

SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 1990

BETWEEN:

PATCON LTD. - Appellant
and
FRED JOSEPH DARE - Respondent

Before; The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: O.R. Sylvester, O.C., and M. Williams for the Appellant
H. Forde O.C., A. Cummings, Miss Hughes-Ferrari,
Dr. R. Browne for the Respondent

1991: July 17, 19,
Dec. 9.

JUDGMENT

BYRON, J.A.

This appeal is against the order of the Court declaring that the plaintiff/respondent was seised in possession of the premises in dispute and for ancillary injunctive relief. The appellant had asserted that the disputed area was a road between their adjoining properties which he was entitled to use.

The background circumstances commenced in 1914 when the late Rosina Cox was the owner of lot 6 of the land settlement allotment at Richmond Hill comprising 5 acres and 1 pole and Surveyor O'Donoghue prepared for her a subdivision plan of the northern part of that lot into 5 residential lots. Lot 5, on that plan, about which this case is concerned, is shown as having as its southern boundary a road between it and the land retained by Mrs. Cox. This road leads from Murray Road along the southern boundary of lot 5 and lot 3 and makes a right angle at lot 2 and then runs northward between lots 2 and 3 to the south western end of lot 1. Both lots 5 and 4 front on Murray road.

Rosina Cox sold the lot numbered 5 on that plan in 1922 to Henry Baptiste. The lot changed hands over the years and eventually the

/appellant....

appellant purchased it from Robin and Stephanie Browne by deed dated 24th March, 1983.

The description of the estate conveyed as lot 5 in the various deeds was based on O'Donoghue's plan and included

"On the south by a road serving the residential lots of said lot number six.....together with all....ways.....and all other easements and appurtenances thereto belonging or usually held used or occupied or enjoyed therewith or reputed to be appurtenant thereto."

Conrad Bute was Rosina Cox's godson and he had lived with her. At the time of the trial he was about 90 years old and he gave evidence. In 1922 he inherited from her the remainder of land that had not been sold.

By deed dated 30th December, 1946 he sold to the respondent part of lot numbered six of the Richmond Hill allotment "being in extent three acres three roods and thirty seven poles". This was land south of lot 5 on O'Donoghue's plan but no mention was made of the road serving the residential lots being the northern boundary. The evidence and facts found by the Judge provide an explanation for this omission because it appeared that lots 1, 2 and 3 were not sold and the road had not been put into use. There was a fence on the southern boundary of lot 5 without any gate or other access to the road. But the deed was not clear and unambiguous on this issue because the Judge accepted the evidence of the chief surveyor that the area of the respondent's land is 6,610 sq.ft. more than 3 acres 3 roods and 37 poles as stated in the deed and that the area of the road in dispute accounts for 4,967 sq.ft.

The Judge found that in 1946 when he bought the land the plaintiff entered into open and unchallenged possession of the land up to the said fence, including the area of the road in dispute, as his own property.

The first attempt to interrupt the respondent's possession of that land came in 1985 when the appellant by his workmen commenced work on the road. This did not succeed because the respondent effectively stopped them, built a concrete wall to block access from Murray Road (which was to replace a fence and stakes that the respondent alleged the appellant had pulled down to gain access), and commenced these proceedings asking the court to declare that he was the owner of the land and that the appellant was not entitled to an easement over it.

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APPEAL

The grounds of the appellant's appeal in brief were that when Rosina Cox sold to Baptiste in 1922 she either

- (a) divested herself of the road because there was a presumption of law that where the boundary of land is stated to be a road the geometric boundary of the land is the outer line of the road, or

- (b) she gave a right of way over the road,

and that in either case her transfer to Bute was subject to the road just as Bute's transfer to Dare must be subject to the road, and that mere non user of the way was insufficient to give rise to a finding that there was abandonment of the easement.

Ownership of the road.

Counsel for the appellant relied on the following statement of law in the case of City of London Land Tax Commissioners v Central London Railway (1913) A.C. 364 by Lord Atkinson at 371 to demonstrate that when Rosina Cox sold the land to Baptiste in 1922 he and his successors in title became the owner of the road:

"It is well established that the presumption is applicable to cases where no grant or conveyance has to be construed: In *Harrison v Duke of Rutland* Kay L.J. states the rule succinctly, thus "The soil of a highway belongs prima facie to the owner of the land adjoining it. If the land on either side is the property of different owners, each is the owner of the soil on his side ad medium filium of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs. These propositions are amply established by judicial decisions."

When one came to apply this rule to the facts of this case the appellant had an insurmountable problem because there was no evidence at all that the area in dispute was a public road or highway and the presumption of law upon which Counsel relied is only applicable to public roads where no conveyance has to be construed. There is therefore no factual basis for applying that presumption in this case and no basis for making any order that the appellant was the owner of that portion of land.

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On this issue it is also of some significance that the appellant had not made any claim in his pleadings for a declaration of ownership and in his judgment the trial Judge commented that the trial had been conducted on the basis that he was proving an easement over the road until his final address.

On the other hand the issue of ownership of the land had been put in issue by the respondent who claimed for a declaration of ownership in his statement of claim.

The Judge had found that the respondent had been in possession as owner of the land originally designated as the road since 1946, but he did not construe the deed to determine whether it conveyed the land in dispute to the respondent. In giving his judgment he explained that he declined to consider whether he should make a declaration of ownership in favour of the respondent for two reasons namely that there was no pleading that title was based on the Limitation Act, and he felt precluded from considering that issue because in his final address the respondent's Counsel appeared to him to have deviated from his pleaded case and relied on the submission that there had been an easement which had been abandoned.

At the hearing of this appeal we refused the respondent's belated application for leave to appeal so in effect the respondent had no appeal against the judgment of the Court.

The declaration of possession made by the Court reflects the uncontroverted factual position. Even if there was enough material before the Judge for him to deal with the respondent's claim for ownership he was entitled to confine himself to the issues limited by the pleadings and Counsel's address. The order for injunctive relief legitimates and protects the respondent's possession so that the Judge's failure to decide on the issue of ownership has not left the respondent stranded without an adequate remedy on the facts established.

Was there an Easement?

Counsel for the appellant submitted that, alternatively, the Cox deed to Baptiste in 1922 conveyed a right of way over the road. Counsel for the respondent pointed out that the deed did not make any express grant of an easement in favour of lot 5 over the road. It merely referred to the road as a boundary and stated that it served the residential lots. The facts found by the Court showed that at the time of the conveyance Cox owned the land and the way was not in
/use or...

use or needed except for the benefit of the proposed residential development. The failure to sell lots 1,2 and 3 and the non use of the road by any of the successive owners of lot 5 had the effect that there was no right of way in existence which could be described as an appurtenance at the time of the conveyance in 1922. He relied on the case of *Wheeldon v Burrows* (1874-80) All E.R. 669. The headnote reads:

"On the grant by the owner of part of that tenement as it is then used and enjoyed there will pass by implication to the grantee all those continuous and apparent easements and quasi-easements which are necessary to the reasonable enjoyment of the property granted and have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted.

If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant, save in the case of an easement of necessity the reservation of which will be implied. Otherwise no implication can be made of the reservation of an easement to the grantor."

The appellant relied on two cases:

Hansford v Iago (1921) 1 Ch. 322

Broom-field v Williams (1907) 1 Ch. 602

to support his contentions.

In *Hansford v Iago* the owner of a piece of land had built four cottages on it leaving at the rear of the back gardens a strip of land providing access to the highway and use for emptying earth closets and cess pits. The property was let for some years and then sold by auction. At the sale the auctioneer announced that each house would have a back entrance and although there was no made road, the strip was worn and marked with tracks so as to make it apparent that it was used as the back entrance. One of the purchasers sued for a declaration that the others had no right of way over his strip. The Court held that there was a right of way de facto in existence at the time the conveyances were drawn and that the right passed under the deed as an express grant as it was an appurtenance which was being enjoyed and in any event if there was no express grant then one ought to be implied because it was apparent that the right was being openly enjoyed.

Broomfield v Williams was a case decided under sec. 6(?) of the Conveyancing and Law of Property Act 1981. The vendor had sold a parcel of land with a dwelling house on it and retained land to build on. The Court rejected the contention that by referring to land he retained to build on and which he described in the deed as "building /land".....

land" the vendor could derogate from his own grant so as to restrict the right of the purchaser to light for a building which had been in existence prior to the conveyance as his conveyance included all rights enjoyed with the house and found him liable for obstructing light to the purchaser's windows by building too close to the house.

Neither of these cases was of much assistance because in each case the Court had found that the easement claimed was expressly granted in the conveyance as an appurtenance because the right claimed as the easement had in fact been in existence prior to the conveyance. In this case there was no evidence that any owner or occupier of lot 5 had ever used the way either before or after the conveyance and it would seem to me that there was neither an express grant nor a factual basis for implying one.

The trial Judge, however, found that the road had been created but not used and therefore the easement was abandoned.

The appellant submitted that it was wrong to hold that there was abandonment of the way because non user by itself was not enough to give rise to abandonment. The respondent agreed with that principle but submitted that there was evidence of intention to abandon on the record.

The rule can be briefly stated, non user is not by itself conclusive evidence that a private right of way has been abandoned. The non user must be considered with the surrounding circumstances. If those circumstances clearly indicate an intention of not resuming the user then a presumption of a release of the easement will in general be implied and the easement will be lost.

This principle was applied in *James v Stevenson* (1893) A.C. 162 by the Privy Council in holding that abandonment being a question of intention, non user by the respondents, coupled with user by the appellant for farm purposes, of portions of land subject to the easement when the easement was not required, could not prove an abandonment of the entire right and was inconclusive to prove an abandonment of portions thereof. In delivering the judgment of the Court Sir Edward Fry explained how the Court came to that conclusion:

"It has, in the next place, been contended at the bar, that the right of way has been abandoned. This is a question of intention to be decided upon the facts of each particular case..... Now, the only facts which can be relied on by the defendant in the present case are, the absence of user of the northern part of the way; the absence of gates in the fences of that
/part of.....

part of the land; But these facts are in their Lordships judgment, insufficient to shew any intention to abandon the right of way."

Swan v Sinclair (1924) 1 Ch 254 was a case that went the other way and Warrington L.J. applied that principle to support a judgment that ruled that an easement had been abandoned and he said at 269:

"In the present case the user of the road has been rendered impossible by not only the continuance of obstructions existing at the time of the grant, but also by the creation of a fresh one by the raising, in 1883, of the level of the land over which the way would pass. It seems to me that these circumstances, adverse to the user, and sufficient in themselves to explain the non user, combined with the great length of time which no objection has been made to their continuance, nor effort made to remove them, are sufficient to raise the presumption that the right has been abandoned, and has now ceased to exist. I cannot myself see anything in the circumstances to suggest that the owners of the dominant tenement contemplated a future use of the way, and if they had done so I think they ought to have made their position clear. I believe the truth to be that the common right of way emanating as it did, not from the owners of the several houses themselves, but from the vendor to them, was found by the parties really interested not to be wanted, and the scheme was given up."

The application of the principle to this case can use much the same process of reasoning. In this case the road was proposed by the vendor and was never used by the various owners of lot 5 as from the first conveyance in 1922. The plan and the evidence explained that the road was not necessary for the enjoyment of lot 5 as it fronted on the highway and the access had been attained in that way. There was a fence along the southern boundary of lot 5 which did not leave a gate or other entrance for access to the said road. The Judge found that at least since 1946 the respondent claimed and used the area designated as the road as his own property. This would constitute possession adverse to the user of the way for over 40 years. A long time elapsed without any objection being raised. It also seemed that lots 1,2 and 3 were never sold so that there was no residential lot that required the use of that road and no use was in fact made of it.

It seems to me that whereas it was Rosina Cox's intention to provide the road for the residential development, the road became unnecessary when lots 1,2 and 3 were not sold and so no one used it as a road. In my view this clearly allows the inference that that the only party who evinced a clear intention that the road should be /used was....

used was Rosina Cox, the vendor. As in Swan's case the truth seems to be that the idea of the road emanated from the vendor and was found by the owners of lot 5 not to be wanted or needed for their benefit and as there was no other part of the residential development which could have benefited from the road there was an intention by all parties to abandon the idea. The order of the Court which in effect denies the appellant a right to reactivate it after a period between 40 to 70 years had elapsed should not be reversed.

I would dismiss the appeal with costs.

C.M.D. BYRON,
Justice of Appeal

I agree that the appeal should be dismissed.

L.L. ROOTHAM,
Chief Justice

I I too agree that the appeal should be dismissed.

G.C.R. MOE,
Justice of Appeal