

IN THE SUPREME COURT OF BELIZE A.D. 2019

CLAIM NO. 419 of 2019

BETWEEN

**MARCELLA ESTELL HALLS
CAROL MORENO
THIRZA ESTELL
MARLON ESTELL
LISA DEBOURG
MARCIA ROTH**

**1ST CLAIMANT/APPLICANT
2ND CLAIMANT/APPLICANT
3RD CLAIMANT/APPLICANT
4TH CLAIMANT/APPLICANT
5TH CLAIMANT/APPLICANT
6TH CLAIMANT/APPLICANT**

AND

**BOWEN & BOWEN LTD.
BELIZE BREWING COMPANY LTD.**

**1ST DEFENDANT/RESPONDENT
2ND DEFENDANT/RESPONDENT**

BEFORE THE HONOURABLE MADAM JUSTICE LISA SHOMAN

Written Submissions 2020/2021

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**Claimants July 20, 2020 & July 30, 2020
Defendants July 21,2020 & July 30,2020**

**APPEARANCES: Ms. Darynka Muñoz for the Claimants

Ms. Iliana Swift for the Defendants**

RULING

1. The matters which are before this Court for resolution are two applications – one is an Application by the Claimants for the Appointment of an expert witness; and the other is an Application by the Defendants to Strike out the Statement of Claim

2. Both Applications were first heard by the Acting Chief Justice, Michelle Arana on July 7, 2020 and directions given to parties for written submissions and for both Applications to be determined on papers filed.
3. The case has been assigned to this Court and I will proceed, by agreement between the parties per the Order of the Chief Justice which was perfected on 8th October 2020, this matter will determined on what has been filed by both parties.

BACKGROUND

1. The Claimants, all siblings of the same family, claim that they maintain the right-of-way on the Estell Estate (“the Access Road”), a private thoroughfare to and through the various parcels of land owned by them which had to be created upon subdivision of the respective properties since the properties were landlocked.
2. They are claiming for trespass and unlawful use of their land by the Defendants and their employees/agents. The Claimants also allege that the Defendants have wrongfully caused quantities of offensive, noxious, or toxic matter to issue, proceed and arise from their factories, and the matter has spread, diffused into, over and upon the Claimants’ lots.
3. Both the 1st Defendant and 2nd Defendant are companies duly incorporated under the laws of Belize, with a registered address located at No. 1 King Street, Belize City, Belize. The 1st Defendant owns and/or operates a factory for the commercial manufacturing and bottling of soft drinks and the 2nd Defendant owns and/or operates a factory for the commercial brewing and bottling of beer, both situate along Old Airport Road, Ladyville Village, Belize.
4. The Claimants’ lots lie in between the factories of the 1st and 2nd Defendants. On the West, the Claimants’ Access Road is bordered by the 2nd Defendant’s property. On the East, the Claimants’ properties are bounded by the 1st Defendant’s property.

5. The Claimants say that the Defendants unlawfully installed their pipes across Lot No. 7 and the Access Road to connect the two factories and to use in their operations at the beer and soft drink factories to derive benefit by cutting operational costs. The pipes lie on the subsurface of the Claimants' properties and are about three (3) feet underground and the Claimants claim that the pipes have severely obstructed the Claimants' use of their land to the extent that there is no development on the properties yet.
6. The Claimants also say the 1st Defendant erected a gate on the boundary fence of Lot No.7, and that the 2nd Defendant also erected a second gate on the boundary fence of the Access Road to encourage and allow servants, employees, or their agents to unlawfully enter the Claimants lands as a shortcut between the two factories.
7. The Claimants claim to have protested the trespass repeatedly by verbal and written communication to the Defendants' employees, servants and/or agents and say that they have not given the Defendants permission or authorization in the form of a license or otherwise to commit acts of trespass nor to release noxious substances on their properties.

APPLICATIONS

8. The Claimants applied by Notice of Application dated April 9, 2020, supported by the First Affidavit of Noemi Novelo to this Court (which exhibited the Curriculum Vitae for Mr. George Moody) for the following Orders:
 - a. For permission to appoint George M. Moody, civil engineer, and real estate appraiser, as an expert witness in this matter to assist the Court in assessing general damages, if any, in this claim.
 - b. That the Expert Report of George M. Moody shall be submitted to the Court and the parties in this matter no later than 30 days from the date of his appointment.

- c. That the Applicants shall provide the Expert with all necessary documents related to the present claim as the Expert may request from time to time.
 - d. That the costs of the Expert's Report and matters incidental thereto shall be borne initially by the Applicants but that costs of the Expert shall be costs in the cause.
 - e. That the Applicants shall be entitled, upon serving a copy of the Expert Report on the Respondents, to rely on the Expert's evidence at the trial of this matter.
 - f. The Expert shall have liberty to apply to the Court for directions in this matter.
 - g. The costs of this Application shall be costs in the cause.
 - h. Such further or other reliefs as the Court deems fit and just.
9. The Defendants applied by Notice of Application dated July 9, 2020 to this Court for an order that the Claim brought by the 1st to 5th Claimants be struck out. The Defendants say as follows:
- a. Although the Claimants allege unlawful occupation of their property via pipes which are subsurface of Lot #7, Lot# 7 is solely owned by the 6th Claimant and therefore any possible cause of action accrues only to her;
 - b. That although the Claimants allege emission of noxious material from the pipelines to their properties, no proof of the same is provided;
 - c. And therefore the 1st to 5th Claimants have disclosed no reasonable cause of action for bringing the claim.
10. Each Application will be dealt with in the order in which the same has been filed.

Appointment of Expert

11. The grounds of the Application are as follows:

- a. The Application is made pursuant to Rule 32.6 of the Supreme Court (Civil Procedure) Rules, 2005 and to the inherent jurisdiction of the Court;
- b. That the expert evidence of George M. Moody will greatly assist the Court in quantifying and/or assessing the damages, if any, that are to be awarded to the Applicants if successful in the claim. General Damages is a relief being sought by the Applicants as against the Respondents as detailed in their Statement of Claim filed;
- c. That the case involves matters within the expertise of the proposed expert. Expert evidence is, therefore, reasonably required in this action to resolve the proceedings justly;
- d. George M. Moody has over 30 years of experience and has the relevant expertise and qualifications to act as a Civil & Structural Engineer and Land Appraising expert in this matter;
- e. The expert testimony of George M. Moody is expected to assist the Court in understanding the practices and procedures in the areas of Civil Engineering and Land Valuation for the assessment and/or quantification of damages in this claim. In circumstances that the Applicants allege that, the Respondents unlawfully used their land, unlawfully installed pipes thereon, permitted their employees to traverse the Applicants' properties and released noxious substances on the Applicants' properties;
- f. That the Expert Report being requested is based on evidence which the Applicants will seek to rely on in support of its claim;

- b. The expert witness must assist the court impartially on the matters relevant to his expertise; this duty overrides any obligations to the party whom he is instructed or paid.³
 - c. No party may call an expert witness or put in an expert witness's report without the permission of the court, which should normally be given at a case management conference.⁴
15. The Claimants commenced the claim by fixed date claim dated 2nd July 2019 and general damages are not the sole remedy which are claimed. The full Claim is for trespass, possession, an order for removal of pipes, gates, fittings or infrastructure placed on the Claimants' property for a permanent injunction restraining continuing nuisance or any nuisance of a like kind, general damages, aggravated damages or exemplary damages.
 16. The Defendants filed their acknowledgment of service on 25th July 2019, and thereafter filed a full defence in which the Defendants denied trespass and release of offensive toxic or noxious material, but the 1st Defendant admits that its pipelines are subsurface of Lot#7, but are there by a license coupled with an equity.
 17. Case Management was held on November 4, 2019 before Mr. Justice Abel, and standard disclosure filed on November 4, and on December 5th, 2019.
 18. Parties were sent to mediation which should have occurred before January 17, 2020, and time for such Mediation was extended to March 15, 2020 and Orders made for Witness Statements to be filed and served, by Case Management Order made by Justice Abel on February 10, 2020.
 19. Witness Statements have been filed by both Claimants and Defendants.

³ Rule 32.3(2)

⁴ Rule 32.6(2)

20. I agree with the Claimants as a matter of fact that the appointment of an expert will be reasonably required to assist the Court in this matter. I accept the contention of the Claimants that George M. Moody, as a Civil and Structural Engineer, is qualified to be appointed as an expert witness to opine on any pipeline system installed at 3 feet subsurface of their properties. Mr. Moody will be able to offer expert evidence as to the extent of the pipeline system on the Claimants' properties, location, the width, depth, possible uses, and cost-savings for the Defendants, and the effects the pipeline system may have on construction on the said properties.
21. Mr. Moody therefore, because of his particular expertise in Civil and Structural Engineering will be of assistance with regards to the pipeline system installed by the Defendants on the property in question, among other matters.
22. The actual qualifications of Mr. Moody are not challenged by the Defendants in any event, and there is no objection on the ground of conflict, or otherwise.
23. Neither have the Defendants objected to the Application based on the time within which it was made. The Claimants say that the application to appoint the expert dated April 9, 2020, was submitted for filing before the scheduled deadline for submission of witness statements as agreed by Counsel for the parties in this matter being April 20, 2020. An advance copy of the application to appoint the expert was provided to Counsel for the Respondents by email on May 14, 2020.
24. The Claimants have provided adequate reason to the Court as to why the application was not made before at a Case Management Conference. This was not challenged in any way by the Defendants in any event.
25. I agree that the granting of the orders in this Application will not in any way prejudice the Defendants or delay this matter as neither has the Pre-trial Review Hearing has been re-scheduled yet, nor have any trial dates been set.

26. I also accept that the overriding objective is better served by appointing George Moody as an expert witness and that it is in the interest of justice to do so. The Application is being made relatively early by the Claimants since neither dates for Pre-trial Review, nor trial dates have been assigned.
27. This Court will permit the appointment of George Moody as an expert witness since it is in the interest of the overriding objective and is reasonably required to resolve the proceedings between the parties in a manner that is just.

Application to Strike

28. The Defendants filed an Application dated July 21, 2021 pursuant to Rule 26.3(1)(c) of the Supreme Court Civil Procedure Rules, and/or the inherent jurisdiction of the Court to strike out the 1st to 5th Claimant from these proceedings on the ground that the 1st to 5th Claimants have not disclosed any reasonable grounds for bringing the claim against the Defendants. The Defendants say that as a matter of law the claim by the 1st to 5th Defendants will fail.
29. The submissions of the Defendants are contained in an exceedingly spare 5 pages, and submit that since the Claimants allege that the Defendants have trespassed on the property since 1996 by traversing pipes subsurface what is now Lot #7 which belongs to the 6th Claimant only⁵, and since the Claimant has provided no scientific expert evidence to prove the allegations of offensive, noxious or toxic matter to issue proceed or arise and spread, diffuse into, over and upon the lots of the Claimants,⁶ therefore the Court should exercise its jurisdiction and strike the statement of case of the 1st to 5th Claimants
29. The Claimants in response say that the Application is without basis and is a “mischaracterization” of the claim of the Claimants/Respondents as pleaded.

⁵ Defendant/Applicant’s Written Submissions, Page 2, Paragraphs 3 and 4

⁶ Ibid Paragraph 5

30. Furthermore, the Claimants/Respondents submit as follows:

- “a It is procedural mischief for the Applicants to raise the Strike Out Application at this stage of the proceedings. The Applicants have had sufficient notice of the Respondents' pleadings since about July 2, 2019.
- b. The content of the statement of case is sufficient in that if every factual allegation contained in it were proved, the Respondents would succeed on their claim, and would be able to obtain the reliefs sought therein.
- c. The Respondents' statement of case has the potential of succeeding on a matter of law.
- d. There are substantial triable issues in this matter rendering a strike out of the Respondents' case not fit in law or warranted.
- e. The Applicants deliberately misstate the Respondents' pleadings by wrongly alleging that the Claimants pleaded that the trespass to land “*only occurred on Lot #7*”⁷ and that “[t]he Claimants alleged that the Defendants have unlawfully occupied the Claimants' properties since the 1990s by the placement of pipelines subsurface Lot No. 7.”⁸ This is a gloss on the Respondents' pleadings and manifest willful blindness from the part of the Applicants.
- f. The Applicants allege on the **wrong premise** that **only a trespass to Lot No. 7 is pleaded**. This is not so and it is evident from the Fixed Date Claim Form that trespass/unlawful use of land and nuisance to the Respondents' lots inclusive of the Access Road is pleaded. The Applicants further compound this error by stating that as a matter of law the Respondents' not being the proprietors of Lot No. 7 nor in possession of the same cannot pursue a claim for trespass concerning only Lot No. 7.

⁷ Written submissions of the Defendants, para. 10.

⁸ Notice of Application to Strike Out, dated July 7, 2020, ground 4.

- g. This being an application to strike out and not an application for summary judgment, the court cannot decide on this Application whether the Respondents' claim has a real prospect of success. The issue as to whether the Respondents' statement of case should be believed is one to be determined at trial since, on a strike out application, the Court is to take the pleadings as true and should not conduct a mini-trial.
- h. The court must be cautious about striking out the statement of case where the application involves an evaluation of witness statements since as noted above, a strike out application is not a mini-trial of the matter. The Applicants sought to evaluate the witness statement of the First Respondent as is evident from paragraph 12 (b) of their written submissions. This should be reserved for the trial".⁹
31. This Notice of Application was filed on July 7, 2020, after both parties had filed witness statements as ordered by Abel J. The Claimants filed witness statements since April 20, 2020. The Defendants filed their witness statements, all dated May 26th, 2020. The Defendant then filed this application, six weeks later. No reason is provided for the delay.
32. The Application could have (and probably should have) been filed upon the close of pleadings in this Claim. The Defendants/Applicants waited for virtually a year to file their Application and provided no reason whatsoever for the delay.
33. The Claimants/Respondents say with justification that if their Statement of Case disclose a legally recognizable claim against the Defendants/ Applicants, then the Defendants/Applicants cannot succeed in their Application.
34. I agree that statements of claim which may be struck out by a Court as disclosing no reasonable grounds are those which:
- a. *set out no facts indicating what the claim is about*
 - b. *are incoherent and make no sense; or*

⁹ Written Submissions of the Claimants/Respondents, Page 4, Paragraph 13

c. contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the party.¹⁰

35. In the instant Claim, the Claimants/Respondents have claimed for trespass, unlawful use by the Defendants of their property, nuisance and damage caused.
36. According to **The Caribbean Civil Court Practice 2011**¹¹ the section dealing with disclosing no reasonable grounds for bringing the claim addresses two situations:
- a. Whether the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or*
 - b. Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.*
37. The Defendants/Respondents fail in their quest to establish either.
38. In the first case, the pleadings of the Claimants/Respondents disclose far more than a statement of case in which the Claimants are simply saying that Defendants have trespassed on the property since 1996 by traversing pipes subsurface what is now Lot#7 and since that lot belongs to the 6th Claimant only, therefore there is no claim by the other Claimants.
38. As I have pointed out above, the Claimants/Respondent's full claim is for trespass, possession, an order for removal of pipes, gates, fittings or infrastructure placed on the Claimants' property, for a permanent injunction restraining continuing nuisance or any nuisance of a like kind, general damages, aggravated damages or exemplary damages.
39. Secondly, in respect of the submission that since the Claimant has provided no scientific expert evidence to prove the allegations of offensive, noxious or toxic matter to issue

¹⁰ Ibid Page 6 Paragraph 23

¹¹ Butterworths, at page 250, Note 23-24

proceed or arise and spread, diffuse into, over and upon the lots of the Claimants, the Claimants cannot succeed, the Application of the Claimants for an Expert to provide scientific evidence to the Court has been granted.

40. It is clear that there are a sufficiency of both legal and factual issues which have been raised by the 1st to 5th Claimants, as well as the 6th Claimant (to which the Defendants have responded with a Defence and Witness Statements) which ought to be tried and therefore, the Court will not strike out the statement of case of the 1st to 5th Claimants.

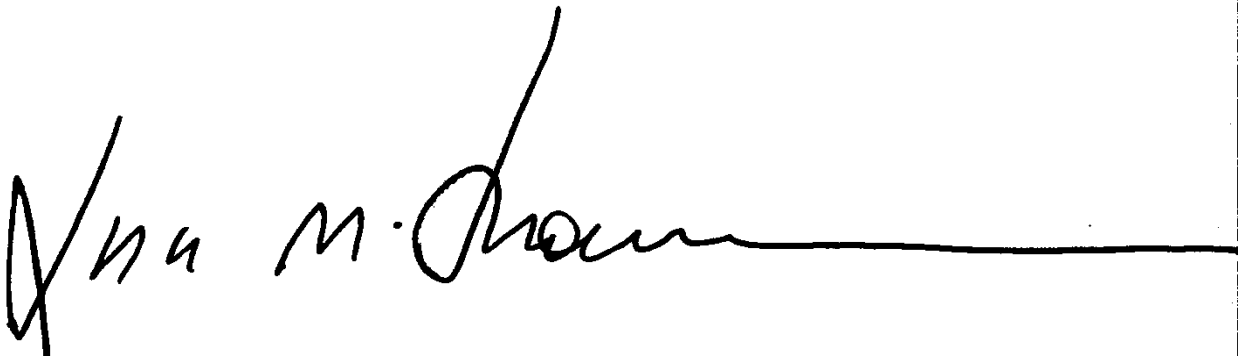
ORDERS

41 The following Orders are made:

- a. George M. Moody, civil engineer, and real estate appraiser is appointed as an expert witness in this matter to assist the Court in this claim with regards to the matter of the pipeline system installed by the Defendants on the property in question, and the impact on the said property including any nuisance and or damage caused to the property and or the value thereof;
- b. That the Expert Report of George M. Moody shall be submitted to the Court and the Parties within 60 days from the date of his appointment;
- c. That the Parties shall provide the Expert with all necessary documents related to the present claim as the Expert may request from time to time;
- d. That the costs of the Expert's Report and matters incidental thereto shall be costs in the cause;

- e. That the Parties may put questions in writing to the Expert on his report within 14 days of receipt thereof, to which the Expert shall reply in writing within 21 days of the receipt of such questions;
- f. The Expert shall attend Court as a witness and may be subject to cross-examination;
- g. The Expert shall have liberty to apply to the Court for directions in this matter;
- h. The costs of this Application shall be costs in the cause;
- i. The Defendants' Application to Strike is refused, with costs to the Claimants as agreed or taxed.

DATED AUGUST 20, 2021

A handwritten signature in black ink, appearing to read "Lisa M. Shoman", followed by a long horizontal line extending across the page.

Lisa M Shoman
Justice of the Supreme Court of Belize