour. This is to be balanced against my finding that the applicant's appeal has some prospect of success. The applicant has argued that damages in the sum of $31,000,000.00 would be appropriate in the event that it is unsuccessful in its bid to convince this court that a claim for past loss of income ought to have been pleaded as special damages. It was also agreed that the respondent, in any event, would be entitled to compensation for the applicant's trespass to the property for the 11 years which its power lines and poles remained there without her permission.

Conclusion

[60] In light of this concession of the applicant, viewed against the background of the applicable principles of law, I concluded that an order granting a stay on condition that a portion of the judgment sum be paid directly to the respondent together with the costs awarded to her in the proceedings below, would produce the least injustice to the parties.

[61] It is for the reasons detailed above that I made the orders set out at paragraph [2] of this judgment.