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Land adjudication
Right of Way

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. THE CHIEF JUSTICE

ON 11TH AND 12TH SEPTEMBER, 1989

CAUSE # 195 OF 1983

BETWEEN	JOAN EVANGELINE WILSON	PLAINTIFF
AND	MARCELLA BODDEN and BENJAMIN WRIGHT	DEFENDANTS

Mr. Norman Hill Q.C. instructed by Messrs. Truman Bodden & Co.
for the Plaintiff

Mr. P. Lamontagne Q.C. instructed by Messrs. Charles Adams & Co.
for the Defendants.

COLLETT C.J. JUDGEMENT

This action is about a dispute over a private right of way. The land concerned is comprised in Registration Section George Town Central Block 13E Parcel 88 which is registered in the name of the Plaintiff, Joan Wilson, formerly Phillips. The incumbrances section of that register shows it to be subject to a "vehicular Right of Way as indicated in the Registry Index Map". A similar entry in the proprietorship section of the register relating to George Town Central, Block 13E, Parcel 42 shows that Right of Way to be an appurtenance of the latter parcel. The two Defendants are now registered as joint proprietors of parcel 42 and thus are entitled to its benefit.

These two parcels of land adjoin each other in Whitehall Estates. The Plaintiff derived her title initially from a deed of gift dated 22nd August 1969 and made between her brother, Joseph, acting as administrator of the estate of their late father, Joseph Rodriques Watler, and herself. The western portion of it had come into possession of the father by way of an earlier deed of gift

dated 9th June 1962, but the Eastern portion was Watler family land. After the conveyance to the Plaintiff took place the remainder of the Watler family land remained vested in the father's estate until on 2nd February, 1977 it was transferred on sale into the name of the first Defendant and subsequently on 30th January 1979 was further transferred into the joint names of the two Defendants, Marcella Bodden and Benjamin Wright.

Examination of the metes and bounds contained in the deed of gift of 22nd August 1969 and of the survey plan annexed thereto reveals that what was originally conveyed to the Plaintiff was not the full extent of the land now registered in her name as parcel 88 but rather a lot of land which stopped short of a strip of land approximately 20 feet wide extending the full length of its northern boundary. That strip, which is clearly marked off by a dotted line on the plan, is labelled thereon as 'Proposed Road' but it is not mentioned at all in the deed's description of the land conveyed. One is obliged to conclude that this deed left the ownership of that strip unaffected in any way and that it remained for the time being thereafter in the legal ownership of the Plaintiff's father's estate.

The purpose for which this proposed road was intended to be used at the date of the 1969 conveyance was given in evidence by Mrs. Wilson as being to provide access from West Bay road to that part of the Watler family lands which are immediately to the east of that conveyed to her and which her sister, Marjorie, was at that time proposing to acquire from the family. However, that intention on her sister's part was abandoned shortly after the Plaintiff acquired her own lot and, by the time the Plaintiff and her first husband came to build their house upon it, the sister was no longer interested. In these circumstances the Plaintiff's house came to be built upon that part of the lot closest to the strip in question because that part was the highest elevated portion of the lot and least likely to be flooded in rainy weather. Thereupon the Plaintiff landscaped the area in front of her new house so as to take in the 20 foot strip as part of its garden. She made up and maintained a lawn there without objection from anyone until the

latter part of 1982.

But for the happening of the Cadastral Survey and the subsequent introduction of systematic land registration in Grand Cayman in the years 1973 and 1974 it is difficult to resist the conclusion that the Plaintiff would, by 1982, have acquired an indefeasible possessory title to this 20 foot strip of land by reason of her continuous, open, peacable adverse possession. See S.3 of the Limitation of Actions Law (Cap.86). The running of time in her favour was fortuitously interrupted by the events of those intervening years.

When notices requiring claims to be submitted under the Land Adjudication Law 1971 were published in respect of the relevant adjudication section, a claim dated 25th September, 1973 was submitted by the Plaintiff (together with her first husband who was then jointly entitled) in regard to the land which was comprised in the 22nd August 1969 deed. That deed together with its annexed plan was submitted in its support. What resulted was an adjudication record prepared under section 16 of that Law in which the title of the Plaintiff was accepted as provisional, later to be declared absolute, for the whole of what is now comprised in parcel 88, including the 20 foot strip on its northern boundary but subject to an easement described in the record as a 'Vehicular Right of Way as indicated on the demarcation index map'. Reference to that map discloses a dotted line traversing the northern part of parcel 88 from east to west roughly paralled to its northern boundary. Neither the map nor the record gives any indication of the width of the demarcated way.

The scheme of the Land Adjudication Law 1971 included an appeals procedure subject to which an adjudication record was declared to be final and, in accordance with sections 9 and 10 of the Registered Land Law, which is a statute in pari materia, the record before the Court furnished the basis for the preparation of the register in respect of parcel 88 to which reference has already been made in this judgement.

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 August 1969 deed does not purport to reserve any such a 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.

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.

Before consideration is given to these issues it is necessary first to refer briefly to the events of November, 1982 onwards. About that time Mrs. Wilson returned home to find that stakes had been placed in a line across the northern boundary of her property in her absence. She took these out and threw them aside. A few days later she was visited by the second Defendant, Mr. Wright who, according to her evidence, asked her for a right of way limited to 10 feet. At first she refused but later, after some outside mediation, she agreed to it. There is a reference to her consent to do so in a letter which she wrote in January, 1983. Following this she proceeded to put out concrete blocks and to plant the beginnings of a hedge some 11 feet short of the Northern boundary of parcel 88.

No reliance has been placed by either party upon this alleged agreement in the Pleadings. There was apparently no valuable consideration for it moving from the Defendants and neither is there such a note or memorandum of it in writing as would satisfy the requirements of section 37 of the Land Registration Law. In these circumstances there can be no question of this alleged agreement in any way governing or modifying the rights of either party to or in respect of this right of way and no further consideration needs be given to that aspect

of the matter in this judgment.

Mrs. Wilson left Grand Cayman in April, 1983 and on her return she found clear signs that excavating machinery had been driven through the northern portion of her property and had demolished the planted hedge and several bushes well beyond the 11 foot line which she had established. The concrete blocks marking that distance had disappeared. Subsequently the Defendants laid a marl surface over the bulldozed area and commenced to use the track thus created for movement of vehicles to and from the West Bay Road and their parcel 42 on which they had begun a residential development and established a concrete making plant. It has not been denied that they were responsible for the initial excavation and the evidence clearly points in that direction. Indeed the Defendants assert that they were entitled to take these actions since their claim is that the width of their right of way is 20 feet.

The Plaintiff on the other hand asserts that their action was a trespass and claims damages for the destruction and inconvenience entailed to her thereby. The roadway thus created has a width which Mr. Wilson in evidence said was 17 feet, an estimate not challenged in cross-examination. From this it is apparent that, if the Defendants are correct in claiming 20 feet as the proper width of their right of way, no trespass was committed. On the other hand, if the Plaintiff is right in claiming that no more than 12 feet was available to them, measured from the northern boundary then it follows that a trespass was involved for which they would be liable in damages to the Plaintiff.

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 plat 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 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 August 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 it western end. If the Demarcator, 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 89 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. 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.

The other major issue of contention canvassed at the trial was the extent of the proper user of this right of way. There is no doubt that it includes the use of vehicles, but does that include all classes of vehicle? There is no doubt that the Defendants, as proprietors of parcel 42, are entitled to use this way personally but does that right extend to others, in particular their residential tenants and their employees? Secondly, do they have the ancillary right to make up the right of way so as to facilitate its use with vehicles, either by maintaining the present marl base or by improving it with a tar spray and chip surface or by topping it over with a more substantial paved all weather surface?

In considering these questions I have taken as established law the dicta of Joyce J. approved by the English Court of Appeal in Robinson v Bailey (1948) 2 A.E.R. 791 at p. 797: "where there is an express grant of a right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled the grant is not to be restricted to access to the land for the purpose for which access would be required at the time of the grant". There is, as I have found, no express grant to be found in the present case in the sense in which that term was employed by Joyce J. However, there is no prescription either and the genesis of this easement as I have found it to be is more akin to a grant than to the process of prescription. So far as can be seen from the Register itself, the use of this right of way is

unrestricted: no limittion is expressed. It would therefore be wrong to conclude that, although in all probability the use by tenants and commercial employees of the grantee could not reasonably have been in contemplation in 1973/74, such a user in 1983 or 1989 would be an excessive user of the right.

In coming to this conclusion I distinguish Todrick v Western National Omnibus Company (1934) Ch. 190 on the same ground as did the Court of Appeal in Robinson v Bailey, namely that there is in the present case no evidence that the physical state of the right of way is such that the extended user of it would be more than the roadway could be asked to bear. I further distinguish the 'caravan case', Jelbert v Davis and Another (1968) 1A.E.R. 1182, on the ground that in that case unlike the present, the grant of the right of way was for use in common with other persons having a like right and, as Lord Denning M.R. held at p. 1185 letter A, such a right must be used so as not to interfere unreasonably with the lawful use of it by those other persons.

For these reasons I hold that the present and future use of the right of way not only by the Defendants and the members of their immediate family but also by their residential and/or commercial tenants and members of their immediate families and by their employees with either private or commercial vehicles of a size and width commensurate with the width and surface structure of the roadway must be regarded as lawful. For similar reasons I hold that no restriction can be implied as to the nature of the surface which the Defendants at their own expense may cause to be placed on this right of way for the purpose of facilitating its convenient use by modern day vehicles. At their election this can include either spray and chip or tarmacadam all weather surfacing, subject to the proviso that, in making up the roadway, the Defendants will be obliged to execute such drainage works as will effectively prevent the run-off of normal rain water from that surface unto the Plaintiff's land which might otherwise flood it.

In reaching the latter conclusion I have also been influenced by the offer of two undertakings on the part of the

Defendants which were very properly tendered through their counsel at the trial for the purpose of deterring the unlawful use of the right of way as a by-pass by the members of the public having no legitimate business on parcel 42. The Defendants have offered firstly, 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 themselves, their tenants and the members of their own or their tenants' immediate families and their employees. Secondly they have offered 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. These undertakings are accepted by the Court and should be embodied in any formal order.

It remains to consider the question of damages for trespass. From my finding that the width of this legal right of way does not exceed 12 feet, it follows that there has been and encroachment of some five feet unto that part of the Plaintiff's land which is unincumbered by the easement. This constitutes a trespass which took place in April 1983 when the roadway was first driven through and the Defendants are liable for it. The special damage pleaded in the Statement of Claim amounts to CI$281.50, a figure accepted at the trial on behalf of the Defendants. Over and above this the Plaintiff is entitled to some recompense for inconvenience and stress of mind, although the limited nature of the encroachment and the Defendants' genuine belief that they are entitled to 20 feet must go in diminution of the amount. I assess the general damages at $150.00 making a total of $431.50. No provision is made by section 62 (1) of the Judicature Law for the award of any prejudgment interest on that amount.

The Plaintiff is also seeking an order for reinstatement by the Defendants of the land encroached upon. Although an injunction, particularly a mandatory injunction, is a remedy which may be granted or withheld in the Court's discretion, I find it difficult to see upon what basis I can properly refuse it to the Plaintiff in these circumstances. Without it she will be deprived altogether of the benefit of some 5 x 150 square feet of land in

front of her house or else she will be put to considerable expense to restore that strip to a condition acceptable to her. For these reasons the order sought will be made in the exercise of the Court's discretion.

In the result I give judgement to the Plaintiff for C.I.$431.50. There will be a declaration 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. There will be an order that the Defendants do restore the remainder of the Plaintiff's land to the condition it was in prior to April, 1983. There will be a further declaration 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 two undertakings just recorded in this judgment. Save as aforesaid, the Counterclaim is dismissed.

I will hear counsel further as to costs.

Dated the 29th September, 1989.

Sgd, G.D.M.Collett

CHIEF JUSTICE.