

**IN THE SUPREME COURT OF BELIZE, A.D. 2022**

**Claim No. 749 of 2021**

**BETWEEN**

**EMPRESS ENTERPRISES LIMITED**

**CLAIMANT/RESPONDENT**

**AND**

**OSCAR A. SABIDO**

**DEFENDANT/APPLICANT**

**Before** the Honourable Madam Justice Geneviève Chabot

**Date of Hearing:** July 29<sup>th</sup>, 2022

**Appearances**

Aaron Tillett, Counsel for the Claimant

E. Andrew Marshalleck, S.C., Counsel for the Defendant

**RULING ON APPLICATION TO STRIKE OUT THE CLAIM**

1. The Defendant/Applicant (the “Applicant”) brings this Application to Strike Out the Claimant/Respondent’s (the “Respondent”) Claim. The Respondent is the registered owner of Parcel 741, Block 45, Fort George/Pickstock Registration Section (“Parcel 741”). The Applicant is the registered owner of Parcel 864, Block 45 Fort George/Pickstock Registration Section (“Parcel 864”). Parcel 741 and Parcel 864 are adjacent. The dispute pertains to a square-shaped portion of Parcel 741 located at the rear of the buildings built on both Parcels (the “Disputed Portion”).
2. The Respondent claims that it has been using the Disputed Portion as a dumping ground and a point of access in order to maintain its building since its acquisition of Parcel 741. The

Respondent contends that the Applicant is trespassing on the Disputed Portion and has brought this Claim in order to be restored in its possession of the Disputed Portion.

3. The Respondent seeks the following relief in the Claim:
  1. A declaration that the Claimant is in sole possession of the entirety of Parcel 741, Block 45, Fort George/Pickstock Registration Section;
  2. A permanent injunction restraining the Defendants whether by themselves, their servants, employees, agents, or otherwise howsoever from entering or using the Claimant's land;
  3. General damages for trespass, to be assessed;
  4. Aggravated damages;
  5. Interest pursuant to sections 166 and 167 of the Supreme Court of Judicature Act, CAP. 9 of the Substantive Laws of Belize, R.E. 2011;
  6. Costs; and
  7. Such further and/or other relief as this Honourable Court thinks fit.
4. The Applicant filed a Defence and Counterclaim in which he submits that he has acquired an equitable interest in the Disputed Portion by way of adverse possession. According to the Applicant, the Disputed Portion is completely enclosed and can only be accessed through Parcel 864. The Applicant disputes that the Respondent uses the Disputed Portion as alleged.
5. The Applicant applies to this Court pursuant to Rules 11.3(1), 11.6(1), 26.3(1) and 26.1(2)(j) of the *Supreme Court (Civil Procedure) Rules, 2005* (the "*Rules*") for the Claim to be struck out. The Applicant seeks the following relief:
  1. A declaration that the Claim is statute barred and constitutes an abuse of process of the Court;
  2. An order that the Claim against the Defendant be struck out as having been issued after the expiration of the applicable limitation period for recovery of possession of land claims, that being 12 years as provided by section 12(2) of the *Limitation Act*;<sup>1</sup>
  3. A declaration that the Claimant's title to the portion of land at the rear of Parcel 741 is extinguished in accordance with section 22 of the *Limitation Act*;

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<sup>1</sup> Cap. 170, Rev. Ed. 2020.

4. A declaration that the Defendant is entitled, pursuant to section 31(1)(f) and (g) of the *Registered Land Act*<sup>2</sup> to an overriding interest in the strip of land in the rear portion of Parcel 741;
  5. A declaration that the Defendant is entitled, pursuant to sections 138(1) and (3) of the *RLA*, to an order for prescriptive title to the strip of land described in Plan of Survey Reg. No. 37 Entry No. 20173 dated December 11<sup>th</sup>, 2020 by Licensed Surveyor Ian Gillett;
  6. An order that the Registrar of Lands registers the Defendant, pursuant to sections 138(1) and (3) of the *RLA*, as proprietor of the small strip of land described in Plan of Survey Reg. No. 37 Entry No. 20173 and issue prescriptive title to him;
  7. A declaration that based upon the Defendant's application for prescriptive title filed on November 2<sup>nd</sup>, 2021 prior to the filing of this Claim on November 25<sup>th</sup>, 2021, the Defendant is entitled to an order that the application for prescriptive title by statutory relief pursuant to section 138 of the *RLA* be referred to the Registrar of Lands for the issuing of title to the Defendant;
  8. Costs;
  9. Such further or other relief as may be just.
6. The issues for determination by this Court are twofold. The Court must first determine whether the Claim is statute barred. If the Claim is not statute barred, the Court must determine whether the declaration sought by the Respondent in the Claim should be struck out as an abuse of process.

## **Discussion**

### *Is the Claim statute barred?*

7. The Applicant contends that the Respondent was dispossessed of the Disputed Portion in 1994, when the Applicant built walls and concrete block fences around the Disputed Portion. By building those walls and fences, the Applicant enclosed and effectively took control of the Disputed Portion to the exclusion of the Respondent. The Respondent's cause of action is for trespass. The Respondent's right of action accrued in 1994 when the Applicant took control of the Disputed Portion. Under section 12(2) of the *Limitation Act*, the Respondent's right to recover possession of the Disputed Portion expired 12 years later, in 2006.

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<sup>2</sup> Cap. 194, Rev. Ed. 2020 ("*RLA*").

8. According to the Applicant, once the 12-year limitation period expired, the Respondent's title to the Disputed Portion was extinguished. Since 2006, then, the Respondent has not had title to the Disputed Portion. As a result, the Respondent's cause of action for trespass is no longer available because the Respondent does not hold title to the Disputed Portion.
9. The issue of who now has title to the Disputed Portion is a separate issue which is the subject of the counterclaim. In essence, the Applicant's argument is that after the Respondent's title to the Disputed Portion was extinguished in 2006, the Disputed Portion entered into a "waiting period" where the Respondent's title was extinguished, but the Applicant was not yet able to assert title to the Disputed Portion. Under section 42 of the *Law of Property Act*,<sup>3</sup> title can be acquired by continuous and undisturbed possession of the land for 30 years. However, Parcel 741 was declared registered land under the *Registered Land Act*<sup>4</sup> on January 14<sup>th</sup>, 2009. Under section 138 of the *RLA*, title can be acquired by open, peaceful and uninterrupted possession of the land for a period of twelve years. The 12 year waiting period under the *RLA* has now elapsed. The Applicant is able to apply for title on the Disputed Portion, and has done so.
10. The Respondent argues that the Application is premature because its Claim raises several issues of facts this Court must determine. The Respondent disputes having been dispossessed of the Disputed Portion until November 2<sup>nd</sup>, 2021, when the Applicant built a chain-linked fence on the Disputed Portion to block the Respondent's access to a portion of the Disputed Portion. The Respondent says that it had, until then, access to, and was in fact utilizing the Disputed Portion as a dump site and to maintain the commercial building on Parcel 741. The Respondent notes that the use of the Disputed Portion as a dumpsite has been recognized by both parties. It also notes that at the hearing, the Applicant recognized that the Respondent has not been dispossessed of a small strip of the Disputed Portion near the Respondent's building where it uses a ladder to effect repairs on the building.
11. The Respondent says that to grant this Application would be to make determinations of facts based only on the Applicant's Defence. The Respondent submits that it has provided affidavit evidence of its utilization of the Disputed Portion, and will provide evidence at trial of the previous owner's utilization of the Disputed Portion. This evidence must be tested in Court.
12. In reply, the Applicant disputes having conceded that the Disputed Portion has been used by the Respondent for dumping. The Applicant also disputes having claimed control over the entire Disputed Portion; only the portion of the Disputed Portion that is now enclosed by the chain-linked fence is in the exclusive possession of the Applicant. The Applicant

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<sup>3</sup> Cap. 190, Rev. Ed. 2020.

<sup>4</sup> Cap. 194, Rev. Ed. 2020 ("*RLA*")

disagrees that the alleged utilization of the Disputed Portion by the Respondent is sufficient to claim possession of the Disputed Portion.

13. I find that the Claim is not statute barred. The cause of action in the Claim is trespass to property. The Respondent argues that the Applicant is trespassing on the Disputed Portion, which forms part of Parcel 741, and is asking this Court to declare the Disputed Portion to be in its sole possession and to restrain the Applicant from trespassing on the Disputed Portion. Because the alleged trespass is ongoing, the Claim is for continuous trespass. Limitation does not apply to a continuing tort, as recently confirmed by the Supreme Court of British Columbia in *Howes v FortisBC Inc.*, a trespass to property case:<sup>5</sup>

For limitation purposes, a continuing tort can be discovered anew each day it continues. The application of limitation periods to continuing tort claims was addressed in *Gautam v. South Coast British Columbia Transportation Authority*, 2020 BCCA 135 at paras. 47, 50-52, 54 (per Justice Groberman and Justice Stromberg-Stein):

[47] Courts have, on many occasions, had to apply statutory limitation periods to civil wrongs of a continuing nature. They have been faced with arguments from defendants that the limitation period should be measured from the day that the civil wrong commenced, and arguments from plaintiffs that the limitation period should be measured from the day that the civil wrong ceased to be committed. They have, uniformly, rejected both positions. Instead, they have treated each day on which a civil wrong continues as the starting point for a limitation period applying to damages suffered on that day [emphasis added].<sup>6</sup>

14. The Applicant's submission that the Respondent cannot claim for trespass because it no longer holds title to the Disputed Portion is premature. I agree with the Respondent that for this Court to conclude that the Respondent has been dispossessed of the Disputed Portion would amount to accepting the Applicant's Defence without testing the evidence. Such a finding is predicated on the Applicant establishing the alleged open, peaceful, and uninterrupted possession of the Disputed Portion. The Respondent strongly resists this assertion, and provided some evidence of its utilization of the Disputed Portion in the Claim. Whether this alleged utilization is proven on the balance of probabilities is a factual issue that can only be resolved through the testing of the evidence presented by both parties at trial. If the Respondent succeeds in establishing some utilization of the Disputed Portion, the next step would be to determine whether this utilization is sufficient to counter

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<sup>5</sup> 2021 BCSC 2271.

<sup>6</sup> *Ibid* at para. 68.

the Applicant's assertion of adverse possession. This legal issue can only be resolved once the extent of the utilization has been proven.

15. As a result, this Court is unable to conclude that any cause of action for the recovery of land has accrued because the Respondent's alleged dispossession of the Disputed Portion remains to be proven. Sections 12(2) and 13(1) of the *Limitation Act* are not engaged. The Claim is one in trespass to property. Because the trespass is continuous, the limitation period resets every day the trespass is alleged to have been committed.

*Should the declaration sought be struck out as an abuse of process?*

16. In oral submissions, Counsel for the Applicant argued that the declaratory relief sought by the Respondent in the Claim is unavailable. The Respondent seeks a declaration that it is in sole possession of the entirety of Parcel 741, including the Disputed Portion. The Applicant submits that this declaration cannot be granted because Empress Enterprises Ltd. is not, in fact, in sole possession of the entirety of Parcel 741. This is acknowledged in the Statement of Claim and is the very reason this Claim has been brought. In addition, granting a declaration that the Respondent is in sole possession of the entirety of Parcel 741 would be inconsistent with its claim for trespass, because there would be no trespass if the Respondent was indeed in sole possession of the entirety of Parcel 741.
17. This Court agrees that the declaration sought by the Respondent must be struck out. The Respondent is seeking a declaration that it "is in sole possession of the entirety of Parcel 741". That is a declaration of fact. However, it is well established that "declaratory relief must determine the rights of the parties"; "courts do not have jurisdiction to simply declare facts, detached from the rights of the parties".<sup>7</sup> Declaratory relief is therefore not available to declare the Respondent's possession of the entirety of Parcel 741.
18. In addition, the Court agrees with Applicant's Counsel that the declaratory relief sought by the Respondent is inconsistent with the injunctive relief it also seeks. The Respondent is not currently in sole possession of the entirety of Parcel 741, and that is the reason this Claim is being brought. The Respondent can only succeed in its claim for trespass if it can show that it is not, in fact, in sole possession of the entirety of Parcel 741. Both reliefs cannot coexist.

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<sup>7</sup> See *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 70, citing *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753 at para. 30.

**IS THIS HEREBY ORDERED**

- (1) The Application to Strike Out the Claim is granted in part;
- (2) The following relief sought by the Claimant in the Claim is struck out:

*A declaration that the Claimant is in sole possession of the entirety of Parcel 741,  
Block 45, Fort George/Pickstock Registration Section*

- (3) The remainder of the Claim is not statute barred;
- (4) Each party shall bear their own costs.

Dated October 18<sup>th</sup>, 2022

Geneviève Chabot  
Justice of the Supreme Court