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IN THE CAYMAN ISLANDS COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 23 OF 1989

BEFORE: THE HONOURABLE MR. JUSTICE ZACCA PRESIDENT
THE HONOURABLE MR. JUSTICE GEORGES, J.A.
THE HONOURABLE MR. JUSTICE KERR, J.A.

BETWEEN MARCELLA BODDEN
BENJAMIN WRIGHT APPELLANTS

A N D JOAN EVANGELINE WILSON RESPONDENT

MR. P. LAMONTAGNE, Q.C. and MR. A. McLAUGHLIN
for the Appellants

MR. N. HILL, Q.C. and MR. R. NELSON
for the Respondent

DECEMBER 5, 8, 1989 AND MARCH 28, 1990

REASONS FOR JUDGMENT

ZACCA, P. :

On December 8, 1989 we dismissed this appeal and affirmed the judgment of the Grand Court. We promised to put our reasons into writing. This we now do.

The Respondent who was the owner of land and a dwelling house being Registration Section George Town Central Block 13E Parcel 88 brought an action against the appellants claiming damages for trespass and asking for an Order that a right of way existing over the Respondent's land be declared to be not more than 12 feet in width.

The right of way exists for the benefit of the Appellants, being the owners of land Registration Section George Town Central Block 13E Parcel 42.

The appellants counterclaimed for a declaration that the right of way was 20 feet in width.

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It was not disputed at the trial or on the appeal that a right of way exists but the width of this right of way was in dispute.

The learned Chief Justice sitting in the Grand Court made the following Order :

"It is hereby declared and ordered as follows :-

1. It is ordered that the Defendants do pay the Plaintiff the sum of CI$431.50.

2. It is declared that the vehicular right of way registered as an appurtenance to parcel 42 over parcel 88 in Registration Section George Town Central Block 13E is 12 feet and no more in width from the northern boundary of the latter parcel.

3. It is ordered that the Defendants do restore the remainder of the Plaintiff's land to the condition it was in prior to April, 1983 within three (3) months from the filing of this order.

4. It is declared that the Defendants may construct upon the 12 foot strip a carriageway with a spray and chip or an all weather paved surface at their election provided that proper drainage works are constructed so as to prevent the normal run-off of rain water flooding the Plaintiff's said land and subject also to their observance of the Defendants' two undertakings :

   (i) to install at the eastern end of this right-of-way a gate to be operated by coded cards, the distribution of which will be restricted to the Defendants, their tenants and the members of their own or their tenants' immediate families and their employees ;

   (ii) to install as part of the surfacing works upon the right of way appropriate speed bumps to reduce the speed of vehicles driven on it.

5. It is ordered that save as aforesaid the Defendants' counterclaim be, and it is hereby dismissed.

6. The Defendants do pay one half of the Plaintiff's costs of this action, such costs to be taxed or agreed. "

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From this Order the appellant has appealed. The only issue on appeal was the Order with respect to the right of way being 12 feet in width.

The appellant contends on appeal that the right of way should be declared to be 20 feet in width. The appellant contends that a plan annexed to the 22nd August, 1969 deed showing a proposed road 20 feet in width is an indication that the right of way was 20 feet in width.

The proposed roadway shown on the annexed plan was to the northern boundary of the respondent's land. It is not in the dispute that the right of way exists at the northern boundary of the respondent's land.

The respondent, formerly Joan Phillips, is the owner of land comprised in Registration Section George Town Central Black 13E Parcel 88. The incumbrances section of that register shows it to be subject to a vehicular right of way as indicated in the demarcation index map.

The appellants are the owners of land comprised in Registration Section George Town Central Block 13E Parcel 42. These two parcels of land ajoin each other in Whitehall Estates. An entry in the proprietorship section of the register relating to parcel 42 also shows a vehicular right of way as indicated on the registry map. The appellants are entitled to the benefit of the right of way.

The land of the appellant and respondent originally belonged to the respondent's father, Joseph Rodriques Watler. The respondent derived her title from a deed of gift dated 22nd August, 1969 and made between her brother Joseph, acting as Administrator of the Estate of Joseph Rodriques Watler, and himself.

After this conveyance to the plaintiff, the remainder of the Watler family land remained vested in the Estate of Joseph Rodriques Watler.

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On 2nd February, 1977, the remainder of the land was transferred into the name of the first appellant and on the 30th January, 1979 was transferred into the joint names of the two appellants.

The deed of gift of 22nd August, 1969 and the plan annexed thereto show that the land which was conveyed to the respondent did not include the 20 foot strip at the northern boundary. The annexed plan shows the 20 foot strip as a proposed road. This 20 foot strip remained in the legal ownership of the respondent's father's estate.

However, the Land Adjudication Law 1971 required claims to be submitted and a claim dated 25th September, 1973 was submitted by the respondent with respect to the land mentioned in the deed of 22nd August, 1969. The deed together with the annexed plan was submitted in support of the claim. An adjudication record was prepared under Section 16 of the Land Adjudication Law in which the title of the plaintiff was accepted. The land is now comprised in parcel 88 and included the 20 foot strip of land on its northern boundary. The land was however subject to an easement described as a 'vehicular right of way as indicated on the demarcation index map'.

The learned Chief Justice found that the Court was bound by what was done in the adjudication process. The effect of this finding is that the 20 foot strip of land is part of parcel 88 but that it is subject to a vehicular right of way.

In arriving at this finding the learned Chief Justice in his Judgment at page 4 said :

> " It was submitted on behalf of the Plaintiff that in these circumstances this Court must find that this right of way has its origin in the adjudication process itself. Counsel pointed out that the 22nd Augsut 1969 deed does not purport to reserve any such right over any of the land comprised in its conveyance to the Plaintiff. Moreover as he says, such a right

"could not have pre-dated that conveyance because, before it was effected both the land conveyed and the 20 foot strip were in the same ownership, that is to say, that of the Administrator of the late Joseph R. Watler estate. Unity of possession of the dominant and servient tenements has always been regarded as inconsistent in law with the existence or continuance of an easement: see Magarry and Wade, Law of Real Property, 4th Edition, p. 871.

On behalf of the Defendants it was submitted that this could not be the case because the scheme of the Land Adjudication Law was to declare only existing rights for purposes of registration rather than to create any new rights. I agree that this was the intention of the Legislature as is apparent from the wording of the statute but it is equally clear that this intention was imperfectly carried out. Adjudication in the manner it laid down is a process of quieting of titles. It is an inescapable feature of such a process that, unless corrected in the course of the in-built appellate provisions, a mistake on the part of those responsible for a particular adjudication is one apt to become final, binding and conclusive in law despite the absence of any adequate basis for the decision in question in the first place.

This Court is not entitled to go behind such a final adjudication or the first registration of any parcel which features on the Register under the 1971 legislation but I am not on that account obliged to assume that the legal rights accepted in the adjudication process must necessarily have had their origin in the documents which were submitted during that process. Nor will the Court do so where there is no indication that those rights have their actual origin in any of those documents which have been put in evidence before it.

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> " I find that if those responsible for the adjudication of the land which subsequently became registered as parcels 88 and 42 respectively had had before them the evidence which is presently before this Court, their proper course would have been to record the 20 foot strip at the northern extremity of what is now parcel 88 as part of parcel 42 and to have included no reference to any vehicular right of way. They did not do so. We are bound by what they did do. In consequence this court is now faced in this action with the task of discovering firstly what is the proper width of that right of way and secondly of determining what is the proper extent of its permitted user by the Defendants as the proprietors of its dominant tenement. For the purposes of that exercise the origin of the right of way in question is to be taken as the adjudication process itself. "

We can find no fault with the reasoning of the learned Chief Justice. Indeed for the purposes of the appeal the appellant accepted the finding of the Court on this point.

The appellant however contends that the annexed plan showing the proposed road as being 20 feet in width is an indication that the right of way ought to be 20 feet in width.

It is necessary therefore to look at the evidence to ascertain, if possible, the reason for the inclusion of the 20 ft. proposed road in the annexed plan.

At the trial the respondent gave evidence as to the intended use of the proposed road. She stated that the proposed road was to provide access from the West Bay Road to that part of the Watler family lands which were immediately to the east of the land conveyed to her and which her sister, Marjorie, was at that time proposing to acquire from the family. This intention did not materialise and her sister was no longer interested in the land. The appellant thereafter built her house on that part of the land closest to the 20 foot strip because it was the highest elevated portion of the land. The appellant landscaped the area in front of the house and took in the 20 foot strip as part of the garden.

"to parcel 42 rather than the right of way over the Plaintiff's land. They were concerned to avoid the use of these two means of access in combination by members of the public as a casual by-pass of the West Bay Road/Eastern Avenue main road junction.

The 22nd Augsut 1969 deed was before the Adjudicator and his assistants at the time of the adjudication, together with its annexed plan. There is no doubt on the face of the latter of the width of the then contemplated 'proposed road' and there is even evidence of an existing survey mark demarcating a width of 20.2' at its western end. If the Demercator, the Records Officer or the Adjudicator had accepted this as evidence of an established right of way twenty feet wide there would have been nothing to prevent them from so stating in the Adjudication record. It would then inevitably have found its way into the incumbrances section of parcel 88 thus conclusively determining this question. The fact that this was not done can only be regarded as a strong indication that they did not regard the width of the right of way as having been established. No assistance can therefore be derived from the position of the dotted line shown on the map prepared during the adjudication process or on the Registry map which was subsequently prepared upon the basis of it.

I bear in mind the undeveloped state of the land comprising parcel 42, the dominant tenement in 1973/4 and the letter dated 7th January, 1982 addressed to Hunter and Hunter by Mr. K.C. Dunlop the Registrar of Lands which states that the minimum width of a vehicular right of way is normally assumed to be 12 feet. I find that there is quite insufficient evidence to enable me to hold that any wider right of way was created as a result of the adjudication process than 12 feet. I have already held that this process was the origin of that easement.

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> "It follows that the Defendants on whom the onus lies in this action have failed to prove upon a balance of probabilities that they are entitled to 20 feet or indeed to any vehicular right of way wider than 12 feet from the northern boundary of parcel 88, and I hold accordingly. "

In our view it was open to the learned Chief Justice to find that the width of the right of way was not to be determined by placing any reliance on the measurement of the proposed road as shown in the annexed plan.

It was also contended by the appellants that the learned Chief Justice was wrong in taking into consideration the letter dated 7th January, 1983 from the Registrar of Lands in which it was stated that the minimum width of a right of way is normally assumed to be 12 feet.

Reference to this letter and the 12 ft. width was made by learned Counsel, Mr. Hill, in his address to the learned Chief Justice at the trial. No objection appears to have been taken at that time.

The letter was included in a bundle agreed to by both parties. The letter was in fact written to Hunter and Hunter who were then the Attorneys acting on behalf of the appellants.

It was therefore open to the learned Chief Justice to refer to the letter in his consideration of the evidence.

In the absence of any evidence to the contrary, it was in our view open to the learned Chief Justice to conclude on the evidence before him that the right of way was 12 feet in width.

It was for these reasons that we dismissed the appeal with costs to the respondent and affirmed the judgment of the trial Judge.

The learned Chief Justice came to the conclusion that the 20 ft. proposed road shown in the annexed plan was not to be regarded as the width of the right of way.

It is to be observed that the claim submitted by the respondent together with the annexed plan occurred in 1973. The appellants acquired their land in 1977. The right of way is not a way of necessity for the appellants' use of parcel 42. The evidence discloses that the appellants will be required to provide a paved road way giving access to parcel 42 from Eastern Avenue.

In considering what was the proper width of the right of way, the learned Chief Justice in his judgment at pages 6 - 8 stated :

> " What, then, is the proper width of this right of way ? From the fact which I have already held that it does not have its genesis in the 22nd August 1969 deed it follows that the 20 foot measurement apparent from that plan does not automatically determine its width. There is a measure of significance in the fact that the plan attached to the earlier deed of 9th June 1962 marks off a 30 foot proposed right of way in this area. If a reduction of 10 feet in the course of seven years is thus apparent in the thinking of the Watler family members, then the Court would, I think, be wrong to treat the figure of 20 which was contemplated in 1969 as being sacrosanct for the future. A further factor which must be taken into account is that this is by no means a way of necessity for the Defendants' use of parcel 42. They have on the evidence been obliged by the Central Planning Authority to put in, and will be obliged in the course of time to make up, a 22 foot wide paved roadway giving access to their property from Eastern Avenue by way of Watler Road on the East. It is apparent, moreover, from the evidence of Christine Ballard, the Director of Planning, that this Authority regarded that alternative route as being the more proper principal route of access