

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2019/CLE/gen/01052

BETWEEN

NAUTICAL MARINE LIMITED

Claimant

AND

SHERWOOD HANNA
JILL YVETTE HANNA

Defendants

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Yvette McCartney Meredith (completed by Martin Lundy)
Philip Lundy for the Defendants

Hearing Date(s) 7 March 2022, 10 June 2024 and 19 August 2024

JUDGMENT

WINDER, CJ

[1.] This is a claim for arrears of rent by the Plaintiff (Nautical). Nautical also claims trespass to property and seeks the restraint of the Defendants (the Hannas) from encroaching on its property. Nautical also seeks the removal of unapproved structures on its property.

[2.] The action was commenced by Writ of Summons dated 25 July 2019. The Statement of Claim endorsed thereon provides as follows:

1. At all material times, the Plaintiff Company, Nautical Marine Limited, a company duly incorporated under laws of the Commonwealth of The Bahamas are the fee simple owner of freehold property situated in the Shirlea Constituency formerly the Montagu Constituency, in the Eastern District of the Island of New Providence East of Fowler Street comprising of 3,809 square feet as indicated and attached to a Conveyance dated the 4th September, 2003 and recorded in the Registry of Records in Volume 880 at pages 573 to 576.
2. At all material times the Defendants were the owners of the property situate to the South of the Plaintiff's property comprising 2,915 sq. ft. in a conveyance dated the 15th April, 2019 and recorded in the Registry of Records in Volume no. 10866 at pages 303 or 311. Additionally, the Defendants were at all material times the leasees of property comprising 3,809 sq. ft. contained in the above mentioned Conveyance dated 4th September, 2003 from the Plaintiff.
3. As part of the terms of the lease agreement between the Plaintiff and Defendants, it was agreed *inter alia* as follows:-
 - a) The Defendants would not make any improvements to the Plaintiff's property without any prior written consent of the Plaintiff;
 - b) The Defendants were not to remove or interfere in anyway with the boundary fence on the South side of the property running between the Plaintiff's and the Defendants' properties;
 - c) The Defendants were to pay the monthly rent in the sum of \$400.00 per month plus VAT;
4. In Breach of the said Lease Agreement the Defendants have failed and continue to do the following:-
 - a) To pay the monthly rent according to the Lease Agreement;
 - b) Have made various unapproved improvements on the said property of the Plaintiff;
 - c) Have removed the boundary fence between the Plaintiff's and the Defendants' properties;
5. Sometime in/or about March, 2018, Mr. Alvin Young, a licensed Surveyor at the instance of the Plaintiff surveyed the property and placed survey markers around the boundaries of the Plaintiff's property.
6. The Defendants, wrongfully and illegally removed from the Plaintiff's property, the survey markers from the South Eastern and South Western side that were placed by the said Mr. Alvin Young, the agent of the Plaintiff.
7. The Defendants are illegally encroaching on a portion of the Plaintiff's property comprising 369.77 sq. ft. The Plaintiff will rely on a Plan prepared by Alvin Young Registration Number 013 showing the encroach area.
8. The Plaintiff wrote to the first Defendant on the 31st July, 2018 demanding *inter alia* that the Defendant cease and desist from continuing to make unapproved improvements and to replace

the boundary fence on the Plaintiff's property and further that the Defendants should VACATE the said premises of the Plaintiff on or before the 30th September, 2018.

9. The Plaintiff has attempted to have the boundary markers replaced; however, the Defendants have impeded this attempt by threatening the surveyors with violence, when they came to replace the said markers.

10. The Defendants have refused and failed to employ a surveyor of their own to survey their property and has refused to cooperate with the requests of the Plaintiff to refrain from encroaching on the Plaintiff's said property.

11. The Plaintiff has a building permit for the construction of a Building and is erecting a 7' wall on the Southern boundary of the property. The said building permit requires a 7' set back, from the wall however, as a result of the Defendants' actions of encroachment and obstruction, the Plaintiff has had to delay proceeding with his said construction.

12. The Defendants intends, unless restrained by this Honourable Court from doing so, to continue to interfere with the Plaintiff's use and enjoyment of its property.

13. In consequence of these matters, the Plaintiff has been greatly disturbed in the enjoyment of his rights of his property and has suffered loss and damage.

Particulars of Loss and Damage

- a. Arrears of rent from January, 2018 to June 2018 at \$400.00 per month plus VAT at 7.5% (\$2,400 plus \$180.00), July, 2018 through June, 2019 at \$400.00 per month plus VAT at 12% (\$4,800 plus \$576.00). Total arrears of rent \$7,956.00;
- b. Loss of boundary marker that was placed on property;
- c. Built too close to the plaintiff's property;
- d. Loss of use of enjoyment of property;

14. The Plaintiff is entitled in respect of such damages as it may be awarded to interest for such rate and for such period as this Honorable Court deems just pursuant to the Civil Procedure (Award of Interest) Act 1998.

AND THE PLAINTIFF CLAIM:-

- a. Arrear of rent in the sum of \$7,956.00;
- b. An injunction to restrain the Defendants, by themselves, their servants or agents or otherwise from erecting or constructing or continuing to construct the structure on the said property on the boundary lines of the property until settlement of this matter;
- c. An Injunction to remove the unapproved structure from off the Plaintiff's property;
- d. An Order to compel the Defendant to replace the issued and approved survey markers;
- e. Damages;
- f. Interest Pursuant to the said Act.

[3.] The Hannas defended the claim in a Defence and Counterclaim filed on 22 March 2021.

...

3. The Defendants deny paragraph 4 (a), (b) and (c) of the Statement of Claim and states that they have entered into a written agreement to repay the said sum.

...

5. The Defendants deny paragraph (10) of the Statement of Claim and states that they have retained the services of Mr. Hubert Williams, a renowned and experienced land

surveyor to survey the said disputed property and to prepare a survey plan and a written report of his findings.

6. The Defendants neither admit or deny paragraph 11 of the Statement of Claim.

7. The Defendants deny paragraph (11) of the Statement of Claim and states that they have been occupying the said disputed property for the past 23 years. Firstly as tenants of Mrs. Mae Virginia Kemp Ferriera and then as owners in fee simple since 2009.

8. Save as in hereinbefore expressly admitted the Defendants deny each and every allegation of fact contained in the Statement of Claim as if the same was set out herein and specifically traversed seriatim.

COUNTERCLAIM

1. That the Plaintiff is estopped from asserting its legal claim to the land the subject matter of these proceedings as a boundary fence was erected with concrete pillars demarcating the boundary between the Plaintiffs and Defendants land on Fowler Street for more than twenty-three (23) years.

2. That the Defendants have an equitable interest in the said disputed land in that they were in continuous undisturbed and uninterrupted use and occupation and possession of the said land for more than twelve (12) years.

3. That such fence with concrete pillars demarcating the northern boundary of the Defendants' land was erected more than thirty (30) years ago before the Plaintiff obtained a vested interest in the northern portion of the Defendants' land.

4. That the Defendants' are the legal owners of the land the subject matter of these proceedings by way of long undisturbed possession of the same.

5. That the area that is disputed is not 369.77 square feet as claimed by the Plaintiff but is only 200 square feet. The Defendants' will rely on a Plan prepared by Hubert Williams License number 041 showing the said area and is thereon coloured red.

AND THE DEFENDANTS' CLAIM:-

1. That they are the owners in fee simple of all that piece parcel or lot of land as described in a conveyance dated the 15th day of April 2009 between May Virginia Ferreira et al as vendors and the Defendants' as purchasers recorded in volume 010866 at pages 303 to 311 which said lot of land is described in the said plot plan of Mr. Hubert Williams.

2. That the Defendants seek a Declaration that they are the legal and beneficial owners of the disputed parcel or land the subject matter of these proceedings.

3. Such other relief that the Court deems necessary or appropriate.

4. Costs.

[4.] Nautical filed a Reply and Defence to Counterclaim which provided, in part:

...

9. The Plaintiff denies paragraph 1 of the Defendants' Counterclaim and repeats paragraphs (1) to (8) inclusive of its Reply above. The Plaintiff further states that, a boundary fence was up when the lease was granted to the Defendants and that the Defendants only remove the boundary fence sometime after they leased the premises from the Plaintiff;

10. The Plaintiff denies paragraph 2 of the Defendants' Counterclaim and further states that the Defendants at the time of entry on the said land were as tenants of the Plaintiff and did not have possession of any part of the property. Further, the Defendants have admitted they owe rent to the Plaintiff and have entered into an agreement to repay the same to the Plaintiff in their Defence. It is denied that they have had possession for 12 years;

11. As relates to paragraph 3 of the Defendants' Counterclaim, the Plaintiff asserts that there was never a concrete boundary fence on the Northern side of the Defendants' property which is the Southern side of the Plaintiff's property. However, the Plaintiff asserts that there was a chain link fence prior to his purchase demarking the boundaries and separating the two properties. Further, in the lease agreement between the Defendants and the Plaintiff it was agreed that the Defendants would not move this fence.

12. The Plaintiff denies paragraph 4 of the Defendants' Counterclaim and repeats paragraph 10 above;

13. The Plaintiff deny paragraph 5 of the Defendants' Counterclaim and asserts the portion of land being encroached on, is 369.77 sq. ft. The Defendants are admitting in their Counterclaim that there is encroachment of 200 sq. ft. The Plaintiff will rely on the plan prepared by Mr. Alvin Young, Licensed Surveyor;

14. As a consequence of the breach, the Plaintiff has sustained damages and there remains an outstanding arrears of rent in the sum of \$5,356.00;

[5.] At trial James Lowe (Lowe) and Alvin Young (Young) gave evidence on behalf of Nautical. Sherwood Hanna (Sherwood), Jill Hanna (Jill) and Iris Finlayson gave evidence on behalf of the Defendants.

[6.] Lowe's evidence was contained in his witness statement which was subject to cross examination. In the witness statement Lowe stated, in part:

1. That I am the Director/President of the Plaintiff herein and I am duly authorized to make this witness statement on behalf of the Plaintiff.

2. That this witness statement is made in support of the Plaintiff's claim against the Defendants for possession the Plaintiff's property situate on Fowler Street in the Eastern District of the said Island of New Providence. The Plaintiff acquired (inter alia) the property the subject of this Action by an Indenture of the Conveyance dated the 4th September A.D., 2003 made between Daniel Thomas Paul Albury of the one part and the Plaintiff of the other part and recorded in the Registry of Records of the Commonwealth of The Bahamas in Volume 8808, page 573-576 a copy of which is attached to my affidavits filed herein on 2nd October, 2020. The Plaintiff seeks possession of the property comprised in the said Conveyance together with property to the north of the property comprised in the said Conveyance and comprising a total of 3,878 sq. ft. (hereinafter "the Plaintiff's Property") and more particularly of the portion of that parcel comprising 369.77 sq. ft. in relation to a portion of which the Defendants have claimed possessory title (hereafter "the Disputed Property"). Additionally, this Witness Statement is made in support of the Plaintiff's claim for arrears of rent for the periods from January, 2018 – June, 2018 at the rate of \$400.00 per month plus VAT at 7.5% (\$2,400.00 plus VAT \$180.00) and July, 2018 – June, 2019 at the rate of \$400.00 per month plus VAT at 12% (\$4,800.00) plus \$576.00) and continuing to present. Total current amount of arrears of rents through June, 2019 is \$7,956.00 and also for the period since July, 2019 to present (September, 2021) at \$400.00 per month plus VAT at 12% (\$10,800.00 plus \$1,296.00) for an additional rent arrears of \$12,096.00;

3. The Defendants have made some payments against the rents owing since September, 2019. The breakdown of payment of rent by the Defendants between November, 2019 – October, 2020 is as follows:

Receipt Number	Payment Date	Amount Paid
a. 318932	November 25 th , 2019	\$ 800.00
b. 659615	February 27 th , 2020	\$ 200.00
c. 659649	June 22 nd , 2020	\$ 200.00
d. 659687	September 14 th , 2020	\$ 200.00
e. 659708	October 28 th , 2020	\$ 200.00
		\$1,600.00
f. The Plaintiff's acknowledges a previous payment of		\$1,000.00
	Total	\$2,600.00

4. Defendants have not paid any further sums towards the rents due since October, 2020.

5. The Plaintiff's leased (inter alia) the entire property indicated in the said Conveyance dated the 4th September, 2003 comprising of 3,878 sq. ft. (The Plaintiff's Property) to the Defendants at a monthly rate of \$400.00 plus VAT. The total area of the Plaintiff's Property is shown on a plan prepared by Alan Alvin Young P.L.S. No. 8 in the Bundle of Documents filed on the 22nd September, 2021.

6. The agreed terms of the Lease at the commencement of the Lease were as follows:

a. That the Defendants would not make improvements to the Plaintiff's property without the Plaintiff's prior written consent;

b. That the boundary fence on the South side of the Plaintiff's property running between the Plaintiff's property and the property of the Defendants was not to be removed; and

c. That the Defendants were to pay the monthly rent in the sum of \$400.00 per month plus VAT.

7. In violation of the original lease agreement, the Defendants removed the boundary fence between the Plaintiff's property and the property of the Defendants and made unapproved improvements to the Plaintiff's property including constructing a square pillar approximately 2 feet inside the southern boundary on the western boundary with Fowler Street, expanding the building situated on the Defendant's property by building an awning extension which encroached onto the Plaintiff's property and construction of other sheds on the Plaintiff's property.

8. As a consequence of the Defendants' breach of the terms of the lease, the Plaintiff wrote to the first Defendant on the 31st July, 2018 giving the Defendants notice to terminate the lease agreement and demanding *inter alia* that the Defendant cease and desist from making any further unapproved improvements to the Plaintiff's Property by the Defendant and to replace the boundary fence between the Plaintiff's property and to immediately remove all unapproved improvements previously made to the Plaintiff's Property and the property of the Defendants, and further that the Defendants should vacate the Plaintiff's Property on or before the 30th September, 2018. The Plaintiff also requested that the Defendants immediately pay all arrears of rent.

9. Sometime in/or about March, 2018, Mr. Alvin Young, a licensed Surveyor (Registration Number 013), at the instance of the Plaintiff, surveyed the Plaintiff's property and placed survey markers around the boundaries of the Plaintiff's property.

10. Shortly after the survey markers had been duly placed by Alvin Young on behalf of the Plaintiff, the Defendants or persons unknown wrongfully and illegally removed from the Plaintiff's property, the survey markers on from the South Eastern and South Western corners.

11. The Defendants are illegally encroaching on a portion of the Plaintiff's property comprising 369.77 sq. ft. The Plaintiff will rely on the plan prepared by Alvin Young at JEL-2 to showing the area encroached on by the Defendants.

...

14. On the 25th of September, 2019 the Defendants and their then attorney, the said Miles K. Laroda, met with me on behalf of the Plaintiff together with the Plaintiff's attorney at C. Yvette McCartney Meredith Law Chambers in connection with this matter. At this meeting the following matters were agreed between the parties which agreement is supported by correspondence between the attorneys thereafter (and referenced in the Affidavit of the Defendants filed herein on 22nd February, 2021)

- a. It was agreed that the outstanding arrears of rent was the sum of Six Thousand Nine Hundred and Fifty-six dollars (6,956.00);
- b. The Defendants agreed to pay the sum of One Thousand Five Hundred dollars (\$1,500.00) on 31st October, 2019;
- c. The Defendants agreed to pay the sum of Four Hundred (\$400.00) per month commencing 30th November, 2019 and each and every month thereafter until the total sum is paid in full;
- d. The Defendants agreed that the Plaintiff would be allowed to replace the survey markers on the southern boundary of the leased property and that those survey markers would remain in place until the matter is completely resolved.
- e. The Defendants agreed to obtain a surveyor to survey the property of the Defendants and to provide the Plaintiff with a copy of the same.

15. In breach of the 25th September, 2019 agreement, the Defendants have failed to pay the arrears of rent as agreed paying only the sums referenced at Clause 3 of this Witness Statement, the Defendants have refused to allow the survey markers to be replaced in their correct location by the Plaintiff's surveyor, have failed to provide evidence to support the placement of the survey markers of unknown origin, and have failed to provide the Plaintiff with a survey plan of the Defendants' property. The Defendants have failed to deduce to the Plaintiff the title of the Defendants to the Defendants' property. The Defendants have consistently impeded attempts by the Plaintiff's servants and agents to replace the boundary markers on the property.

...

25. In consequence of these matters, the Plaintiff has been greatly disturbed in the enjoyment of its rights of to the Plaintiff's property and has suffered loss and damage:

Particulars of Loss and Damage

- a. Arrears of rent from January, 2018 to June 2018 at \$400.00 per month plus VAT at 7.5% (\$2,400 plus \$180.00), July, 2018 through June, 2019 at \$400.00 per month plus VAT at 12% (\$4,800 plus \$576.00). Total arrears of rent \$7,956.00 less 2,600.00 = \$5,356.00
- b. Continuing arrears of rent from July, 2019 to present until Defendants duly vacate the Plaintiff's Property and return possession to the Plaintiff at a rate of \$400.00 per month plus VAT at 12%;
- c. Removal of boundary markers placed on property;
- d. Built too close to the plaintiff's property;
- c. Loss of use of enjoyment of property; and
- f. Damages, Interest and Cost.

[7.] Young's evidence was contained in his witness statement which was subject to cross examination. In the witness statement Young stated, in part:

1. I am a Registered Land Surveyor #013 in the Commonwealth of the Bahamas.
 - a. I am a registered Land Surveyor #5250 in the State of Florida, U.S.A.
 - b. I am a registered Land Surveyor #266 in Guyana.

I have practiced as a Land Surveyor for fifty nine (59) years.

...

3. I was instructed by Mr. Lowe to execute a survey plan for a parcel of Land that is owned by his company "Nautical Marine Ltd.", #57 East Bay Street; the survey was undertaken and completed in July 2019. To assist in the preparation of the survey, we used the documents for "Nautical Marine Ltd." that was surveyed and plotted and shown on the 24th February, 1921 by W.H. Aranha, Surveyor along with the conveyance for the property in questioned.

4. Secondly, Mr. Lowe submitted a document and plan showing ownership to a parcel of land bounded on the East side of Fowler Street. To execute this survey, I used the survey plans prepared by Chee A. Tow & Co. Limited dated 26th July, 1976. The documents and plans by Chee A Tow \$ Co Ltd show the boundary lines as per my survey plan please note the highlighted area in blue claimed by Mr. Lowe. Both surveys are shown on my plan which is dated July, 2019 for ease of reference.

...

[8.] Sherwood's evidence was contained in his witness statement which was subject to cross examination. In the witness statement Sherwood stated, in part:

1. I am 59 years old and I am a self-employed auto body repair specialist.

2. I am a citizen of the Commonwealth of The Bahamas, and my family and I reside and work at #7 Fowler Street, New Providence, The Bahamas. The Second Defendant and I have been married for sixteen (16) years and we have been exclusively occupying the property the subject matter of these proceedings for the past twenty-three (23) years.

3. According to our Conveyance dated the 15th April 2009 between Howard Joseph Kemp, Mae Virginia Ferriera and Edith Iris Finlayson and Sherwood D. Hanna and Jill Y. Hanna our property is described as "ALL THAT piece parcel or lot of land situate on Fowler Street in the Eastern District of the said Island of New Providence bounded on the NORTH by land now or formerly the property of A. Hall and running thereof Ninety-six (96) feet on the EAST by land now or formerly the property of Matthew Hall and running thereon Twenty-Seven (27) feet and Six (6) inches on the SOUTH by land now or formerly the property of Alexander Edwards and running thereon Ninety-six (96) feet and on the WEST by Fowler Street and running thereon Thirty-three (33) feet and Three (3) inches." "our property".

4. My wife and I initially began occupying our property as tenants of Mrs. Mae Virginia Kemp Ferriera and in 2009 we became fee simple owners of our property.

...

6. The northern boundary of our property was marked by a chain link fence that was erected with one concrete pillar on the eastern boundary and the other concrete pillar on the western boundary directly near to Fowler Street. I am advised by the former owners of our property and I verily believe that the said chain link fence along with the concrete pillars existed at that location several years prior to my wife and I leasing our property in or around 1999 and subsequently purchasing the property in 2009.

7. Sometime in or around 2005 I entered into an agreement with Mr. Lowe (and not the Plaintiff) to purportedly lease the Plaintiff's property to expand my business operations. Shortly after the said agreement I removed the chain link fence in order to traverse between my property and the Plaintiff's property without obstruction.

8. At no time after the removal of the chain link fence did Mr. Lowe or any representative of the Plaintiff objected or asked me to replace the same until shortly before these Court proceedings commenced.

9. It was only until Mr. Lowe approached me sometime in 2019 to indicate that he had plans to erect a steel frame building on the Plaintiff's property and that his surveyor told him that the concrete pillar located on the western boundary was encroaching on his property and made demands for it to be removed back several feet.

...

12. I have no issues with replacing the said chain link fence connecting it, as it was, to the two concrete pillars between both landowners (the Plaintiff and I) and revert back to the way things were prior to my removal of the said chink (sic) link fence.

...

14. That notwithstanding the matters outlined above, my wife and I retain an equitable interest in the disputed portion of the land as a consequence of our continuous undisturbed and uninterrupted use and occupation of the land for more than 12 years. Additionally, our said equitable interest is supported by the fact that the previous owners of our property were also in continuous undisturbed and uninterrupted use and occupation and possession of the land prior to our acquisition of their legal and equitable interest which is reflective in the aforementioned conveyance dated the 15th April 2009.

[9.] Jill's evidence was contained in her witness statement which was subject to cross examination. In the witness statement Jill stated, in part:

1. I am 53 years old and I am a home maker and I also assist my husband, the First Defendant, in our auto body repair business.

2. I am a citizen of the Commonwealth of The Bahamas, and my family and I reside and work at #3 (formerly #7) Fowler Street, New Providence, The Bahamas. The First Defendant and I have been married for sixteen (16) years and we have been exclusively occupying the property the subject matter of these proceedings for the past twenty-three (23) years.

...

7. Sometime in or around 2005 my husband, the First Defendant, entered into an agreement with Mr. Lowe (and not the Plaintiff) to purportedly lease the Plaintiff's property to expand our business operations. Shortly after the said agreement, we removed the chain link fence in order to traverse between our property and the Plaintiff's property without obstruction.

8. At no time after the removal of the chain link fence did Mr. Lowe or any representative of the Plaintiff objected or asked us to replace the same until shortly before these Court proceedings commenced.

...

14. Notwithstanding the matters outlined above, my husband and I retain an equitable interest in the disputed portion of the land as a consequence of our continuous undisturbed and uninterrupted use and occupation of the land for more than 12 years. Additionally, our said equitable interest is supported by the fact that the previous owners of our property were also in continuous undisturbed and uninterrupted use and occupation and possession of the land prior to our acquisition of their legal and equitable interest which is reflective in the aforementioned conveyance dated the 15th April 2009.

[10.] In the case of **Montague Investments Limited v Westminster College Ltd. and another** [2020] 1 BHS J No 11, *Charles J* (as she then was) provides a very useful discussion on the law on trespass in The Bahamas. At paragraphs [21] – [24] she states:

[21] The law relating to trespass [21] Trespass to land is a medieval concept, much developed by the common law. Any unjustifiable intrusion by one person upon land that is in possession of another amounts to a trespass. It is a trespass to place anything on or in the land which is in the possession of another: *Simpson v Weber* (1925) 41 TLR 302. It matters not how trifling the nature of the action is, a suit in trespass will lie.

[22] In *Robert Addie and Sons (Collieries), Limited v Dumbreck* [1929] A.C. 358 Asquith LJ defined a trespasser at page 371 as:

“The trespasser is he who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to.”

[23] In *Macnab and another v Richardson and another* [2008] EWCA Civ 1631, at paragraph 19, Lloyd LJ defined trespass as follows:

“... the slightest encroachment on another’s land is a trespass. So even if the extent of the encroachment in this case is that the mesh, which constitutes the fence in this present case, was over the Richardsons’ land but the fence posts were still on the Macnabs’ land then the mesh of the fence was an encroachment and a trespass.”

[24] Similarly, in the Bahamian case of *Paradise Island Ltd. v. El Condor Enterprises Ltd.* [1992] BHS J. No. 133, Thorne J held that the encroachment of a wall on the plaintiff’s property was a trespass by the defendant.”

[11.] Having observed the witnesses as they gave their evidence I have no hesitation in indicating that I prefer the evidence of Nautical and its witnesses where that evidence differs from the Hannas.

[12.] I accepted that the Hannas entered into an agreement with Nautical in 2009 to lease its property on Fowler Street. This agreement was entered into around the same time that they acquired the neighbouring property from Iris Finlayson and others. At this time a chain link fence existed on the Finlayson property which demarked the boundaries between the two properties. After the entering into of the lease the fence which separated the two adjoining properties was removed and the Hannas utilized both properties for their benefit.

[13.] I also accepted that when Nautical sought to reclaim the leased property in 2018 it was determined that the Hanna’s auto business activities was being operated on a small sliver of Nautical’s property. This encroachment was confirmed in a survey plan prepared by Alvin Young, the accuracy of which I fully accept. I should indicate that I gave little weight to the survey plan prepared by Herbert Williams as he was not subject to cross examination as to how he came to prepare the survey.

[14.] The Hannas say that the title of Nautical to the encroached area has been extinguished by the effluxion of time and that their predecessors in title have been in occupation of that property for in excess of the 12 year limitation period. The Hannas point to a concrete pillar on the property which they say preexisted the lease arrangements.

[15.] I did not accept this submission and prefer the evidence of Nautical that the concrete pillar was erected without Nautical’s or Mr Lowe’s permission after entering into the lease. While the Hannas say that they did not erect the pillar, Ms Finlayson’s equivocal evidence as the existence of the pillar did not leave me with confidence as to its existence when she owned the property.

[16.] In all the circumstances the counterclaim is dismissed.

[17.] On the question of the outstanding rent payments there is little dispute that these sums remain due and outstanding. Hanna accepted that he owed outstanding sums in his Defence and indicated that he would pay the sums. In the circumstances I give judgment for those sums in the amount of \$12,096.

[18.] I find that the Hannas have engaged in trespass to Nautical's property and that Nautical is entitled to an award of damages. Having regard to the size of the encroachment I will award a nominal sum for damages in the amount of \$4,000.

[19.] The Hannas are directed to remove the concrete pillar and any other chattels from the subject property. They are hereby restrained from entering or otherwise engaging in any further trespass on the encroachment and are to replace all survey markers which were removed.

[20.] I order that Nautical shall be entitled to its costs, such costs be summarily assessed (if not agreed) and that a pro forma bill of costs be laid over to the Court (and served on the Hannas) within 21 days.

Dated the 5th day of February 2025

A handwritten signature in blue ink, consisting of a stylized 'S' followed by a large, circular flourish.

Sir Ian R. Winder
Chief Justice