

IN THE HIGH COURT OF BELIZE A.D. 2023

CLAIM No. CV120 of 2023

BETWEEN:

[1] MICHELLE DEVORE

Claimant

and

[1] IMER HERNANDEZ DEVELOPMENT CO. LTD

Defendant

Appearances:

Ms. Stacey Castillo for the Claimant

Mr. E. Andrew Marshalleck SC and Mr. Jaraad Ysaguirre for the Defendant

2024: April 9;
 May 20.

DECISION

*Preliminary Issue – Trespass – Surface Rights Interference – Damages – Measure of Damages –
Wayleave Assessment – Diminution in Value – Fair and Reasonable Fee – Mines and Minerals Acts.*

[1] **ALEXANDER, J.:** Before me is the trial of the preliminary issue of the appropriate measure of damages for trespass occasioned by the removal of minerals from land belonging to the claimant.

[2] Counsel for the parties were unable to agree on the appropriate measure of damages in the circumstances of this case. It was felt necessary to resolve this issue before the matter progresses to the stage of filing of witness statements and the appointment of experts. At the case management conference on 29th February 2024, I made the order for trial of this preliminary issue.

[3] The claim is for damages for trespass or, alternatively, for damages for the value of the materials removed by the defendant from the claimant's property between November 2020 and February 2021. The claimant also seeks a declaration that the defendant has no title to the minerals situate within or under the claimant's property and an account of the materials that were removed. At this stage of the proceedings, however, my remit is to determine how the damages are to be measured.

[4] I rule that the appropriate measure for determining damages is that as prescribed by statute.

Submissions

[5] Ms. Castillo submitted that the appropriate measure of damages should be by "wayleave" against the relevant statutory background for the portion of the land used by the defendant to extract minerals. Regarding the rest of the land, the damages ought to be measured based on the diminished value of the land to the claimant. Basically, she posits that there should be two ways of measuring damages in the instant case.

[6] Ms. Castillo grounds her approach on the fact that the claimant's property was damaged by the defendant when it committed the trespass, by entering and doing the excavation works. During the excavation works, the defendant carried away large quantities of materials including limestone and marl. The defendant also removed plants, trees, and bushes from the claimant's property, causing damage to the land. The damage caused by the extractions was done to the claimant's surface rights. In the instant claim, the claimant accedes that she has no ownership interest in the minerals removed by the defendant and accepts that she is only entitled to damages for trespass. It is how her damages are to be quantified that is in issue before me. According to Ms. Castillo, it would be inappropriate to assess damages on a wayleave basis only. Two types of assessments (i.e. wayleave and assessment of the diminished value of the land) are necessary. She relies on the case of **Whittham v Westminster Brymbo Coal and Coke Company**.¹

¹ [1896] 2 Ch 538.

- [7] Mr. Marshalleck argues that the approach of Ms. Castillo is **not** correct. Ms. Castillo's approach is akin to that of wayleave cases. In wayleave cases, the amount of damages is assessed not merely on the basis of diminution in the value of the land but the trespasser ought to pay for the user of the land. The wayleave principle holds that damages are assessed by conducting an inquiry as to the wayleave, using the customary rate of charge in the locality to arrive at a convenient measure of damages.² In effect, a wayleave assessment allows for damages to be measured by reference to what is the customary rate of wayleave in a particular area. Thus, the claimant seeks an account of the materials removed by the defendant, its value to the defendant and payment of what is found due upon taking the account. She also wants damages based on the diminished value for the rest of the property.
- [8] Mr. Marshalleck argues that the **Whitwham** approach is not appropriate in this case. In the instant case, the claimant has no right to the materials removed. In fact, the claimant admits that she has no ownership interest in the minerals removed. Any claim for damages based on the value of those minerals is unsustainable. Further, the claimant has made no allegation of any physical damage to "developments" on the surface, so the appropriate measure of damages is a reasonable fee for the use made of the surface of the land without the agreement of the owner or the order of the Minister.
- [9] He submits that, in these circumstances, the statutorily prescribed measure of damages is the correct approach, as provided under the Mines and Minerals Act of Belize Chapter 226 R.E. 2020. He invites the court not to accede to Ms. Castillo's approach of obtaining an account to determine the value of the materials removed, as it is an unsustainable and inappropriate measure for assessing damages in this case.

Statutory Framework

- [10] The questions of minerals, their ownership, removal and compensation are addressed in the Mines and Minerals Act. I think it necessary, at this stage, to set out the relevant sections.

² Whitwham, page 538.

[11] Section 2 of the Mines and Minerals Act states that:

[1] Notwithstanding anything in any other Act or any grant of, or title to, land conferring rights to minerals, the entire property in and control of all minerals–

(a) in any land in Belize;

(b) under territorial sea as determined by the maritime legislation in force;

(c) on or under the sea bed beyond the territorial sea to a point where the sea is two hundred metres in depth and beyond to such depths of the super jacent waters as admit of exploitation of minerals; or

(d) in suspension or in solution in any spring, stream, river, lake, lagoon or in the sea,

shall be deemed to be and always to have been vested in Belize. [Emphasis added].

[12] Section 3 of the Mines and Minerals Act defines minerals as “any substance whether in solid, liquid or gaseous form, occurring naturally in or on the earth, formed by, or subject to, a geological process, but does not include ...” Surface rights are defined to “include the right of the owner/lawful occupier over the crops, trees, grass, other bushes or plants and structures of any kind whatever standing on the land but does not include the right to dig the land for any mineral, excluding water”.

[13] Section 103 of the Mines and Minerals Act states that:

103.-(1) Subject to the provisions of this Act, **where, in the course of reconnaissance, prospecting or mining operations, the rights of the owner/lawful occupier of any land are disturbed or damage to any crops, trees, buildings, stock or works thereon is caused–**

(a) the holder of the authority, by virtue of which the operations are carried on; or

(b) if the operations are carried on by or on behalf of a person who is not the holder of an authority otherwise than in accordance with an authority, every person by or on whose behalf the operations are carried on,

is liable to pay the owner or lawful occupier fair and reasonable compensation in respect of the disturbance or damage according to the respective rights or interests of the owner or lawful occupier concerned.

(2) **The amount of compensation payable for surface rights shall be–**

- (a) where the owner or lawful occupier is also the licensee or permit holder, fair and reasonable compensation less one half per cent reduced royalty; and
- (b) **where the owner or lawful occupier is not the licensee or permit holder, fair and reasonable compensation shall be charged in addition to ten per cent of the annual acreage rental.** [Emphasis added].

[14] The statute also provides for instances of trespass to land, where a permit holder fails to get the owner's consent to enter her land to access the minerals that belong to the State. Section 102 of the Mines and Minerals Act states:

102.-(1) The holder of an authority shall not exercise any of his rights under the authority or under this Act—

- (a) except with the written consent of the Minister in respect of—
 - (i) any land set apart for any public purpose, other than mining; or ...
- (b) except with the written consent of the owner/lawful occupier thereof

Provided that where the consent of the owner/lawful occupier is withheld, if the Minister, on an application by the holder of the authority made through the Inspector, and after hearing both the parties, is satisfied that such consent is being unreasonably withheld, he may, by Order, direct the owner/lawful occupier to allow the holder of the authority to carry on such works on the land on such terms and conditions and within such period as may be specified in the Order—

Discussion

[15] Certain undisputed facts exist in the present case. The defendant entered upon the claimant's land, without permission and without an order of the Minister. Should liability be found for trespass, the claimant is only entitled to recover damages for the trespass. The claimant has no ownership interest in the minerals removed by the defendant, which she acknowledges. There is no claim that there existed any development on the land that was disturbed by the trespass. In these circumstances, Mr. Marshalleck stated that it is a bare claim for damages for the violation of a right of ownership or a trespass to land. Ms. Castillo disagrees, arguing that the claim is for more than a mere violation of ownership rights. In fact, the claimant's property was damaged in the process of excavation. Her surface rights were interfered with or "disturbed" when the defendant actually removed

vegetation from her land, causing her loss and damage. The vegetation included plants, trees and bushes existing on the property at the time of the trespass.

[16] Against this backdrop, the claimant intends to produce evidence of the damage done and applies for the preliminary determination of the appropriate measure of damages. Ms. Castillo says that it would be inappropriate for the assessment of damages to be done on a wayleave basis alone and relies on **Whitwham**.

[17] In **Whitwham**, Lopes LJ stated:

Now, applying that principle here, what loss have the plaintiffs suffered in consequence of the wrongful act of the defendants? The value of their land, beyond all question, has been diminished; and Mr. Russell admits that the plaintiffs are entitled to be paid in respect of that. **But there is something more in respect of which I think the plaintiffs are entitled to be compensated, and that is for the use the defendants have made of the plaintiffs' land** during some eight years past. That, as I understand, is the principle that has been applied in this case by Chitty J., and I think that it is a right principle. This is a peculiar case, and it may be said to be a mixed one – something between the ordinary trespass to land case and a way-leave case. I do not think that any authority can be said to have a strict bearing upon this case. [Emphasis added].

[18] The **Whitwham** approach requires an assessment to determine the user or the wayleave measurement for the portion of land used by the defendant and a separate assessment of the diminished value of the rest of the land to the claimant. However, Mr. Marshalleck maintains that there is no allegation of disturbance or interference with any “development” on the land. The excavation did not damage any specific surface rights and, therefore, the claim is restricted to damages for entering upon the land without permission and without an order of the Minister. Damages for trespass, where there is no damage to any developments on the surface or diminution in value of the land are assessed based on a reasonable price for the user of the land. He references **Bocado SA v Star Energy UK Onshore Ltd et al**³ where Lord Clarke cited the principle set out in **AG v Blake** [2001] 1 AC 268 at 278 thus:

A trespasser who enters another's land may cause the landowner no financial loss. In such a case, damages are measured by the benefit received by the trespasser, namely by his use of the land. The same principle is applied where the wrong consists of use

³ [2010] UKSC 35 at paragraphs 119 to 121.

of another's land for depositing waste, or by using a path across the land or using passages in an underground mine. **In this type of case the damages recoverable will be, in short, the price a reasonable person would pay for the right of user.** [Emphasis added].

[19] Ms. Castillo rejects the argument that there is no damage to surface rights. She argues that to the contrary, the claim is for damage to *surface rights*, specifically damage to property in the form of vegetation. In these circumstances, there should be a dual approach to the assessment of damages.

[20] In my view, the matter involves allegations of "disturbance" of surface rights by trespass. To this extent, I did agree with Ms. Castillo. However, I do not agree that in the present case, the **Whitwham** approach is applicable. In the present circumstances, the appropriate measure of damages is prescribed by statute. The Mines and Mineral Act clearly and unequivocally sets out the compensation regime for disturbance of surface rights, including interference or damage to crops, trees, building, stock or works on the land. Section 103(1) as set out above at paragraph 13 spells out the measure of damages to be applied. It is fair and reasonable compensation that is applicable. In addition, section 103(2) stipulates and effectively imposes a fixed charge of ten percent of the annual acreage rental for the use of land for the purpose of extracting minerals. This provides a complete answer to the preliminary issue.

[21] The Mines and Minerals Act is not to be used as a mere backdrop against which a wayleave assessment is to occur, as suggested by Ms. Castillo, nor is it an *additional* way by which damages could be measured. It clearly provides for how compensation is to be measured in the circumstances of the present case. The measure of damages payable for the interference of surface rights is fair and reasonable compensation pursuant to the statutory regime.

[22] Given the above discussion, it means that I do not accept the two-pronged approach advanced by Ms. Castillo of taking an account, ascertaining the value of a portion of the land, and then applying a separate measure for the rest of the land, by using the diminution of the value to the claimant. The appropriate and applicable measure for

assessing damages is statutorily prescribed and is to govern the assessment in the present claim.

Disposition

[23] It is ordered that the applicable measure of damages in the instant claim is that as prescribed in the Mines and Minerals Act of Belize.

Martha Lynette Alexander
High Court Judge