

IN THE SUPREME COURT OF BELIZE A.D. 2019

CLAIM NO. 317 of 2019

BETWEEN

MICHAEL BOGAERT

CLAIMANT

AND

THE COMMISSIONER OF LANDS & SURVEYS

1st DEFENDANT

THE ATTORNEY GENERAL OF BELIZE

2nd DEFENDANT

VICTOR BALAN JR

3rd DEFENDANT

CARLOS ITZA

4th DEFENDANT

Before the Hon Mr Justice Westmin R.A. James (Ag)

Date of Delivery: 18th May 2021

Appearances: Ms Velda Flowers for the Claimant

Ms Brianna Williams for the 1st and 2nd Defendants

Ms Andrea McKoy for the 3rd Defendant

Mr Allister Jenkins for the 4th Defendant

ORAL RULING ON STRIKE OUT APPLICATION

1. The Defendants filed applications for an order pursuant to Rule 26.3(1)(a)(b) and (c) of the Civil Procedure Rules (CPR) to strike out the Claim Form and Statement of Claim of the Claimants filed on June 24th 2019 along with costs. The application of the 3rd-4th Defendants are also seeking to discharge the order of injunction granted on the 31st May 2018 and that the Claimant's undertaking in damages be enforced and the Claimant pay damages to the Defendants.
2. The grounds of the application to strike out is that the action are an abuse of the process of the court as it discloses no reasonable cause of action against the Defendants.

Principles Governing applications to Strike Out a Claim

3. The power of the court to strike out a Statement of Claim is provided for by Rule 26.3 (1) (a) (b) & (c) of the CPR which provide as follows;

26.3 (1) In addition to any other powers under these Rules, the court may strike out a Statement of Claim or part of a Statement of Claim if it appears to the court

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- (a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;*
- (b) that the Statement of Claim or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
- (c) that the Statement of Claim or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or*

4. This is considered a nuclear option and the rule ought not to be used except in the clearest of cases where a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court.¹ Where an arguable case is presented or the case raises complex issues of fact or law its use is inappropriate and so the burden of proof in this regard is on the applicant.² The Defendants, as applicants, must satisfy the Court that no further investigation will assist it in its task of arriving at the correct outcome. The Applicant must persuade the Court either that a party is unable to prove allegations made against the other party; or that the Statement of Claim is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.³

5. The Claimant has claimed

- a. A Declaration that the Claimant is entitled to possession of the property known as 200 acres of land situate on the West Bank of Barton Creek, Mary Hickey Registration Section, Block 23 in the Cayo District, Belize;*

¹*Brian Ali v. The Attorney General of Trinidad and Tobago*, CV 2014 02843 Kokaram J at para 13; **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al (Civil Appeal No. 20A of 1997)**

² *Tawney Assets Limited v East Pine Management Limited and Ors* [2012] ECSC J0917-4; *Ian Peters v Robert George Spencer* [2009] ECSC J1222-1

³ *Tawney Assets Limited v East Pine Management Limited and Ors* [2012] ECSC J0917-4

- b. *A Declaration that the Claimant is entitled to possession of the property known as 80.6 acres of land situate on the West Bank of Barton Creek, Mary Hickey Registration Section, Block 23 in the Cayo District, Belize;*
- c. *An Order that the 1st Defendant delivers title to the Claimant of all that piece or parcel of land known as 200 acres of land situate on the West Bank of Barton Creek, Mary Hickey Registration Section, Block 23 in the Cayo District, Belize AND of all that piece or parcel of land known as 80.6 acres of land situate on the West Bank of Barton Creek, Mary Hickey Registration Section, Block 23 in the Cayo District, Belize;*
- d. *An Order that the 3rd and 4th Defendants deliver up possession of the said property to the Claimant;*
- e. *Damages for trespass to the Claimant's property;*
- f. *An Order for Injunction restraining the 3rd and 4th Defendants whether by their servants or agents or otherwise howsoever from trespassing, surveying, wrongfully interfering with the property in any way, causing damage to the property constructing or attempting to construct or erect thereon any structure or building or works on the property; or dealing with the same in any way;*
- g. *An order for an injunction restraining the 1st Defendant from leasing, transferring or in any way giving title of the said lands or any portion thereof to the 3rd and 4th Defendants;*
- h. *Alternatively, that the Claimant is entitled to said parcels of land being all that piece or parcel of land known as 200 acres of land situate on the West bank of Barton Creek, Mary Hickey Registration Section, Block 23 in the Cayo District, Belize AND of all that piece or parcel of land known as 80.6 acres of land situate on the West Bank of Barton Creek, Mary Hickey Registration Section, Block 23 in the Cayo District, Belize, having been in open, undisturbed occupation and possession for upwards of 30 years;*
- i. *Interest on Damages*
- j. *Costs*
- k. *Any further or other relief this Honourable Court deems just*

Wrong procedure

- 6. The Applicants argued that the claim for possession of land must be filed by using a fixed date claim and not an ordinary claim form as used by the Claimant herein.
- 7. Part 26.9(3) provides that

(3) Where there has been an error of procedure or failure to comply with Rule, practice direction, court order or direction, the court may make an order to put matters right.

8. The Court has the ability to convert proceedings to a fixed date claim form under Rule 26.9 and correct the procedural error. At this late stage in the proceedings just before a trial date is set with no objection being made thus far, this court will not strike out a claim on this basis.

Ownership of the properties

9. The Claimant's claim is that in [1997] he purchased 200 acres of land situated on the West Bank of Barton Creek, Mary Hickey Registration Section Block 23 in the Cayo District, Belize from Patrick Cartwright and the other joint title holders. The Claimant indicated that he had retained the services of the late attorney-at-law, Lionel Welch to obtain title to the said 200 acres but to date, this has not materialised.
10. The Claimant has also pleaded that in or around 1998, he purchased all that piece or parcel of land known as 80.6 acres of land situate on the West Bank of Barton Creek. Mary Hickey Registration Section Block 23 in the Cayo District from one Barbara MacLeod. Since 1998 the Claimant indicated he has been liaising with the Ministry of Natural Resources to obtain title over this 80.6 acres of land but has not yet been able to obtain the title for the said parcel of land as the title was never transferred to Barbara McLeod. That despite the Claimant's repeated request for title, this was never done.
11. The Claimant's witness statement contains more or less the same contentions. The Claimant's witness statements or documents disclosed does not in any one of them evidence a purchase of the property by the Claimant from the persons he alleges. There is no sale agreement, no transfer or title, no payment receipt and there isn't even a title in the name one of the alleged sellers to the Claimant (Barbara McLeod).
12. Further even if the Claimant owned the parcel of land, the property in question especially as it relates to the 3rd and 4th Defendants was acquired by the State for a public purpose and so the Claimant's action would be for compensation upon proof of the ownership. The Claimant would not be able to get possession.

13. The Claimant indicates that there are documents which would show ownership by the Claimant but was not disclosed by the previous Attorney and so should be granted an opportunity to enter supplemental list of documents and further evidence. The strike out application was first in time, further the Claimant had all opportunity to disclose the documents and include in the witness statements. The matter was ready for trial and so to extend time for the Claimant to remedy their serious defect would be contrary to the overriding objective of dealing with cases fairly. The Claimant was aware of the Defences and has a duty to put forward their case properly. Moreover, the documents which the Claimant seeks to rely on does not evidence title by the Claimant either. The documents actually go contrary to the Claimant's case. One document shows that Barbara McLeod did not have title to the property and the person she was seeking title from referred her to the government who had acquired the property. If Barbara McLeod did not even herself have title at the time and was still seeking title documents, how could she be selling to the Claimant. The other documents are notices by the State to the Claimant of the acquisition and requesting a claim be made for compensation. These notices sent to everyone in the area doesn't evidence ownership but rather that a notice under the act for potential claimants upon showing ownership to be compensated.
14. Having regard to the above, the case for the Claimant as it relates to title and possession is bound to fail.

Undisturbed possession

15. The Claimant in the alternative pleaded that he was in sole and undisturbed possession and occupation of the 200 acres since 1997 and in undisturbed possession of the 80.6 acres since 1998 and before that Barbara MacLeod had been in sole possession since 1975.
16. It is settle law that in order to prove possession the guidance in the English House of Lords decision in *J A Pye (Oxford) Ltd and anor, v Graham et al (2002) WLR 221* on the two elements necessary for legal possession is applicable. They are (a) a sufficient degree of physical custody and control ("the factual possession") and (b) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("an intention to possess").
17. The onus was on the party claiming possessory title, in the instant case the Claimant to prove, on a balance of probability that he was in continuous exclusive

possession for the period of time and to prove the two elements of factual possession and the intention to possess.

18. The Claimant has not provided any cogent evidence in his witness statements that he occupied the entire 200 acre or 80.6 acre properties. The Claimant definitely has no evidence that he was in possession of the properties occupied by the 3rd and 4th Defendants before the injunction. The Claimant had not developed the property occupied by the 3rd and 4th Defendants before the injunction.
19. There was no evidence of purchase by Barbara McLeod and there was no evidence that she was occupying the property since 1975 but simply someone who wanted to purchase the property. Therefore, the presumed possession of Mrs McLeod cannot count towards the Claimant's possession. The Claimant's time would start to run from 1998 and as a result 30 years has not yet passed.
20. As indicated before since the land was acquired for public purposes the Claimant could have sought compensation. The case for possessory title will therefore also fail.
21. I therefore order that the Claimant Statement of Case be struck out and the discharge of the undertaking granted.
22. In relation to the 3rd and 4th Defendants claim for damages set out in his Affidavit. The Defendant has to specifically prove the damages claimed.
23. There is no proof of the payment of workers so I will not allow the item at (1).
24. I will allow the claim at (2) and (3). There was no evidence produced of (4) so it is not allowed. Item at (5) there was no claim for assault in these proceedings so I will not allow that claim. Items at (6)(7) and (11) will be covered under costs. There was no evidence of (8) and so will not be allowed. I am not convinced about item (9) since the defendant has not shown how much fruits and vegetables were growing on the property and whether the feed was necessary so I will not allow that.
25. I would allow the sum of \$2,200.00 as proved in receipts. I will allow item (10) at a nominal sum of \$500.00 per month since the grant of the injunction.
26. Costs of the application in the sum of \$750.00 for the 1st-2nd Defendants and 3rd-4th Defendant.

27. Costs of the claim in the sum of \$5,000.00 for the 1st-2nd Defendants and 3rd-4th Defendant.

I so order

/s/WJames

Westmin R.A. James

Justice of the Supreme Court (Ag)