In The Supreme Court of Bermuda

CIVIL JURISDICTION
2009: No. 30

BETWEEN:

RENEE LINDSAY

-and-

MICHAEL LINDSAY

Plaintiffs

-v-

JEAN RICHARDS

-and-

ANTHONY RICHARDS

Defendants

JUDGMENT
(In Court)

Date of Trial: February 2, 2010
Date of Judgment: February 12, 2010

Mr. Ben Adamson, Conyers Dill & Pearman,
for the Plaintiffs
Mr. Eugene Johnston, Trott & Duncan,
for the Defendants

Introduction

1. The subdivision of comparatively small plots of land occupied by different members of a common family into separate lots which are sold on to third parties is a fertile source of legal disputes concerning intrusive rights of way. The present case is a classic example of neighbourly conflict arising from the geographical realities that the Defendants' right of way over the Plaintiffs' property, if lawfully utilised, significantly diminishes the ability of the Plaintiffs to fully utilise the eastern side of their property.

2. It appears to me that the principal dispute between the parties revolves around the Plaintiffs' desire to negotiate an alteration to the Defendants' existing right of way and the Defendants' desire to have the existing right of way made more conveniently useable in its present form. An impasse exists because the Defendants have an undisputed legal right to use the right of way as presently delineated while the Plaintiffs have no legal right to compel the Defendants to negotiate a change to their existing legal rights. As often happens in such cases, the dispute the Court is asked to resolve is about something only peripherally related to the real neighbourly dispute.

3. The Court is asked to determine whether the Defendants' right of way includes the right to park on the right of way, a few feet away from the eastern portion of the Plaintiffs' home. The Defendants say that they have the right to park up to two vehicles on the path; the Plaintiffs say they do not. At the commencement of the trial Mr. Adamson indicated in opening that provided suitable undertakings were given by the Defendants, the Plaintiffs would not seek an injunction restraining the Defendants from damaging[1] the right of way.

4. The claim for damages was also not pursued at trial. This seemingly arises from initial steps taken by the Defendants, by way of self-help, to improve the surface of a very rough and ready path or roadway.

Legal Findings

5. It is common ground that the Defendants bears the burden of proving that they have acquired by way of the doctrine of lost modern grant the right to park one or more vehicles on the right of way, by way of expansion of the scope of the easement they admittedly enjoy pursuant to their paper title. It was also eventually conceded by the Plaintiffs that, reference to a cross-section of authorities notwithstanding, the easement contended for was essentially a legally recognised concept.

[1] The Specially Indorsed Writ sought an Order restraining the Defendants from causing "further damage" to the right of way. The interim injunction restrained the carrying out of further construction work on the right of way.

6. Accordingly the following passage from my Judgment in *Simmons -v- Steede* [2009] Bda LR 5; [2009] SC (Bda) 5 Civ (27 January 2009), apply in general terms here:

> "*39. The law related to the evidence required to prove an adverse possession claim is shaped by the following practical considerations. The whole framework of private property ownership would be thrown into chaos if people with valid legal title to land could be easily displaced by trespassers or squatters. There is obviously a strong public policy interest in protecting persons who have acquired valid legal title to real property from having their property rights being usurped by trespassers bold enough to take advantage of the fact that the true owner is not occupying their property. There is a countervailing legal policy which holds that if the true owner permits a trespasser to use his property for many years, the trespasser's extensive use of the property will (at such point as Parliament may determine to be the limitation period) will extinguish the original owner's title. The original owner is effectively treated as having abandoned his title if he has permitted the trespasser to treat the property as his own for 20 years.*
>
> *40. The tension between these two opposing legal policies has resulted in rules designed to assist both courts and property owners to determine what physical acts in connection with somebody else's property if not interrupted for 20 years will extinguish the owner's title. These rules state certain basis principles the application of which may vary greatly depending on the type and location of property to which the adverse possession claim relates. The present case, subject to one exception, raised no controversy as to the content of the applicable legal principles; rather, the real dispute was how the principles ought to be applied to the facts of the present case.*"

7. The cases Mr. Adamson placed before the Court suggested two different legal tests for deciding when an easement to park might be found to exist. The Plaintiffs' counsel suggested the Court should apply the somewhat more restrictive test applied by the English Court of Appeal in *Batchelor-v-Marlow* [2003] 1 WLR 764. The Defendants' counsel preferred the more liberal test articulated by two members of the House of Lords in the Scottish appeal of *Moncrieff-v-Jamieson* [2007] 1 WLR 2620. Tuckey LJ in the *Batchelor* case summarised the applicable law as follows:

> "*10. The underlying principle is set out in paragraph 1-52 of the 16th Edition of Gale which says:*
>
> > *"An easement...involves a diminution of natural rights of ownership, and a grant under which the proprietary rights of the so-called servient owner are either shared or*

> *usurped cannot create an easement. For instance, 'no man can be considered to have a right of property, worth holding, in a soil over which the whole world has the privilege to walk and disport itself at pleasure'. The line is difficult to draw, and each new case would probably be decided on its own facts in the light of common sense."*

> 11. *The authority for this proposition is cited as Dyce v Hay where in 1852 the House of Lords said:*
>
> > *"There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected."*

8. In the latter case, the Court of Appeal found on the facts that the claimant garage proprietor could not assert a right to park six cars on an area of land belonging to the appellant and adjacent to the right of way because that would effectively prevent the owner of the land from using it altogether. I pause to note that it will almost invariably be easier to show an alleged right to park on land over which no right of way admittedly exists than over a right of way itself. In the latter case, the servient property owner's right to use the right of way will already have been substantially reduced. The factual matrix of the present case is, in this respect, distinguishable from that in *Batchelor-v-Marlow*. And the passage from '*Gayle on Easements*' approved in that case concluded with the important observation that "*each new case would probably be decided on its own facts in the light of common sense."*

9. *Moncrieff-v-Jamieson* [2007] 1 WLR 2620 is more factually apposite to the present case in that it involved a dispute as to the right to park linked to an express grant of a right of way. But the main legal question which fell for determination was whether as a matter of Scots law[2] the right to park could be said to exist as a reasonable incident of the right of access, rather than whether such right could be said to have been acquired by prescription. So the *dicta* from this case dealing with prescription upon which Mr. Johnston relied did not, strictly speaking, form part of the reasons for the decision, or, the *ratio decidendi*. But this objection to the weight to be attached to the judicial observations is a highly artificial one, because Lord Scott makes it plain that in his view the scope of an easement fell to be defined by the same principles, whether it was created by express grant or prescription:

> *"59. In my respectful opinion the test formulated in the London & Blenheim Estates case and applied by the Court of Appeal in Batchelor v Marlow, a test that would reject the claim to an easement if its exercise*

[2] Lord Scott (at paragraph 45) considered Scots law on servitudes and the English common law on easements to be the same.

would leave the servient owner with no "reasonable use" to which he could put the servient land, needs some qualification. It is impossible to assert that there would be no use that could be made by an owner of land over which he had granted parking rights. He could, for example, build above or under the parking area. He could place advertising hoardings on the walls. Other possible uses can be conjured up. And by what yardstick is it to be decided whether the residual uses of the servient land available to its owner are "reasonable" or sufficient to save his ownership from being "illusory"? It is not the uncertainty of the test that, in my opinion, is the main problem. It is the test itself. I do not see why a landowner should not grant rights of a servitudal character over his land to any extent that he wishes. The claim in Batchelor v Marlow for an easement to park cars was a prescriptive claim based on over 20 years of that use of the strip of land. There is no difference between the characteristics of an easement that can be acquired by grant and the characteristics of an easement that can be acquired by prescription. If an easement can be created by grant it can be acquired by prescription and I can think of no reason why, if an area of land can accommodate 9 cars, the owner of the land should not grant an easement to park 9 cars on the land. The servient owner would remain the owner of the land and in possession and control of it. The dominant owner would have the right to station up to 9 cars there and, of course, to have access to his 9 cars. How could it be said that the law would recognise an easement allowing the dominant owner to park 5 cars or 6 or 7 or 8 but not 9? I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land, and substitute for it a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land."

10. Lord Neuberger, somewhat tentatively, agreed with this analysis in the following passage upon which the Defendants' counsel also relied:

"*140. At least as at present advised, I am not satisfied that a right is prevented from being a servitude or an easement simply because the right granted would involve the servient owner being effectively excluded from the property. In this connection, the Privy Council in Attorney-General of Southern Nigeria v John Holt & Company (Liverpool) Limited [1915] AC 599 at 617 appears to have held that a right to store materials on land could be an easement although it involved the dominant owner enjoying an "exclusive" right to enjoy the property concerned. Citing Dyce v Hay in support, the Privy Council immediately went on to observe that, in considering arguments as to whether a right could be an easement "[t]he law must adapt itself to the conditions of modern society and trade". Further, the Court of Appeal in Wright v Macadam [1949] 2 KB 744 held that an apparently exclusive right to store coal in a small shed was*

capable of being an easement. Neither case was cited to Upjohn J in Copeland v Greenhalf.

141. There are also Australian cases which support the notion that a right could be an easement even if the servient owner was thereby excluded from the land concerned - see for instance Mercantile General Life Reinsurance Co v Permanent Trustee Australia Ltd (1988) 4 BPR 9534, and per Handley JA (who described parking as "a form of storage") in Wilcox v Richardson (1997) 8 BPR 97652.

142. Further, as Lord Rodger pointed out during argument in this case, a right of aqueduct (or water rights) or a right of drainage is often granted over a specific route, so that that [sic] *route may often be the full extent of the servient tenement. In such a case, the servient owner is effectively excluded from the whole of his tenement, yet such a right has always been assumed to be capable of constituting a valid servitude or easement - see the discussions at paragraphs 3.80 (aqueduct) and 3.82 (drainage) of Cusine and Paisley, and paragraphs 6-49 to 6-57 (drainage) and 6.71 to 6.72 (water rights) of Gale.*

143. Accordingly, I see considerable force in the views expressed by Lord Scott in paras 57 and 59 of his opinion, to the effect that a right can be an easement notwithstanding that the dominant owner effectively enjoys exclusive occupation, on the basis that the essential requirement is that the servient owner retains possession and control. If that were the right test, then it seems likely that Batchelor v Marlow was wrongly decided. However, unless it is necessary to decide the point to dispose of this appeal, I consider that it would be dangerous to try and identify degree of ouster is required to disqualify a right from constituting a servitude or easement, given the very limited argument your Lordships have received on the topic."

11. In many cases, such as the instant one, the factual character of the prescriptive claim may reduce to marginal the significance of the precise formulation of the operative legal test. Nevertheless, I prefer the more fluid formulation of Lord Scott and Lord Neuberger in the *Moncrief* case to the more rigid traditional test approved by the English Court of Appeal in *Batchelor-v-Marlow* [2003] 1 WLR 764. An easement to park on or adjacent to a right of way may as a matter of law be found to exist in circumstances where the servient owner retains possession and control of the relevant portions of his property; it matters not if the relevant easement effectively excludes the servient owner from using either the relevant portions of his property or the entirety of his property. Preferring such test does not mean that there may not be many factual scenarios in which the fact that the easement contended for prevents the servient owner from reasonably using his property at all may provide a cogent basis for rejecting a disputed contention that an easement should be found to exist.

12. In any event the most important issue in this case is whether the Defendants can prove the two legal elements of an adverse possession claim in respect of their alleged right to park two cars on the admitted right of way. The law does not assist trespassers to such an extent that an adverse possession claim can be made out merely by demonstrating that the claimants were in fact "*dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else had done so.*" In addition, "*the courts will require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that has intended to exclude the owner as best he can, the courts will treat him as not having had the required animus possidendi and consequently as not having dispossessed the owner*": *Powell -v- MacFarlane* (1977) P & CR 452 at 471-472.

Factual findings: the Defendants' undisputed right of way

13. The right of way is a narrow, sloping unpaved and uneven track which leads from the Middle Road up a comparatively steep rise along the eastern side of the Plaintiffs' property to the Defendants' property, which lies in a southerly direction above and behind the Plaintiffs' home. The track is bounded by banks on each side with narrow strips of land along the eastern boundary of the Plaintiffs' property and adjacent to the eastern side of the Plaintiffs' house, respectively.

14. A site visit made it plain that the right of way is currently both in a poorly maintained condition and delineated in such a way that it severely limits the use the Plaintiffs can make of the adjacent strips of property. The northerly beginning of the right of way off the Middle Road provides access to both property owned by Vernora Dawson ("102") and the Plaintiffs' property ("98"). After a few feet, the pathway curves (more or less) to the west and then upwards to the southwestern boundary of the Defendants' property ("100"). For most of its length the right of way is hidden by a boundary hedge from 102.

15. The Defendants produced the entirety of their Deed of Voluntary Conveyance dated October 20, 2006, while the Plaintiffs only produced the schedule to their Deed. The recitals to the Defendants' Deed only go back as far as June 2, 1978 so it is unclear whether the right of way was created on or before this date as part of a subdivision. Vernora Dawson testified that all three properties were at one point under common ownership. It seems possible that the subdivision took place much longer ago as the right of way is shown on what appears to be a 1962 '*Plan of Land Near Black Bay*', which seems to form part of the Defendants' Deed (TAB 5 page 7). This plan appears show 98, 100 and 102 to be subdivided into separate lots as of the date of the plan drawn nearly 50 years ago.

16. The admitted right of way is described in the Schedule to the Plaintiffs' Deed as follows:

> " *SUBJECT NEVERTHELESS to full and unrestricted right of way for the owners and occupiers for the time being of the said land shown on the said Plan and designated "D" and Mrs. Jean Richards and their tenants and servants and all other persons lawfully authorized with or without animals and vehicles of all descriptions to the extent that the said person(s) can properly use the same OVER AND ALONG that part of the said lot of land coloured Green consisting of a path or right-of-way One decimal point eight three metres(1.83m) wide AND ESPECIALLY TOGETHER WITH full free and unrestricted right-of-way and access for the owners and occupiers for the time being of the said land hereinbefore described and their tenants and servants and all other persons lawfully authorized with or without animals and vehicles of all descriptions OVER AND ALONG that portion of the path or right-of-way One decimal point eight three metres 1.83m) wide coloured Yellow on the said Plan and leading to the said Middle Road.*"

17. In the Schedule to the Defendants' Deed, the same right of way is described more concisely as follows:

> "*AND ESPECIALLY TOGETHER WITH full free and unrestricted right and liberty of way and passage for the owners and occupiers for the time being of the two lots of land or either of them or any part or parts thereof and their tenants servants and all other persons going lawfully to or from the said lot with or without animals and vehicles of all descriptions OVER AND ALONG the Right of Way coloured Yellow on the said plan One decimal point eight three metres (1.83m) wide leading in a North-Easterly direction to join the Public Road known as the 'Middle Road'.*"

18. It is not disputed, however, that the Defendants enjoy a right of way which is both pedestrian and vehicular in character. Although the 2001 Plan attached to the Defendants' Deed as read with the description of 100 in the Schedule suggests that their property consists of one lot of land to the northeast of the Railway Trail, the right of way retains what may be an older reference to "two lots of land". Whether this is an accidental carry-over from the 1962 position when 100 consisted of lots on either side of the Railway Trail was not addressed at trial, which seems surprising unless there is no longer any corresponding right of way in favour of the now separate owner of what used to form part of 100 on the other side of the Railway Trail.

19. The picture is not complete without noting that the Defendants' property as described in their Deed and as depicted in the attached 2001 Plan is bounded to the southwest by the Railway Trail owned by the Crown. The Defendants presently enjoy access to their property from the Railway Trail, and seemingly use a lay-by in this area for their primary access and parking needs. Nevertheless, the site visit made it clear that the access to 100 from the Railway Trail is down a flight of steps whereas the right of way provides access to a level paved courtyard area on the same level of as the lower apartment currently occupied by the First Defendant's 95 year-old Aunt. It is difficult to envisage the Aunt being able to conveniently use anything other than the right of way to enter and exit the Defendants' property.

Factual findings: the right to park on the right of way

20. In the present case the Defendants were unable to adduce any independent evidence in support of her claim that one or more vehicles had been parked on the right of way in a manner giving rise to an easement during the period 1968 to 2008. As the Plaintiffs' themselves were only able to testify as to events after the requisite 20 year period expired in 1988 (they bought 98 in 2001), they called the owner of 102 to refute the prescriptive claim.

21. Vernora Dawson's evidence for the Plaintiffs carried little weight, despite her apparent independence and general credibility. This is in part because during the crucial time period, she admitted only visiting the property then occupied by her father only around five times a year. Even after she moved into 102 roughly five years ago, she conceded that she could not see from her residence whether anyone was parking on any part of the right of way other than at the entrance to Middle Road. Assuming the evidence of her father's belief that the right of way was pedestrian only, no weight can be attached to Ms. Dawson's speculation that her father would during his lifetime have objected to the Defendants parking on the Plaintiffs' property which he admittedly did not even own.

22. Accordingly, the Defendants' prescriptive claim rested almost exclusively on the oral evidence of Jean Richards herself; which no other witness called at trial was able to support or refute. She attempted to support her case by reference to vehicle registration records from the Transport Control Department ("TCD"). However, under cross-examination, the witness was bound to concede that the earliest car registration evidenced by the TCD records was as recent as 1999. The earliest cycle registration was in 1984. Unfortunately no evidence was adduced as to how far back TCD's computerized or other records go. However, I will assume in the Defendants' favour that it is possible that the records obtained were incomplete. I find it improbable that no motor car would have been registered to 100 (or used by the property's occupants) between, say, 1980 and 1999.

23. While the First Defendant's counsel might have taken greater care to check the accuracy of the Witness Statement, clearly professionally drafted for a client who did not appear to be wholly at ease with the written word, the discrepancies which emerged at trial related to issues of comparatively minor importance. I found the Defendant to be a generally credible witness because she did not appear inclined to overstate her case on vital issues in many instances when it would have been easy for her to do so. For instance, she frankly admitted that her pleadings were inaccurate to the extent that they could be read as suggesting that the parking she alleged took place occurred in precisely the same spot. She was also not overly specific about how frequently she would park her taxi at the end of the right of way near the mouth of the entrance to her property, or how frequently her now deceased son Kelvin would park in the same area. In other words, there was no precise case advanced to a right to park one or more vehicles on the right of way each and every night or for a specific number of hours every day.

24. Bearing in mind that no one could contradict the First Defendant as regards what happened between 1968 and 2001, this suggests that she was in general terms a truthful witness. Ms. Richards admitted that the most important recent and current usage of the right of way was to collect her elderly Aunt who occupies the lower apartment of 100 nearest the southwesterly end of the right of way. She also admitted that prior to the Plaintiffs' 2001 acquisition of 98, its occupants were her cousins. This somewhat weakens the inference which might otherwise be drawn that any parking which did take place took place as of right as opposed to by way of license. Ms. Richards also admitted that since the Plaintiffs moved in, she had not been parking on the right of way very often, although it seems clear that her son Kelvin parked near the entrance to her property as late as his death in 2006. The evidence as to continuous user was very weak.

25. Bearing in mind the strong legal policy against creating easements generally by implication in the absence of an express grant and taking into account the fact that the admitted right of way is only a right of passage, it would require very clear evidence to support a finding of both continuous and uninterrupted parking and parking in a manner which would be objectively viewed as parking as of right. The geographical circumstances do support the inference that the express easement includes by implication the right to stop and load and/or offload at the mouth of the Defendants' property, especially if it is impossible to enter and turn around in the paved courtyard area if, for instance, another vehicle or vehicles are parked there. The question the parking claim raises is whether, beyond this, the Defendants have proved continuous parking on the right of way itself for at least 20 years in a manner which is consistent with their right to do so.

26. I find that occasional parking of no more than one vehicle wholly or partially on the right of way immediately adjacent to the Defendants' property has, more likely than not, occurred for at least 20 years. But such parking did not occur in such a way as to either (a) deprive the owners of 98 of any reasonable use of their land, or (b) to deprive them of possession and control of the relevant portions of

their land altogether. It is highly improbable that any parking occurred lower down the right of way in an area which the owners of 98 would have wished to use themselves, so it is plausible that any parking which did occur might well have been tolerated by the owners of 98. However, I am not satisfied to the requisite standard of proof that such parking was uninterrupted and continuous for a period of 20 years and therefore carried out in a manner that suggested rights of ownership.

27. This is not a case where the owners and/or occupiers of 100 could never possibly park a vehicle, having used the right of way to access their property, without parking wholly or partially on the Plaintiffs' land, as was the case in *Virdi-v-Chana and another* [2008] EWHC 2901 (Ch). Nor was the alleged parking a regular occurrence by necessary implication because (a) the right of way afforded the only access to 100, and/or (b) there was clear evidence that one car was routinely parked on the Defendants' property leaving no room, save on the right of way, for a second car to park. Bearing in mind the character of the right of way as a means of free passage, it is inherently improbable that it would ever be used for more than occasional parking. Property rights in Bermuda would potentially be thrown into great uncertainty if an easement of the nature contended for could be established on evidence as tenuous as the Defendants' in circumstances similar to the present case.

28. Accordingly, the Defendants' adverse possession claim fails and is dismissed.

Summary

29. The Plaintiffs are entitled to a declaration that the Defendants' right of way over their property does not include the right to park. However, their claim for damages which was not pursued is dismissed. The Defendants' prescriptive claim to a right to park on the right of way, based solely on the uncorroborated oral evidence of the First Defendant is dismissed on the grounds that the evidence adduced was not sufficiently reliable to be accepted.

30. Subject to the Defendants providing satisfactory undertakings, essentially agreeing not to carry out their own repairs to the right of way if the Plaintiffs repair it themselves within a reasonable time, the Plaintiffs' application for a permanent injunction is dismissed. It is to be hoped that the parties will find a way to resolve the underlying disputes about the right of way in an amicable manner.

31. I will hear counsel as to costs.

Dated this 12th day of February, 2010

KAWALEY J