IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL NO. 1 OF 2007

Between:

ROBERT MOULDER

Appellant

and

PAUL JEREMY SLAUGHTER

First Respondent

and

JANET MURRAY SLAUGHTER

Second Respondent

Before: Zacca, E. President
Nazareth, G. P.
Stuart-Smith, M.

Date of Hearing: **8 & 9 March 2007**
Date of Judgment: **9 March 2007**

Reasons for Judgment

Sir Murray Stuart-Smith

This is an Appeal for the Judgment of Mrs. Justice Wade-Miller given on the 5th December, 2006 in which she declared that the Respondents to this Appeal, the Plaintiffs of the Court below, who I shall refer to as the Slaughters, have established a right of way over certain land belonging to the Appellant, who I shall refer to as Mr. Moulder. She subsequently gave injunctive relief against Mr. Moulder to prevent his interference with the right of way.

By a conveyance stated the 31st October, 1999, the Slaughters purchased land known as Hillcrest from Michael Cranfield. That parcel of land was conveyed by the vendor as beneficial owner. Two other matters were dealt with in the conveyance. First, the vendor purported to convey an area of land to the south of Hillcrest adjoining the land owned by Mr. Moulder or his predecessors in title. This was referred to in the Conveyance as the

possessory land and was outlined in blue on the Plan B attached to the Conveyance. I shall refer to that land as the disputed land. It was said that the predecessor of the vendor had acquired a title by adverse possession to the disputed land for over twenty years.

The third matter was a right of way which was described as the acquired right of way and was described in Schedule 4 of the Conveyance as follows.

> "Full free and liberty of way and passage for the Purchasers their heirs and assigns owners for the time being of the lot of land hereinbefore described in the first schedule or any part thereof their tenants and servants and all other persons lawfully going to or from the said lot of land or any part thereof with or without animals and vehicles of all descriptions OVER AND ALONG the roadway of the minimum width of 2.44 metres shown delineated and coloured yellow on the said plan marked "A" leading from the Southern boundary of the Land in Southerly and Easterly directions to the next described roadway AND OVER AND ALONG the roadway (known as "Bridge View Lane") of the minimum width of 2.44 metres."

The remarkable thing is that Plan A and Plan B are inconsistent with each other. Because Plan A purports to show a right of way running up to the southern boundary of Hillcrest land being the part which was conveyed as beneficial owner, whereas Plan B shows a right of way extending only to the eastern boundary of the disputed land. And, as such, it does not show or purport to show any right of way over that portion of the disputed land since the contention was that they possessed that as a right.

There is a long history of the litigation. By their writ of summons issued on the 20th February, 2004 the Slaughters claimed that they were entitled to possession of the disputed land and a right of way from the eastern edge of the disputed land to the east over the land owned by Mr. Moulder. There was no reference in the writ to what is now advanced as the Slaughter's alternative case, namely that based on the right of way as described in the Conveyance; but that claim was advanced in the Statement of Claim.

The case came to trial before Mrs. Justice Wade-Miller in 2005 and the Judge gave judgment on the 6th June, 2005. The case that was advanced by the Slaughters was that their predecessors had acquired a possessory title to the disputed land by long adverse possession. The Judge rejected this case. She held that the disputed land had indeed been in the occupation of the Slaughters' predecessors in title, but that they had done so by permission of a Mr. Davidson, who was then not only the landlord of Hillcrest, but also part owner of the Moulder land, sometimes referred to as the estate property. The Judge was impressed by the evidence a Mrs. DeSilva and a Mrs. Tatem.

The Slaughters appealed this judgment, but the appeal was dismissed by the Court of Appeal on the 17th of November. The reasons were given on the 25th November. I read from paragraphs 8 & 9 of the judgment of Sir Charles Mantell in the Court of Appeal.

He said this –

> "There was evidence from a number of the occupants of Hillcrest during the material period. Mrs. DeSilva gave evidence about the erection of a hedge and a fence on the disputed land with, she put it, with the permission of Mr. Davidson. She remained in occupation following the death of her husband until 1976. It was her understanding, she told the Judge, that she continue to have the use of the disputed land with the permission of Mr. Davidson.
>
> In 1982, a Mr. & Mrs. Tatem rented the property and remained there until 1995. Mrs. Tatem had been told by the previous occupier that it was "OK to use the land". She considered that permission had been given for the use of the land. The conveyance of Hillcrest to Mr. Cranfield in 1993 did not purport to convey title to the disputed land. The solicitor responsible, Mr. Wakefield, told the Court that all that could be conveyed had been. The learned Judge was impressed by the evidence of Mrs. DeSilva and Mrs. Tatem. On that evidence, and following a view, she held up the necessary **"**animus posidendi" to support adverse possession was absent for a significant portion of the period on which the Appellants were

relying. It was, she held, sufficient to defeat the Appellant's claim. She also held that the Respondent had established title to the estate property and the disputed land, which permitted him to counter claim the trespass. She adjourned the counter claim for assessment of damages until a future date. It was her understanding, mistaken as it turns out, that the Appellant's claim for the right of way across the disputed land and along a channel coloured purple had been settled by agreement between the parties. It now appears that no agreement had been reached."

One might have thought that would have been the end of the case, but, unfortunately, it was not. The Judge had not dealt specifically with the claim for the right of way, because she wrongly thought that the parties had come to an agreement about it. Accordingly, the Court of Appeal remitted this matter to the Trial Judge.

The relevant part of the order is as follows.

3. The Plaintiffs' claim in relation to the disputed right of way, marked in purple on the plans annexed hereto marked 'A' and 'B', to be remitted for further consideration and adjudication by the Supreme Court (and by Madam Justice Wade-Miller, if available) after the expiry of 28 days from today, 17th November, 2005. The Court further directs the parties and their representatives, if any, to use their best endeavours, forthwith, to agree the issue(s) raised in connection with the said claim.

4. The Respondent (Defendant in the action) undertakes that he will continue to permit the Appellant to use the right of way marked in purple on the plan annexed hereto marked 'A', and through to the Hillcrest property as shown on the plan annexed hereto marked 'B', including vehicular access but not including any right to park, pending trial of the issue remitted to the Judge as aforesaid, or further order, or as may be agreed by the parties."

When the matter came for hearing again before the Judge no further evidence was adduced. Reference was made to the evidence given at the original hearing and submissions were made upon it. At the resumed hearing, the Slaughters' case was that their predecessors' in title had acquired a right of way by long use over fifty years right up to the southern boundary of Hillcrest. It is evident that the western end of this right was situated in the disputed land.

There is no dispute as to the law. The sole issue was whether the undoubted use of this way was exercised adversely to the true owner or by permission. It was the same issue as had been determined in the original proceedings.

The Judge set out her conclusions as follows:

> 18. The property was conveyed to the Plaintiffs on the 31st October, 1999 by Michael Alan Cranfield.
>
> I scrutinized the conveyance which shows that the owners and occupiers of Hillcrest had the benefit of a right of way over the estate property the servient land).
>
> 19. It is patently clear from the recitals that the right of way of the Estate property has been enjoyed by the occupants of Hillcrest for over fifty years. (See recital 6-12 and the First and Second and Third Schedule to the Conveyance Appendix A).
>
> 20. The evidence shows that the only existing Deed which relates to the estate property dates from more than 100 years ago. Thereafter the property has been passed by wills.

21 From the evidence the Plaintiffs the owner and occupier of Hillcrest had the benefit of an easement over the estate property from at least since 1954.

22. In their affidavits sworn respectively on 31st day of October 1997 and on the 11th day of November 1997 Mr. Leicester St. George Moulder and Mrs. Alda Jessie Cranfield beneficial owners of the property respectively stated that:

(1) "I am one of the beneficial owners of the land shown on the plan annexed hereto marked "Land A". (2) That owners and occupiers for the time being of the land and cottage marked on the said plan as Hillcrest have had the benefit of an easement by way of passage for all purposes over the land of Lot A which they have exercised nec vi nec clam nec precario (which I am advised and understand to mean not by force, not secretively and without permission) for more than fifty years." (3) "That the last deed of title relating to Lot A was executed in 1901 and my ancestors and relatives owned both Land A and Hillcrest but at different times and for different estates."

23. I have carefully looked into the circumstances of the Plaintiffs' claim and the facts which have been proved which shows that the occupiers of Hillcrest have had open uninterrupted enjoyment which has continued for at least fifty (50) years. This has been accounted for by the affidavits of Leicester St. George Moulder and Alda Jessie Cranfield. Also, the other land owners at the end of the property on Bridgeview Lane and Ferry Lane have acknowledged the right of way and have no objection to the Plaintiffs continued use of the right of way.

24. On this claim the Plaintiffs have established user for a period of fifty (50) years. In these circumstances I hereby declare that the Plaintiffs their

> heirs and assignees have a right of way across the purple area as delineated on the plan. Having so declared there is no need to address the Defendant's counterclaim which has not been particularized and has not been established.

The affidavits of Leicester St. George Moulder and Mrs. Alda Cranfield are there set out in the judgment of the learned Judge. Neither of those deponents of the affidavits were called as witnesses. At the first trial reliance was placed on the evidence of Mrs. DeSilva and Mrs. Tatem. In particular, in paragraph 4 of Mrs. DeSilva's affidavit she says that she has been a tenant of Hillcrest for a number of years; she says that Mrs. Yvonne Davidson, the owner of Hillcrest at that time, allowed her husband to cut the oleander hedge on the eastern side of the property so that they could drive right up to the house. At all times, they considered the hedge to be the property of Hillcrest. Mrs. Tatem also said that they had been occupiers of Hillcrest for a number of years and that they had regarded the disputed land as part of what they could use. In both cases exhibited with those two affidavits was a plan showing the alleged right of way running from the eastern boundary of the disputed land and not over the disputed land up to the southern border boundary of Hillcrest.

That is an important factor. And it is not surprising because it is clear that for some time prior to 1971 there was a hedge on the eastern boundary of the disputed land. Paragraph 4 of Mrs. DeSilva's affidavit makes that clear and that it was removed by permission of Mrs. Davidson, the wife of the owner of the Moulder land. It was again made clear in a later affidavit of Mrs. DeSilva dated the 19th May, 2004.

The important paragraph of Mrs. DeSilva's affidavit is – "

> "When my husband and I moved into Hillcrest we owned a car. I was aware that there was a right of way over Ferry Lane and over steps of the property to the north of "Hillcrest". The right of way that existed with Hillcrest did not allow for vehicular access. In order to have vehicular access we drove straight up to

> "Hillcrest" along an alternate route, namely over Bridge View Lane which I was well aware was not a legal right of way to "Hillcrest". Mr. Davidson gave us permission to use this route to "Hillcrest", and in fact gave us permission to cut a portion of the hedge bordering "Hillcrest" to enable us to drive straight up to the house. I at all times was aware that the use of this road to gain vehicular access into "Hillcrest" was with the permission and kindness of the owners of the bordering property."

She confirmed that account when she gave her oral evidence at the trial and that was the evidence which was accepted by the learned Judge at the first trial.

Mrs. Tatem gave a further affidavit in which she said this. "I had a good relationship with my neighbours, Sylvia DeSilva and Basil Hassell, who lived at 10 Bridgeview Lane, and it is my recollection that they each told me that the fence was not an indication of the boundary between the two properties. I accepted this, and always knew that the majority of the property between "Hillcrest" and the disputed property was owned by the owners of the disputed property. I did, however, feel that we had permission to use a portion of the property between the two properties, including the roadway leading to "Hillcrest" along Bridge View Lane." And again, in oral evidence, she confirmed that she used the purported right of way with permission.

Mrs. Moulder, who conducted the appeal on behalf of her husband with great skill, made a number of submissions in support of the grounds for appeal which were very extensive. I do not find it necessary to deal with all but a few of them, because in my judgment the Slaughters are faced with an insuperable argument. It is this:

In the first trial the Judge held that the disputed land was occupied with the permission of the then owners of the estate property, a Mr. Davidson. She based this finding largely on the evidence of Mrs. DeSilva and Mrs. Tatem to which I have referred. That finding was upheld by the Court of Appeal. It follows that any use made of the disputed land could not be adverse, but was with permission. A crucial part of the claimed right of way was

upon the disputed land. So far as is relevant, the necessary ingredients for establishing a possessory title are the same as those in establishing a right of way under the doctrine of lost modern grant. In particular, and this is the vital matter, that the user has been without permission of the owner of the servient tenement. That matter was decided against the Slaughters in the previous proceedings and is now res judicata. But it necessarily means that a vital part of the claimed right of way was also used by permission.

In my judgment Mr. Harshaw has no answer to this proposition. He submitted that if this was so, it is difficult to see why the Court of Appeal found it necessary to refer the matter back to the trial Judge, since their decision killed the case for the right of way. I do not think it is helpful for speculation as to why the Court of Appeal did this. They were clearly influenced by the fact that the Judge had mistakenly thought that the matter of the right of way had been settled by agreement and, therefore, had not decided the matter. Moreover, in the first trial and on appeal, everyone's attention was directed to the disputed land. It was only in the closing submissions to the trial Judge that Mr. Harshaw mentioned his alternative case in relation to the right of way. Mrs. Moulder said that she and her husband were taken by surprise by this. I can understand this, since this alternative case was completely inconsistent with the primary case. It is quite possible in these circumstances that the Court of Appeal was not alive to the implication of their decision on the claim to the right of way and, indeed, that the Moulders were not then alive to it either.

In my judgment, this is the short answer to this Appeal, but in deference to some of Mrs. Moulder's grounds of appeal, I will deal with them briefly.

First, she submitted that the Judge paid no attention to the evidence of Mrs. DeSilva and Mrs. Tatem, both of them who had previously impressed the Judge. In her judgment, the Judge makes no reference to this evidence at all. This evidence is entirely inconsistent with the affidavit evidence of Leicester Moulder and Alda Cranfield on which the Judge purported to act. While it can be said that on findings of fact on disputed evidence this Court would not normally reverse the trial Judge, that cannot apply where the Judge

simply fails to deal with the evidence which she herself had accepted previously as truthful, especially is that so when neither Leicester Moulder and Alda Cranfield gave no oral evidence. The fact that Mr. Moulder's evidence was against his interest, cannot in my judgment surmount this difficulty.

Secondly, it was submitted that the Judge paid no attention to the evidence of Mr. Wakefield who drafted the conveyance in 1999. His attention was drawn to Recital 12 of this conveyance which refers to a vesting deed on the 9th February 1993, between the personal representatives of the Estate of George Alan Davidson and Michael Alan Cranfield, the Slaughters' vendor. Mr. Wakefield confirmed that having regard to the vesting deed, all that was conveyed to Michael Cranfield was the property, "Hillcrest" itself, and an abandoned right of way over some steps to the north of "Hillcrest", (the abandoned right of way) which is not relevant to this issue. There is no mention of the disputed land or the right of way in issue. That was all that could be conveyed to the Slaughters.

Thirdly, it appears that in 1994, application was made by Jones Waddington, on behalf of all the property owners" involved, to abandon the right of way down the steps to "Hillcrest" (the abandoned right of way) and instead for the creation of a right of way as shown on the plan attached. This is the same plan as Plan A attached to the conveyance of 1999 with one significant difference. The significant thing about it is that the right of way is described as a "proposed right of way". It is not entirely clear who all the property owners were, but they must have included the owners of "Hillcrest" since it was they who were abandoning the right of way down the steps. In the Plan A attached to the conveyance the word "proposed" has been deleted and the word "acquired" was written over the top. Mr. Moulder points out with force that this plan and application are inconsistent with the existence of a right of way as now claimed.

Fourthly, in her judgment, the learned Judge, appears to place reliance on the letters from other land owners of Bridge View Lane and Ferry Lane acknowledging the right of way and having no objection to its continued use.

These letters, as Mr. Harshaw has accepted, have no probative value whatever. They in no way impinge on the issue whether the use of the way by the owners/occupiers of "Hillcrest" over the Estate/Moulder land was with permission or not. Nevertheless, the Judge appears to attach some importance to those letters.

Finally, although it may not be necessary to decide the matter because the claim to the right of way must fail for the reasons I have given, as to that part which crosses the disputed land, it seems to be inevitable that the part of the claimed right which extends from the eastern end of the disputed land toward the east must also fail, since it is inconceivable that exercise of that right over that section can have been adverse, while that in the disputed land was by permission.

In my judgment the appeal must be allowed. The declaration contained in the order dated the 5th December, 2006 set aside and the injunction contained in the order of the 8th December, 2006 and the 17th January, 2007 be discharged.

I propose to append to this judgment a copy of the conveyance of the 31st October, 1999, together with Plans A and B. Those plans must be coloured as in the original conveyance.

I agree

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Zacca, P

I also agree

_____

Nazareth, JA

_____

Sir Murray Stuart-Smith, JA

Cost of Appeal and Hearing below to the Appellant
To be taxed, if not agreed

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Zacca, P