In The Supreme Court of Bermuda

CIVIL JURISDICTION
2013: No. 126

BETWEEN:-

MICHAEL PEARMAN

Plaintiff

-and-

(1) TERRY FRAY
(2) KENDAREE FRAY

Defendants

JUDGMENT

(In Court)

Disputed title to private roadway – whether right of way – whether to grant permanent injunction re use of roadway

Date of hearing: 18th April 2016, 27th – 30th March 2017
Date of judgment: 21st April 2017

Mr Delroy Duncan, Trott & Duncan, for the Plaintiff
Mr Martin L Johnson, Barrister and Attorney, for the Defendants

Introduction

1. This is a dispute about the ownership of a portion of a private roadway in St David's Parish ("the Roadway"). By a specially indorsed writ of summons filed on 16th April 2013 and amended on 23rd July 2015 (this action has not proceeded expeditiously) the Plaintiff seeks a declaration that he has the fee simple interest in the Roadway or alternatively a right of way over the Roadway. The claim to a fee simple interest was first raised in the amended statement of claim. The Plaintiff also seeks damages from the Defendants for obstructing his access to the Roadway. A claim for a declaration that the Defendants have no *locus standi* to oppose the Plaintiff's claim for a right of way was abandoned when the statement of claim was amended.

2. Additionally, the Plaintiff seeks a permanent injunction prohibiting the Defendants from obstructing the Roadway in an attempt to prevent him from using it. On 14th December 2014 the Court granted an interim injunction in those terms, the Defendants having breached an undertaking given on 9th May 2013 by their then attorney to Kawaley CJ not to obstruct the Roadway.

3. The Roadway runs past an adjacent property known as 19 Chapel of Ease Lane ("No 19"). The property was previously owned and occupied by both Defendants. However, by a defence filed on 21st October 2014, the First Defendant avers that on 1st July 2014 he transferred his entire interest in No 19 to the Second Defendant as part of a final divorce settlement. He has not played an active role in the proceedings.

4. By a defence and counterclaim filed on 16th August 2014 and amended on 18th October 2015 and again on 16th May 2016 the Second Defendant denies that the Plaintiff has any right or interest in the Roadway. She counterclaims for an injunction prohibiting the Plaintiff from using the Roadway to access his property and damages for damage which the Plaintiff is said to have caused to the Second Defendant's property and the right of way. It is not disputed that the Second Defendant has a right of way over the Roadway, at least insofar as is necessary for her to access No 19.

5. The Plaintiff served a reply and defence to counterclaim on 6th October 2014. It has not been amended to deal with the amendments to the defence and counterclaim, presumably because the Plaintiff's legal advisors did not think it necessary to do so.

6. On 8th June 2015 I dismissed an application by the Second Defendant to strike out the statement of claim and for summary judgment. I gave the Plaintiff leave to amend her pleadings to address separate ownership of the dominant and servient tenements in relation to his claim for a right of way over the Roadway. Any such amendments were to be made within 14 days. Although, pursuant to a further order, the statement of claim was subsequently amended, the amendments did not deal with this point.

7. In his closing submissions at trial, Delroy Duncan, counsel for the Plaintiff, applied for leave to amend the statement of claim out of time so as to remedy this deficiency. Martin Johnson, counsel for the Second Defendant, objected. Most of the oral evidence in the trial went to the question of whether the Plaintiff had a right of way over the Roadway, and the issue of a right of way has been dealt with very thoroughly in Mr Johnson's written closing submissions. In the circumstances I am satisfied that the Second Respondent will not be unfairly prejudiced by the amendment, which is therefore allowed.

8. The trial commenced on 18th April 2016, but was adjourned part heard to allow both parties to amend their pleadings and put in further evidence in light of their respective researches regarding title to the Roadway.

The Roadway

9. It is said that a picture paints a thousand words. Sometimes a plan does too. Anyone reading this judgment will find it much easier to follow if before going any further they turn to the plan exhibited to the judgment. It was prepared by Clarke & Doidge, Engineers and Surveyors, in December 1960 ("the 1960 Plan") for purposes of an indenture dated 7th January 1961 ("the

1961 Indenture"). This Indenture is an important document to which we shall return.

10. Mr Johnson referred me to a copy of the 1960 Plan stamped "*NOT TO BE USED FOR DEED PURPOSES*" in the top right hand corner and with a stamp headed "*JONES WADDINGTON LTD*" ("JWL"), who were surveyors, on which has been hand-written "*18/8/2004*" in the bottom right hand corner. He suggested that I should therefore treat the measurements in the 1960 Plan with caution.

11. However I have had the benefit of expert evidence on conveyancing practice from Kevin George, an experienced conveyancing lawyer called by the Plaintiff. He said that he had frequently come across such a stamp on documents supplied by JWL and their successors in title Bermuda Realty. He explained that JWL had purchased several sets of plans, including plans from Robert H Clarke of Clarke & Doidge. Mr George stated that Clarke & Doidge were very highly regarded surveyors in Bermuda in the fifties and sixties. He said that JWL would supply unstamped copies of the plans which they had bought to conveyancing attorneys for a fee, or copies stamped "*NOT TO BE USED FOR DEED PURPOSES*" without a fee. Thus the presence of a stamp carried no significance for the information on the plan: it was merely a device to limit the use to which people could put documents for which they had not paid. In the premises I have no concerns about the accuracy of the 1960 Plan.

12. At the top of the 1960 Plan is a large parcel of land marked in the name of Charles Theophilus Taylor ("Mr Taylor"), who was the Plaintiff's uncle. This is "The Narrows". Adjacent to the southern boundary of "The Narrows" is a plot of land marked "C". This is now No 19. Adjacent to the southern boundary of "C" is a plot of land marked "B", and adjacent to the southern boundary of "B" is a plot of land marked "A".

13. The Roadway runs from the southern boundary of "The Narrows" along the western boundaries of plots C and B down to the northern boundary of plot A. Another private roadway intersects the Roadway to the west, opposite

plot B. This is Chapel of Ease Lane. The 1960 Plan shows that Chapel of Ease Lane and the Roadway are the sole means of accessing plots A, B and C from the public highway. Access from the public highway to "The Narrows" is provided by both the Roadway and another private road that runs along the north-west boundary of the property. The access arrangements shown on the 1960 Plan remain in force today. The disputed portion of the Roadway is marked in yellow. Although this is not shown on the 1960 Plan, it is common ground that from Chapel of Ease Lane towards "The Narrows" the Roadway runs uphill. The Plaintiff, giving evidence, estimated that the gradient was about 10 to 15 feet.

Title to the Roadway

14. The question of title to the Roadway can be resolved by tracing its conveyancing history. By two separate Indentures made on 9th November 1959, Francis Peniston ("Mr Peniston") conveyed (i) "The Narrows" ("the First 1959 Indenture") and (ii) the piece of land that would later be subdivided into plots A, B and C ("the Second 1959 Indenture") to Mr Taylor. The parties have been unable to locate a copy of the Second 1959 Indenture. However a description of the property which it conveyed is contained in a Notice to Parish Vestry filed on 20th January 1960 ("the 1960 Notice") in which Mr Taylor and Mr Peniston gave notice of the conveyance. Mr George explained that in those days Parish Vestries were responsible for charging land tax. Thus when a conveyance took place the parties would notify the Parish Vestry so that it could update its records with details of the new landowner.

15. Mr Duncan submits that the Roadway was carved out of the land conveyed by the Second 1959 Indenture. He seeks to make good this proposition by comparing the measurements of the land given in the 1960 Notice with the measurements of the same land given in the 1960 Plan. Eg in the 1960 Notice the northern boundary of the land conveyed is given as 186 feet whereas in the 1960 Plan the northern boundary of plot C is given as 173 feet ten inches and the width of the roadway is given as 12 feet 2 inches.

Thus the northern boundary of plot C together with the width of the Roadway measure the same as the northern boundary of the land conveyed. The obvious inference, Mr Duncan submits, is that the Roadway has been carved out of the land conveyed. This inference is supported by the description of the land conveyed given in the 1960 Notice, where there is no mention that the land is bounded to the west by a 12 foot Roadway. This suggests that at the date of the Second 1959 Conveyance no such roadway existed.

16. The inference is further supported by the diary which Mr Taylor kept of the work which he carried out to "The Narrows". Diary entries for February 1960 include the following, which are evidently dealing with construction of the Roadway: "*Sunday 7th cleared trees & Bush to make roadway to South*"; "*Thurs. 11th digging pit, sorting rubble to make roadway*"; and "*Sunday 21st cleared trees, Bush & dug high spots for road to south*".

17. Mr Duncan submits that the fact that the Roadway runs to the southern border of "The Narrows" suggests that Mr Taylor intended that it should grant access to "The Narrows". If it was only intended to give access to plots A, B and C then it could have stopped at the southern corner of plot C, just as it stopped at the northern corner of plot A.

18. To all this, Mr Johnson had no convincing answer. He relied upon the recitals numbered 4 and 5 to an Indenture dated 18th July 1966 ("the 1966 Indenture") whereby Leslie Wilson conveyed plot A (which Mr Taylor had sold to him, together with plot B, in 1964) to Quinton and Effie Lambe.

"*4. By an indenture dated the second day of December One thousand nine hundred and forty-nine made between Andrew Alter Hayward of the one part and the said John Anthony Elisford Outerbridge (therein named John Outerbridge) of the other part by way of exchange the said John Anthony Elisford Outerbridge released certain easements of way and passage and was granted the like easements over a roadway over which rights of way are intended hereby to be assured:*

5. By an indenture dated the fourteenth day of February One thousand nine hundred and fifty-three made between Guy Millett of the first part Charles Griffiths of the second part Claude Pitcher of the third part Chester Fox of the fourth part and the said John Anthony

Elisford Outerbridge of the fifth part further easements of way (which are intended hereby to be assured) were confirmed over the roadway hereinafter mentioned:".

19. The 1949 Indenture referred to in recital no 4 was one of a series of indentures intended to extinguish rights of access over two roadways to the south of what is now Chapel of Ease Lane and confer instead rights of way over Chapel of Ease Lane. I have not seen the indenture referred to, but I was referred to another indenture of the same date ("the Second 1949 Indenture") between Andrew Hayward and other landowners whose properties bordered these various roadways. These indentures had nothing to do with the Roadway.

20. Mr Johnson submits that the reference in the 1953 Indenture mentioned at recital no 5 to "*further easements of way … were confirmed over the roadway hereinafter mentioned*" must refer to a roadway other than Chapel of Ease Lane, and the only other roadway mentioned subsequently in the 1966 Indenture was the Roadway. But it is in my judgment more likely that the recital refers to further easements over Chapel of Ease Lane.

21. According to the plan annexed to the Second 1949 Indenture, the parties to the 1953 Indenture were all landowners whose property adjoined Chapel of Ease Lane. No doubt that is why they signed it. (True it is that recital no 5 refers to "*Chester Fox*" whereas the plan annexed to the Second 1949 Indenture shows land belonging to "*RTD Fox*". But, given the coincidence of surname, it is a reasonable inference that Chester Fox signed the 1953 Indenture as or on behalf of the owner of the land shown in the Second 1949 Indenture as belonging to RTD Fox.) The parties to the 1953 Indenture did not, however, all own land adjoining what is now the Roadway. They would therefore have had no reason to sign an indenture relating to it. Moreover, Mr Johnson's interpretation of recital no 5 is inconsistent with the 1960 Notice. That is another reason why I reject it.

22. I said earlier that the 1961 Indenture was important. By that document Mr Taylor conveyed plot C to Edward Trenton Richards ("Mr Richards"), who later became premier of Bermuda and was knighted, and his heirs.

23. The 1961 Indenture provided in material part:

> "*[1] … the said Charles Theophilus Taylor doth hereby GRANT AND RELEASE unto the said Edward Trenton Richards and his heirs ALL THAT certain lot of land in St. David's Islandin St. George's parish in the Islands of Bermuda delineated and outlined in Pink on the plan hereto annexed designated Lot C …*
>
> *[2] …TOGETHER WITH all houses buildings fixtures ways rights of way rights liberties privileges easements advantages and appurtenances whatsoever to the said lot of land belonging to or in anywise appertaining or usually held or enjoyed therewith or reputed as part thereof or appurtenant thereto*
>
> *[3] AND ESPECIALLY TOGETHER WITH full free and unrestricted right and liberty of way and passage … OVER AND ALONG the roadway of the minimum width of Twelve feet (12') coloured Yellow on the said plan forming the Western boundary of the said lot of land and running in a Southerly direction to join another roadway Eight feet (8') wide coloured Yellow on the said plan*
>
> *[4] AND OVER AND ALONG the roadway Eight feet (8') wide coloured Yellow on the said plan and leading in a South-Westerly direction to join the Chapel of Ease Public Road*
>
> *[5] AND ALL THE ESTATE right title interest claim and demand whatsoever of the said Charles Theophilus Taylor in to and upon the same and every part thereof*
>
> *[6] TO HAVE AND TO HOLD the hereditaments and premises hereby appointed granted and released or expressed to be so unto the said Edward Trenton Richards and his heirs to the uses hereinafter declared concerning the same …*"

I have broken the text into numbered paragraphs for ease of reference.

24. Mr Johnson submits that paragraphs [5] and [6] conveyed Mr Taylor's right and interest in the Roadway, whether ownership of it or alternatively a right of way over it, to Mr Richards. Thus, once Mr Taylor had conveyed plot C to Mr Richards, Mr Johnson submits that he no longer owned the Roadway, if indeed he ever had, and no longer had any right of way over it. Had Mr Taylor wished to preserve a right of way over the Roadway, then, Mr Johnson submits, he should have done so expressly in the Indenture. See Megarry & Wade, Law of Real Property, 6th Ed (2000) at para 18-097, cited

with approval by Carnwath LJ, giving the judgment of the Court in Adealon International Ltd v Merton LBC [2007] 1 WLR 1898 EWCA at para 14:

"*The general rule . . . is that a grant is construed in favour of the grantee. Therefore normally no easements will be implied in favour of a grantor; if he wishes to reserve any easements he must do so expressly.*"

25. Mr Duncan, on the other hand, submits that the 1961 Indenture merely conveyed title to plot C to Mr Richards together with an easement, ie "*unrestricted right and liberty of way*", over *inter alia* the Roadway. Indeed Mr George gave expert evidence that the wording of the 1961 Indenture was standard form wording for the time for the conveyance of a right of way. If the 1961 Indenture had been intended to convey title to the Roadway, Mr Duncan submits, it would have said so in express terms. There was no need for Mr Taylor to reserve a right of way over the Roadway, Mr Duncan submits, because it remained his property.

26. Moreover, on the 1960 Plan the entirety of the Roadway was coloured yellow, not just the part running north from the boundary with Chapel of Ease Lane. Thus the wording in the 1961 Indenture upon which Mr Johnson relies applies to the entirety of the Roadway, as well as to Chapel of Ease Lane. It would be surprising if, subject to any possible easements of necessity, Mr Taylor had intended to surrender his right of way over the entirety of the Roadway and over Chapel of Ease Lane as he would have needed to use both the former and, on Mr Johnson's case, the latter, roadways to access plots A and B. Consequently, if by the 1961 Indenture Mr Taylor had divested himself of the entirety of his right and interest in the Roadway and Chapel of Ease Lane then he could not have conveyed a right of way to plots A and B. This would have rendered any future sale of those lots problematic. Yet all those surprising consequences would follow from Mr Johnson's analysis.

27. In the premises I am satisfied that Mr Duncan's submission is correct. By the 1961 Indenture, Mr Taylor conveyed a right of way over the Roadway to Mr Richards in order to allow Mr Richards to access plot C. However Mr Taylor retained title to the Roadway.

28. The subsequent conveyancing history of plots A, B and C is briefly told. By an indenture dated 2nd October 1964, Mr Taylor conveyed plots A and B into the joint names of Mr Trenton and one Leslie Wilson. It is unnecessary to follow their conveyancing history any further, other than to note that plots A, B and C are no longer in common ownership. Plot C was conveyed to new owners in November 1993 and October 1995, and then to the Defendants on 25th June 2001.

29. By a Voluntary Conveyance dated 16th December 1975 ("the 1975 Voluntary Conveyance"), Mr Taylor conveyed "The Narrows" to himself and his wife, Cynthia Taylor ("Mrs Taylor"), as joint tenants. Mr Taylor died intestate on 29th March 1987, leaving his wife to inherit the property as the surviving joint tenant. By a Voluntary Conveyance dated 3rd October 1988, Mrs Taylor conveyed "The Narrows" to herself and her daughters, Diane Moreau ("Ms Moreau') and Laurel Taylor-Adams ("Ms Taylor Adams") as joint tenants. I have not seen either Voluntary Conveyance. However there is no evidence that the Roadway was included in either of them and counsels' researches suggest that it was not. I shall proceed on that basis.

30. By a Conveyance dated 22nd March 2002 ("the 2002 Conveyance"), Mrs Taylor, Ms Moreau and Ms Taylor-Adams conveyed "The Narrows" to the Plaintiff for a purchase price of $440,000. Mrs Taylor died shortly thereafter, on 31st March 2002. The Schedule annexed to the 2002 Conveyance describes the property conveyed as including "*full free and unrestricted right of way and access*" over the private road that runs along its north-west boundary. But it makes no mention of the Roadway, which was therefore not included in the 2002 Conveyance.

31. In April 2016 the Plaintiff's attorneys investigated the conveyancing history of the Roadway and discovered that title to it had not been conveyed since Mr Taylor's death. By written instruments dated 7th July 2016, Ms Moreau and Ms Taylor-Adams assigned to the Plaintiff their rights under Rule 20 of the Non-Contentious Probate Rules to a grant of administration of the estates of Mr and Mrs Taylor. On 12th October 2016 he was granted interim Letters

of Administration for both estates. The purpose of the exercise was so that he could have title to the Roadway conveyed to him. This was achieved by a Deed of Confirmation and Conveyance (of Equity) dated 7th November 2016. The Plaintiff has from that date held the fee simple interest in the Roadway and I grant him the declaration to that effect which he seeks. The Second Defendant's claim for an order restraining him from using the Roadway is dismissed, as is her claim for a declaration that he is not presently entitled to do so.

Lost modern grant

32. Much of the evidence at trial concerned whether, before the Plaintiff purchased "The Narrows", the Roadway was used to access it. This went to the Plaintiff's alternative claim that he had acquired a right of way over the Roadway by way of lost modern grant and the Second Defendant's counterclaim for a declaration that he had no right of way. The issue is no longer relevant to the Plaintiff's right going forward to use the Roadway as I have found that he owns it. But he will need to establish that he had a right of way over the Roadway prior to 7th November 2016 as a precondition for claiming damages for interference with his use of it prior to that date. Moreover, the Second Defendant's claim for a declaration still falls to be considered insofar as it relates to the pre-7th November 2016 period.

33. As I explained in my ruling on 8th June 2015, and as the Court of Appeal acknowledged in Lathan v Darrell and Hill [1986] Bda LR 30 and Gleeson and Gleeson v Bell [1994] Bda LR 8, the doctrine of lost modern grant applies in Bermuda. Having reviewed these cases, Kawaley J (as he then was) summarised the doctrine thus in Bean and Smith v Frost [2006] Bda LR 87 at para 31:

"*So an easement such as a right of way over land may be acquired on proof of the following circumstances: (a) uninterrupted exercise of the right for more than 20 years, (b) exercise of the right of way as of right, which implies the absence of any evidence of either (i) it being impossible for the grantor to have expressly conferred a right of way, or (ii) an admission by the claimant that the grantor was entitled to grant a license*

during the period in question. Once these matters are proved, the law will presume that a right of way was granted expressly in a deed that has been lost."

34. These requirements fall to be construed within the four requirements for any easement as stated by Lord Evershed, accepting the formulation in Cheshire's Modern Real Property, 7th Edition at 456 ff, in In Re Ellenborough Park [1956] Ch 131 EWCA at 163:

"*They are (1) there must be a dominant and a servient tenement [ie one piece of land that benefits from the easement and another piece of land that provides that benefit]: (2) an easement must 'accommodate' the dominant tenement [ie benefit the land and not merely the user]: (3) dominant and servient tenement owners must be different persons, and (4) a right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant.*" [Explanatory text in square brackets added.]

35. In the present case those four requirements have been satisfied. (i) There was a dominant tenement, "The Narrows", and a servient tenement, the Roadway. (ii) A right of way over the Roadway would have accommodated "The Narrows as it would have benefited that property. (iii) As of 16th November 1975, when Mr Taylor conveyed "The Narrows" to himself and his wife as joint tenants, the dominant and servient tenement owners were different persons: "The Narrows" was owned by Mr and Mrs Taylor as joint tenants whereas the Roadway was owned by Mr Taylor alone. Although no authority was cited to me on the issue, in my judgment it is sufficient to satisfy the separate ownership requirement that at least one of the owners of the dominant tenement was not also an owner of the servient tenement. If I am mistaken on this point, then the dominant and servient tenements were separately owned from 29th March 1987, when as the surviving joint tenant Mrs Taylor became the sole owner of "The Narrows". (iv) A right of way over the Roadway was capable of being the subject matter of a grant, as evidenced by the fact that such a right was granted to the purchaser of plot C by the 1961 Indenture.

36. However in order for the Plaintiff to succeed on this point he must also establish the specific requirements for an easement by way of lost modern grant. I am satisfied that any exercise of a right of way was of right: it was

possible for the grantor to have expressly conferred a right of way over the Roadway, as he did for the benefit of plot C, and there is no admission by the Plaintiff that the grantor was entitled to grant a licence during the period in question. The controversial issue is whether there was uninterrupted exercise of the right of way for more than 20 years. As to this, I heard evidence from a number of witnesses.

37. The Plaintiff gave evidence that he had visited "The Narrows" as a child. The earliest visits were with his parents when he was aged four of five. That would have been in 1978 – 79. He used to access the property through the northern roadway, but when he was at the property he could see the Roadway. In later years, accompanied by his aunt, Mrs Taylor, he used to access the property via The Roadway. The Plaintiff stated that when he purchased "The Narrows" in 2002 he thought that he would be gaining access to it via both the northern and southern roadways. He exhibited a photograph which he took in September 2003 showing the Roadway as a visible topographical feature. The Defendants had recently completed building their house on plot C when the photograph was taken. In late 2010 or early 2011 the Plaintiff began building a house on "The Narrows" which was completed in early 2012. In around March 2012 he paved the Roadway adjacent to plot C with "grasscrete".

38. Ms Taylor-Adams gave evidence for the Plaintiff that she recalled going to "The Narrows" when she was aged four or five in the 1960s. She would often go there with her father at the weekends as he was building a house there. Occasionally she used the northern route but more often she used the southern route, ie the Roadway. In those days the Roadway wasn't paved, but it was clear, and there was enough room for a small truck to go up to where the construction work was taking place. Ms Taylor-Adams said that she remembered seeing the occasional pick-up truck with stone blocks. She also saw cars. What she particularly remembered was that along the Roadway there were cherry trees within easy reach.

39. Ms Taylor-Adams said that she left Bermuda aged seven when the family moved to Canada. However they returned to Bermuda at least once per year

for two weeks every summer. Mr Taylor used to work on building a house at "The Narrows" and his family would come and visit him there. They often had picnics there. Ms Taylor-Adams estimated that between the early 1960s and the early 1990s she had visited "The Narrows" more than 100 times. If she was approaching the property by motor bike or scooter she would use the Roadway as the turnings on the northern access route were "*kind of scary*". If she was in a small car she would take the northern route because the driveway was easier to manoeuvre. There were two or three occasions when she went in a small van to work on the property, and on those occasions she used the Roadway. She was present on the property in March 1987 when Mr Taylor collapsed there: the ambulance which took him to the hospital, where he died, accessed the property from the Roadway.

40. When questioned about the use of the Roadway in the 1970s, Ms Taylor-Adams said that her father used to keep the Roadway fairly clear until his death because of his occasional visits to "The Narrows". The Roadway was not paved at the time but there was gravel and it was clearly for vehicular use. She said that it was not so much maintained as a regular thoroughfare. She said that a reference in her father's diary to material for a road to the south was because the Roadway needed constant clearing, and that if you left it for a month or more there would be more brush and trees in the way. Her father had probably wanted to widen the Roadway as he wanted to bring in more blocks to "The Narrows" and the Roadway was the primary access route.

41. Olivier Moreau, Ms Moreau's husband, also gave evidence for the Plaintiff. He said that his wife and he were living in Bermuda for five years from early 1985 to late 1989. He couldn't remember how often he visited "The Narrows", but it was many times. He used the Roadway to do so. The Property was overgrown, as were both access roads. They had cleared the roads, which when they first visited the property were too overgrown for a car to drive along.

42. Patricia Dangor, Mr Richard's daughter, gave evidence for the Plaintiff from England via Skype. She was born in 1943 and was a retired Circuit Judge

and Judge of the Court of Appeal. She left Bermuda in 1960. But she returned regularly during the summer holidays, when her parents always used to drive her around to see the properties which they owned, including plot C. This was in the early 1960s. They would drive along Chapel of Ease Lane to the junction with the Roadway, and then walk up the Roadway to plot C and "The Narrows". She explained that when her father died in 1991 her mother inherited plot C, and transferred it to her by a Voluntary Conveyance in 1993. She sold plot C in 1995.

43. Ms Dangor described a visit that she made to plot C in the summer of 1994 with her mother and two of her nephews. She stated that the Roadway leading up to "The Narrows" from Chapel of Ease Lane was a distinct pathway, albeit with a lot of overhanging vegetation. She took some photographs during the visit which corroborate this description. In her judgment there was enough space for a car to drive up the Roadway to "The Narrows", although the overhanging vegetation would probably have scratched the bonnet.

44. I also heard from the Second Defendant. She gave evidence that when the Defendants purchased plot C in 2001 both the plot and the roadway north of Chapel of Ease Lane were covered in thick bushes. She remembered visiting plot C with the seller and the First Defendant. I understood this to have been her first visit to the property, which she said took place in 2000. She said that there was no road or track leading to "The Narrows" from Chapel of Ease Lane. The route was inaccessible by car, and even making the journey on foot would have been like "*walking through a web*". The Defendants had hired a landscaper, Joey Da Silva, to clear plot C in order to build on the property. This was in 2001. Mr Da Silva said in evidence that when he attended plot C for this purpose both the property and the adjacent part of the Roadway were completely overgrown.

45. The Second Defendant exhibited a set of four aerial photographs of the area covered by "The Narrows", the Roadway and plot C. They were taken over a period of years by the Department of Land Surveys and Registration. The Roadway is visible as a track in a photograph taken in June 1973; not visible

at all in a photograph taken in July/August 1981; partially visible in a photograph taken in February 2000; and both visible and cleared of vegetation in a photograph taken in May 2012.

46. Cindy Lamb, who lives at 26 Chapel of Ease Lane on plot A gave evidence for the Second Defendant. She said that her father bought the property in 1965 and built a house there for the family. She owned the property and was still living in the same house. She said that her father had made a roadway through the part of the Roadway which ran south from Chapel of Ease Lane to plot A. Previously, that part of the Roadway was just a dirt road. As children, Ms Lamb and her neighbours used to go up to the top of the hill on "The Narrows". But there wasn't any pathway – they just went through the trees. They didn't follow the path of what is now the Roadway and they never saw anybody else do so either, whether by car or on foot. Indeed "The Narrows" would have been inaccessible by vehicle from the Chapel of Ease Lane.

47. Elaine Fox, who grew up, and still lives, along Chapel of Ease Lane also gave evidence for the Second Defendant. She was born in 1946 and gave evidence about the area in the 1950s through to the 1970s. She said that throughout that time "The Narrows" was surrounded by trees and that there was no pathway up there from Chapel of Ease Lane. Although her father had forbidden her to play up in "The Narrows" as a child because the combination of thick vegetation and holes from quarrying made the area dangerous. However she had gone up there as a young adult in the early 1970s. She said that if you were going up there you had to fight your way through trees, over fallen logs and through bees' nests. She remembered one such occasion vividly as she had walked into a bees nest and got stung. She had never seen anyone accessing "The Narrows" from Chapel of Ease Lane during that period.

48. Ernest McCallan was another witness for the Second Defendant. He was born in 1932 and lived in Chapel of Ease Road from 1956 to around early 1967. He used to keep chickens in the area. He stated that Mr Taylor's property was very bushy and that Mr Taylor would have had to use the

northern access road to enter "The Narrows" as there was no other road. Mr McCallan had used that road on the one occasion when he had visited the property. He had never seen anybody walking up to "The Narrows" from the south. There was no pathway cut from Chapel of Ease Lane to the southern border of "The Narrows" although there was a pathway made by cows.

49. I accept the evidence of the Plaintiffs' witnesses regarding their use of the Roadway. Their evidence was measured and careful. It would be difficult for them to be mistaken about the existence of a path or track which they had used many times. It would be much easier for the Second Defendant's witnesses to be mistaken about its existence if they never used it and seldom visited "The Narrows". Particularly as the area around the Roadway was covered in thick vegetation so that the Roadway would not have been visible from a distance. Moreover, its existence in 1973 and 1994 is corroborated by photographic evidence. The fact that it is not visible in the 1981 aerial photograph is consistent with the presence of overarching trees and bushes, such as appear in the 1994 photographs, and is not persuasive evidence that by 1981 the Roadway was completely overgrown.

50. I conclude that the Roadway was in regular, although not always frequent, use as a means of going to and from the "The Narrows" until the early 1990s. On the evidence before me its most recent use for this purpose before the Plaintiff came on the scene was during Ms Dangor's visit in the summer of 1994. Thereafter, there was a hiatus of some seven years, which ended when the Plaintiff purchased "The Narrows" in 2001.

51. In my judgment, therefore, the Plaintiff has established uninterrupted use of the Roadway from 1975, when "The Narrows" and the Roadway fell into different ownership, until the early 1990s. I find that Ms Dangor's use of the Roadway does not count for reckoning a 20 year period as she had a right to use the Roadway by reason of the easement in favour of plot C. Even if I am wrong on that point, her use of the Roadway only takes the period of uninterrupted use to 19 years (ie from 1975 to 1994). In my judgment, the lack of usage of the Roadway from the early 1990s until 2001

counts as an interruption for purposes of reckoning a 20 year period. Thus the Plaintiff has failed to establish uninterrupted exercise of a right of way over the Roadway for more than twenty years. He therefore had no right of way over the Roadway before title to it was conveyed to him on 7th November 2016 and I grant the Second Defendant a declaration to that effect. It follows that his claim for damages is limited to the period subsequent to that date.

Damages

52. The focus of the hearing was on whether the Plaintiff had a right of access to "The Narrows" via the Roadway, whether because he owned the Roadway or alternatively because 'The Narrows" benefited from an easement over it. However both the Plaintiff and the Second Defendant also sought an award of damages.

53. The Plaintiff's claim for damages related to what was allegedly the deliberate obstruction by the Defendants of the Roadway from July 2012 to the present. None of his allegations were contested by the First Defendant, who has played no active part in the proceedings, or the Second Defendant. However the particulars of damage provided in the Statement of Claim and verified and updated by affidavit evidence all relate to the period prior to 7th November 2016. They are therefore not supported by any cause of action as at the material times the Plaintiff had no right or interest in the Roadway.

54. The Second Defendant's claim for damages comprises claims for damage allegedly caused by the Plaintiff to both the Roadway and No 19. The former claim, which relates to the period before the Plaintiff acquired title to the Roadway, is obviously unsustainable as the damage alleged did not interfere with the Second Defendant's use of the Roadway. See para 30-004 of the Seventh Edition of Megarry and Wade on The Law of Real Property, and the cases there cited, eg Pettey v Parsons [1914] 2 Ch 653 EWCA.

55. The latter claim, which relates to damage allegedly caused to the Second Defendant's driveway and boundary fencing by a crane hired by the

Plaintiff, might be arguable. But none of the facts giving rise to it have been pleaded. Neither has the claim been made out on the evidence: in an affidavit dated 8th October 2014 the First Defendant repeated some bald assertions which her then attorneys had made in a letter to the Plaintiff's attorneys dated 14th April 2011 and exhibited some photographs which are said to document the damage. But this is not, without more, sufficient to establish the necessary causation. The Second Defendant did not, eg, explain to the Court when the photographs were taken, by whom, and what they are relied upon to show. She may have a good case, but in order for the Court to decide whether she does that case needs to be properly pleaded and evidenced.

56. Rather than dismissing both parties' claims for damages, in my judgment the fairest course is to adjourn those claims so as to give the parties an opportunity to file any further evidence on which they wish to rely and, in the Second Defendant's case, to amend her pleadings. In taking this unusual course I bear in mind that the hearing did not really focus on the question of damages. It would be unsatisfactory if a claim for damages which might prove meritorious were defeated because the attention of the party making that claim was fixed on other issues. I also bear in mind that both parties accepted that even if I awarded them damages at this stage there would have to be a further hearing in order to deal with quantum. I do not understand the Plaintiff to be seeking damages against the First Defendant, but I can deal with that issue when giving further directions as to the future conduct of the damages claims.

Injunction

57. The Plaintiff seeks a permanent injunction:

> "*... restraining the Defendants by themselves or their tenants, servants or agents or otherwise howsoever from placing or allowing to be placed on the [Roadway] anything restricting, preventing or otherwise interfering with the reasonable enjoyment of the said way by the Plaintiff, his servants and licensees on foot and with motor vehicles and other*

conveyances at all times and for all purposes and from doing any act whereby the Plaintiff may be hindered or obstructed in the free use thereof."

58. The First Defendant has not contested the claim for a permanent injunction. But as he is no longer living at or frequenting No 19 it would in my judgment serve no useful purpose to make an injunction against him.

59. The Second Defendant did not challenge any of the Plaintiff's allegations of interference with his use of the Roadway, which included interference during the life of the interim injunction. I am satisfied for purposes of the Plaintiff's claim for an injunction that the allegations of interference against her have been made out. In the circumstances I shall make a permanent injunction against her in the terms sought.

60. As stated earlier in this judgment, the Second Defendant's claim for an injunction prohibiting the Plaintiff from using the Roadway is dismissed as I have found that the Roadway belongs to him.

Summary and disposition

61. The Plaintiff has leave to amend his pleadings out of time to address separate ownership of the dominant and servient tenements in relation to his claim for a right of way over the Roadway. The Second Defendant, if she so wishes, has leave to amend her pleadings to address her claim for damages. She should do so within 14 days of the date of this judgment.

62. The Plaintiff holds the fee simple interest in the Roadway and has done since 7th November 2016. He had no right of way over the Roadway prior to that date and I grant the Second Defendant a declaration to that effect. However her claim for injunctive relief is dismissed.

63. The Plaintiff's claim for damages incurred prior to 7th November 2016 is dismissed. His claim for damages incurred on or after that date, together with the Second Defendant's claim for damages, is adjourned to a date to be fixed.

64. The Plaintiff is granted a permanent injunction against the Second Defendant as prayed. His claim for a permanent injunction against the First Defendant is dismissed.

65. I shall hear the parties as to (i) costs and (ii) directions regarding the adjourned hearing of their respective claims for damages, including the filing of further evidence.

Dated this 21st day of April, 2017

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Hellman J