

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION
NEW PROVIDENCE**

2019/ CLE/GEN/00555

BETWEEN:

IN THE MATTER OF ALL THAT piece parcel or lot of land totaling approximately 3,978 square feet being situate on the Northern Side of West Bay Street in the Western District of the Island of New Providence and bounded on the NORTH by the sea and running thereon forty-four (44) feet on the EAST by and now or formerly the land of Esso Standard Oil S.A. Ltd. and running thereon one hundred and sixty-two and two hundredths (162.02) feet on the SOUTH partly by West Bay Street and running thereon fourteen (14) feet and partly by and of the Harbour Side Warf Ltd and running thereon thirty (30) feet and on the West by property of Harbourside West Ltd. and running thereon One Hundred and sixty-two and two hundredths (162.02) feet.

BETWEEN:

KOZY HARBOUR LIMITED

PLAINTIFF

AND

CYRIL EZEKIEL MINNIS

DEFENDANT

Before: The Honourable Mr. Justice Keith H. Thompson

**Appearances: Mr. Myles Parker of counsel for the Plaintiff
Mr. Wayne Munroe Q.C. of counsel for the Defendant**

Dates of Hearing: 03rd May, 2019
18th September, 2019
09th October, 2019
15th October, 2019
06th November, 2019
11th November, 2019
16th December, 2019

18th February, 2020
25th February, 2020
28th February, 2020
16th July, 2020
21st July, 2020

RULING

[1] This matter was commenced by a Specially Indorsed Writ of Summons (WOS) filed April 23rd, 2019. The Statement of Claim (SOC) provides as follows:

“STATEMENT OF CLAIM

- 1. By virtue of an Indenture of Conveyance to the Plaintiffs dated the 28 day of June, A.D. 1971, and recorded at the Registry of Records in Volume 2993 at Pages 326 to 331, the Plaintiff at all material times was and is at the date hereof the owners of *inter alia* ALL THAT piece parcel or lot of land totaling approximately 3,978 square feet being situate on the Northern side of West Bay Street in the Western District of the Island of New Providence and bounded on the NORTH by the sea and running thereon**

forty-four (44) feet on the EAST by land now or formerly the land of Esso Standard Oil S.A. Ltd. and running thereon one hundred and sixty two and two hundredths (162.02') feet on the SOUTH partly by west bay street and running thereon fourteen (14') feet and partly by the land of the Harbour side West Ltd., And running thereon thirty (30') and on the WEST by property of Harbour side West Ltd. and running thereon One Hundred and sixty-two and two hundredths (162.02') feet.

- 2. That in or about the year 2017, the Plaintiffs discovered that the Defendant was trespassing on the subject land and immediately demanded that the Defendant cease in his trespass thereon. In or about the month of February A.D. 2019 the Plaintiff wrote the Defendant and, who was in occupation of the subject land, informing him of its title to the subject land by virtue of the said Indenture of Conveyance and demanding that he immediately deliver up vacant possession of the subject land. The Defendant, despite having been advised of the Plaintiff's title to the subject land, has failed and/or refused to vacate the subject land to the date hereof.**

- 3. The Defendant has also unlawfully and without permission erected concrete structures on the Plaintiff's said land, which structures the Defendant has to the date hereof failed and/or refused to demolish and remove from the Plaintiff's land.**

- 4. The Defendant is not the tenant of the Plaintiff and has not been given permission to enter upon or to occupy the subject land,**

nor has the Plaintiff sold the subject land or any portion thereof to the Defendant.

- 5. The Plaintiff's demands notwithstanding the Defendant has refused to vacate the subject land.**

- 6. Unless compelled and restrained by this Honourable Court the Plaintiff fears that the Defendant will continue in his unlawful occupation of the subject land.**

AND THE PLAINTIFFS CLAIM:

- (1) An Order that the Defendant do forthwith deliver up vacant possession of the subject land.**
- (2) An injunction restraining the Defendants whether by himself his servants, agents or otherwise howsoever from entering or remaining upon the subject land or disturbing the Plaintiff in his quiet possession enjoyment and ownership of the lot of land the subject hereof.**
- (3) An Order that the Defendant within thirty (30) days and at his own expense demolish and remove any and all structures unlawfully erected upon the Plaintiff's land the subject hereof without the Plaintiff's permission. Failing which an Order that the plaintiff be at liberty to demolish and remove the said structures at the Defendant's expense without liability for waste.**

- (4) Damages for Trespass.**
- (5) Damages for Waste.**
- (6) Damages until vacant possession is delivered up to the Plaintiff.**
- (7) Mense profits.**
- (8) General Damages.**

- (9) Costs.**
- (10) Such further or other relief as to the Court may seem just.”**

[2] The Defence and Counter-claim provides:

“DEFENCE AND COUNTER-CLAIM DEFENCE

- 1. That the Defendant make no admission as to the Plaintiff's claim to documentary title in paragraph 1 of the Statement of Claim hereof.**
- 2. The Defendant says that the Plaintiff never approached him in 2017 about any trespass as stated in paragraph 2 of the Statement of Claim. The Defendant avers that in 2019 the Plaintiff approached him and had Cedric Parker & Co. write him about trespass. The Defendant avers that he has been in possession of the land since 2005.**
- 3. That Defendant repeats paragraph 2 and avers he is no longer a trespasser but the owner of the land that he occupies.**

4. That paragraphs 4 and 5 thereof are admitted.
 5. That paragraph 6 thereof is admitted SAVE that the Defendant denies that his occupation is unlawful.
 6. The Defendant claims that by virtue of his undisturbed possession of the land in question he has extinguished the title of the tile holder.
-

AND THE DEFENDANT CLAIMS:

1. A Declaration that the Defendant is the legal and beneficial owner of the property the subject of this Action pursuant to S. 16 of the Limitation Act, CH. 83.
2. Costs.
3. Any further or other relief as the Court deems just.”

[3] The Reply and Defence to Counter-Claim provides:

“REPLY & DEFENCE TO COUNTERCLAIM

1. The Plaintiff denies paragraph 2 of the Defence in as much as the Defendant claims to have been on the subject land since 2005.
2. The Plaintiff denies paragraph 3 of the Defence in as much as the Defendant claims to be the owner of the subject land.

3. Paragraph 6 of the Counterclaim is denied and the Plaintiff denies that the Defendant has been in undisturbed possession of the subject land.”

CASE FOR THE PLAINTIFF:

-
- [4] The Plaintiff called four witnesses namely; Bazel Robin Nichols, Benjamin Albury, Donald E. Thompson and Winifred Thompson all of whom executed Witness Statements.
 - [5] The Defendant intended to call three witnesses however, the Defendant was the only witness called for examination.
 - [6] There is no disagreement as to the documentary ownership of the Plaintiff as it relates to the subject land. The Defendant is claiming time pursuant to the Limitation Act.

EVIDENCE OF BENJAMIN ALBURY:

- [7] Mr. Albury executed a witness statement (WS) which was filed November 01st, 2019. The WS also contains exhibits BA-1, BA-2, (a – p), and BA-3 (a – r). The exhibits in BA 2, (a – r) and BA-3, (a – r) are Google Earth Maps.

WITNESS STATEMENT OF BENJAMIN ALBURY:

“I BENJAMIN ALBURY of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:

- 1. I am a Director of the Plaintiff in this action and am duly authorized make this Affidavit from my own knowledge on its behalf.**

- 2. The Plaintiff is the owner of the captioned 3,978 square foot tract of land located off of West Bay street immediately opposite St. Albans Drive (hereinafter referred to as “*the Property*”), having purchased the larger tract of land which includes the Property. On or about the 28th day of December A.D. 1978, the Plaintiff submitted the entire western portion of the larger tract of land of which the Property forms a part to a declaration of Condominium for the Harbourside West Condominium (“*the Condominium*”). I own unit 2.100 in the Condominium from 1983 to date. I was also in possession of Unit 2.300 from June 1993 up to Sunday, April 1st 2012. Both of these units are in the western block of the development and unit 2.300 is located vertically above unit 2.100 (hereinafter collectively referred to as the “*Units*”). A copy of the conveyance to me is annexed hereto and marked Exhibit “BA-1”.**
- 3. During the period from 1988 to November, 2011, I visited the condominium almost on a daily basis and often spent the night there, as during this period of time, both my daughter and her mother lived in the Units. In November 2011, my daughter completed construction of her residence on her own piece of property and she and her mother moved out of the Units and into my daughter's residence in November 2011. I helped them move out and I locked up the units and the access gates thereto**

in 2011. I periodically visited the Units to retrieve various items as the move was made over a period of time until April 2012 when I lost possession of Unit 2.300. However, I still retain possession of Unit 2.100 to date and my daughter still has items stored therein.

- 4. Up to the time my daughter and her mother moved out in November 2011, there was no construction, clearing down or any other type of building activity taking place in the North Eastern corner of the property where the subject building is located.**
- 5. The Defendant did not commence construction of the subject building until sometime between the years 2014 and 2015, when I noticed construction taking place as I passed the building whilst going about my daily activities. I immediately brought the Defendant's activities to the attention of Mr. Tennyson Wells who was also a shareholder in the Plaintiff. I was advised that Mr. Wells confronted the Defendant and told him to cease in his trespass, however, the Defendant ignored the Plaintiff's demands and continued in his said construction. Whilst the Defendant made his trespass, the members of the Plaintiff were focused on selling the property.**
- 6. I have also had an opportunity to use the google earth program on my computer and have located aerial photographs of the subject property.**
- 7. Google Earth also has a history function which allows one to view aerial photographs of a property at various times in the past. I have searched the Google Earth database and have been able to locate historical photographs of the subject property covering the period beginning in November 2000 to September 2019. The photographs clearly show that the**

Defendant began his clearing down and construction upon the subject property in or about the year 2014. I have printed a bundle of the aforementioned photographs from google Earth and have also made enlarged copies of the said photographs covering the aforementioned period. Annexed hereto and marked Exhibit “BA-2 (a)” to “BA-2 (r)” and “BA-3 (a)” to “BA-3 (r)” are copies of the said originally sized aerial photographs of the subject property and copies of the enlarged aerial photographs of the subject property.

8. The contents hereof are correct and true to the best of my knowledge information and belief.

[8] Mr. Albury is also the owner of several of the units in the condo complex. Mr. Albury and his brother are the owners and operators of B.M. Albury & F.D. Albury Architects and their firm was the architects for the condo complex.

[9] Mr. Albury showed the Court at Tab 3 the entirety of the property owned by Harbouside West Condominium. He also pointed out that portion of land which was retained by the Plaintiff measuring some 3,978 square feet, the subject of this action.

[10] On the subject property is a building which is demarcated and coloured yellow. It is constructed on the North East portion of the property.

CROSS EXAMINATION OF BENJAMIN ALBURY:

[11] Under cross-examination Mr. Albury testified that he was responsible for the architectural work on the building and he also oversaw the construction. The setback was from the eastern most boundary of the property going west, inclusive of the western area. This was the setback in 1979.

[12] Mr. Albury was the owner of units 2.100 and 2.300. He lost possession of 2.300 but still retained 2.100. There is a door which gives access to the unit itself and a gate.

[13] The entrance from West Bay Street to the property was never locked and there was some vegetation. The area was not gated and fenced in 2002. Mr. Albury became aware of an encroachment and brought it to the attention of Mr. Tennyson Wells. Mr. Albury also said he was aware that Mr. Wells had written to the Ministry of Works complaining about the construction. In this regard, the Ministry was asked to stop the construction and issue a demolition order.

[14] The driveway was not paved by the Defendant but by the Plaintiff Kozy Harbour for the use of the units which were finished in 1981.

RE-EXAMINATION:

[15] Under re-examination, Mr. Albury testified that he was familiar with ariel photography and had spoken to a Mr. Tex Turnquest who had promised to provide certain information. Counsel for the Plaintiff then took Mr. Albury to the google earth maps exhibited to his WS. On exhibit BA-3 (b) dated 12/31/18, he pointed

out the boundary of the condo property. He was able to do this because of the roofs. He also showed the driveway and the pool.

[16] On Exhibit BA-3 (d), dated 4/10/17 he pointed out the driveway and tennis courts. On exhibit BA-3 (e) dated 3/25/17 he said it showed basically the same as the previous ones.

[17] On exhibit BA-3(i) it showed the buildings again. However, he pointed out that there was no roof on the Defendant's structure at that time.

[18] On exhibit BA-3 (k) dated 2/13/15 you can see the foundation of the encroachment. On exhibit BA-3 (r) dated 12/16/14, there was only a clearing and some fill. On exhibit BA-3 (N) dated 2/21/14 there is no building, only trees.

[19] On exhibit BA-3 (i) dated 12/10/12 there is no building. On exhibit BA-3 (r) dated 2/1/2011 he pointed out the condo and the fact that there was no building on the subject property. On exhibit BA-3 (e) dated 11/5/2000 there is no building on the subject property only trees.

[20] Mr. Albury confirmed that he was a member of Kozy Harbour but wasn't aware of the Defendant purchasing any unit (s). He was also not aware of any of the members raising any questions of setbacks.

EVIDENCE OF BAZEL ROBIN NICHOLS:

[21] Mr. Nichols executed a Witness Statement (WS) which was filed November 01st, 2019. His WS also contained several exhibits. Like Mr. Albury, Mr. Nichols is also a member of the Plaintiff Company. His WS contains at BN 1 a letter dated May

8th, 2015 to Mr. Charles Zonicle from Mr. Tennyson Wells. At BN-2 is a letter dated 22nd October 2019 from Craig Delaney, Building Control Officer.

[22] At BN-3 is an appraisal report by Wong dated February 27th, 2008 of the entire property inclusive of that portion which is the subject of this action, valuing the property at \$6,000,000.00.

[23] At exhibit BN-4 is another appraisal by a Dwight R. Watkins dated August 18th, 2015 valuing the entire property at \$8,200,000.00.

WITNESS STATEMENT OF BAZEL NICHOLS:

"I, BAZEL ROBIN NICHOLS of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:

- 1. I am a member of the Plaintiff company in this action and am duly authorized to make this Affidavit from my own knowledge on its behalf.**

- 2. The Plaintiff is the owner of the captioned 3,978 square foot tract of land located off of West Bay Street immediately opposite St. Albans Drive (hereinafter referred to as "the Property". The Property immediately West of the subject property is owned by the Harbourside West Condominium ("the Condominium") in which condominium development I also have an interest.**

- 3. Sometime in Mid-2015 whilst I was passing the condominium, I noticed that someone had commenced clearing and construction works on the subject property. I enquired as to who was responsible for the construction works and upon discovering that it was the Defendant, I immediately contacted Mr. Tennyson Wells, who is also a member of the Plaintiff, and advised him of the Defendant's trespass. Mr. Wells wrote the Ministry of Works advising them of the Defendant's illegal construction and requested a stop order and possibly destroy the subject building. I also met with attorney Gina Morley and instructed her to writ to the Defendant demanding that he cease and desist in his trespass, which she did. However, the Defendant ignored the Plaintiff's demands and continued in his said construction. Whilst the Defendant made his trespass, the members of the Plaintiff were focused on selling the property. A copy of the said letter from Tennyson Wells on behalf of the Plaintiff is annexed hereto and marked Exhibit "BN-1".**
- 4. I also recently contacted the ministry of public works and requested confirmation of the steps taken in response to the Plaintiff's said letter and received confirmation from them that they did receive a building application from the Defendant in May 2015, but that his application was refused. A copy of that letter is annexed hereto and marked Exhibit "bn-2".**
- 5. I have also had an opportunity to review the Witness statement of Mr. Benjamin Albury and do hereby confirm that the google**

map pictures exhibited thereto do include the subject property in each and every picture.

- 6. In or about February 2008 the Plaintiff secured an appraisal of the Condominium. Included in that appraisal were various pictures of all of the features and structures of note on the subject property. There are no pictures of the subject building nor is it mentioned because it was not constructed or under constructed at that time. In fact, the third page of "Exhibit C" to the appraisal contains a picture of the view of the Condominium from the west looking towards the subject property and the subject building is clearly not present. The Plaintiff also secured an appraisal of the condominium in August 2015 and on the twelfth page of the 2015 appraisal a picture of the Western view of the condominium is taken from an almost identical angle to that shown in the 2008 appraisal and the subject building is clearly visible. The 2015 appraisal also shows that the subject building is under still under construction at that date. Annexed hereto and marked Exhibits "BN-3" and "BN-4" are copies of the said 2008 and 2015 appraisals.**

- 7. The contents hereof are correct and true to the best of my knowledge information and belief."**

[24] Under further examination in chief, Mr. Nichols was asked about the document at Exhibit Tab 1. He explained that it was a letter from Tennyson Wells to Charles Zonicle as Mr. Wells was a shareholder in Kozy Harbour. Mr. Nichols went on to explain that he had come into town to watch the Floyd Mayweather Fight and noticed some construction on the most eastern end of the driveway. He queried it. After being told who it was he contacted Mr. Wells who was also the attorney

for Kozy Harbour. After having done that, he left it with Mr. Wells to deal with who promised to make further enquiries.

[25] He explained the document at exhibit BN-2 as being a letter from the Ministry of Works dated October 22nd, 2019. Mr. Nichols explained that he had written to the Ministry to follow up on whether there was any permit issued to build the building on the subject property. For ease of reference, it is in my opinion acceptable to set out those two letters.

KOZY HARBOUR LTD

P. O. Box N-0605, Nassau, Bahamas ☎ 242-077-3120

May 8, 2015

Mr. Charles Zonicle
Director, Physical Planning
Ministry of Public Works & Urban Development
Nassau, Bahamas

Dear Mr. Zonicle,

I had occasion to visit your office on Wednesday May 6, 2015 at which time I made a complaint to Mr. John Davis, one of your officers about the construction of a building on piece of property owned by Kozy Harbour Ltd (Kozy Harbour) on West Bay St. opposite St. Alban's Dr.

Kozy Harbour is owned by a number of Bahamians with the Wells family have a majority interest. It was brought to the attention of a number of shareholders of Kozy Harbour that one Mr. Minnis is illegally constructing a two-storey building on the North-eastern section of the property which is common property under the Declaration of Condominiums (Harbourside West), established by Kozy Harbour.

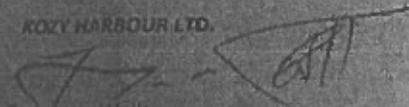
It is our understanding that Mr. Minnis did not apply for and does not have a valid building permit to construct such a building nor does he have title to the property.

The shareholders of Kozy hereby request that your office and The Ministry of Public Works and Urban Development issue the appropriate instructions/order to stop the construction immediately and if necessary have the building destroyed.

Should you require any further information please feel free to contact the undersigned.

Sincerely,

KOZY HARBOUR LTD.


Terrence Wells
Director

RD-4



MINISTRY OF PUBLIC WORKS
P.O. Box N - 8156 Nassau, Bahamas

TELEPHONE NO. 326-4888
FAX 326-7344 - TELEX 20572 MOWBS

Mr. Bazel Robin Nichols
Columbus House
P. O. Box N-9665
Nassau, Bahamas

Your reference

Our reference: MOW&T/BC/ 24/16

Date: 22nd October 2019

Dear Sir,

RE: Proposed Commercial Building for Mr. Cyril Minnis, West Bay Street - Building Application No. 122288

Reference is made to your inquiry in letter dated 22nd October 2019.

This is to advise that our records reflect building application number 122288 which was submitted in May 2015 for a proposed commercial building submitted on behalf of Cyril Minnis. The above application was subsequently refused by the Department of Physical Planning and refusal recorded by the Buildings Control Division on 11th November 2015

Yours faithfully

Craig G. Dolancy
Buildings Control Officer

[26] As to the appraisals, Mr. Nichols confirmed that the first appraisal was done by William Wong and the walk through by Robert Smith. The second was done at the instance of one Rae L. Williams.

[27] At Tab 4 of the agreed bundle of documents are photographs of the structure which is the subject of both this action and Mr. Nichols' and Wells' letters to the Ministry. Initially, Mr. Nichols was not aware of who constructed the building but at the time of giving evidence he said; "I KNOW NOW, MR. MINNIS". According to Mr. Nichols, the building has been there since mid-2015. The photos at Tab 4 were taken by the appraiser.

CROSS-EXAMINATION:

[28] Under cross-examination, Mr. Nichols testified that in mid-2015, the building was out of the ground. He confirmed that Mr. Wells was a director also and was asked to write the letter on behalf of Kozy Harbour. He confirmed that he had instructed Gina Morley to write to the Defendant. Mr. Nichols totally rejected that after the Defendant bought his first unit in 2002, the Defendant started using a fenced off area to store supplies. He further rejected the suggestion that the building, the subject of this action was built in stages.

[29] In re-examination, Mr. Nichols confirmed that he had instructed Gina Morley to write to the Defendant.

EVIDENCE OF DONALD THOMPSON:

[30] Mr. Donald Thompson executed a Witness Statement filed December 12th, 2019, 2nd Witness Statement filed December 13th, 2019 and a report filed August 28th, 2020.

To be used at the Hearing on Monday, the 16th day of December A.D. 2019 at 11:00am
before His Lordship Mr. Justice Thompson.

COMMONWEALTH OF THE BAHAMAS

2019

IN THE SUPREME COURT

SUPREME COURT

CLE/GEN/00555

Common Law and Equity Division

Nassau, Bahamas

B E T W E E N

IN THE MATTER OF ALL THAT piece parcel or lot of land totaling approximately 3,978 square feet being situate on the Northern side of West Bay Street in the Western District of the Island of New Providence and bounded on the NORTH by the sea and running thereon forty-four (44) feet on the EAST by land now or formerly the land of Esso Standard Oil S.A. Ltd and running thereon one hundred and sixty two and two hundredths (162.02') feet on the SOUTH partly by West Bay Street and running thereon fourteen (14') feet and partly by the land of the Harbour Side West Ltd. And running thereon thirty (30') feet and on the WEST by property of Harbour Side West Ltd. and running thereon One Hundred and Sixty two and two hundredths (162.02') feet.

KOZY HARBOUR LIMITED

Plaintiff

AND

CYRIL EZEKIEL MINNIS

Defendant

WITNESS STATEMENT OF DONALD E. THOMPSON

I, DONALD E. THOMPSON of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:

1. I am a registered Land Surveyor, License No. 037, under the Land Surveyors Act and Regulations 1975. I was employed as a Surveyor with the Department of Lands and Surveys in New Providence for 25 years. At my resignation I held the post of Senior Surveyor. I am now Principal of Donald E. Thompson & Associates, a firm of Land Surveyors. I have visited the property being the subject of this action and am familiar therewith.

2. Exhibited hereto and marked "DT-1" is a copy of the Survey Plan of the subject property produced by Donald E. Thompson & Associates, dated the 9th day of December A.D. 2019, which Survey Plan illustrates the Defendant's trespass/encroachment onto the Plaintiff's property. The Defendant's said encroachment consists primarily of a two-story building which is located on the North-Eastern quadrant of the Plaintiff's property.

3. I am familiar with the computer program known as Google Earth by which one is able to view aerial photographs of the planet earth. I have also had cause to use google earth in the course of my profession and have found it to be a reliable resource. I have also had the opportunity to examine the google earth photographs exhibited at Exhibits BA-2(a)-(o) and BA-3(a)-(o) of the Witness statement of Benjamin Albury filed herein on the 1st day of November A.D. 2019 and I hereby confirm that they are photographs of the Plaintiff's subject property.

4. The contents hereof are correct and true to the best of my knowledge information and belief.

SWORN TO at New Providence, The Bahamas)

this 12th day of December A.D. 2019)



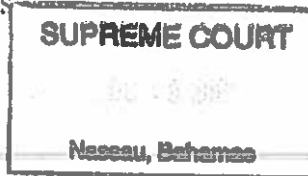
Before me,



NOTARY PUBLIC

To be used at the Hearing on Monday, the 16th day of December A.D. 2019 at 11:00am
before His Lordship Mr. Justice Keith Thompson.

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division



2019
CLE/GEN/00555

BETWEEN

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KOZY HARBOUR LIMITED

Plaintiff

AND

CYRIL EZEKIEL MINNIS

Defendant

2nd WITNESS STATEMENT OF DONALD E. THOMPSON

I, DONALD E. THOMPSON of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:

1. This Witness Statement is supplemental to my Witness Statement filed herein on the 12th day of December A.D. 2019.

2. To the best of my knowledge, approximately every five years the Government of the Bahamas historically caused aerial photography or satellite imagery of the Bahamian terrain to be taken. The last aerial photography taken by the Bahamas Government was for the year 2004. Since then they have been relying on satellite imagery. I have recently attempted to obtain copies

of the aerial photographs and satellite imagery of the subject property taken by the government over the past twenty (20) years, however I have only been able to obtain photographs of the subject property for the years 1999, 2004 and satellite imagery for 2010. Exhibited hereto and marked "DT-1" are copies of the said 1999 and 2004 photographs and 2010 satellite imagery of the subject property.

3. I have also obtained copies of Good Earth images and World Satellite images of the subject property for 2019 which are being used by the Government. The Defendant's building is clearly identifiable on the 2019 satellite imagery. Exhibited hereto and marked "DT-2" are copies of the said 2019 satellite imagery of the subject property.

4. The contents hereof are correct and true to the best of my knowledge information and belief.

SWORN TO at New Providence, The Bahamas)

this 13th day of December A.D. 2019

) 

Before me,


NOTARY PUBLIC

COMMONWEALTH OF THE BAHAMAS

2019

IN THE SUPREME COURT

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BETWEEN

IN THE MATTER OF ALL THAT piece parcel or lot of land totaling approximately 3,978 square feet being situate on the Northern side of West Bay Street in the Western District of the Island of New Providence and bounded on the NORTH by the sea and running thereon forty-four (44) feet on the EAST by land now or formerly the land of Esso Standard Oil S.A. Ltd and running thereon one hundred and sixty two and two hundredths (162.02') feet on the SOUTH partly by West Bay Street and running thereon fourteen (14') feet and partly by the land of the Harbour Side West Ltd. And running thereon thirty (30') feet and on the WEST by property of Harbour Side West Ltd. and running thereon One Hundred and Sixty two and two hundredths (162.02') feet.

KOZY HARBOUR LIMITED

Plaintiff

AND

CYRIL EZEKIEL MINNIS

Defendant

REPORT OF DONALD E. THOMPSON

I, **DONALD E. THOMPSON** of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:


1. I am a registered Land Surveyor, License No. 037, under the Land Surveyors Act and Regulations 1975. I was employed as a Surveyor with the Department of Lands and Surveys in New Providence for 25 years. At my resignation I held the post of Senior Surveyor. I am now Principal of Donald E. Thompson & Associates, a firm of Land Surveyors. I have visited the property being the subject of this action and am familiar therewith.

2. I have been asked to examine the attached photograph which is exhibited hereto and marked Exhibit "DET-3" to determine whether a fence enclosing the subject property is visible thereon. I am advised that the attached photograph represents a magnification of a section of the 2004 aerial photograph taken by the Bahamas Government of the property being the subject of this action. A full copy of the aforementioned 2004 Bahamas Government's photograph of the entirety of subject property and its surrounding area is set out at Exhibit "DT-1" to my 2nd Witness Statement filed herein on the 13th day of December A.D. 2019.

3. I have carefully examined the attached photograph and state that I cannot see or ascertain therefrom the presence of a fence, chain link or otherwise, whether in the north eastern quadrant of the photograph where I am advised that the subject property is located or anywhere else on the attached photograph.

4. The contents hereof are correct and true.

SWORN TO at New Providence, The Bahamas
this 28th day of August A.D. 2020

) 

Before me,


NOTARY PUBLIC

[31] Counsel for the Defendant accepted Mr. Thompson as an expert in land surveying and photogrammetry. In Mr. Thompson's WS filed December 12th, 2019 at exhibit D-1 it shows the subject area measuring 5,944 square feet. The WS filed December, 13th, 2019 at exhibit D-1 contains a 1999 photo, which shows no building on the subject property, a second 2004 photo which shows no building and a 2010 photo which shows no building. Exhibit D-2 is a 2019 photo which shows a building on the subject property.

[32] Mr. Thompson was referred to paragraph 3 of his WS filed December 12th, 2019 which confirms that he examined the google earth photos exhibited to Ben Albury's WS and confirms that they are all photos of the Plaintiff's subject property.

[33] Counsel for the Plaintiff commenced taking Mr. Thompson through the Majority of the photographs exhibited to Mr. Albury's WS. The following was his evidence in that regard.

1. EX. BA-3(a) - 10/09/2019 - Shows a building on the subject property.
2. EX. BA-3(c) - 27/01/2018 - Shows a building.
3. EX. BA-3(e) - 25/03/2019 - Shows a building on the subject property
4. EX. BA-3(q) - 31/03/2015 - Shows a building on the subject property
5. EX. BA-3(k) - 13/02/2015 - No building on the subject property
6. EX. BA-3(m) - 05/04/2014 - Shows just a cleared area, no building
on subject property
7. EX. BA-3(r) - 01/02/2011 - Shows a cleared area, but no building
on the subject property.

[34] According to Mr. Thompson the earliest he saw signs of a building would have been in a photograph dated 14/04/2015. Counsel for the Defendant asked Mr. Thompson if before you construct you clear the land and he said yes.

[35] Mr. Thompson was directed to his WS filed December 13th, 2019 and pointed out the beach north of the subject property. At this point Mr. Munroe advised the Court that he had two witnesses separate and apart from the Defendant. Mr. Parker also advised the Court that he had one additional witness in the person of Ms. Winifred Thompson.

EVIDENCE OF WINIFRED THOMPSON:

COMMONWEALTH OF THE BAHAMAS

2019

IN THE SUPREME COURT

SUPREME COURT

CLE/GEN/00555

Common Law and Equity Division

FEB 28 2020

Nassau, Bahamas

B E T W E E N

IN THE MATTER OF ALL THAT piece parcel or lot of land totaling approximately 3,978 square feet being situate on the Northern side of West Bay Street in the Western District of the Island of New Providence and bounded on the NORTH by the sea and running thereon forty-four (44) feet on the EAST by land now or formerly the land of Esso Standard Oil S.A. Ltd and running thereon one hundred and sixty two and two hundredths (162.02') feet on the SOUTH partly by West Bay Street and running thereon fourteen (14') feet and partly by the land of the Harbour Side West Ltd. And running thereon thirty (30') feet and on the WEST by property of Harbour Side West Ltd. and running thereon One Hundred and Sixty two and two hundredths (162.02') feet.

KOZY HARBOUR LIMITED

Plaintiff

AND

CYRIL EZEKIEL MINNIS

Defendant

WITNESS STATEMENT OF WINNIFRED M. THOMPSON

I, **WINNIFRED M. THOMPSON** of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:

1. I am the former owner of Unit 2.203 (*"the Unit"*) in the Harborside West Condominium property (*"the Condominium"*) and I am familiar with the parcel of land adjoining the eastern boundary of the Condominium property, which is the subject matter of this action. I have reviewed the Survey plan prepared by, and attached to the Witness Statement of Mr. Donald Thompson filed herein on the 12th of December A.D. 2019 and confirm that I am

familiar with the subject 5944 square foot property ("*the Subject Property*") which is outlined in pink thereon ("*the Plan*").

2. I purchased the Unit in on the 26th day of April A.D. 1983 and I resided in the unit from the date of my said purchase until in or about the early part of the year 2000 at which time I moved out of the Unit and rented it to a relative of mine. My tenants resided in the unit until in or about the year 2014 when they moved out. A copy of my conveyance of the Unit is annexed hereto and marked Exhibit "*WT-1*".

3. Whilst my Unit was rented, I visited the Condominium regularly. My Unit is located on the Eastern end of the Condominium with windows overlooking the subject property and I am therefore very familiar with it. I can recall that up to the time that my tenants moved out of my Unit in or about 2014, the Defendant had not yet commenced construction of the two-story building ("*the Building*") that is built on the subject property.

4. I can also confirm that the Defendant did not occupy any other portion of the subject property as the lot was vacant and unoccupied. It was not fenced off nor was it occupied or exclusively used by anyone for storage or any other activity. In fact, up to the time that the Defendant commenced construction of the Building, there was a bench located under the tree in the northern portion of the Subject Property where myself, my tenants and guest used to regularly sit and relax.

5. I have reviewed the Survey plan prepared by an attached to the Witness Statement of Mr. Donald Thompson filed herein on the 12th of December A.D. 2019 and note the cesspit which is clearly identified, and a portion of which cesspit is on the western boundary Subject Property. I can confirm that I constructed that cesspit in or about the year 1999. I clearly recall this as prior to my installation of the cesspit, my Unit, which is located on the 2nd floor of the Condominium, had plumbing issues which resulted in sewerage constantly backing up into the plumbing of my Unit.

[35] Ms. Thompson had one correction to make to her WS. She pointed out that in paragraph 7, she sold the unit in 2013 and not 2018.

CROSS-EXAMINATION:

[36] Under cross-examination Ms. Thompson testified that the bench she referred to in paragraph 4 of her WS, went there shortly after she purchased the property in 1983. There was no fence, only lattice. Counsel for the Defendant asked her if there was a deep well on the property. She said there was no deep well. She also confirmed that she was the only one who had put in a cesspit to which only her unit was connected. She also pointed out that the pit was not paved over, only to the side of the pit is paved. Ms. Thompson confirmed that when the Defendant purchased from her that he owned other units in the building.

CASE FOR THE DEFENDANT:

[37] The Defendant executed a Witness Statement, which was filed on November 4th, 2019.

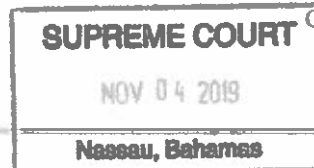
COMMONWEALTH OF THE BAHAMAS

2019

IN THE SUPREME COURT

Common Law and Equity Division

B E T W E E N



CLE/gen/00555

IN THE MATTER OF ALL THAT piece parcel or lot of land totalling approximately 3,978 square feet being situate on the Northern side of West Bay Street in the Western District of the Island of New Providence and bounded on the NORTH by the sea and running thereon forty-four (44) feet on the EAST by land now or formerly the land of Esso Standard Oil S.A. Ltd. and running thereon one hundred and sixty two and two hundredths (162.02') feet on the SOUTH partly by West Bay Street and running thereon fourteen (14') feet and partly by the land of the Harbour side West Ltd. and running thereon thirty (30') feet and on the WEST by property of Harbour Side West Ltd. and running thereon One Hundred and sixty-two and two hundredths (162.02') feet

BETWEEN

KOZY HARBOUR LIMITED

Plaintiff

AND

CYRIL EZEKIEL MINNIS

Defendant

WITNESS STATEMENT OF CYRIL EZEKIEL MINNIS

I, CYRIL EZEKIEL MINNIS of West Bay Street in the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas, Businessman, state as follows:

1. That sometime around 2001 I was a very popular professional boxer and I had a water sport business and it was kind of hectic to travel with jet skis, boat etc. I saw that area the subject of the law suit and used that particular area.

2. That during this time I fenced in the area to the eastern end to keep building materials and my water sport equipment etc.
3. That I also fenced in and walled the western area of the property around the same time.
4. I would use that particular area to store my equipment and whatever extra stuff that I have.
5. Sometime around 2002 there was information passed on to me that Barclays Bank had a Unit in that particular complex for sale and I went ahead and purchased that unit.
6. After 2002 when I purchased the unit (at #5) I used the eastern portion to store building materials only.
7. That I mainly used the western area to store my water sports equipment only.
8. Since 2002 to 2015 I purchased eight (8) units in the complex.
9. After the years purchasing the units I had to buy like scaffolding, building materials, ladder, lawnmower etc. I stored these items in numerous locations on the property which is the subject of the law suit.
10. I have been on the property ever since then and no one has ever asked me to move.

STATEMENT OF TRUTH

11. I, **CYRIL EZEKIEL MINNIS**, have read the Statement in this Witness Statement and hereby confirm that the statements are correct and true to the best of my knowledge, information and belief and are derived from my own personal knowledge.

SWORN at Nassau, The Bahamas)

This ⁴ day of Nov, A.D., 2019)

Before me,



NOTARY PUBLIC

[38] Mr. Minnis had one correction to be made to his WS. In the first paragraph he said it should have said 1999 instead of 2001.

CROSS-EXAMINATION OF CYRIL EZEKIEL MINNIS:

[39] Under cross-examination Mr. Minnis was directed to EX. DT1 of Mr. Thompson's second WS in particular the 1999 photo. Mr. Minnis said "I could see MY BOAT" and some large trees. According to Mr. Minnis, he fenced in the subject property in 2002. He was directed to the 2004 photo at EX. DT1 of the WS filed December 13th, 2019.

[40] According to the Defendant, between 1999 and 2004 he didn't know who owned the property. In 1999 the Defendant didn't own anything there. He entered the property some years after he purchased. When that was, was never disclosed to the Court. He said he interacted with Al Jarret and Tennyson Wells. He met Tennyson Wells in 2002 when he purchased a unit from the bank. The first unit he purchased was on the ground floor. He had some neighbours.

[41] At first he didn't live there and he got no permission to go into any portion of the Plaintiff's land. There was no bench there he says just like Ben Albury said, only bush. He met Ben Albury some years after he purchased.

[42] He thinks he moved into the complex in 2002. He recalled Ms. Thompson and purchasing a unit from her. He wasn't sure if the Plaintiff had an office in the complex. He did however recall there being a music studio there. No one else tried to use the area, the subject of this action because it was fenced in he thinks in 1999. He couldn't recall how long the fence was up.

[43] He said he took the fence down as the building was up and he also had a storage area for his building materials. He had a chain link fence up not lattice. It was put to Mr. Minnis that he did not fence in the subject property in 1999, but he said he did. It was further put to him that he only went into possession in 2014. He said he moved debris, weed and left a grape tree there in 1999.

[44] He was directed to the 2010 photo in Mr. Thompson's 2nd WS, which really shows nothing of which Mr. Minnis says. Mr. Minnis says he was passing by in 1999, he saw the area, it was attractive to him and he went into the property. He was then taken through various photos exhibited to Ben Albury's WS, BA3.

1. EX. BA-3(e) - 3/25/2017.

Mr. Minnis says he sees the boats. When asked if he sees the subject building, he said he saw his office. He said that his office would have been completed by 3/25/2017.

[45] Mr. Minnis' further evidence is that he started building as soon as he got there. He disagreed that he had only started building in 2014. He was then directed to the photo dated 2/13/2015.

2. EX. BA-3(k) – 2/13/2015

He saw the boats

[46] In paragraph 8 of his WS he says he purchased 8 units. When questioned, he said he may have purchased one or two more since then. As to his conveyances, he said he didn't think it was necessary to bring them. Not all of them are stamped and recorded.

[47] He was re-directed to the photo of 2/13/2015 and asked to show the building. He said he saw something else, a fence. He says he also saw a building on the subject property. (There is no building in this photo.)

[48] Mr. Minnis was directed to the photo dated 12/10/2012 and asked to show where his building or the fenced in portion was. His response was;

“It’s a poor photo.”

[49] He said he had the area fenced off in 2012 and that may have been there as well as it may not have been but it was there” NOW”.

[50] He was directed to the photo dated 2/1/2011 and asked if it was a better photo whereby he could see the condos. He agreed it was and he could see the condos. Mr. Minnis denied that the property wasn’t fenced in in 2011 and he said there was no bench. When asked to show on the photo where his office was he said it was a very poor photo and all he could see was a fence.

[51] Counsel asked him since he had a fence there to tell the Court when he took it down. His response was: -

“When you ask a professional boxer to refer to something with memory, I have the same problems.”

[52] The dialogue continued

Mr. Parker: Have you been diagnosed or self-diagnosed?

Mr. Minnis: No Sir, no doctors.

Mr. Parker: So you have memory problems?

Mr. Minnis: Not really”.

[53] Mr. Minnis continued saying he only fenced in the square area which was about 20/20.

[54] He did not recall ever being served with a letter from Tennyson Wells to the Ministry of Works. He had no response for the questions;

“Did Mr. Wells contact you in May of 2015?

Did you recall Town Planning or Mr. Zonicle asking you to stop construction?”

[55] However, he did answer the following questions;

“Do you have an occupancy certificate for the building?

He answered “No I don’t”.

“Did you apply for one?”

“No I didn’t.”

Do you have utilities?

“Yes”

“Do you have a meter?”

“Yes”

Is the meter on the building?

“It’s on the property.”

“Do you have water?”

“Yes”

“What name is the light in?”

“It’s in my name.”

How do you know?”

“B.E.C. would email me.”

“Is your connection legal?”

“Yes I go through the champion process.”

[56] He again denied that he never had exclusive control of the subject area until 2014 and that any use prior to that was in common with the other residents.

RE-EXAMINATION:

[57] Under re-examination Mr. Minnis said the area he had fenced in was larger than the building. He confirmed that he didn’t start construction and go straight through to completion. He started and stopped.

FURTHER EVIDENCE OF THE DEFENDANT:

- [58] Counsel for the Defendant on the last day of the hearing, sought to produce a blow up of the photo at Exhibit DT1 of the 2nd WS of Donald Thompson. It's a 2004 google earth photo. The Defendant was recalled to put the blow up photo into evidence. It goes without saying that counsel for the Plaintiff would have the liberty to address any matters arising therefrom.
- [59] The Defendant said that he could see a fence and a gate very clearly. He was able to point out the condos but not a building on the subject property. The Defendant testified that in 2004 he was working on the first unit he purchased. The purpose of the spot he says was to store his water sports equipment. His business grew so large that he had to move to the western end of the property. It was bigger than Trinidad.
- [60] The Court asked the Defendant if he had ever been to Trinidad and he said no. The Defendant was asked to point out the tennis courts and he did. When asked if there was a fence around the tennis courts, he said that there was one but he couldn't see it on the blowup photo. Counsel said; "In 2004?" and he said "yes".
- [61] Counsel asked the Defendant to show him his boats on the blowup 2004 photo. His response was that they must have taken the picture in the day when his boats were gone. He was then directed to the WS of Ben Albury.
- [62] The Defendant's business he says is still presently operating and is the largest operation of its kind. EX. BA-3, (c) of the Albury's WS was put to the Defendant in order for him to point out the condos.

[63] The Defendant said he saw something on the photo which may be the condos but as he couldn't recognize them he was not able to say where his building was. I hasten to point out that this is a 2018 photo. He could not even identify the soccer pitch. However, he could see the boats and when asked whose boats they were, he said "mine".

[64] He couldn't identify the pitch with the orange circle. According to the Defendant there must have been ground swells when the photo was taken.

[65] At this point, counsel for the Plaintiff requested the agreement from the other side for Mr. Donald Thompson to also review the photo and provide a report as to what his position was as to the content of the blown up photo.

[66] Mr. Thompson's report was filed August 28th, 2020 and is set out below. Mr. Thompson was accepted by both the Plaintiff, Defendant and the Court as an expert.

COMMONWEALTH OF THE BAHAMAS

2019

IN THE SUPREME COURT

SUPREME COURT

CLE/GEN/00555

Common Law and Equity Division

AUG 28 2020

BETWEEN

Nassau, Bahamas

IN THE MATTER OF ALL THAT piece parcel or lot of land totaling approximately 3,978 square feet being situate on the Northern side of West Bay Street in the Western District of the Island of New Providence and bounded on the NORTH by the sea and running thereon forty-four (44) feet on the EAST by land now or formerly the land of Esso Standard Oil S.A. Ltd and running thereon one hundred and sixty two and two hundredths (162.02') feet on the SOUTH partly by West Bay Street and running thereon fourteen (14') feet and partly by the land of the Harbour Side West Ltd. And running thereon thirty (30') feet and on the WEST by property of Harbour Side West Ltd. and running thereon One Hundred and Sixty two and two hundredths (162.02') feet.

KOZY HARBOUR LIMITED

Plaintiff

AND

CYRIL EZEKIEL MINNIS

Defendant

REPORT OF DONALD E. THOMPSON

I, **DONALD E. THOMPSON** of the Western District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:

1. I am a registered Land Surveyor, License No. 037, under the Land Surveyors Act and Regulations 1975. I was employed as a Surveyor with the Department of Lands and Surveys in New Providence for 25 years. At my resignation I held the post of Senior Surveyor. I am now Principal of Donald E. Thompson & Associates, a firm of Land Surveyors. I have visited the property being the subject of this action and am familiar therewith.

2. I have been asked to examine the attached photograph which is exhibited hereto and marked Exhibit "DET-3" to determine whether a fence enclosing the subject property is visible thereon. I am advised that the attached photograph represents a magnification of a section of the 2004 aerial photograph taken by the Bahamas Government of the property being the subject of this action. A full copy of the aforementioned 2004 Bahamas Government's photograph of the entirety of subject property and its surrounding area is set out at Exhibit "DT-1" to my 2nd Witness Statement filed herein on the 13th day of December A.D. 2019.

3. I have carefully examined the attached photograph and state that I cannot see or ascertain therefrom the presence of a fence, chain link or otherwise, whether in the north eastern quadrant of the photograph where I am advised that the subject property is located or anywhere else on the attached photograph.

4. The contents hereof are correct and true.

SWORN TO at New Providence, The Bahamas
this 28th day of August A.D. 2020

) _____
)

Before me,


NOTARY PUBLIC



THE LAW:

[67] This is a trespass action brought by the Plaintiff against the Defendant. The Defendant presently occupies the land which is the subject of this action.

[68] The Plaintiff claims:

- (1) **An Order that the Defendant do forthwith deliver up vacant possession of the subject land.**
- (2) **An injunction restraining the Defendant whether by himself his servants, agents or otherwise howsoever from entering or remaining upon the subject land or disturbing the Plaintiff in his quiet possession enjoyment and ownership of the lot of land the subject hereof.**
- (3) **An Order that the Defendant within thirty (30) days and at his own expense demolish and remove any and all structures unlawfully erected upon the Plaintiff's land the subject hereof without the Plaintiff's permission. Failing which an Order that the plaintiff be at liberty to demolish and remove the said structures at the Defendant's expense without liability for waste.**
- (4) **Damages for Trespass.**
- (5) **Damages for Waste.**
- (6) **Damages until vacant possession is delivered up to the Plaintiff.**
- (7) **Mense profits.**
- (8) **General Damages.**

(9) Costs.

(10) Such further or other relief as to the Court may seem just.

[69] The Defendant also has a Counter-Claim.

COUNTER-CLAIM

(6) The Defendant claims that by virtue of his undisturbed possession of the land in question he has extinguished the title of the title holder.

AND THE DEFENDANT CLAIMS:

- 1. A Declaration that the Defendant is the legal and beneficial owner of the property the subject of this Action pursuant to S. 16 of the Limitation Act, CH. 83.**
- 2. Costs.**
- 3. Any further or other relief as the Court deems just.**

DISCUSSION AND DISPOSITION:

[70] This being a trespass action must not be confused with an adverse possession action. In this action, adverse possession is being used as a defence to the trespass action.

[71] Trespass is defined in Volume 97 (Tort) of the Fifth Edition of Halsbury's Laws of England (2015) as;

“The unlawful presence on land in the possession of another.”

[72] According to that text, a person trespasses on land *“if he wrongfully sets foot on it, or rides or drives over it, or takes possession of it, or expels the person in possession*

[73] At paragraphs 573 and 574 the authors of Halsbury's Laws say;

“573. If the defendant intends to enter the land on which he trespassed it is no defence that he mistakenly thought that it was his own land; MISTAKE IS NO DEFENCE IN TRESPASS. (My emphasis).

[74] Interestingly enough, the Defendant does not plead mistaken belief. He says that he was driving along West Bay Street one day in 1999 and noticed the subject land and it looked like a good spot for him to store his watersports equipment. He went on the land without any permission. His evidence is that he fenced the land in and started storing his water sports equipment on it. In 2002 he says he purchased a unit in the condominium complex. However, according to him he cleared the land down in 1999 leaving only a sea grape tree on the land.

[75] The Defendant's evidence in the first instance is an admission of wrongfully entering another person's land and taking possession of it seeking to oust the legal owner.

574 provides;

“Any form of possession, so long as it is exclusive and exercised with the intention to support a claim of trespass is sufficient to support a claim of trespass against a wrong doer. It is not necessary, in order to maintain trespass, that the claimant’s possession should be lawful and actual possession is good against all EXCEPT those who can show a better right to possession in themselves. However, a mere trespasser who goes into occupation CANNOT BY THE VERY ACT OF TRESPASS, AND WITHOUT ACQUIESCENCE GIVE HIMSELF POSSESSION AGAINST THE PERSON HE EJECTED.”

[76] Halsbury’s Laws, the same edition in paragraphs 581, 583, 584 and 587 set out the defenses available against a claim for trespass.

“581. A defendant may plead and prove that he had a right to the possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such a right; but he may not set up the title of a third person unless he claims under or by authority of such a person...

583. It is a good defence to a claim of trespass for the defendant to plead and prove that he entered on land in the exercise of a legal right whether statutory or otherwise... The defence of justification must be specially pleaded and must cover all of the acts done.

584. Mere delay by the claimant in complaining of the defendant's actions is not of itself sufficient to establish the defence of acquiescence or stopper. It must further be shown that the defendant had been misled to his detriment so that it would be

unconscionable for the Plaintiff to assert his rights. However the claimant is not debarred by acquiescence from enforcing legal rights of which he was unaware.

587. A claim of trespass to land is barred by lapse of the statutory period of limitation, which, except in certain specified cases, is six years from the cause of action arose.”

[77] The Defendant is hanging his hat on two questions:

1. Whether or not the Defendant is the beneficial owner of the subject property subject to Section 16 of the Limitation Act, Chapter 83 and
2. Whether or not the title of the Plaintiff has been extinguished by the possession of the Defendant.

[78] The interest of the Plaintiff is that of a documentary title holder. In the case of **ARAWAK HOMES LIMITED V JOHN SANDS & SMITH, SMITH & CO.** No. 27 of 1991, Mr. Justice Lyons opined at page 64, paragraph 236:

“That being the case, the Plaintiff’s interest is that of a documentary title holder. The interest that John Sands, the first defendant claimed was that of a trespasser. That is no interest at all until the land is quieted within the provisions of the Quieting of Titles Act.”

[79] The documentary title of the Plaintiff is not disputed. However, the Defendant in his submissions asserts that the Plaintiff is not the owner of the subject property and that the subject property is part of the common property of the condominium and owned by Harbourside. This is totally incorrect.

[80] In the Declaration of Condominium **KOZY HARBOUR** is the “Declarant”. In recital 2 under the rubric “**INTEREST AND INTENT**” it provides:

2. **“That the Declarant is THE LEGAL AND EQUITABLE OWNER IN FEE SIMPLE IN POSSESSION OF THE SAID PROPERTY FREE FROM INCUMBRANCES.”**

[81] In recital 16 under the rubric “**MANAGEMENT COMPANY**” it provides:

“That to enable the Unit Owners for the time being to manage and operate the condominium as an efficient whole a company has been or will be incorporated under the Companies Act under the name HARBOUR SIDE WEST LIMITED (herein referred to as the; Management Company) which shall be deemed to be a body Corporate for the purposes of the Act and a copy of its Memorandum and Article of Association is annexed hereto (annexure “C”)

[82] Thus it is clear that Harbour Side West is just the management company.

[83] The Defendant says that the first of two issues for resolution of this matter is whether or not the Defendant is the beneficial owner of the property subject to Section 16 of the Limitation Act, Chapter 83. I stated earlier that this is not a quieting matter or one of adverse possession. This is a trespass action.

[84] In the case of **FAIRNESS LIMITED V. STEVEN BAIN & KENDAL McKENZIE & PENIAL BAIN & CHRISTOPHER BAIN, SCC IV APP No. 30 of 2015** the Hon. Dame Anita Allen P. opined at paragraphs 44 and 45:

“44. As stated earlier, this is an action in trespass not a Quieting Titles action or one of adverse possession. As such, sections 16 to 25 of the Limitation Act, referred to by the Chief Justice at paragraphs 26 - 31 of his judgment, do not arise, and the learned Chief Justice was wrong to raise them. Indeed, the limitation defence to the tort of trespass is found in section 5 of the Limitation Act which states:

“5. (1) The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say-

(a) Actions founded on simple contract (including quasi contract) or on tort;”

45. In this case, as the respondents remain on the land, the appellant’s cause of action is not debarred, but continues to accrue. In this regard, paragraph 569 of Halsbury’s Laws of England (above) states in part:

“Continuing trespass occurs when a person who is or has become a trespasser remains on the land as a trespasser ... In these circumstances a new trespass is committed from day to day.”

[85] Even if the Plaintiff was not the beneficial owner, Harbourside having been created to manage the property, being in possession for the purpose of managing would have been able to bring the action in its own right, despite not being the owner but being in possession. In other words the outcome would have been no different.

[86] In the case of **ARAWAK HOMES LIMITED V. BETHELL'S TRUCKING & HEAVY EQUIPMENT SERVICES LIMITED** and **STANLEY BETHEL** and **SHANE GIBSON SCC** iv App. No. 32 of 2008 (CAIS No. 59 of 2008) Sawyer P. said at paragraphs 4-12:

-
- “4. The respondents deposited over two thousand loads of soil and fill on property (“the property” belonging to Harmony Homes Ltd., a subsidiary of the appellant. While Harmony Homes Ltd. is the legal and documentary owner of the property, the appellant was in possession of the property at the time when the respondents deposited the soil on the land.**
 - 5. After discovering that they had in fact deposited the materials on the wrong property, the respondents proceeded to remove the materials and were alleged to have caused permanent damage to the property. Before the appellant applied to the Supreme Court for an interim injunction, there were some unfruitful discussions between the appellant and Mr. Stanley Bethell, the second respondent, regarding the matter.**
 - 6. As a result of what Mr. Bethell is reported to have said to the representatives of the appellant, the appellant then applied ex parte to the Supreme Court for an injunction prohibiting the respondents from removing any more soil and fill from the property. That application was granted subject to the usual undertaking in damages.**
 - 7. At a later inter partes hearing, the learned judge dissolved that injunction on the ground that there had not been full and frank disclosure as to the identity of the owner of the property when the matter came before the court on the ex parte application.**

The learned judge then made the order summarized in paragraph 1 above; that order, in effect, allowed the respondents to continue their trespass (a tort) on the property in order to continue to remove the materials they had wrongly deposited there but not to commit “waste”, they were to do so under the supervision of the “owner” whom the judge had precluded from being joined as a party and who was not, therefore, before the court.

8. **Mr. Kahlil Parker, junior counsel for the respondents, took a preliminary objection to the appellant’s appeal on the basis that the appellants lacked standing to appeal the decision of the court below since they are not the owners of the land on which the soil and fill was deposited but another company called Harmony Homes Limited is and it was on the basis of the appellant’s claimed ownership that the ex parte application for an injunction had been advanced. Now it was admitted in the affidavit of Mr. Stanley Bethell that the surveyor employed by Destini Lakes – a company which had contracted the services of Mr. Bethell’s company to construct a road – had wrongly identified the subject property bordering Destini’s property as that on which the road was to be constructed hence the deposit of the soil there.**
9. **In response to that objection, counsel for the appellants, submitted that as the appellants were in possession of the subject land, they were the proper party to apply for the injunction and to deal with any trespassers on that property. Counsel relied on the decision in Graham v Peat reported in 1 East 244, ER 102, 95 at page 96 where Lord Kenyon, CJ said:**

“There is no doubt but that the plaintiff’s possession in this case was sufficient to maintain trespass against a wrongdoer. And if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrong-doer. Suppose a burglary committed in the dwelling-house of such a one must it not be laid to be his dwelling-house notwithstanding the defect of his title under that statute.” (Emphasis added).

- 10. In that case, an action in trespass quare clausum fregit had been brought by the plaintiff against the respondent to which the respondent had pleaded the general issue. At the trial before Graham B, at Carlisle, the trespass was proved in fact; but it also appeared that the locus in quo was part of the glebe of the rector of the parish of Workington in Cumberland, which had been demised by the rector to the plaintiff, and the rector had not been resident in the parish for the preceding five years and no sufficient excuse was shown for his absence. The defendant objected that the action could not be maintained since the lease by the rector was absolutely void by the Act of 13 Eliz C. 20, which provided that; “no lease of any benefice or ecclesiastical promotion with cure or any part thereof shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above 80 days in any one year; but that every such lease immediately upon such absence shall cease and be void.”**
- 11. That was a very strong case because the facts and the statute were against the plaintiff; nevertheless, he succeeded in obtaining a rule absolute because he was in possession of the**

property; in other words, “possession is nine points of the law”. It is that principle which informed the old Statutes of Forcible Entry.

- 12. In the circumstances of the appellant as they appeared to me, the respondents cannot complain about the standing of the appellant since they have in fact admitted their trespass. The preliminary objection therefore failed.”**

[87] In reading the above paragraphs, there is no doubt that the law and the facts support the Plaintiff. In the Bethell and Gibson Case, it was the company which was in possession bringing the action. It therefore provides the Plaintiff in the instant case with an even stronger case being the owner in fee simple. Put very simply, Harbour Side West is a company engaged via the Condominium Act to manage the property in a contractual capacity. I have stated earlier that Harbourside West is not the owner. However, there is a nexus between the Plaintiff and Harbourside.

[88] I am therefore of the view that the Defendant knew before going on to the land that he did not own it. He admitted this when he said he saw the property and it looked attractive. He never claimed to have purchased it or that he was authorized to enter upon the subject land.

[89] The Plaintiff produced google earth ariel photographs. This was done to show that despite this being a trespass action, the Plaintiff wanted to show that the Defendant was not on the subject land when he said he was. In fact both parties accepted Mr. Donald Thompson as a registered land surveyor (No. 037), the principal of Donald E. Thompson & Associates, a firm of Land Surveyors.

[90] Mr. Thompson's expert evidence is accepted by the Court. According to his evidence, the earliest he would have seen any signs of a building would have been in the photographs dated 14/04/2015. In EX. BA-3 (m) dated 5/4/2014 Mr. Thompson identified a cleared area but no building.

[91] The Defendant's evidence was that he fenced in the subject area in 2002. However, Mr. Donald Thompson saw no such fence or anything else until in 2014. The Defendant was back and forth with dates. At one point he said he had fenced in the property in 1999, when he says he cleared the property. He said while passing one day he saw the property and it looked attractive.

[92] The Defendant admits he does not have an occupancy certificate and never applied for one. He never even had plans approved for the construction of the building. However, he does have utilities. The Defendant boldly said:

"I don't go through the regular process. I go through the champion process."

[93] The Defendant's counsel had this to say about the photographs in the transcript of November 11th, 2019 at page 46 lines 2 – 20 and page 47 lines 4 – 18.

"2 – 20 MR. MUNROE: My learned friend made a useful suggestion. We can take the two witnesses and then Mr. Thompson and Mr. Minnis can go on the same day with the digital and that. That still wouldn't. I am not being a lawyer in saying we need ten minutes and we are going to need a day. I am being actual that exercise itself

shouldn't require your Lordship, should find us an hour at the most.

THE COURT: Because they will speak for themselves.

MR. MUNROE: As I told someone in a murder, you can row with the picture don't row with me.

THE COURT: The camera can only take what it sees.

MR. MUNROE: It is what it is. I don't think we need more than half an hour an hour at most."

"4 – 18 MR. MUNROE: And I would be prepared to say in everyone's presence including my client. This case will rise or fall with the photos.

THE COURT: Precisely.

MR. MUNROE: Your witness can row with the photos too. But that's the – in fact, I experienced it in a murder case where the chap was fortunate that his girlfriend took a photo, that was date, time stamp and geo stamp.

THE COURT: I think I read that.

MR. MUNROE: Technology today rebuts some of the evidential speculation of a body. We may actually be content with the photo, either what Mr. Minnis says happened is displayed in the photos or it is not.”

[94] The Plaintiff is seeking from the Court.

- “1. An Order that the Defendant do forthwith deliver up vacant possession of the subject land.

2. An injunction restraining the Defendant whether by himself, his servants, agents or otherwise, however, from entering or remaining upon the subject land or disturbing the Plaintiff in its quiet possession enjoyment and ownership of the lot of land the subject hereof.

3. An Order that the Defendant within thirty (30) days and at his own expense demolish and remove any and all structures unlawfully erected upon the Plaintiff’s land the subject hereof without the Plaintiff’s permission. Failing which an Order that the Plaintiff be at liberty to demolish and remove the said structures at the Defendant’s expense without liability for waste.

4. Damages for Trespass.

5. Damages for waste.

6. Damages until vacant possession is delivered up to the Plaintiff.
7. Mesne profits.
8. General Damages.
9. Costs
10. Such further or other relief as to the Court may seem just.

[95] The Defendant has not claimed any proprietary interest in the event a decision is made against him. I must therefore consider whether the Plaintiff's legal right to possession of the subject land upon which the Defendant has built a structure should be mitigated by the doctrine of proprietary estoppel. However, for the sake of completeness I cite several paragraphs from the case of ARAWAK HOMES LIMITED V. DENNIS DEAN No. CLE/gen/1883/2002, wherein ALLEN S. J. opined at paragraphs 24, 25, 26, 27, 28, 29, 30, 33 and 34:

"24. According to Lord Denning M.R. in Moorgate Mercantile Co. Ltd. v. Twitchings [1976] Q.B. 225, "estoppel is not a rule of evidence, not a cause of action, but a principle of justice and equity".

25. The modern law of proprietary estoppel stems from the House of Lords' decision in Ramsden v Dyson [1866] LR 1H1129 in which the Lord Chancellor (Lord Cranworth) set out the circumstances in which proprietary estoppel may arise. He said at page 140: "If a stranger builds on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that

the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

26. Lord Cransworth further elaborated: “But it will be observed to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all of the expenditure made on it. There would be nothing in my conduct active or passive, making it inequitable in me to assert my legal rights.” (Emphasis mine)

27. This case was followed by *Wilmott v Barber* (1880) 15 Ch D 96. In his judgment, Fry J. put forward the following formulation at pages 105 to 106:

“It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights.”

28. Fry J. then went on to set out the elements or requisites necessary to constitute such fraud in order to overcome a

person's legal rights. He said: "In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls on him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment, nothing short of this will do."

29. In *Crabb v. Arun District Council* [1976] Ch. 179 C.A. Scarman L.J. described Fry J's elements "as a valuable guide to the matters of fact which had to be established in order to raise an estoppel in equity". Scarman L.J. pointed out at page 195 however, that what Fry J. called fraud in 1880 should today be called "taking advantage of a person in a way which was unconscionable, inequitable and unjust."
30. In *Shaw v Applegate* [1977] 1WLR 970 C.A. Buckley L.J. interpreted Fry J.'s probanda in *Wilmott* (above) as meaning: "... where a man has a legal right ... acquiescence on his part will

not deprive him of that legal right unless it is of such a nature and in such circumstances that it would really be dishonest or unconscionable to set up that right after what has occurred.” The learned judge also commented that it was open to doubt whether in order to reach that state of affairs, it was necessary to comply strictly with all of the elements put forward by Fry J.”

33. In considering whether the doctrine of proprietary estoppel should be applied to the facts of this case, I am mindful of the admonition of Slade L.J. 632 C.A. that the Court should apply the doctrine with a degree of caution since the estoppel principle may have the drastic effect of conferring on one person a permanent, irrevocable interest in the land of another, even though he has given no consideration for such acquisition, by way of contractual arrangement, and no legally effective gift of it has been made in his favour. A similar caution was sounded by Ormrod J. in *E & L Berg Homes Ltd. v Grey* (1979) 253 EG 473 at 479 C.A.
34. The Defendant’s case, as pleaded, falls within the category of ‘estoppel by acquiescence’, namely that the Plaintiff quietly acquiesced while his rights were being infringed. It is suggested that in such cases, there must be shown a duty to speak, protest or interfere on the part of the person whose rights are being infringed. In deciding where the justice of this case lies, I must determine whether the elements espoused by Fry J. are present and whether, the actions of the Plaintiff in the circumstances, were unconscionable, inequitable and unjust, such as the Plaintiff ought to be deprived of its legal right to the land.”

[96] The above several paragraphs are patently clear. I accept that the Defendant went into the land of another willingly and knowing quite well it wasn't his. His evidence was that:

"I was driving one day and saw the property and it looked attractive for my water sports equipment."

[97] The Defendant has demonstrated a complete disregard for the law period and has the testicular fortitude to brag about it from the witness box. This is totally unacceptable.

[98] Having heard the Defendant's evidence and carefully observing his demeanour, I am convinced that there was no mistaken belief held by him that he owned the subject land. I have said earlier that I accept the evidence of Mr. Benjamin Albury and Mr. Donald Thompson.

[99] I reject the Defendant's evidence that he went onto the land between 1999 and 2002. I find that he only really commenced any real possession until early 2014 as a trespasser. After observing the Defendant in the witness box, I cannot accept his evidence. I have no hesitation in finding that he deliberately tailored his evidence and had to facilitate what he in his pleadings relied on as a defence, Section 16 of the Limitation Act.

[100] In the premises, I am satisfied that it would not be unconscionable or unjust for the Plaintiff to assert its legal right to possession of the subject land on which the Defendant has constructed a building. The Plaintiff is entitled to recover the same.

[101] As to the measure of damages for trespass to land in paragraph 66 of the **DENNIS DEAN** case (CLE/gen/1883/2002) ALLEN S.J. opines:

“66. The rule as to the measure of damages for trespass to land is that the person wrongfully dispossessed of land, has, in addition to the recovery of the land, a right of action for damages in respect of all loss suffered by him during the period of his dispossession. This is so even if it causes no damage to the plaintiff, he is still entitled to claim by way of reasonable damages, a reasonable remuneration for its use.”

[102] In the premises therefore, I accede to the Plaintiff's claim and award damages for any loss incurred by it during the period it was dispossessed by the Defendant and if none, a reasonable remuneration for the use of the land by the Defendant. The quantum of those damages is to be assessed by this Court.

[103] In the circumstances therefore and after detailed consideration of the evidence and the authorities, I dismiss the Defendant's counter-claim and grant the following relief to the Plaintiff:

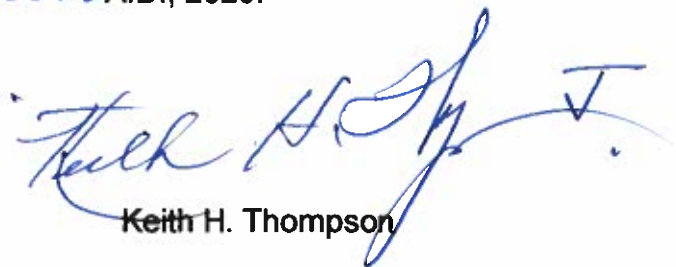
- (1) An Order that the Defendant do forthwith deliver up vacant possession of the subject land;
- (2) An injunction restraining the Defendant whether by himself his servants, agents or otherwise howsoever from entering or remaining upon the subject land or disturbing the Plaintiff in its quiet possession enjoyment and ownership of the land the subject hereof.

- (3) An Order that the Defendant within Thirty (30) days and at his own expense demolish and remove any and all structures unlawfully erected upon the Plaintiff's land the subject hereof without the Plaintiff's permission;
- (4) An Order that failure to demolish the unlawful structure (s) by the Defendant, the Plaintiff is at liberty to demolish and remove the said structure (s) at the expense of the Defendant without liability for waste.

- (5) Damages for Trespass to be assessed by the Court;
- (6) Damages for waste to be assessed by the Court;
- (7) Damages until vacant possession is delivered up to the Plaintiff;
- (8) Mense profits;
- (9) General Damages to be assessed by the Court;
- (10) Costs to the Plaintiff be taxed if not agreed.

I so order.

Dated this 14th day of December A.D., 2020.

A handwritten signature in blue ink, appearing to read "Keith H. Thompson". The signature is stylized and includes a flourish at the end.

Keith H. Thompson

Justice