In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 414

BETWEEN:-

(1) STANLEY WINSLOW RAY, JR.
(2) GLORIA RAY

Plaintiffs

-and-

BERNARD ARNOLD RUDOLPH SIMMONS

Defendant

RULING

(In Chambers)

Boundary dispute – whether de facto boundary in the right place – whether right of way – whether, if there once was a right of way, it has been abandoned

Date of hearing: 17th August 2016
Date of ruling: 3rd October 2016

Mr Samuel Riihiluoma, Cox Hallett Wilkinson Limited, for the Plaintiff
Ms Keiva Durham. Amicus Law Chambers, for the Defendants

Background

1. The Plaintiffs are mother and son. They own the property known as 22 Spring Hill Road, Warwick, which is their home. The First Plaintiff's wife also lives there. The Defendant has a life interest in the properties to the north, which are known as 12 – 16 Westering Lane, which he lets out to tenants. I shall refer to them for convenience as "*his*" properties. The *de facto* southern boundary of 12 Westering Lane and part of the *de facto* southern boundary of 14 Westering Lane and the *de facto* northern boundary of 22 Spring Hill Road are adjacent. I say "*de facto*" boundaries because, as explained below, the Defendant contends that these boundaries are not the legal boundaries and that they represent an encroachment by the Plaintiffs onto his land.

2. In or around 1988 the Defendant built a 15 foot high retaining wall between his properties and the Plaintiffs' property. The wall was built to retain land fill which the Defendant had used to level what was previously a gentle slope rising from or near the *de facto* boundary between the properties by raising the height of the land along the slope so that it was level with the top of the slope. The land fill was unstable and the wall was badly built and designed. In February 2015 part of the retaining wall collapsed and fell onto the Plaintiffs' property, together with some of the land fill material, which included soil and rocks.

3. In November 2014 the Plaintiffs issued a specially endorsed writ of summons seeking (i) damages and (ii) a mandatory injunction requiring the Defendant to build a new retaining wall along the boundary between the parties' respective properties in accordance with plans prepared by Onsite Engineering Services Limited ("Onsite Engineering"), which the Plaintiffs had instructed for this purpose and for which they had secured planning permission.

4. In January 2015 the Plaintiffs issued a summons seeking judgment in default of pleadings pursuant to Order 19 of the Rules of the Supreme Court 1985 ("RSC") (although it was not described as such in the summons).

5. On 10th February 2015 the Court entered default judgment in favour of the Plaintiffs for damages to be assessed and granted them a mandatory injunction in the terms sought, but subject to a proviso that if the Defendant produced an alternative proposal for the construction of a retaining wall which was satisfactory to the Plaintiffs then he could build that instead.

6. The judgment entered was a default judgment because the Defendant had not filed a defence. But the Court heard evidence from both parties and gave an *ex tempore* judgment on the merits.

7. A dispute arose as to the location of the boundary along which the wall was to be built. That was the subject of a further hearing. This is my ruling on the issue.

Defendant's case

8. The Defendant instructed Woodbourne Associates ("Woodbourne") to prepare an alternative proposal. This contemplated the construction of two separate but structurally interdependent walls: a retaining wall and a boundary wall. The latter wall was to be located roughly eight foot to the south of the *de facto* boundary between the parties' respective properties and would therefore encroach on what the Plaintiffs' have always regarded as their property. Further, the Defendant asserts that there is an eight foot wide right of way running between his properties and the Plaintiffs' property, which extends a further eight foot onto what the Plaintiffs' have always regarded as their property.

9. The Defendant asserts that the wall proposed by Onsite Engineering (which would be built in the same location as the collapsed wall built by the Defendant) does not in fact run along the boundary to his properties, but eight feet within the boundary, and that (like the collapsed wall) it would prevent him from accessing the right of way which he now asserts.

10. The Defendant relies upon the indenture dated 29th April 1961 whereby a parcel of land including 12 – 14 Westering Lane was conveyed to him. The

plan annexed to the indenture shows an 8 foot wide roadway running along the southern boundary of the Defendant's properties and the schedule to the indenture grants the Defendant, his heirs and assigns "*full and free right of liberty of way and passage … ever an along the said roadway Eight feet wide forming the Southern boundary of the said parcel of land …*"

11. The Defendant gave evidence that his tenants at both 12 and 14 Westering Lane have used the path between the properties in order to get to Spring Hill. They used to do so since before he built the retaining wall in the late 1980s.

12. The Defendant stated in oral evidence (but not in his affidavits) that the roadway was in existence when he purchased 12 – 14 Westering Lane and that he had used a machine to clear the roadway and used it to transport building materials onto his properties. He further stated in oral evidence (but not in his affidavits) that there an opening in the retaining wall opposite 22 Spring Lane which gave access from his properties to the right of way.

13. As to the location of the boundary of 12 – 14 Westering Lane, the Defendant stated in oral evidence that when he purchased the land he had it surveyed, and that the surveyor staked out the boundaries of his property and the right of way. He was able to work out the boundaries of his property by subtracting the width of the right of way from the area surveyed.

14. The Defendant stated in oral evidence (although not in his affidavits) that upon purchasing his properties he had started to build a boundary wall along the southern boundary of the right of way ("the low wall") but that he had been required by the Department of Planning to stop work on the wall at that location and to build it within the boundary of his land. The wall which he built on his land was the retaining wall. He stated that there was never a fence at the site of the retaining wall.

15. The Defendant stated that the remains of the low wall, which the parties noted on a site visit and are about 1 ½ to 2 ½ feet high by 3 to 4 feet long, are located on what the Plaintiffs' have always regarded as their land about three feet to the north of their house.

Plaintiff's case

16. The Plaintiffs' property was conveyed to the Second Plaintiff and her husband by an indenture dated 4th June 1955. The plan annexed to the indenture shows an 8 foot wide roadway running along the northern boundary of the property. Together with two lots of land to the east, it was previously owned by the Second Plaintiff's grandmother. The Second Plaintiff, who was born in 1929, gave evidence that she remembered playing on her grandmother's land as a child and that the Plaintiffs' property was separated from the land to the north by a boundary fence. The fence was still there when she and her husband acquired the property.

17. The Second Plaintiff stated in her witness statement:

"*My husband and I used the land on our side of the fence as part of our outside space; nobody else has used this space other than my family and our guests. On our side of the fence, there was grass, some bushes (some of which we had removed) and trees. My husband cut the grass and we put in flowers and plants; we kept the space looking neat and maintained. Our children played in this area. My husband built a wooden bench that was placed near the boundary. The bench can be seen on our side of the boundary fence in a c 1964 photograph of my daughter, Linda (a copy of which is attached to my witness statement).*"

18. The Second Plaintiff stated that the Defendant built his retaining wall along his side of the boundary line marked by the fence. She was not aware of anyone crossing the northern boundary of the Plaintiffs' property to use a right of way to Spring Hill.

19. The First Plaintiff gave evidence to similar effect. He had grown up in the Plaintiffs' property, which he left in around 1980, but moved back in with his wife and children in 2005. When he wasn't living at the Plaintiffs' property he had often visited his parents there. His name was added to the title deeds in 1998. His evidence corroborated the Second Plaintiff's evidence, and he exhibited several photographs taken in the 1960s showing the Plaintiffs' property with the boundary fence in the background. Thus the First Plaintiff states that the collapsed retaining wall was built along the boundary between the parties' respective properties and that in his memory

there was never a roadway running along the northern boundary of the Plaintiffs' property. The First Plaintiff stated that the low wall was built by his father.

20. One of the Plaintiffs' photographs, taken in or about 1962, showed a dirt track running across the Plaintiffs' property. The First Plaintiff explained that it ran east to Spring Hill Road (ie parallel with the right of way claimed by the Defendant) and had formerly been used to access the property. It was eliminated when the Plaintiffs applied to subdivide their property into 20 and 22 Spring Hill in 2003 – 04. The First Plaintiff stated that, as appears from the 1962 photograph, the track is set well back from the boundary with the Defendant's properties. He further stated that there was never any access from the Defendant's properties onto the Plaintiffs' properties, which were always separated by a wall or fence.

21. The Plaintiffs also relied on evidence from a neighbour, Maxine Pearman, who was born in January 1951 and has lived in the area all her life. She stated that she has never known of anyone, including the Defendant and his tenants, using a right of way to the south of his properties to access Spring Hill, and that such a right of way has never existed in her lifetime. Neither, so far as she was aware, has one ever existed. Miss Pearman stated orally that anyone seeking to use such a right of way would have found it blocked by the wall and outside tank at 18 Spring Hill, to the east of the Plaintiff's property. She stated that the tank had been there since before she was born.

22. The parties jointly instructed Compu-Cad Training & Services Limited ("Compu-Cad"), a company whose services include land surveying, to survey the properties and the surrounding area. Quinell Francis, a chartered surveyor employed by Compu-Cad, prepared a report dated 2nd May 2016 which stated in material part:

> "*After an extensive boundary survey of 22 Spring Hill, Warwick WK09 and 12, 14 & 16 Westering Lane, Warwick WK09 we have concluded that the roadway noted on all property deeds described as a 2.44m (8.00') wide between the above properties, is not in existence in the field.*
>
> . . . . .

Once all data was calculated and all deed information provided was reviewed and researched, we found out there was a shortage of 2.44 m (8.00'). This shortage is the width of the proposed roadway which is not currently in use. From our works we have concluded that there is no land for a roadway between the above properties as intended on the deed information.

We held all deed measurements for the properties within 0.20m (0.67') as per the deeded information. We recognised that many surveying companies had previously surveyed in the area, and boundary markers located were checked and held as correct.

Along the southern boundary of 12, 14 & 16 Westering Lane and the northern boundary of 22 Spring Hill, there are boundary markers delineating the property boundaries, which after our calculations, accepted as being correct.

From the information in the field, and from the deed information provided for the above properties and adjacent properties, there is no evidence in the field that a roadway ever existed, as there are boundary walls and also building features constructed east of these above mentioned properties.

. . . . .

... due to the calculations in the field and from the deed information, we can confirm that the proposed right of way which is of dispute is not in existence in the field and therefore ...

a) The right way cannot be located on the ground

b) The northern boundary of the Ray's and the southern boundary of Mr Simmons is a common boundary."

23. Ms Francis attended court and gave oral evidence. She was not challenged about the report.

Discussion

24. The starting point is the survey carried out by Ms Francis. This confirmed that the *de facto* boundaries of 12 – 14 Westering Lane and 22 Spring Hill Road correspond to the dimensions of these properties shown on the plans annexed to the indentures conveying them to their current owners. The survey is consistent with the evidence of the Plaintiffs' witnesses that the *de*

facto boundaries have been in place for as long as any of them can remember: in the case of the Second Plaintiff, her memory goes back to her childhood in the 1930s.

25. If the *de facto* southern boundary of the Defendant's properties was extended so as to encroach beyond the *de facto* northern boundary of the Plaintiffs' property then the Defendant would gain land that was not conveyed to him and the Plaintiffs would lose land that was conveyed to the Second Plaintiff and her late husband.

26. In the circumstances, I am satisfied that there is no basis for concluding that the *de facto* southern boundary to the Defendant's property is in the wrong place. The *de facto* boundary and the legal boundary coincide.

27. Ms Francis' survey also concluded that, assuming that the dimensions of the parties' respective properties were accurately recorded on the plans annexed to the relevant indentures, there was no room for a right of way between those properties. Thus, if there was an 8 foot wide roadway running along the southern boundary of the Defendant's properties, it would encroach upon the *de facto* northern boundary of the Plaintiffs' property, and if there was a roadway running along the *de facto* northern boundary of the Plaintiffs' property, it would encroach upon the southern boundary of the Defendant's property.

28. This is curious, as both sets of plans show an 8 foot roadway running between the properties and the indenture relating to the Defendant's property expressly grants him a right of way along that roadway. There is no suggestion in the indentures or the plans attached to them that the roadway runs over any of the parties' properties: it is shown as running between them.

29. The evidence of the Plaintiffs' witnesses is that for so long as any of them can remember there never has been a roadway running between the northern border of their property and the southern border of the Defendants' properties. Their evidence is partly corroborated by the photographs

produced by the First Plaintiff. Moreover, any roadway would have been obstructed by the wall and tank at 18 Spring Hill Road. There was a track running from the Plaintiffs' property, parallel with the putative 8 foot roadway, but it was set well back from the boundary with the Defendant's properties. There was no suggestion that the Defendant had any right of way over that track, or over the Plaintiffs' property to access it.

30. The Defendant stated that there was a roadway running along the southern boundaries of his properties when he purchased them. I have no hesitation in preferring the Plaintiffs' evidence to the Defendants. None of the Defendant's claims were raised at the hearing of the Plaintiffs' application for default judgment, which is when one might have expected them to be raised. There is no evidence other than his say so that they were raised at any time previously and the Plaintiffs assert that they were not. Further, parts of the Defendant's case were not mentioned in his affidavit evidence but for the first time when he gave oral evidence.

31. Moreover, parts of the Defendant's evidence were implausible or demonstrably incorrect. Eg he stated that: there was never a fence separating his properties from the Plaintiffs' property notwithstanding that the Plaintiffs produced photographic evidence that there was; there was an opening in the retaining wall allowing access to the roadway notwithstanding the land fill behind the wall; and that he had used machines to clear the roadway and transport materials onto his properties notwithstanding the existence of the fence and the obstacles created by the wall and tank at 18 Spring Hill Road. These examples are not exhaustive.

32. The Defendant is a senior citizen. I am satisfied that he has not deliberately misled the Court. But, having observed him give evidence, I am also satisfied that he was confused about events, some of which happened many years ago, and that his recollection was shaped by his opposition to the construction of the new boundary wall proposed by the Plaintiffs rather than what was actually the case.

33. I am satisfied on a balance of probabilities that there never was a roadway running along the southern boundary of the Defendant's properties or the northern boundary of the Plaintiffs' property. If there was, it had ceased to exist by the 1930s, when the Second Plaintiff was a child. The right of way purportedly conferred on the Defendant by the 1961 conveyance was a right of way over the roadway. If the roadway had ceased to exist, so, too, had the right of way.

34. Assume, however, that (contrary to my findings) there used to be a roadway and that the fact that it no longer existed did not extinguish the Defendant's right of way over the area that it had formerly occupied. The Plaintiffs submit that in that case the Defendant abandoned the right of way. The law on abandonment was conveniently summarised by Cumming-Bruce LJ when giving the judgment of the court in Williams v Usherwood (1983) 45 P & CR 235, 15 EWCA:

> "*A right of way is a discontinuous easement. The easement may be extinguished by express or implied release. Implied release may be inferred from mere non-user, provided that such cessation to enjoy is accompanied by the intention to relinquish the right: see Gale on Easements. This is a common law problem. The relevant case law is conveniently given in concise form in the judgment of Buckley L.J. in Gotobed v. Pridmore [1971 EG 759 EWCA transcript page 13]. We quote:*
>
> > *'To establish abandonment of an easement the conduct of the dominant owner must, in our judgment, have been such as to make it clear that he had at the relevant time a firm intention that neither he nor any successor in title of his should thereafter make use of the easement …, Abandonment is not, we think, to be lightly inferred. Owners of property do not normally wish to divest themselves of it unless it is to their advantage to do so, notwithstanding that they may have no present use for it.'*
>
> *We quote also from a passage cited by Buckley L.J. from the judgment of Sir Ernest Pollock M.R. in Swan v. Sinclair [[1924] 1 Ch 254, 266 EWCA]:*
>
> > *'Non-user is not by itself conclusive evidence that a private right of easement is abandoned. The non-user must be considered with, and may be explained by, the surrounding circumstances. If those circumstances clearly indicate an intention of not resuming the user then a presumption of a release of the easement will, in general, be implied and the easement will be lost."*'

35. The Defendant may be taken to have known of the right of way from the 1961 indenture. The fact that, as I have found, he did not use the roadway, and could not do so because by the time that he purchased the properties it did not exist, would not in itself amount to abandonment. However, by raising the height of the land on his properties and building the retaining wall, the Defendant made the right of way inaccessible from his land. In my judgment, viewing his actions objectively, this demonstrated an unambiguous intention to abandon the right of way. This is assuming that, contrary to my primary finding of fact, he ever had one.

Summary and conclusion

36. I am satisfied that the *de facto* boundaries of the parties' respective properties accurately reflect the legal boundaries of those properties. I am further satisfied that the Defendant does not have a right of way over a strip of land 8 foot wide running along the southern boundary of his properties. If he ever did he has abandoned it.

37. I therefore order that, further to my Order of 10th February 2015, the Defendant shall within 14 days of the date of this ruling instruct contractors to build a new retaining wall along the boundary between the parties' respective properties in accordance with the plans prepared by Onsite.

38. I shall hear the parties as to costs.

Dated this 3rd day of October 2016

_____

Hellman J