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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 203/92

GRAND COURT CAYMAN ISLANDS

BETWEEN: Brinsley Danville Lazzari PLAINTIFF
Executor of the Will of the Estate
of Eslie Earle Lazzari

AND: (1) Leon Lazzari
(2) Freda Lazzari
(3) Pedro Lazzari DEFENDANTS

For the plaintiff: **Roald Henriquez Q.C., with him Mr. Steven Roy**
For the defendants: **Pierre Lamontagne Q.C.**

Before Harre CJ.

JUDGMENT

This is a family dispute about land. I must therefore set out that part of the family history which seems to me to be relevant and indicate how it relates to the history of various parcels of land on Cayman Brac. As all the individuals in this dispute share the surname "Lazzari" I shall refer to them simply by their first names where convenient.

John A. Lazzari was the grandfather of the plaintiff and the first defendant. The first and second defendants are husband and wife and the third defendant is their son.

Eslie Earl Lazzari ("Eslie") was the plaintiff's father. He died on the 8th April 1992 and the plaintiff is his executor. At the time of his death he was possessed of land comprising Cayman Brac East Block 108D, Parcel 34 ("Parcel 34"). That land was transferred to him as his share of the estate of his parents.

The first and second defendants.are registered proprietors of land situated to the east of the deceased's land. Between these two parcels and Parcel 34 is other land, not in the ownership of any of the parties. The first defendant is also registered as proprietor in common with his brother Enrique of Block 109A Parcel 20 ("Parcel 20") which is on the bluff from which Cayman Brac derives its name directly above Parcel 34.

The plaintiff gave evidence that he remembered from when he was a boy that there were three ladders erected up to the face of the bluff from parcels 108 and 109 to give access to the top of the bluff and that these were built about 1945. That accords with an affidavit of Eslie, now deceased, which was admitted in evidence as a statement.

It is the plaintiff's case that from 1974, when Eslie's title to Parcel 34 was registered, Eslie gave the defendants permission to walk through it and that as a result of an estrangement in or about 1986 Eslie demanded $30 per month for the right to enter his land and use the well. The defendants, however, say that they and their predecessors in title enjoyed an unrestricted right of way across the land since at least 1946, and a right to pump water from the well on the land since at least 1957, when Eslie and the first defendant installed a pump, engine and pipeline on the land. They deny therefore that the

plaintiff or Eslie had any right to seek to prevent access across Parcel 34 by the defendants.

The defendants admit that they constructed a ladder and path in 1990 and 1991 as alleged but deny that this is wrongful. They deny trespass and by way of counterclaim claim a right of way across parcel 34 by prescription or by virtue of a lost modern grant and if necessary claim rectification of the land register . They also counterclaim for damages . There is also a claim that the ladder and path are upon land belonging to the Crown over which the defendants have been granted an easement.

In his amended reply the plaintiff makes the following assertions of fact and law.

1. That the land now registered as Block 108 D Parcel 34 and Block 109A Parcel 20 prior. to 1957 and from 1957 to 1974 comprised undivided family land and any such acts as were done by the defendants were with the permission of the other members of the family and not as of right by them.

2. That in 1967 in contemplation of a sale by Leon to a third party, Clyde Daniels, a separate agreement had to be made on 19th August 1967 with Eslie and John Cummings Lazzari (the administrator of the estate of Eslie's parents) to grant and allow entry and exit from the lands on the bluff and also for water rights from the well on Parcel 34. That is said to show recognition of the fact that these rights were not an appurtenance of the land.

The defence to counterclaim raises a further issue of law. It is that the defendants are estopped from maintaining their claim in this action against the plaintiff. The ground for this is that in 1986 the first and second defendants submitted a claim to the Registrar of Lands for a right of way by prescription over Parcel 34 and the Acting Registrar rejected it after considering the evidence and intimated his decision on 10th July 1989. No appeal was taken against this decision.

From this evidence the following main issues arise.

1. Are the defendant s precluded from pursuing their claim in these proceedings by reason of an estoppel per rem judicatam?

2. If not, did the defendants acquire an easement as of right over the plaintiff's property, Parcel 34, and a right to take water from the well on the parcel?

3. Are the structures erected by the defendants and the means of access to them on the plaintiff's land or on Crown land?

There are two sources for the statutory prescriptive right which are relevant . The first is Section 2 of the Prescription Law which reads as follows:

> "When any profit or benefit, or any way or easement, or any water course, or the use of any water, a claim to which may be lawfully made at the common law, by custom, prescription or grant, shall have been actually enjoyed or derived upon, over or from any land or water of Her Majesty the Queen,, or of any person, or of any body corporate, by any person claiming right thereto, without interruption for the full period of

> twenty years, the right thereto shall, subject to the provisos hereinafter contained be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

The Prescription Law is referred to in Part IX of the Registered Land Law (1995 Revision) which sets out the way, and the procedural scheme, whereby a prescriptive right to easements and profits may be acquired and registered. I now set out the relevant sections. The first is Section 138 -

> "(1) Subject to the Prescription Law, easements and profits may be acquired without registration by peaceable, open and interrupted enjoyment thereof for a period of twenty years.
>
> Provided that no easement or profit shall be so acquired unless the proprietor of the land burdened by such easement or profit is, or by reasonable diligence might have been, aware of such enjoyment and might by his own efforts have prevented it.
>
> (2) Where any person claims to have acquired an easement or profit by virtue of subsection (1)he may apply to the Registrar for the registration thereof, and the Registrar, on being satisfied as to the claim and subject to such notices, advertisement and conditions as the Registrar may direct, shall register the easement or profit as an incumbrance on the register of the land affected and, in the case of an easement, in the property register of the land which benefits."

Next are Sections are 147 to 149 which set out the procedural scheme for appeals from the Registrar to the Grand Court and the Court of Appeal. The appeal process throughout relates to a "decision, direction, order, determination or award" by the Registrar".

The decision of the Acting Registrar in 1989 to which I have referred was to refuse to register the easement over Parcel 34, for reasons which he set out extensively. It was a decision as to whether the easement had been acquired by prescription or not. Its substance is to be found in the following passage in his letter dated 10th July 1989 to the first and second defendants -

> "There is no argument that parcel 108D 34 was formerly owned by John A. Lazzari who was the grandfather of Mr. Leon Lazzari and Mr. Eslie Lazzari (sic). Title was registered in favour of Mr. Eslie Lazzari from 1974 by authority of the Adjudication Law.
>
> Therefore, until 1974 Mr. Leon Lazzari and his wife, were entitled to walk through 108D 34 as it was undivided family land. However, as soon as Mr. Eslie Lazzari was registered as the proprietor of the parcel, the land became subject to an overriding interest, in that a right of way was then in the process of being acquired by Mr. Leon Lazzari and his wife, in favour of parcel 109A 20. That easement will not be capable as being registered as an encumbrance against parcel 108D 34 until there has been at least 20 years uninterrupted use of the easement from 1974.
>
> Therefore the CLAIM of Mr. Leon Lazzari and Mrs. Freda Lazzari to register a pedestrian easement over parcel 108D 34 in favour of parcel 109A 20 is DENIED"

On the question of whether this gave rise to an estoppel the plaintiff relied extensively on the approach of Lord Bridge of Harwich in **Thrasyvoulou v. Secretary of State for the Environment** (1990) 2 W.L.R. p. 1. The question in the appeal was whether an issue estoppel arose as a result of earlier proceedings under the Town and Country Planning Act 1971. Lord Bridge expressed the principles on which the doctrine of res judicata rests in the following way -

> "The doctrine of res judicata rests on the two principles which cannot be better expressed than in terms of two Latin maxims "interest reipublicae ut sit finis litium" and "nemo debet bis vexari pro una et eadem causa." The principles are of such fundamental importance that they cannot be confined in their application to litigation in the private field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions."

In a later passage in his speech, at page 14 of the Report he distinguished between the expressions estoppel per rem judicatam and issue estoppel by reference to the terminology used by Diplock LJ in **Thoday v. Thoday** (1964) P. 181, where he said at page 197-198 -

> "The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call 'cause of action estoppel,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties,. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment , or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim "Nemo debet bis vexari pro una et eadem causa.' In this application of the maxim 'causa' bears its literal Latin meaning. The second species, which I will call 'issue estoppel,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfillment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfillment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not or deny that it was fulfilled if the court in the first litigation determined that it was."

Harley Development Inc. v. Commission of Inland Revenue (1996) 1 W.L.R. 727 was a case where the appropriateness of judicial review procedure in relation to an issue

under the Inland Revenue Ordinance of Hong Kong was considered. The matter went to the Privy Council and the following passage from the judgment of Lord Jauncey of Tullichettle succinctly indicates the view of their Lordships -

> "Their Lordships consider that where a statute lays down a comprehensive system of appeals procedure against administrative decisions it will only be in exceptional circumstances, typically an abuse of power, that the court will entertain an application for judicial review of a decision which has not been appealed. "

That must apply a fortiori to a further recourse to the very court to which an appeal could have been brought. The Acting Registrar of Lands rejected the claim to register a pedestrian easement over Parcel 108B/34 in favour of Parcel 109A/20 because he was not satisfied as to the claim to have acquired the easement. Had he been so satisfied it would have been mandatory upon him to register it , as provided in section 138 (2) of the Registered Land Law. That was a substantive decision against which the appeal provisions of the Law to which I have referred could have been invoked. That position is distinguishable from that which prevailed in **Re. Freehold Land in Dances Way, Hayling Island** (1962) 2 ALL.E.R. 42 which was relied upon by the defendants. I need however to make that observation good by looking at that case in some detail. In concerned a conveyance in which the following appeared -

> "Excepting and reserving full right of way for all persons entitled to the same , their heirs and assigns...and all other persons having occasion to use the same.... through and over [a certain strip of land]"

The appellant subsequently sold parts of the land which he had purchased and on his application for first registration of the remaining land it was registered with absolute title but a note was entered that the registration took effect subject to the exception and

reservation to which I have referred. The ground for the entry was thus that the exception and reservation "created" and easement within Section 70 (2) of the Land Registration Act 1925. The appellant applied to the Land Registry for rectification of the register by the removal of the note and the Chief Land Registrar ordered it to be cancelled, taking the view that the exception did not benefit the respondent's adjoining land. The matter reached the Court of Appeal where the majority (Diplock LJ dissenting) held that the Chief Land Registrar's decision did not give rise to res judicata on the construction of the exception and reservation. Before I turn to what was said by Lord .Evershed MR I need for the sake of clarity to explain that the Chief Land Registrar had been asked not only to remove the note which existed on the Register but also to make a specific entry on the Registrar that "the said land tinted brown on the filed plan is free of any right of way in favour of Ernest William Gilbert or his successors in title."

Lord Evershed MR said this -

> "I am now expressing myself with deliberate caution. I think that it is clear from the language which the Chief Land Registrar used (and particularly from his abstinence from making any note such as Mr. Mosely had asked for in his application) that he was not purporting finally to determine as a matter of law whether there was an easement in favour either of Mr. Gilbert or of anybody else."

That approach appears in a later passage in the judgment of Lord .Evershed MR. It is this -

> "In saying that I think the Registrar was justified and did not err when the came to his conclusion for deleting the note, that should not be taken as a final determination, a res judicata between Mr. Gilbert and Mr. Mosely as to the true construction of this document if, when the matter is fully tried out, further material, further evidence of admissible surrounding circumstances should be available which might affect the result,"

The court was unanimously of the opinion that the Chief Land Registrar had jurisdiction to entertain the question of construction of any instrument. However, as was said by Upjohn LJ the object of the proceedings then before the Court of Appeal was solely to determine whether the note which had been entered on the Register pursuant to Section 70 (2) of the Land Regisration Act 1925 had been rightly entered. It was conceded on both sides that whether an entry of an overriding interest is or is not made does not in itself affect the validity of the overriding interest if such it be. Upjohn LJ expressed the matter thus-

> "There will not be any question of res judicata arising by reason of anything that happened before the learned Chief Land Registrar who pointedly refused to make any entry upon the Register that the land was free of any right of way in favour of the vendor."

The present case seems to me to be easily distinguishable. The Registrar made a specific determination, which was made known to the first and second defendants by letter dated 10th July 1989, that the easement which they claimed would not be capable as being registered as an encumbrance against Parcel 108B/34 until there had been at least 20 years uninterrupted use from 1974. It was for that reason that he declined to register the easement. There was a right of appeal against this decision which was not exercised. It would be quite wrong for the court to relitigate that issue these many years later. There is in my view a clear estoppel and that is the end of these proceedings as far as the claim for an easement over Parcel 34 is concerned. Nevertheless, I should refer briefly to the principles of lost modern grant, which was raised on behalf of the defendant, although it

does not arise unless the court finds a long, open and uninterrupted enjoyment of a right which is otherwise unexplained.

In **Tehidy Minerals v. Norman** (1971) 2 QB 528, Buckly LJ expressed the effect of the House of Lords decision in **Angus v. Dalton** (181) 6 App. Cas 740 as follows -

> "In our judgment Angus & Co. V. Dalton decides that, where there has been upwards of 20 years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the 20 year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no grant was made."

This Court need not go to that unless the necessary period of user is established. That was the very matter on which the Acting Registrar adjudicated in 1989 and with which I have already dealt. On my view of this case there is no need to go to the fiction of a lost modern grant, and indeed it would be quite wrong to do so.

I now turn to the next issue. The question for determination is whether the ladder and path which the defendants admit that they constructed are on property belonging to the plaintiff - namely Parcel 34- or whether they are on Crown land over which the defendants have been granted an easement.

This issue is one of fact and I will start my analysis with a reference to the affidavit of Mr. Colin Fawkes who is a Chartered Land Surveyor and who was employed by the Cayman Island Government at the material time. He says that he carried out a survey

about July 1991 of certain properties at North East Bay Cayman Brac where there was a dispute between the plaintiff and the defendants. His remit came from Government and was totally independent of the parties in this case. The following is an extract from his affidavit.

> "My survey involved an examination of the Land Adjudication records upon which the Land Register is based and a physical examination of the site. The Land Adjudication Records were compiled before 1974 and at the time I believe all proprietors had an opportunity to make comments regarding the make up of these records.
>
> I discovered that the physical features of the property corresponded with the Land Adjudication records. There was a dispute between the parties regarding the boundaries of Parcel 34. The Defendants maintained that the boundary at the eastern side was represented by a wall whereas the Plaintiff contended that a metal pin in the face of the Bluff was the true boundary. My examination revealed marks found in situ on the ground and revealed that the wall was featured in the Land Adjudication records and showed that a measurement would take the boundary to said metal pin. I measured the distance indicated in the Land Adjudication records and found that the boundary of Parcel 34 was said metal pin in the face of the Bluff. Both at the east and west side of Parcel 34 there are stone walls but the old records show that the boundaries of Parcel 34 go beyond these walls and extend to the face of the Bluff as I have confirmed by my examination.
>
> I concluded that the boundary of Parcel 34 extended to the vertical face of the Bluff. This was evidenced from my examination of the Land Adjudication records and the physical inspection as aforesaid. This also corresponds with the titles and plans in the Land Register.
>
> I examined the ladder structure and climbed same. The foot of the structure has been constructed over boulders which have at one time fallen from the face of the Bluff. According to my examination the part of the structure constructed on these boulders is on Parcel 34 and not on Parcel 72 (Crown land) which forms the face of the Bluff. To access the foot of this structure one crosses almost the whole width of

Parcel 34 if entering from the eastern side. The structure is nearer to the western boundary.

I am aware that Government granted an easement over Parcel 72 to assist the defendants. This was, and could be, of no effect since the base of the structure is on Parcel 34 and not Parcel 72. It was clear to me that while the vertical face of the Bluff is Crown land (Parcel 72), that Crown land does not extend horizontally out from the face of the Bluff. The base of the structure is situated wholly on Parcel 34 and to obtain access to it one has to cross Parcel 34."

The easement there said to have been granted by Government over Parcel 72 arose as follows On 7th May 1991 the Principal Secretary of the portfolio of Communications, Works and Agriculture had written to the first and second defendants in the following terms.

> "I have been directed to inform you that the Governor-in- Council has no objections to the grant of easement of the above-mentioned Crown land in order that you may gain access to your property on the Bluff. Bloc 109A Parcel 20 for agricultural purposes.
>
> The portfolio of Communications, Works and Agriculture has authorised that the Lands and Survey Department demarcate the boundaries of this Crown land to ensure that trespassing will not occur upon bordering properties.
>
> A copy of this letter is being sent to the Registrar of Lands for his information."

However, on the 10th September 1991 another letter was sent by the Principal Secretary to the first and second defendants. It read as follows -

> "Pursuant to a site visit that was made by the Principal Secretary CW&A , Chief Surveyor and Director Lands and Survey, it was confirmed that Mr.Brinsley Lazzari's property, Parcel 34 Block 108D, extends into the vertical face of the Bluff. Due to this fact, passage to access the ladder which is situated at the base of Parcel 34 is not possible without trespassing upon private property.

> The grant of easement that was assigned to you allows passage over Crown land but in no way gives any authority to trespass upon private property.
>
> The portfolio is in the process of reviewing the evidence and in an effort to settle this matter in the most amicable way to all parties concerned. However, it must be acknowledged that at this time the ladder is not accessible through private property and the alternate route will have to be utilised for the time being until this matter can be resolved."

That letter was followed up on 18th February 1992 by a further letter from the Principal Secretary declining to be further involved.

I have now read or heard extensive evidence as to the boundary between Parcels 38 and 72. Apart from the unsupported expression of opinion by the second defendant that the boulders are part of the bluff, that evidence is adduced on behalf of the plaintiff. He did say under cross-examination that on an adjoining parcel, parcel 111 a strip had been left on survey at the base of the bluff and that the line on the registry map showed a straight line from parcel 111 to parcel 34. Against that is the affidavit evidence of Mr. Fawkes to which I have referred. The Director of Lands and Survey recorded his opinion thus in his letter to the defendant's attorney dated 27th January 1994.

> "It is my opinion that the Cadastral boundary between Parcels 34 and 72 of Block 108D as determined during the Cadastral process in this area in 1973 has been reaffirmed by the locating of original marks during the General Boundary Survey 3550 in 1990. Section 17 (2) of the Registered Land Law (R)is therefore satisfied"

The evidence as a whole satisfies me that Parcel 34 does indeed extend to the vertical face of the bluff. There being no easement over that Parcel, the plaintiff succeeds in his claims for an injunction to restrain the defendants whether by themselves or by their

servants or agents or others whomsoever from entering or crossing Parcel 34 and an order that the defendants do forthwith pull down and remove the footpath, bridge and ladder constructed by them and situated upon parcel 34 and to restore the property to its former state prior to their interference therewith and the defendants fail in their counterclaim in this action.

I will hear any submissions as to damages and costs.

GRAND COURT CAYMAN ISLANDS

G.E. Harre
Chief Justice

Dated 24th July 1997