[2014] JMCA Civ 52

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 137/2009

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

BETWEEN	**PATRICK WOOLCOCK**	**1ST APPELLANT**
AND	**THE BUNGALOO HOTEL**	**2ND APPELLANT**
AND	**DAVID GEOFFREY SYKES**	**1ST RESPONDENT**
AND	**AUDREY LOUISE SYKES**	**2ND RESPONDENT**

8, 9, 10 April and 19 December 2014

Raphael Codlin and Miss Anishka Biggs instructed by Raphael Codlin & Co for the appellants

Mrs Daniella Gentles-Silvera and Miss Sidia Smith instructed by Livingston Alexander & Levy for the respondents

PHILLIPS JA

[1] I have had the opportunity of perusing the draft reasons for judgment of my learned sister Mangatal JA (Ag) and commend her for her thorough, comprehensive

review of the various issues on appeal. I entirely agree with her reasoning and conclusion and have nothing I can usefully add.

BROOKS JA

[2] I have read, in draft, the judgment of my learned sister Mangatal JA (Ag). I agree with her reasons and conclusion and have nothing to add.

MANGATAL JA (Ag)

[3] This is an appeal from the judgment of Cole-Smith J delivered on 23 September 2009 whereby she gave judgment in favour of the respondents as follows:

> "1. The Claimants be awarded damages in the sum of $13,500,000.00 being:
>
> a) $10,000,000.00 in respect of Trespass; and
> a. $3,500,000.00 in respect of Public Nuisance.
>
> 2. The 3rd and 4th Defendants remove the open air bathrooms and any other structure constructed by the 3rd and 4th Defendants which currently encroaches on the Claimants' land within ninety days from the date hereof;
>
> 3. Judgment for the Claimants on the 3rd and 4th Defendants' Counterclaim;
>
> 4. Costs to the Claimants on the Claim and on the Defendants [sic] Ancillary Claim if not agreed to be taxed."

Background

[4] The respondents are the registered owners of land known as Firefly, on Norman Manley Boulevard, Negril in the parish of Westmoreland, being the land comprised in

certificate of title registered at Volume 1150 Folio 693 of the Register Book of Titles. The respondents became registered owners in October 1978.

[5] The respondents' land is on the Negril coast line. They are in the business of tourism and are shareholders and directors of Firefly Limited which operates a hotel known as "Firefly Cottages" on their land.

[6] The respondents were the claimants in the court below. The further amended particulars of claim stated, and the further amended defence admitted, that Stafford Phillips and Vanessa Masciantonio were registered proprietors of land adjoining the respondents' land on its southerly side being the land comprised in certificate of title registered at Volume 608 Folio 26 of the Register Book of Titles. The appellants were purchasers or prospective purchasers of part of the land owned by Mr Phillips and Ms Masciantonio and are occupiers of that portion of land. At the commencement of the claim below, Mr Phillips and Ms Masciantonio had been named as the 3rd and 4th defendants, however suit was discontinued against them both over time.

The respondents' case

[7] It was the respondents' case that on or about 20 August 1995, the appellants commenced construction of a wall on the respondents' land without their knowledge and/or consent. It was alleged that the appellants also constructed an extension to a building on their land, which extended beyond the boundary of the land occupied by them and onto the respondents' land.

[8] It was alleged that throughout the period from January 1996 to March 2002 the appellants played loud music from their premises, which disturbed the respondents and their guests.

[9] It was claimed that in or about January 1996, the appellants' agent Mr Lloyd Patterson, assaulted the 2nd respondent.

[10] The respondents averred that the 1st appellant and/or his agents and/or servants have, from 2002 and onwards, dumped raw sewage at different times at the boundary of the respondents' land, and that this caused a pungent odour to pervade the respondents' land. This thereby affected the comfort and enjoyment of the respondents and their guests.

[11] The respondents stated that the 1st appellant and/or his servants or agents have, from 1997 to the present, engaged in burning rubbish close to the respondents' boundary thereby affecting their comfort and enjoyment and that of their guests.

[12] It was further alleged by the respondents that the appellants demolished the respondents' boundary wall, which was built within the respondents' boundary, without their consent. It was also contended that the appellants have engaged in the construction of two open air bathrooms which currently occupy part of the respondents' land, without their consent.

[13] It was also alleged that the appellants and/or their servants and/or employees entered upon the respondents' land at various times since 1995 without their consent and destroyed property belonging to the respondents.

[14] The respondents contended that as a direct result of the wrongful actions of the appellants, the respondents and their business Firefly, have suffered loss, financial loss and damage.

The appellants' case

[15] For their part, in their defence, the appellants denied that they are liable to the respondents as alleged or at all. The 1st appellant is the managing director and the major shareholder of the 2nd appellant. They further stated that the 1st appellant is the registered proprietor of land currently registered at Volume 1326 Folio 576 of the Register Book of Titles, which was land formerly part of that which was registered at Volume 608 Folio 26 of the Register Book of Titles. The 1st appellant stated that he purchased the land from Ms Masciantonio in or about 1995. It was averred that the respondents own the property to the north of the 1st appellant's land.

[16] It was the appellants' case that the 1st appellant in or about 1995 constructed a wall between his land and the respondents' land. This wall, the 1st appellant stated, extended along part of his northern boundary, and extended to the high water mark. However, the respondents complained that the wall was constructed on the public beach, and the 1st appellant pulled down the wall.

[17] The 1st appellant obtained a survey from Mr Hartley Campbell, commissioned land surveyor. This survey confirmed that the wall constructed was on the boundary between the 1st appellant's land and the respondents' land. The appellants averred that the boundary between the 1st appellant's land and the respondents' land, as set out by Mr Campbell, was accepted by all, save that the 1st appellant's land continued down to the high water mark in a straight line.

[18] In or about 1995 the 1st appellant constructed a wooden bar and some showers which the appellants maintained were within the boundaries of the 1st appellant's land.

[19] The appellants stated that in or about March 2003 there was another survey of the land done by Anthony Allison & Associates.

[20] On or about July 2003 the respondents constructed a 10 foot wall, raising the height of part of the wall previously constructed by the 1st appellant. However instead of going down in a straight line to the high water mark, in the vicinity of the bathrooms constructed by the appellants, the appellants averred that the respondents encroached on to the 1st appellant's property for about 20 feet. Further the respondents constructed a chain link fence up to the high water mark.

[21] The appellants claimed that in October 2003 the 1st respondent came with police officers and entered the 1st appellant's land. They alleged that he and his servants and/or agents knocked down a part of the bar which extended over the boundary into the respondents' land.

[22] In or about 2003 officials from the Negril Green Island Area Local Planning Authority visited the land and removed the concrete fence and chain link fence that had been constructed by the respondents.

[23] The appellants maintained that the respondents' destruction of their bar was unlawful, and claimed damages for the replacement of the bar and for loss of profit.

[24] The respondents also claimed against the appellants for sundry acts of alleged nuisance, all of which the appellants have denied.

Grounds of appeal

[25] The appellants are satisfied with the learned trial judge's finding of law that "there was insufficient evidence of the private nuisance in respect of the rubbish thrown on the Claimants' land and the existence of a noxious smell emanating from the pit". Save for that finding the appellants are challenging all other findings of law made by her Ladyship. The grounds of appeal and orders sought are as follows:

> "The Grounds of Appeal are:
>
> i. The learned judge misdirected herself when she held that the wall constructed by the [appellants] had encroached on the respondents' property in circumstances which suggest that the encroachment had ceased to exist up to the time of judgment.
>
> ii. The learned judge having failed to stipulate her findings as to the time of the encroachment misdirected herself as to the proper law to be applied since her findings of fact are not stated with clarity in order that one may determine the exact nature of those findings.

iii. The learned judge misdirected herself in finding that there was an open air bathroom encroaching on the [respondents'] land, where the [respondents] did not provide any evidence of such an encroachment.

iv. The learned judge ordered that damages be paid to the respondents by the [appellants] in the sum of Ten Million Dollars ($10,000,000.00) for trespass and Three Million Five Hundred Thousand Dollars ($3,500,000.00) for public nuisance, in circumstances where there was no evidence or insufficient evidence to make the claim.

v. The [appellants] will say that the learned judge misdirected herself in finding that 'there was insufficient evidence of the private nuisance in respect of the rubbish thrown on the Claimants' land and the noxious smell emanating from the pit' yet went on to find that there was public nuisance.

vi. That the learned judge misdirected herself in awarding ($3,500,000.00) for public nuisance and ($10,000,000.00) for trespass where the [respondents] failed to provide any evidence of the damage suffered to justify such an award.

Orders sought:

1. That the judgment pronounced by Her Ladyship on the 23rd day of September 2009 be set aside.

2. That judgment be entered for the [appellants] against the [respondents].

3. Costs here and in the court below.

4. Such further or other orders as this Honourable Court deems fit."

The appellants' arguments

> **Ground i- The learned judge misdirected herself when she held that the wall constructed by the appellants had encroached on the respondents' property in circumstances which suggest that the encroachment had ceased to exist up to the time of judgment.**
>
> **Ground ii- The learned judge having failed to stipulate her findings as to the time of the encroachment misdirected herself as to the proper law to be applied since her findings of fact are not stated with clarity in order that one may determine the exact nature of those findings.**

[26] The appellants in their written submissions have argued grounds i and ii together. The learned trial judge's findings in relation to this issue were challenged on the basis that the evidence does not support such findings. It was argued that the 1st appellant in his evidence demonstrated that the wall which was said to have encroached on the respondents' property was removed in keeping with an order made by the Honourable Mr Justice C G James on 25 and 27 September 1995.

[27] It was further argued that, based on the surveyor's report prepared by Mr Campbell, which was exhibited to the affidavit of the 1st appellant filed on 22 September 1995 in the Supreme Court, it was found that there was an overlapping area which appears on certificate of title registered at Volume 1150 Folio 693 as part of the land comprised therein and also appears on certificate of title registered at Volume 608 Folio 26 as part of the land comprised therein. This position, it was contended, is also confirmed in the affidavit of Richard Haddad filed by and on behalf of the respondents on 15 September 1995. Therefore, based on the evidence presented the building erected on the property owned by the appellants in no way can be seen as an

encroachment on the respondents' property since there is an overlapping area which appears on both titles.

[28] It was submitted that the learned judge erred in finding that such an encroachment existed without survey evidence from the respondents showing such an encroachment at the time of trial. By failing to take account of the fact that the wall was removed, counsel argued, the learned judge misdirected herself as to the proper law to be applied.

> **Ground iii- The learned judge misdirected herself in finding that there was an open air bathroom encroaching on the [respondents'] land, where the respondents did not provide any evidence of such an encroachment.**

[29] In relation to ground iii, it was submitted that the learned judge misdirected herself in finding that there was an open air bathroom and other structures that encroached on the respondents' land without the respondents providing any evidence of such an encroachment. It was submitted that he who alleges must prove and as such, the learned judge erred in law when she made the order without substantial proof of the existence of an encroachment.

> **Ground iv- The learned judge ordered that damages be paid to the respondents by the appellants in the sum of Ten Million Dollars ($10,000,000.00) for trespass and Three Million Five Hundred Thousand Dollars ($3,500,000.00) for public nuisance, in circumstances where there was no evidence or insufficient evidence to make the claim.**

Ground v- The appellants will say that the learned judge misdirected herself in finding that "there was insufficient evidence of the private nuisance in respect of the rubbish thrown on the respondents' land and the noxious smell emanating from the pit" yet went on to find that there was public nuisance.

Ground vi- That the learned judge misdirected herself in awarding ($3,500,000.00) for public nuisance and ($10,000,000.00) for trespass where the respondents failed to provide any evidence of the damage suffered to justify such an award.

[30] In relation to grounds iv, v and vi, it was argued that her Ladyship misdirected herself when she ordered that damages should be paid to the respondents in excess of $13,000,000.00 for trespass and public nuisance, even though there was insufficient evidence to ground the claims.

[31] Reference was made to page 11 of the judgment where the learned trial judge found as follows:

> "6. There is insufficient evidence placed before the court on which the Court could find that the 3rd and/or 4th Defendants, their employees, servants and/or agents had a pit on his [sic] premises from which an obnoxious and offensive smell emanated from his land to the Claimants' land which created a nuisance.
>
> 7. There is also not enough evidence on which the court can find that the 3rd and/or 4th Defendants their employees, servants and/or agents habitually dumped garbage and rotting waste on the Claimants' property creating a nuisance to the Claimants, their business and guests and also the burning of plastic and other garbage in close proximity to the Claimants' boundary....."

[32] It was also pointed out that, in relation to trespass, the learned trial judge stated:

> " There is no physical damage to the Claimants' property so the question is what measure of damage the Court will apply."

[33] The submission was therefore made that these findings clearly show that her Ladyship rejected a considerable portion of the evidence tendered against the appellants. However, notwithstanding these pertinent findings, the learned judge went on to award damages to the respondents in the sum of $10,000,000.00 for trespass and $3,500,000.00 for public nuisance.

[34] Reference was made to McGregor on Damages, 17th Edition, paragraphs 44-001 and 8-001, which was cited at pages 18-19 of the judgment and which state as follows:

> 44-001
>
> "The Claimant has the burden of proving both the fact and the amount of damage before he can recover substantial damages…. Even if the Defendant fails to deny the allegations of damage or suffers default the Claimant must still prove his loss."
>
> 8-001
>
> "A claimant claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court as to its amount. If he satisfies the court on neither, his action will fail, or at the most he will be awarded nominal damages where a right has been infringed. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages...."

[35] It was submitted that in the instant case, the respondents failed to prove the damages suffered as a result of the trespass and the nuisance and as such the learned judge erred in law when she awarded the respondents substantial damages without proof that they were entitled to such an amount. It was submitted that even if it had been proved that there was trespass or nuisance, the award of a nominal sum would have been more appropriate in this case. This principle, it was argued, was highlighted in the decision of the Supreme Court of Belize in ***Maxwell Samuels v Samuel Flores*** Claim No 558 of 2009, delivered 15 January 2010 where it was held that:

> "Though there was a trespass and nuisance, in the absence of specific evidence of damage cause[d] to the claimant by the nuisance.....nominal damages is appropriate...."

Reference was also made to the decision of this court in ***Archibald McIntyre v Delroy and Revolene Greenwood*** SCCA No 48/2002, delivered 26 October 2007 where, it was argued, a similar stance was taken.

[36] Counsel Mr Codlin argued that having found that there was insufficient evidence to ground a claim for private nuisance in respect of the rubbish thrown on the respondents' land and the noxious smell emanating from the pit, the judge awarded substantial damages for public nuisance, without stating the nature of, the evidential basis for such a claim or the rationale for such a substantial award. The appellants submitted that the learned judge had no basis on the evidence presented to make such

an award and as such she misdirected herself as to the law relating to private and public nuisance.

[37] Reference was made to the decision of Lord Goddard CJ in ***Howard v Walker*** [1947] 2 All ER 197 at 199 which referred to the learned authors of Winfield's Texbook on the Law of Tort as providing a definition of private nuisance as "an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it..."

[38] The submission continued that the tort takes three forms:

(a) encroachment on a neighbour's land;

(b) direct physical injury to the land;

(c) interference with the enjoyment of the land - ***Hunter & Others v Canary Wharf Limited*** [1997] AC 655.

[39] However, in order to ground a claim for public nuisance the respondents would have had to prove that they had suffered particular damage over and above that suffered by the general public. Reference was made to ***Southport Corp v Esso Petroleum Co Ltd*** [1954] 2 All ER 561. Public nuisance or common nuisance is one which materially affects the reasonable comfort and convenience of life of a class of the public who come within the sphere or neighbourhood of its operation. For this submission counsel relied on ***R v Rimmington*** [2006] 1 AC 459. The cause of action is actionable by the Attorney General. Furthermore, it was submitted, where an individual wants to bring an action for public nuisance, he/she must prove that he/she

has suffered some damage above and beyond that suffered by the general public. The respondents, it was submitted, did not offer any evidence of any such suffering and the learned judge made no finding that they had in fact so suffered.

[40] The submission in relation to this aspect of the matter closed with the appellants averring that, for her Ladyship to have made such a substantive award, the respondents' case should have some "peculiarity" based on the evidence presented. In this case there was no evidential basis for the award and as such the learned trial judge erred in law when she awarded the respondents damages for public nuisance.

[41] Mr Codlin referred to the decision in ***Flannery and Another v Halifax Estate Agencies Ltd*** [2000] 1 All ER 373 where it was held that the failure of the judge on the facts of that case, to give reasons was critical; the appeal was allowed and a new trial ordered. He submitted that the ***Flannery*** decision was apposite in this case because here the judge did not make appropriately specific or reasoned findings, and did not say which of the experts she was accepting, and if so, why. Counsel indicated to the court that it was his regrettable view that in this case a retrial should also be ordered because of the judge's failure to provide reasons or adequate reasons.

The respondents' submissions

Ground i

[42] In their written submissions, counsel for the respondents stated that on 21 September 1995, an order was made granting an injunction preventing the 1st appellant

from proceeding with the construction of the wall and that the court also ordered that the appellants remove the wall, which was then about 7-8 feet high. According to the respondents' counsel, the wall was reduced to 2 feet and was approximately 6 feet in length. Further, that it was never completely removed thereby still constituting a trespass on the respondents' property at the date of the trial.

[43] Reference was made to the fact that commissioned land surveyor Mr Richard Haddad, who carried out a survey on 14 February 2003 of the respondents' land, gave evidence at the trial that there were the remains of the appellants' wall of about 1 foot in height and about 1 chain in length within 7.5 feet to 10 feet of the respondents' boundary. Mr Haddad is quoted as having stated:

> "I noticed that at the most easterly end of the remains of the partly demolished wall (that is the wall noted in 1995 was about 4 feet high plus foundation) part of the wall, 6 feet in length, had not been demolished or reduced in height. In fact the height of this part of the wall had been increased by about 2 feet and had been made to form the back wall of two shower cubicles built...."

[44] Reference was made to paragraphs 19-21 (inclusive) of Mr Haddad's witness statement as demonstrating that these walls were on the respondents' property, not being part of the land that overlapped. Counsel argued that whether or not the wall had been substantially diminished the fact is that some of it was still encroaching on the respondents' property. A photograph was exhibited to the 1st respondent's witness statement.

Ground ii

[45] Counsel Mrs Gentles-Silvera submitted that the learned judge was correct in her finding that the appellants' wall, which had been encroaching on the respondents' property since 1995 was still the subject of a trespass at the time when the judgment was delivered. She pointed out that no evidence to the contrary was given to show that the wall was no longer in existence.

Ground iii

[46] In relation to this ground, counsel referred to the evidence of the surveyors who gave evidence in this case. The evidence of Mr Adrian Levy, commissioned land surveyor, was that the appellants' bar, specifically the canopy/roof of the wooden structure being used as a bar and a shower facility encroached on the respondents' property. Reference was made to page 114 of the record of appeal, paragraphs 3 and 4 of the witness statement of Mr Levy, the surveyor's report and plan at page 142 of the record of appeal, vol 1 and pages 5-6 of the record of appeal, vol 3.

[47] Reference was made to the cross-examination of Mr Levy where he said that "based on measurements I took on the 16th May 2005 the shower facility was clearly shown to be encroaching on Mr Sykes' land. The bar was not encroaching, only a section of the canopy" (page 189 of the record of appeal, vol 1). As regards the bar, Mr Levy's evidence was that "the roof" section that overhangs is called a canopy, overlaid with thatch (page 189 of the record of appeal, vol 1).

[48] Mr Haddad stated in his witness statement that the shower cubicles encroached on the respondents' property in relation to the wall built by the appellants in 1995 which encroached on the respondents' property at the south-western end of their land:

> "I further noted that at right angles to this higher part of the wall- adjoining it, were two (2) walls that were not there in 1995 or 1996. They formed part of the shower cubicles mentioned above and were about 6 feet high. These walls were built on the Claimants' land. They were <u>not</u> on that part of the land that was overlapping." (paragraph 20 of witness statement, page 148 of the record of appeal, vol 1).

[49] At paragraph 13 of their written submissions, the respondents referred to the fact that Mr Haddad took a photograph, as part of his report, which showed the location of the showers and the bar and in particular made it "... possible to see that an important part of the encroaching bar was in fact on the Claimants' land and that the showers were on his land." Reference was made to paragraph 21 of the witness statement of Mr Haddad at page 148 of the record of appeal, vol 1.

[50] Counsel referred to paragraphs 59 and 64 of the witness statement of the 1st respondent where according to the 1st respondent there is one shower cubicle totally on the respondents' land and the other is 60% on the overlap land and 40% on the respondents' land (pages 112 and 114 of the record of appeal, vol 1).

[51] It was submitted that the evidence of Messrs Haddad and Levy and the 1st respondent was clear that the shower facilities and the wooden bar built by the appellants are not contained within the overlap section but are further west of it

thereby encroaching on the property of the respondents, which land is longer than the appellants' land towards the sea.

[52] The submission continued, with counsel for the respondents stating that this evidence was contrary to the evidence of Mr Anthony Allison and Mr Prendergast, who were commissioned land surveyors who gave evidence on the appellants' behalf. However, the learned judge had the advantage, it was submitted, of seeing and hearing all of the witnesses and, it was posited, obviously preferred the evidence of Messrs Haddad and Levy to that of the 1st appellant.

[53] It was submitted that an appellate court should only upset findings of fact by a trial judge if it is satisfied that the trial judge failed to use the advantage of seeing and hearing the witnesses. Reference was made to the decision of the Judicial Committee of the Privy Council in ***Mitra Harracksingh v Attorney General*** (2004) 64 WIR 362 and in ***Industrial Chemical Co (Jamaica) Ltd v Ellis*** [1986] 35 WIR 303.

Ground iv

[54] In relation to the issue of trespass, reference was made to the decision in ***Kynoch Ltd v Rowlands*** [1912] 1 Ch 527 for the proposition that trespass is an unjustifiable intrusion by one person upon the land in the possession of another and involves placing anything on or in the land in the possession of another and may include dumping rubbish on another's land.

[55] It was submitted that, not only did the respondents go to the trouble of photographing the various acts of trespass, but they gave detailed accounts of the various acts alleged to constitute that tort, as compared with the 1st appellant who merely denied them and who in cross-examination gave no explanation as to the photographs.

[56] It was submitted that on a balance of probabilities the learned judge was correct in accepting the evidence of the respondents and their witnesses in relation to the numerous acts of trespass by the appellants and further, that this more than justified the award of $10,000,000.00 for trespass, especially as the learned trial judge appreciated that the trespass by the wall, the appellants' building of a concrete restaurant and bar and bathroom extension all trespassed on the respondents' land.

[57] In relation to the issue of nuisance, it was submitted that a nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of:

(a) a right belonging to him as a member of the public, in which case it is then a public nuisance; or

(b) his ownership or occupation of land or of another right used or enjoyed in connection with land, which is a private nuisance.

[58] It was further submitted that a nuisance may become actionable by a private citizen if certain requirements are fulfilled. Reference was made to ***Harper v GN***

Haden and Sons Ltd [1933] Ch D 298, where at page 304 Lord Hanworth M R held as follows:

> "3 If an individual can establish:
>
> (a) a particular injury to himself beyond that which is suffered by the rest of the public;
>
> (b) that the injury is directly and immediately the consequence of the wrongful act;
>
> (c) that the injury is of a substantial character, not fleeting or evanescent, he can bring his action and recover damages for the injury he has suffered."

[59] It was submitted that these conditions mean that there must be a wrongful act in the sense that the user complained of was unreasonably exercised. Reference was made to ***Fritz v Hobson*** [1880] 14 Ch D 542, ***Gaunt v Fynney*** (1872) LR 8 Ch App 8, ***Attorney-General (on the relation of Glamorgan County Council and Pontardawe Rural District Council) v PYA Quarries Ltd*** [1957] 1 All ER 894 and ***Halsey v Esso Petroleum Co Ltd*** [1961] 2 All ER 145.

[60] It was argued by Mrs Gentles-Silvera that the guests and visitors to Firefly were constantly harassed by persons coming over from the appellants' property offering prostitution, drugs and drinks which led to a fall in repeat guests (paragraphs 33 and 90 of the witness statement of the 1st respondent, pages 104 and 121 of the record of appeal, vol 1). Further, it was submitted, the constant harassment led to much of the respondents' property, about 50 yards, and the beach being unusable (paragraphs 52

and 53 of the witness statement of the 1st respondent, page 110 of the record of appeal, vol 1).

[61] Further, it was averred that the appellants encroached on the public land being the beach which adjoins the respondents' property and that encroachment prevented or hindered the respondents, their guests and visitors, who are all members of the public, from freely accessing and enjoying the public beach which has also led to a decline in visitors to the respondents' hotel as it is no longer as attractive.

[62] It was argued that the use of the property (the beach) which extends from the appellants' property to the high water mark which really belongs to the Commissioner of Lands, prevents members of the public from using and enjoying it. It was argued that this encroachment by the appellants is a nuisance. Reference was made to section 4 of the *Beach Control Act 1956.*

[63] It was submitted that this section clearly shows that members of the public have a right to use and enjoy the foreshore and have been prevented from doing so because of the acts of the appellants including:

(a) building structures on it; and

(b) placing speakers on the foreshore from which emanated loud noises and music.

[64] Counsel therefore urged that there was sufficient evidence upon which the learned judge could have come to her conclusion that the acts of the appellants constituted a trespass and a public nuisance.

Ground v

[65] In relation to this ground, the respondents submitted that the learned trial judge's finding of the public nuisance was limited to the encroachment by the appellants on the beach. She so found irrespective of her finding regarding the insufficiency of evidence as to private nuisance in relation to the dumping of rubbish and the noxious smell. She found that the encroachment by the appellants on the beach was a public nuisance for which the respondents were entitled to recover damages as they were "adjoining land owners [who were] prohibited from using the full area of the public beach" (page 233 of the record of appeal, vol 1) and were therefore deprived of its quiet enjoyment, a set of circumstances which the cases have established constitute a public nuisance.

Ground vi

[66] Counsel conceded that no evidence was led as to the letting value of the areas on the beach on which the appellants encroached/trespassed or created such a nuisance, rendering it unusable by the respondents, their guests and visitors. However, it was submitted, this does not mean that the learned trial judge had no basis upon which to award damages for trespass and nuisance.

[67] It was posited that where a private nuisance constitutes interference with one's quiet enjoyment of property as opposed to encroachment or direct physical injury, damages are at large and the court is entitled to take into account in arriving at a figure, the defendant's motives, conduct and manner of committing the tort.

[68] Reference was made to this court's decision in ***Pamela Davis v McQuiney Card et al*** [2012] JMCA Civ 39. In that case, Mrs Gentles-Silvera contended, the issue before the court was whether or not the learned Resident Magistrate could have awarded damages of $250,000.00, being the then statutory limit for nuisance. This was in relation to interference with a person's quiet enjoyment of land in circumstances where there was, it was contended by the appellant, no evidence. In the appeal, the appellant complained that the learned Resident Magistrate gave no indication as to the basis for her award. Reference was made in full to paragraphs [30] – [33] of the judgment of my learned sister, Phillips JA.

[69] Mrs Gentles-Silvera relied upon the English decision of ***Hunter & Others v Canary Wharf***, which was also relied upon in ***Pamela Davis***. Counsel argued that Lord Lloyd identified private nuisance as being of three kinds as set out below, which counsel submitted, would also apply to a public nuisance provided it affects the reasonable comfort and convenience of a class of user:

i. by encroachment;

ii. by direct physical injury;

iii. by interference with a person's quiet enjoyment of land (that is, where nuisance is productive of sensible discomfort).

[70] Counsel submitted that the measure of damages for the first and second kind is diminution in value (that is, the difference between the value of the respondents' interest in the relevant property before damage and the value after damage). In

relation to the third kind of nuisance, it was contended that the measure of damages is loss of amenity value so long as the nuisance continues. In this type of case the utility of land was diminished due to the existence of the nuisance and it is this diminution in utility for which the innocent party is entitled to be compensated. It was proposed that the court in ***Hunter & Others v Canary Wharf*** recognised that loss of amenity value is not capable of precise mathematical calculation, but rather damages are at large.

[71] Counsel argued that the public nuisance in this case is in the form of encroachment on the public beach and interference with the quiet enjoyment of the respondents and other users of the public, and as the appellants not only encroached on the public beach with their bar and showers but also placed signs on it, it was submitted, they made parts of the beach unusable. The argument continued, that the appellant encroached on the public land/or the beach thereby hindering access by the public, the guests of Firefly Cottages and the respondents to the public beach (paragraph 89 of the witness statement of the 1st respondent). As the learned judge found, counsel argued, these lands "...enure to the benefit of all persons in the neighbourhood including the adjoining landowners. From the 1st appellant's own evidence he did not obtain a licence for the erection of the portions of the showers and portions of the bar" (page 233 of the record of appeal, vol 1). Counsel also referred to page 15 of the judgment, (page 233 of the record of appeal, vol 1), where the learned judge stated:

> "There is evidence that the Claimants being adjoining land owners are prohibited from using the full area of the public beach."

[72] Counsel submitted that the judge probably had these matters in mind when making the award. The respondents had submitted that their evidence demonstrated the vindictiveness, spitefulness and flagrant disregard of the law by the appellants.

[73] In relation to the trespass aspect of the claim, the respondents relied upon numerous authorities, including Clerk & Lindsell on Torts at paragraph 19-09*,* ***Stoke-on-Trent City Council v W & J Wass Ltd*** *[1988] 1 WLR 1406;* ***Nicholls v Ely Beet Sugar Factory Ltd*** [1936] 1 Ch 343 *and* ***JPS v Enid Campbell and Marcia Clare*** *[2013] JMSC Civ 22.* It was submitted that the tort of trespass is actionable without proof of damage. There is no need to prove actual loss. The infringement of the legal right in trespass and nuisance gives rise to the cause of action without actual damage being proved as it depends on a much wider principle that is, that where there is an interference with a legal right the law presumes damage.

[74] Reference was made to the ***Stoke-on-Trent City Council v W & J Wass Ltd*** case as authority for the general rule that in actions for tort damages recovered are equivalent to the loss which the innocent party suffered and where that loss is to property or to some property right the damages recoverable are equivalent to the diminution in value of the property or right. It was submitted that what is payable is such sum as should reasonably be paid for the use.

[75] Counsel indicated that they accepted that no evidence was led at the trial of diminution in value or rental value of the areas trespassed on or on which a nuisance was created but that does not mean that the court could not have awarded damages and in fact the cases say in such situations the court has to do the best it can.

[76] Counsel sought to remind the court of the dicta of Vaughan Williams LJ in ***Chaplin v Hicks*** [1911] 2 KB 786, when he said at page 792:

> "I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable... I only wish to deny with emphasis that because precision [that is, certainty/accuracy] cannot be arrived at, the jury has no function in the assessment of damages.... In such a case.....[that is, difficult to assess/impossible to say exactly how much case] the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract."

[77] Reference was made to the case of ***Joseph W Horsford v Lester Bird & Others*** Privy Council Appeal No 43 of 2004, delivered 17 January 2006, where damages for trespass were awarded for the use of the land trespassed upon and the extent to which the land trespassed on had enhanced the value of the trespasser's land. However, where the owner of property has been deprived of his property through trespass the damages will be increased and amount to at least the value of his interest. There was evidence of repeated acts of trespass for many years, it was submitted, which the learned judge had before her.

[78] It was submitted that the learned trial judge rightly took into account that there were repeated acts of trespass, committed even in the face of a court order, and that some of these acts of trespass and public nuisance ensued for years. It was submitted that in doing the best that it can the court may look at the motives of the appellants. Further, the respondents were repeatedly threatened with violence including threats to kill them and to rape the 2nd respondent, and the 2nd respondent was in fact hit down by the 1st appellant's accomplice on one occasion. The court also had to take into account the effect that these actions had on the respondents, the stress and worry they underwent, sleepless nights in fear of their lives, and the stress partially due to the financial losses of the hotel. They felt unsafe in their own home.

[79] In their penultimate submission counsel asserted that the learned judge was guided by these principles which have support in cases such as ***Margaret Morris v Danhai Williams et al*** Suit No CL 199/M304, delivered on 20 February 1998, when the court awarded $100,000.00 for the inconvenience, annoyance and distress caused by the conduct of the defendants and the fact that the trespass had been going on for over seven years. The court was urged not to upset the judgment of Cole-Smith J but rather to affirm it and to order the appellants to pay the respondents' costs.

[80] In closing, counsel submitted that if the court determines that there was not sufficient evidence in this respect, then the court should consider remitting the matter back to the Supreme Court for evidence on damages to be led and assessed.

Discussion and analysis

[81] One of the important issues in this case, and which impacts a number of grounds, is the question of what, if any, findings, the learned judge made in relation to the evidence, and that of the experts, and what should be the appellate court's approach to such findings as there are. Further and/or alternatively, if the findings are found wanting, how should the court deal with that?

[82] Reference was helpfully made by Mr Codlin to the decision in ***Flannery*** where, the headnote states:

> "**Held-**Where a failure by a judge to give reasons made it impossible to tell whether he had gone wrong on the law or the facts, that failure could itself constitute a self-standing ground of appeal since the losing side would otherwise be deprived of its chance of appeal. The duty to give reasons was a function of due process and, therefore, of justice. Its rationale was, first, that parties should not be left in doubt as to the reasons why they had won or lost, particularly since, without reasons, the losing party would not know whether the court had misdirected itself and thus whether he might have any cause for appeal. Second, a requirement to give reasons concentrated the mind, and the resulting decision was therefore more likely to be soundly based on the evidence. The extent of that duty depended upon the subject matter of the case. Thus in a straightforward factual dispute, which depended upon which witness was telling the truth, it would probably be enough for the judge to indicate that he believed the evidence of one witness over that of another. However, where the dispute was more in the nature of an intellectual exchange, with reason and analysis exchanged on either side, the judge had to enter into the issues canvassed before him and explain why he preferred one case over the other. That was particularly likely to apply in litigation involving disputed expert evidence, and it should usually be possible for the judge to be explicit in giving reasons in cases which involved such conflicts of expert

> evidence. In all cases, however, transparency should be the watchword. In the instant case the judge had been under a duty to give reasons, and had not done so. Without such reasons, his judgment was not transparent and it was impossible to tell whether the judge had adequate or inadequate reasons for his conclusion. Accordingly, the appeal would be allowed and a new trial ordered."

However, it was counsel Mrs Gentles-Silvera's submission, having referred to the ***Harracksingh*** and ***Industrial Chemical*** cases, that an appellate court should only upset the findings of fact of the trial judge if she failed to properly use the advantage of seeing and hearing the witnesses. She also asked the court to infer that the learned judge had obviously preferred the evidence of Messrs Haddad and Levy and the 1st respondent over the evidence to the contrary of Messrs Allison and Prendergast.

[83] In my judgment, the ***Flannery*** case is distinguishable from the instant case in a number of ways, because although there was no verbatim record, this court has the witness statements, the survey diagrams and the judges' notes of cross-examination from which it can be seen what the evidence was. At page 379j of ***Flannery***, Henry LJ pointed to circumstances that were plainly influential in the English Court's decision to order a new trial. His Lordship stated:

> "Accordingly, we do not regard this as an appropriate case to remit to the trial judge. Nor have we the evidence before us necessary to form our own view - for instance, we do not have the transcripts of the experts' evidence. Accordingly, we have no alternative but to allow the appeal, set aside the judgment, and order a new trial." (underlining emphasis provided)

[84] The approach taken by this court and by the Judicial Committee of the Privy Council in ***West Indies Alliance Insurance Company Ltd v Jamaica Flour Mills***, Privy Council Appeal No. 24 of 1998, delivered 21 July 1999, in my view, proves useful. At pages 20-23, Lord Hutton sets out the points that I consider helpful in this appeal, the instant case also being one requiring treatment of conflicting expert evidence. Their Lordships examined the approach taken in the courts below as follows:

> "Judgments in the Court of Appeal
>
> The Court of Appeal by a majority (Rattray P and Woolfe [sic] JA with Downer J.A. dissenting) allowed the plaintiff's appeal, entered judgment for the plaintiff and remitted the case to the Supreme Court for the assessment of damages.
>
> An important issue which arose in the Court of Appeal was whether, when the trial judge had had the advantage of observing the witnesses give evidence in the witness box over a very lengthy period, the Court of Appeal was entitled to set aside his findings. Rattray P, with whose judgment Woolfe [sic] JA agreed, held that the judge's assessment of the plaintiff's witnesses was seriously flawed and that therefore it was necessary for the Court of Appeal itself to review the facts and, applying the relevant law, to come to its own conclusion.
>
> In his judgment at page 123 Rattray P stated:
>
> > 'A trial judge may well conclude that a theory or viewpoint expressed by one expert or another is flawed. Indeed, we are very much in the realm of theory in many aspects of this case. The flaw may emanate from several reasons. The expert may have strayed outside the specific areas of his expertise. He may have failed to take factors into account which, had he done so, could have led him either to a different conclusion or affected the certainty with which his

> opinion was proffered. Furthermore, since even experts can err he may have been in error. None of this supports a conclusion of dishonesty which must rest almost reluctantly on the most compelling indicators.
>
> The learned trial judge rejected Mr. Cader as a witness of truth based upon certain conclusions which, in my view, cannot withstand careful and balanced scrutiny.
>
> ...'

Rattray P. stated that he found it difficult to reconcile the judge's assessment of Mr. Cader with rational judgment, and went on to state at page 125:…

> 'Whilst the trial judge has an advantage in observing the demeanour of those witnesses who gave evidence before him, it is very less so in the case of the expert witness. The arrogant, assertive and yet truthful expert is not a stranger to judicial experience.
> ...
> An appellate court is always reluctant to disturb the findings of fact of a trial judge, since the trial judge has the advantage of having seen and heard the witnesses, an advantage denied to the appellate court, and I bear that in mind. However, there are circumstances in which an appellate court will do so and this case cries out for this approach.'

Their Lordships were taken by counsel through the transcript of those portions of the evidence upon which the trial judge based his criticism of the plaintiff's witnesses, and in their opinion Rattray P was right to conclude that the approach of the trial judge to the assessment of those witnesses was seriously flawed with the consequence that the Court of Appeal had itself to consider the evidence and reach its own conclusion. Their Lordships consider, as Rattray P observed at page 126, that the case was one to which the principle stated by Lord Thankerton in *Watt (or Thomas) v. Thomas* [1947] 1 All ER 582 at 587 applied:-

> 'The appellate court … because it unmistakably so appears from the evidence, may be satisfied that (the

> trial judge) has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'"
> (underlining emphasis provided)

[85] In my view, it is clear, as Mrs Gentles-Silvera argued, that the learned trial judge accepted the evidence of Messrs Haddad and Levy as experts, and the 1st respondent as the witness of fact, in preference to the evidence of Mr Allison and Mr Prendergast, as experts, and over the 1st respondent, as a witness of fact.

[86] As discussed in ***Flannery***, given the issues that were involved in this case, the learned trial judge ought to have firstly, expressly stated what version of the evidence she preferred, and provided reasons for preferring one account to another. Although she did not do so expressly, the learned trial judge did, however, indicate what her findings of fact were. It is because of those findings that one is able to deduce which accounts she accepted.

[87] In my view, this is a case in which the approach of the learned trial judge was flawed, since she gave no reasons for preferring one version over the other. The learned judge also erred in other ways that will be elaborated on later in this judgment. In those circumstances, since this court has available to it, the relevant evidence, it is appropriate for it to examine and consider the evidence, apply the relevant law, and reach its own conclusions.

Ground i - The learned judge misdirected herself when she held that the wall constructed by the appellants had encroached on the

respondents' property in circumstances which suggest that the encroachment had ceased to exist up to the time of judgment.

Ground ii - The learned judge having failed to stipulate her findings as to the time of the encroachment misdirected herself as to the proper law to be applied since her findings of fact are not stated with clarity in order that one may determine the exact nature of those findings.

[88] The respondents on 27 September 1995 obtained a court order preventing the 1st appellant from proceeding with the construction of the wall which was then about 7-8 feet high. The appellants were also ordered to remove the wall. However, it was the 1st respondent's evidence that the wall was never completely removed.

[89] It was Mr Haddad's evidence, he having carried out the survey in 1995, that on 14 February 2003 when he carried out a joint survey with Mr Allison, of the respondents' land, there were the remains of the appellants' partially demolished wall of about 1 foot in height and about one chain in length, 7.5 to 10 feet within the respondents' boundary. This wall was on the respondents' land and was not part of the overlapping land. Mr Haddad, at paragraph 19 of his witness statement, also testified as follows:

> "....I noted that at the most easterly end of the remains of the partly demolished wall (that is the wall first noted in 1995 when it was about 4 feet high plus foundation) part of the wall, 6 feet in length, had not been demolished or reduced in height. In fact the height of this part of the wall had been increased by about 2 feet and had been made to form the back wall of two shower cubicles [built]..."

[90] In the amended defence it was pleaded that the 1st appellant constructed the original wall on the boundary between his land and the respondents' land as identified to him by Mr Campbell, who has since died, but whose identification report was admitted in evidence. The 1st appellant also relied upon the report and evidence of commissioned land surveyor Mr Prendergast.

[91] In my judgment, there appear to have been ample grounds upon which the learned trial judge could have accepted the evidence of the respondents and Messrs Haddad and Levy. There was a sound and proper evidential basis for the learned judge's conclusion that the appellants' wall had been encroaching on the respondents' property since 1995. As argued by counsel for the respondents, there was no evidence produced by the appellants to say or demonstrate that the wall was no longer in existence. Thus, there appears to be no merit in grounds i and ii and they therefore fail.

Ground iii - Evidence of encroachment of open air bathroom on the respondents' land

[92] Mr Codlin argued that the learned judge misdirected herself in finding that there was an open air bathroom encroaching on the respondents' land, when, he submitted, the respondents did not provide any evidence of such an encroachment.

[93] The evidence of Messrs Haddad and Levy and the 1st respondent was plainly to the effect that the shower facilities and the wooden bar built by the appellants are not contained within the overlap section but is further west of it thereby encroaching on the

property of the respondents, which land is longer than the appellants' land towards the sea. This evidence was contrary to the evidence of Mr Allison and Mr Prendergast. In my judgment, it seems clear that the learned judge had the advantage of seeing and hearing all of the witnesses and obviously preferred the evidence of Messrs Haddad and Levy to that of the 1st appellant.

[94] In ***Harracksingh***, cited by Mrs Gentles-Silvera, Sir Andrew Leggatt, delivering the advice of the Board, stated at paragraphs 10-11 on pages 367-368 that:

> "[10] The classic approach of an appellate court was formulated thus by Lord Sumner in **Owners of SS Hontestroon v Owners of SS Sagaporack** [1927] AC 37:
>
> > '.... not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.'
> > ...
> >
> > If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should .... be let alone.'
>
> [11] It is axiomatic that even where a case on paper would support a decision either way, the trial judge's decision ought not to be disturbed unless it can be demonstrated that it is- 'affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong'
> see ***Watt* or *Thomas v Thomas*** [1947] AC 484 at 491, per Lord Macmillan."

[95] Nevertheless, as observed by Rattray P in the ***West Indies Alliance*** case, whilst the trial judge has an advantage in observing the demeanour of those witnesses who gave evidence before him, it is very less so in the case of expert witnesses.

[96] However, in this case the learned judge, in addition to accepting the experts put forward by the respondents, being Messrs Haddad and Levy, importantly, also accepted the 1st respondent's evidence and the factual positions advanced by him in relation to the shower facilities. We have also had the opportunity of examining the witness statements, diagrams and reports prepared by the different witnesses including the experts in this case. I am of the view that in relation to this ground of appeal, it cannot be said that the learned trial judge failed to use or palpably misused her advantage of seeing and hearing the witnesses. Further, as regards the experts, it does seem to me that the reasoning of Mr Haddad and that of Mr Levy was sound and possessed clarity and internal consistency, logic and credibility. I see no reason to disturb the learned trial judge's decision on ground iii.

Ground iv- No evidence of trespass and public nuisance therefore judge wrong to order damages

Ground vi- That the learned judge misdirected herself in awarding ($3,500,000.00) for public nuisance and ($10,000,000.00) for trespass where the respondents failed to provide any evidence of the damage suffered to justify such an award.

[97] It is convenient to deal with grounds iv and vi together in considering the question of trespass and the damages awarded in respect thereof. I will deal with the question of damages for public nuisance in greater detail when dealing with ground v.

[98] There are a number of aspects to the finding of trespass. I turn firstly to the finding in relation to the encroachment by the wall. In 1995, the respondents obtained an interlocutory mandatory injunction requiring the appellants to remove the offending wall and preventing them from proceeding further with its construction. It does seem as if, strictly speaking, the respondents could have proceeded against the appellants for contempt of court. It is to be noted that contempt of court proceedings, are quite different from proceedings claiming compensatory damages. In contempt proceedings, the court exercises its powers to punish a wrongdoer for breach of a court order, whereas a claim for general damages is compensatory. In ***Stoke-On-Trent City Council v W & J Wass Ltd*** at page 1408, Nourse LJ, sitting in the English Court of Appeal, stated in the opening paragraph of his judgment as follows:

> "Where an interlocutory injunction has been running before trial, no further question of damages will usually arise. In respect of any period before or after trial where no injunction is in force, substantial damages will be recoverable if loss can be proved."

[99] In this case the respondents did obtain an interlocutory injunction for a long period before trial. In my judgment, whilst the respondents could have proceeded against the appellants for contempt of court, this would not affect their right to pursue a permanent compensatory remedy in damages in relation to the continuing trespass constituted by the continued presence of the wall, albeit in reduced dimensions.

[100] In this case, the learned judge found that in addition to trespass arising from the presence of the encroaching wall, trespass arose as a result of the construction of the concrete restaurant and bar. At page 10 of the judgment, where the learned judge stated her findings of fact, she stated the following as one of those findings:

> "2. The third and/or fourth Defendant constructed a concrete restaurant and bar on or around July 1995, which encroaches partly on lands owned by the Claimants' [sic] and partly on NRCA. This constitutes in part, trespass to the Claimant's property since 1995 to the present."

[101] At page 12 the learned judge further found as follows:

> "The Defendants are liable for the acts of trespass on the lands within the area of the overlap which is now part of the Claimant's [sic] land except for the section marked at ARC and which is subsumed under their title by virtue of section 45 of the Limitation of Actions Act."

[102] During the course of the hearing, the court raised with counsel on both sides, the issue regarding the law relating to dual registration of land. In the course of that enquiry, the question was also asked as to what was the meaning of the term "ARC" referred to by the learned judge and quoted in the paragraph above.

[103] Counsel, Mrs Gentles-Silvera, pointed out that the term had appeared during the opening of the then counsel for the respondents at the trial before the learned judge, and in a sketch diagram referred to by counsel during the opening. Mr Codlin was unable to contact counsel who conducted the case in the court below on behalf of the appellants. However, Mrs Gentles-Silvera filed an affidavit sworn to by Miss Anna

Gracie, one of the attorneys-at-law who had conduct of the matter on behalf of the respondents in the court below, exhibiting the sketch diagram allegedly referred to. This court ruled that since the judge had referred to this document, the affidavit of Miss Gracie and the diagram ought to be allowed into evidence in the interests of providing clarification and for ease of reference.

[104] Mr Codlin submitted during the course of his oral submissions that there was no finding by the learned trial judge on the cardinal submission that the title of Ms Masciantonio, from whom the 1st appellant had bought the land, would take precedence in relation to the area of overlap. However, in my view, it does appear that it was not in dispute between the parties that the appellants had acquiesced in the boundary maintained by the respondents for many years in respect of the area of overlap. Hence, in opening on behalf of the respondent (page 2 of the judge's notes provided in the record of appeal), counsel stated that the respondents were not claiming that portion of the overlap demarcated by the letters "ARC" on the sketch plan, but were making claim in relation to the remaining section of the overlap, demarcated by the letters "CRXE" in which area the restaurant and bathroom extensions were, on the respondents' case, located.

[105] The law in this area of dual registration and adverse possession has been very recently and comprehensively examined by this court in ***Recreational Holdings (Ja) Ltd v Carl Lazarus and the Registrar of Titles*** [2014] JMCA Civ 34. In an illuminating and characteristically thorough judgment, Morrison JA, delivering the main

judgment of the court, held that section 70 of the Registration of Titles Act itself makes it clear that where there is an area of disputed property registered in both titles, the title registered later in time is subject to the estate or interest of a proprietor claiming the same area of land under a prior registered title. Further, one of the express exceptions to the recoverability of land from a registered proprietor referred to in section 161(f) of the Registration of Titles Act is where an action for recovery is brought by a person who has a certificate of title that was registered earlier in time in respect of the same land – paragraphs [56] and [57] of the judgment. It was further held, amongst other matters, that the claim of the earlier registered proprietor to the disputed plot of land can be defeated if the proprietor registered second in time can prove title by way of adverse possession pursuant to sections 3 and 30 of the Limitations of Actions Act.

[106] In the instant case, I note that counsel on both sides as well as the learned judge referred to section 45 of the Limitation of Actions Act, which the marginal note indicates deals with reputed boundaries acquiesced in for seven years, whereas in the ***Recreational Holdings*** case this section was not discussed or emphasized at all. The difference may well be because the parties in the instant case were relying on particular boundaries they had each maintained in relation to different portions of the overlapping land.

[107] Section 70 of the Registration of Titles Act provides that a registered title is indefeasible save for, inter alia, the estate or interest of a proprietor claiming the same land under a prior registered certificate of title. It provides:

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

[108] Section 161(f) of the Registration of Titles Act provides as follows:

> "161. No action of ejectment or other action suit or, proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say-
>
> ....
>
> (f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land."

[109] Section 3 of the Limitation of Actions Act provides as follows:

> "3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims or if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing same."

[110] Section 30 of the Limitation of Actions Act states:

> "At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

[111] Section 45 of the Limitation of Actions Act provides as follows:

> "In all cases where the lands of several proprietors bind or have bound upon each other, and a reputed boundary hath been or shall be acquiesced in and submitted to by the several proprietors owning such lands or the persons under whom such proprietors claim for the space of seven years together, such reputed boundary shall forever be deemed and adjudged to be the true boundary between such proprietors and such reputed boundary shall and may be given in evidence upon the general issue, in all trials to be had or held concerning lands, or the boundaries of the same, any law, custom or usage to the contrary in anywise notwithstanding..."

[112] The 1st appellant's predecessors in title, that is, Mr Phillips and Ms Masciantonio, owned the land registered at Volume 608 Folio 26 and the parent title of the 1st

appellant's registered title was registered at Volume 1328 Folio 576 in 1952. The respondents' title at Volume 1150 Folio 693 was registered in 1978. The parent title for this property was registered in 1959.

[113] Mrs Gentles-Silvera, in further written submissions filed in response to questions from the court, has argued that, although the 1st appellant's title was first in time and therefore paramount to the respondents' title, the evidence of the respondents was that they purchased the property in 1978 and in 1987 built a fence along the southern boundary which included part of the portion registered in both titles. This fence remained until 1995 (eight years), when the appellants destroyed it. The respondents therefore claimed part of the overlapping land on their southern boundary where they erected the fence in 1987, by way of acquiescence under section 45 of the Limitation of Actions Act.

[114] It is my view that the learned judge plainly accepted that part of the land belonged to the respondents by way of the 1st appellant's acquiescence. That being so, the learned judge was correct in finding that the appellants by their concrete building (the restaurant) and bathrooms (to be distinguished from the showers, which were not on the overlap) trespassed on the respondents' property. The learned judge also cannot be faulted for finding that the appellants trespassed on the respondents' land including part of the overlap property which had become the respondents' property by virtue of the Limitation of Actions Act. This was with the exception of a section which is from the east running along the wire fence to a retaining wall which is in the middle of the

overlap land, being the area delineated by the letters "ARC" on the sketch diagram, which the learned judge found the 1st appellant was entitled to by virtue of the respondents' acquiescence in the wire fence.

[115] I now turn to deal with the judge's award of damages in relation to trespass. The judge relied heavily on the case of ***Biggin and Co Ltd v Permanite Ltd*** [1950] 2 All ER 859 at 870 where Devlin J stated as follows:

> ".....where precise evidence is obtainable, the court naturally expects to have it. Where it is not, the court must do the best it can."

[116] Devlin J went on to quote from a passage from the judgment of Vaughan Williams LJ in ***Chaplin*** at page 792, upon which the respondents' attorneys have also relied. It states as follows:

> "In the case of a breach of a contract for the delivery of goods the damages are usually supplied by the fact of there being a market in which similar goods can be immediately bought, and the difference between the contract price and the price given for the substituted goods in the open market is the measure of damages; that rule has always been recognised. Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract."

[117] It is to be noted that both the ***Biggin*** and the ***Chaplin*** cases are cases concerning contract and not tort. In the instant case, as regards the claim for damages,

the more appropriate guiding principles are, to my mind, those stated in ***Stoke-on-Trent City Council v W & J Wass Ltd***. At pages 1410G-H and 1413H -1414B, Nourse LJ discussed the principles as follows:

> "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...
>
> ...
>
> 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 LJ 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 the 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, those other cases are exceptions to the second, but not to the first, of the general rules stated above."

[118] Then in ***Inverugie Investments Ltd v Hackett*** [1995] 46 WIR 1, at pages 5-6, Lord Lloyd of Berbick, delivering the advice of the Board of the Judicial Committee of the Privy Council, discussed the legal position as follows:

"Before stating their own conclusions on the facts, their lordships should say a brief word on the law. The cases to which they have already referred establish, beyond any doubt, that a person who lets out goods on hire, or the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself. The point is well expressed by Megaw LJ in ***Swordheath Properties Ltd v Tabet*** as follows (at page 288):

> 'It appears to me to be clear, both as a matter of principle and authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages.'

It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the "loss" which the plaintiff has suffered. As the Earl of Halsbury LC pointed out in ***The Mediana*** [1900] AC 113 at page 117, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.

In ***Stoke-on-Trent City Council v. W & J Wass Ltd*** [1988] 1 WLR 1406 Nicholls LJ called the underlying principle in these cases the 'user principle'. The plaintiff may not have suffered any *actual* loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any *actual* benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The

> principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both."

[119] In my judgment, this is not the type of case referred to in the ***Biggin*** case where precise evidence was not or could not have been available. In this case, it seems to me that the respondents' case was simply deficient in that no effort was made to lead evidence as to the letting value, or theoretical or derived letting value, of the areas of the respondents' property upon which the appellants encroached and trespassed. It is nevertheless clear that there has been some proof of substantial damage and diminution in value, albeit no proof of quantum. Further, the respondents have suffered loss of amenity and inconvenience over a considerable period of time in aggravating conditions. In those circumstances, I arrive at the same conclusion as the learned trial judge, (albeit by a different route), that the court has to just do the best it can, acting with its jury mind and make an award of general damages, looking at the matter in the round - see the enlightening discussion of this point by my learned sister Phillips JA in the recent decision of ***Akbar Ltd v Citibank NA*** [2014] JMCA Civ 43, paragraphs [67] to [70]. I should indicate that I do not in the circumstances think that it would be just to allow the matter to go back for assessment in the Supreme Court, as suggested by counsel for the respondents. Instead, it falls to this court to examine the awards made by the learned trial judge, and if it is found that the amounts awarded were so extremely high (see dictum of Greer LJ in **Flint v Lovell** [1934] All ER Rep 2000), to carry out its own best assessment on the evidence as already presented at trial.

[120] The learned trial judge attempted, in the absence of evidence that should have been led, to do the best in the circumstances. However, the award of damages for trespass to land in the sum of $10,000,000.00 seems arbitrary and inordinately high. The award of damages for nuisance assessed in the sum of $3,500,000.00 also appears to be faulty for the same reasons. There was no proper basis on the evidence for such awards.

[121] It is my view that in all of the circumstances, having regard to the length of time over which the trespass took place in the instant case, and the aggravating, menacing and humiliating circumstances found by the learned trial judge (expressly or impliedly) to have featured in the evidence, an award of damages in the sum of $1,000,000.00 would be appropriate.

Ground v- The appellants will say that the learned judge misdirected herself in finding that "there was insufficient evidence of the private nuisance in respect of the rubbish thrown on the respondents' land and the noxious smell emanating from the pit" yet went on to find that there was public nuisance.

[122] During the course of his submissions, Mr Codlin sought to raise the fact that the learned judge had awarded damages for public nuisance but counsel claimed that there was no claim in the pleadings for damages for public nuisance. Although the words "public nuisance" are not specifically set out, at paragraph 18 of the further amended particulars of claim, there is a claim which, in my view, may just be sufficient to cover the claim for public nuisance. In paragraph 20 (3) there is a claim for damages for

trespass and nuisance. In the circumstances, it cannot be said that the claim for public nuisance took the appellants by surprise. It is alleged at paragraph 18:

> "18. Still further, the construction of the wall and of the extension is taking place in part on the Claimants' land and partly on the public beach on the southerly side of the claimants' land; and the Defendants are thereby creating a nuisance by capturing the public beach and preventing access thereto by the Claimants and their hotel guests as well as to the public generally, as a consequence of which the Claimants are being seriously inconvenienced and the Claimants' business is being severely hurt."

[123] Whilst the complaint in ground v is that the learned judge found that there was insufficient evidence of private nuisance, yet went on to find that there was public nuisance, it was not the same type of acts that were alleged to constitute private nuisance that the learned judge considered to comprise a public nuisance. Mrs Gentles-Silvera put it this way at paragraph 47 of her written submissions:

> "47. The learned judge unfortunately did not find that the aforesaid evidence was sufficient to create a private nuisance... but went on to find that the encroachment by the Appellants on public lands specifically the beach was a public nuisance for the Sykes who could recover damages as they were...."adjoining land owners' [who were] prohibited from using the full area of the public beach."

[124] The finding of public nuisance turns on whether the learned judge had, in accepting the submissions of counsel who appeared for the respondents in the court below, ascribed the correct meaning to section 4 of the Beach Control Act. For a proper understanding, it may be useful to also have regard to section 3 of the Act. That section and section 4 state as follows:

> "3.(1) Subject to the provisions of this section, all rights in and over the foreshore of this Island and the floor of the sea are hereby declared to be vested in the Crown.
>
> (2) …
>
> (3) …
>
> 4. Any person who is the owner or occupier of any land adjoining any part of the foreshore and any member of his family and any private guest of his shall be entitled to use that part of the foreshore adjoining his land for private domestic purposes, that is to say, for bathing, fishing, and other like forms of recreation and as a means of access to the sea for such purposes.
>
> Provided that where any land as aforesaid is let, the letting of which is in pursuance of a commercial enterprise, the right to the use of the foreshore for private domestic purposes shall only be by virtue of a licence granted to the lessor under this Act." (Underlining emphasis provided)

[125] In my judgment, section 4 of the Beach Control Act gives an owner or occupier of any land adjoining any part of the beach or foreshore a right to use that part of the foreshore adjoining his land for private and domestic purposes. The right which an adjoining landowner A would have to complain about in nuisance would be a right to complain if landowner B was interfering with or preventing him from using or accessing that portion of the foreshore or beach adjoining his own land and not that portion of the foreshore or beach adjoining landowner B's land or any other landowner. In any event, the land about which the complaint was made in this case, although adjoining the foreshore, is not owned by either the 1st appellant or the respondents, and since section 4 is concerned with the use of the foreshore by owners of lands adjoining the

foreshore, that section would be inapplicable. Additionally, members of the public would not generally have right of accesss to the foreshore unless they are owners of land adjoining the foreshore as section 3 declares that all rights in and over the foreshore of the island and the floor of the sea are vested in the Crown. It follows from this that no claim for public nuisance could be made under section 4.

[126] Although there is no right to claim public nuisance by virtue of section 4 of the Beach Control Act, one also has to consider whether any other right to a claim of public nuisance exists. In this regard, the learned trial judge noted that the land, upon which the appellants had built the structures, belong to the National Resource Conservation Authority (NRCA) (page 14 of the judgment). This ownership, it seems, would preclude any entitlement or right in the respondents, or indeed the public, to access that land.

[127] The learned trial judge, at page 15 of her judgment, stated that those "lands enure to the benefit of all the persons in the neighbourhood including the adjoining land owners". She, however, did not support that statement by reference to any authority and unfortunately it seems to conflict with the provisions of the Beach Control Act.

[128] Section 3(4) of the Beach Control Act makes it clear that no member of the public has any inherent right to bathe or walk along the foreshore, except where acquired by specific statutory process. The subsection states:

> "(4) No person shall be deemed to have any rights in or over the foreshore of this Island or the floor of the

> sea save such as are derived from or acquired or preserved under or by virtue of this Act."

[129] The Beach Control Act does allow public rights to be acquired over a beach or access to a beach but those may only be secured by way of application. Section 12 authorises the NRCA to acquire land, including the foreshore, for the use of the public. Section 14 allows for members of the public, by way of a court order, to secure rights to use any beach or land adjoining any beach. There is no evidence, however, that any such rights exist in this case.

[130] The fact that the land the appellants have built upon belongs to the NRCA, and the fact that there is no evidence that the public has acquired any right to access those lands mean that, despite the learned trial judge's finding to the contrary, the public, including the respondents, can suffer no loss by virtue of the construction. The award of damages for nuisance is therefore unwarranted.

[131] I am therefore of the view that ground v must succeed. In all of the circumstances, the appeal must be allowed in relation to the issue of public nuisance and of damages awarded in relation thereto.

[132] In my view, the judgment should stand in favour of the respondents in relation to the issue of liability in respect of trespass and in relation to the permanent injunctions granted. However, the judgment should be departed from in relation to damages. I propose the following orders:

a. The appeal is allowed in part. The order for damages for trespass and public nuisance is set aside and the following order is substituted:

The Claimants are awarded general damages for trespass in the sum of $1,000,000.00.

b. Save as above, the appeal is dismissed and the judgment of Cole-Smith J and the orders made by her on 23 September 2009 are affirmed.

PHILLIPS JA

ORDER

a. The appeal is allowed in part. The order for damages for trespass and public nuisance is set aside and the following order is substituted:

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b. Save as above, the appeal is dismissed and the judgment of Cole-Smith J and the orders made by her on 23 September 2009 are affirmed.

c. Half costs of the appeal to the respondents to be agreed or taxed.