

2. Mr. Hubert Mark, the claimant, has made a claim in trespass, and nuisance (private nuisance) against Belize Electricity Limited, BEL. The Attorney General was joined as an ancillary defendant. The joinder was on the application of BEL which claimed indemnity from the Government of Belize, based on an undertaking said to have been given by the Government to predecessors of BEL; and on an indemnity clause in a share purchase agreement between the Government and two companies, Fortis Inc. and Newfoundland Energy Cayman Inc, when they purchased the shares in BEL. The particulars on which the claim is based are simple on the face of the statement of claim, but the many transactions that make up the full facts of the claim are extensive, and occurred over an extended period of time; and raise several issues of law.

3. The claimant averred simply that, in the year 1993, BEL without the knowledge or consent of the claimant, unlawfully entered upon land belonging to the claimant and constructed high voltage electricity works thereon. The works are electricity lines conveyed over and across the land by posts affixed to the land. The land is Parcel 602, Block 24, Society Hall, Cayo District, measuring a total area of 28.35

acres. A swathe of the land measuring 100 feet wide and a total area of about 5 acres was cleared and put out of the use of the claimant to date.

4. The claimant seeks the reliefs of: “removal of the defendant’s offending works pursuant to s: 34 of the Electricity Act, or \$100,000.00 damages for loss of use of the five acres; mesne profits; interests and costs”.

5. BEL has pleaded somewhat circuitous defences. On the one hand it pleaded that it never entered the land in 1993, another entity, BECOL did; and so BEL was not liable for the trespass and nuisance claimed. But BEL averred on the other hand that, the electricity works became the property of BEL’s on 1.4.1996; and that the claim of Mr. Mark was statute barred under s: 4 of the Limitation Act, Cap 170, in that the claim was brought more than (6) years after the cause of action had arisen.

6. In his well researched submission, learned counsel Mr. D. Bradley, for BEL, greatly extended the scope of BEL’s plea of limitation. He

submitted that: (1) under s: 4 (a) of the Limitation Act, claims in torts, that is, trespass and nuisance in this case, must be brought within 6 years from the date on which the cause of action first accrued; (2) under s: 4 (d), a claim for recovery of money by virtue of any enactment must also be brought within 6 years; and (3) under s: 12 (2), a claim for recovery of land must be brought before the expiration of twelve (12) years.

7. Mr. Bradley extended further his submission regarding limitation under s: 12 of the Limitation Act, to include a contention that when the claim in trespass and nuisance was made on 2. 8. 2006, BEL had already acquired title to the 100 feet wide swathe of land out of the claimant's land by reason of continuous undisturbed possession for more than 12 years. He cited s: 22 for the proposition that the title of the claimant to the extent that it covered the five acre swathe had been extinguished, and the claimant has no right any more to claim trespass and nuisance in respect to the swathe of land. Mr. Bradley urged the court to include the prior possession by Belize Electricity Board and by BECOL in computing the 12 year period.

8. In a further submission, counsel argued that, under s: 36 of the Electricity Act No. 13 of 1992, the claim of Mr. Mark was a matter for arbitration, not for the court, the claim should be struck out.

9. ***Determination.***

Trespass to land is the *unlawful direct and immediate interference with the possession* of land which is in the possession of another person, or which another person is entitled to possession of. Nuisance is the *unlawful indirect interference with the use or enjoyment of land, or right over land*. For a claim in nuisance to succeed, the claimant must have some proprietary right to the land—see *Hunter v Canary Wharft Ltd [1997]2 WLR 684 (HL)*; *Malone v Laskep [1907] 2K.B. 141*; and *Khorasandjian v Bush [1993] 3 All E.R. 669*.

10. It is a common fact that high voltage lines have been run over land belonging to the claimant, and that the lines were and remain supported by posts affixed to the land; and further that, the claimant cannot use the 100 feet swathe of land below the lines. Those facts established direct interference with the possession of the land by the

claimant. There has been trespass or at the very least, *trespass by relation*. The facts also established private nuisance. The use and enjoyment by the claimant of his land has been restricted, thereby interfered with.

11. Regarding the acts of trespass and nuisance, it was argued by Mr. Bradley that, notice was not given by the predecessor of BEL to the claimant when the land was entered upon in 1991, and the works were carried out, and so the entrance and works were not carried out under the Electricity Act, No. 13 of 1992, which was passed subsequently anyway, so the claimant must prove trespass and nuisance under common law, and cannot rely on s: 34 of the Electricity Act Further, Mr. Bradley emphasized that the claimant must further prove that the trespass and nuisance were the acts of BEL. Further still, Mr. Bradley submitted that, the claim in the two torts would have been time barred anyway after six years from 1991 or from 1993, the year pleaded by the claimant.

12. I am not persuaded by those arguments of Mr. Bradley. Entry upon the land in 1991(the claimant said in 1993), and the carrying out of

works thereon must have been made under an earlier statute than the Electricity Act of 1992. That statute was, *the Belize Electricity Board Ordinance*, of 1950. It was Chapter 182 of the 1980 – 1990, Revised Edition of the Laws of Belize. Its commencement date was 8th July 1950. With due respect, Mr. Bradley overlooked that. The relevant provisions in s: 17, of the Ordinance, are the following:

“17. (1) The Board may from time to time –

...

(d) enter or authorize any person to enter upon any land at all reasonable time after giving reasonable notice and to remain thereon as long as may be necessary for the purpose of effectually doing any act or thing as may be reasonably necessary for the purpose of any survey or preliminary investigation or incidental to the exercise of any power or the performance of any duty of the Board, or for carrying into effect any of the provision of this Ordinance.

(2) In the exercise of the powers given by this section, the Board shall not be deemed to acquire any right other than that of user only in or over the soil of any enclosed and other land whatever through, over or under which it places any of its works; and should any of the works so carried through, over or under any such land become a nuisance or the cause of loss to the owner of such land the Board shall at its own expense remove or alter such work or shall give reasonable compensation as provided by subsection(3).

(3) In the exercise of the powers given by this section, the Board shall do no more damage than is necessary in the circumstances and shall make full compensation to any person interested for all damage sustained by him by reason or in consequence of the exercise of such powers.

(4) *In the event of disagreement, the amount of such compensation shall be determined by arbitration.*

(5) *No compensation shall be payable in respect of any right of user acquired under the authority of subsection (2)''.*

13. The above provisions of the Belize Electricity Ordinance are substantially the same as the provisions in s: 34 of the Belize Electricity Act, the current Act, especially the provisions regarding giving notice to landowners, and compensation.

14. The Belize Electricity Ordinance was repealed by the current Act, ***the Electricity Act, No. 13 of 1992, Cap. 221 of the Revised Edition 2000, Laws of Belize***, which came into force on 28.8.1992. But the Ordinance had lawfully authorized the entry and the carrying out of the works in 1991 or 1993; the repeal of the Ordinance did not affect the lawfulness of the entry and the carrying out of the works in 1991 or 1993. However, from 28.8.1992, the right and obligations of landowners such as Mr. Mark on the one part, and of BEL, the final

- successor to Belize Electricity Board, the licensee, on the other part, became governed by *the Electricity Act*, the current Act.
15. Accordingly, the entry upon the claimant's land and the carrying out of electricity works thereon in 1991 or 1993, were lawful because statute authorized those acts at the time. The acts of the Board, which would otherwise be unlawful acts of trespass and nuisance were lawful. The claim of Mr. Mark is therefore primarily a statutory claim authorized then by *s: 17 of the then Belize Electricity Board Ordinance, 1950*, and now by *s: 34 of the Electricity Act*.
16. The defence of BEL based on claim of title by continuous and undisturbed possession for twelve years, cannot succeed. *Section 17 (2) of the 1950 Ordinance* denied all rights except the right of user to the Board. The provision of that section has been repeated in *s: 34 (2) of the 1992 Act*. The Board could not, and now BEL or any licensee holder who provides electricity cannot acquire any right other than that of user in or over the land over or upon which it places any of its works. It is convenient to set out in full *subsections (2) and (3) of s: 34 of the 1992 Act*. They state as follows:

“34...

(2) *In the exercise of the powers given by this section, the licence holder shall not be deemed to acquire any right other than that of user only in or over the soil of any enclosed and other land whatsoever in, over or upon which he places any of his works; and should any of the works so carried on, over or upon any such land, become a nuisance or cause of loss to the owner of such land, the licence holder shall at his own expense, remove or alter such work or shall give such reasonable compensation as is provided under subsection (3) of this section.*

(3) *In the exercise of the powers given by this section, the licence holder shall do as little damage as possible and full compensation shall be paid by the licence holder to any owner or occupier, or other person having a lawful interest in the land, who suffers damage as a result of the exercise of those powers:*

Provided that, subject to section 17 of the Belize Constitution, no compensation shall be payable in respect of any right of user acquired under subsection (2) of this section.

17. The evidence is that BEL told Mr. Mark not to use the 100 feet wide swathe of land. Not all electricity works require that licence holders deny to landowners possession or use of their land. The evidence here is proof that the electricity works on Mr. Mark's land were *a nuisance and a cause of loss* to Mr. Mark. He is entitled therefore under the two subsections of s:34 of the Electricity Act, to demand that BEL remove the works or pay reasonable compensation. The claim herein must be regarded as a claim based on the grounds of *nuisance* and *loss* caused as the result of conveying the high voltage electricity works over the land belonging to the claimant. The claim is authorised by **s: 34 (2) and (3) of the Electricity Act.**

18. The defence, among others, that Mr. Mark's claim has been barred under s: 4 (a) and (b) of the Limitation Act, because it was brought

after the expiration of six years from the date when the claim first accrued is also rejected. It is my view that, the nuisance and loss caused were and are of continuing nature, and with every day that passes, new or more nuisance and loss arise. Based on to that view, I grant that the claimant is entitled to reasonable compensation dating back six years from 8.9.2006, the date on which this claim was filed.

19. There is even a more fundamental reason for rejecting the defence of limitation of time within which to make this claim. *The proviso in s: 34 of the Electricity Act* saves a claim by a landowner or a person who has interest in land, if the claim can be grounded on *s: 17 of the Constitution, Cap. 4 Laws of Belize* The relevant part of that section of the Constitution states:

“17. (1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that-

- (a) *prescribes the principles on which and the manner in which reasonable compensation therefore is to be determined and given within a reasonable time: and*
- (b) *secures to any person claiming an interest in or right over the property a right of access to the court for the purpose of-*
 - (i) *establishing his interest or right (if any);*
 - (ii) *determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorizing the taking of possession or acquisition;*
 - (iii) *determining the amount of the compensation to which he may be entitled; and*
 - (iv) *enforcing his right to any such compensation”.*

20. In my view, to deny the claimant compensation for the nuisance and loss caused as a result of the works, on the ground of limitation of to make a claim time will result in BEL compulsorily excluding the claimant from the swathe of his land without BEL paying compensation to him at all. That would be contrary to s: 17 of the Constitution. The Electricity Act indeed seeks to be consistent with s: 17 of the Constitution. Section 34 of the Act authorizes a provider of electricity to compulsorily acquire right of user, but the section fulfills the requirement of s: 17 of the Constitution, by providing for compensation.
21. My decision is that the electricity works of the defendant Belize Electricity Limited, conveyed over land belonging to the claimant Mr. Hubert Mark, and supported by posts affixed to the land, became a nuisance and caused loss to Mr. Mark. Accordingly, Belize electricity Board Limited is liable under s: 34 of the Electricity Act to pay compensation to Mr. Mark. Permission is granted for proof of reasonable compensation to be by affidavits.

22. In regard to the question of whether the Government of Belize is liable to indemnify BEL against the judgment sum herein, I decided that the question required a proper inquiry through a separate claim by a general claim form. It was a mistake on my part to have ordered at pretrial review that, the Government be joined as an ancillary defendant. At the time not much facts about how the indemnity might have arisen were made known to me. In the course of writing judgment, I discovered that the indemnity was based on an undertaking given to BECOL by the Government, and on an indemnity clause in a share purchase agreement between the Government of the one part, and two companies, Fortis Inc. and Newfoundland Energy Cayman Inc. On the other part, when the companies bought shares in BEL. The question which arises is whether BEL is privy to the undertaking and to the share purchase agreement, or in any other way was entitled to the benefit of the undertaking or the indemnity. I grant permission to BEL, if it desires, to file a new claim against the Government for indemnity.
23. Costs as between Mr. Mark and BEL are payable by BEL.

24. This judgment will remain undelivered because of the provision of s: 23 of the Electricity Act, which provides for arbitration. I prepared this judgment before I considered s: 36. I have made the appropriate orders based on s: 36.

21.4.2009