

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

MONTSERRAT

CLAIM NO. MNIHCV 2022/0017

BETWEEN:

[1] LIONEL LINDSEY

Claimant

and

[1] KRISTOLYN AYMER

Defendant

Appearances:

Mr. Jean Kelsick for the Claimant

Ms. Korah Galloway for the Defendant

2023: DECEMBER 28

2024: March 1

JUDGMENT

FITZPATRICK [AG.]:

THE COURT CONSIDERED THE FOLLOWING:

- [1] The Claimant is the registered owner of Parcel 92, Block 11/05, Salem ("Lot 92"). The Claimant filed a Claim on August 12, 2022 seeking a Declaration for use of what he described as the right of way marked in yellow on the survey for Block 11/05, Salem filed with the Land Registrar (the "Disputed Track") by "foot, carriages, motor vehicles and other conveyances". Essentially, the Claimant wants to be able to traverse the Disputed Track by motor vehicle from the entrance off of the Frith's main road to Lot 92. Further, he seeks an order requiring the Defendant to remove all structures he claims were erected by her

blocking the entrance to the Disputed Track along with an injunction prohibiting her from erecting any further, future blockages.

- [2] The Defendant is the owner of Parcel 94, Block 11/05, Salem ("Lot 94"), which adjoins the entrance and initial boundary of the Disputed Track. In fact, the Disputed Track acts to divide the Defendant's property such that her residence sits along the easterly border of the Disputed Track and her garage is located along the westerly border. The Defendant refers to the Disputed Track as a "footpath". She accepts that the Disputed Track permits pedestrian access and use. She denies that the Disputed Track has ever been or can be used by motor vehicles. She denies that she has done anything to block pedestrian access to the Disputed Track.

The Trial Evidence

- [3] The trial of this action was completed in less than one day. Each party testified and each called one lay supporting witness. All witnesses adopted his/her witness statement as evidence in chief and were subject to cross-examination. I below review the material evidence from each side.

The Evidence for the Claimant

- [4] The Claimant was shown and identified a Land Registry Survey Plan being an overhead view for the numerous properties comprising Block 11/05. This Plan shows all of the parcels comprising Block 11/05, including Lot 92, Lot 94 and the Disputed Track.
- [5] The Claimant testified to his estimate that it is a distance of 150 feet from the Frith's main road along the Disputed Track to the beginning of Lot 92. The Claimant noted that the Disputed Track varies in width with the narrowest point at six feet and widest part at eight feet. He obtained these width measurements by having a "surveyor use a ruler". This surveyor was not called as a witness and did not otherwise provide any evidence for this trial.

- [6] The Claimant stated that Lot 92 was originally owned by his grandmother since around the 1940's. The Claimant lived on the property with his mother and siblings for "a few years in the 1960's" in the existing wooden house. The Claimant moved to live in his father's "nearby" house in 1969.
- [7] The Claimant's evidence was that he purchased Lot 92 "from my mother in the 1980's". However, the extract from the Land Registrar records filed by the Claimant as part of the trial evidence records the Claimant taking title at July 2, 1993. This discrepancy was not addressed in the Claimant's evidence.
- [8] I have no evidence of where the Claimant lived from 1969 when he relocated to his father's home to when he purchased Lot 92. In particular, I have no evidence that the Claimant was living at lot 92 during this interim period.
- [9] The Claimant did tell us that his older brother, Mervin Lindsey lived on the property along with his wife and children for "about ten years" before the Claimant purchased it. The Claimant was not then resident at Lot 92 with his brother and family. Regardless, the Claimant said at trial that he "remembers [Mervin's] vehicles, a pickup and cars, driving regularly over the right of way from the public road to the property for all of the years he resided there".
- [10] The Claimant's evidence was that he occupied the old wooden house on Lot 92 after acquiring it and drove his then vehicles (a classic MGB convertible and a Nissan Pathfinder) over the Disputed Track to and from the property on a daily basis.
- [11] The Claimant tore down the old wooden home on Lot 92 in 1995 and began building his current house. He states that he used the Disputed Track daily to access the property and to transport lighter building materials. Heavier materials were brought through the land of his neighbour, Thomas Greenaway.
- [12] The only dispute the Claimant says he had over his vehicular use of the Disputed Track was in 1995 with the Defendant's grandmother, who was then owner of Lot 94, and objected to the conveyance of building materials. The Claimant's

evidence was that he then hired a surveyor, Dawn Bramble, who pegged the Disputed Track, thereby ending any further complaint. This surveyor was not called as a witness and did not otherwise provide any evidence for this trial.

[13] The Claimant relocated to the United States in 1997 when the volcanic activity on Montserrat intensified. He first returned to Montserrat in 2007 and each year following. Even so he did not attend at Lot 92 until 2013. His stays on Montserrat were limited to about two weeks each time he did return.

[14] The Claimant's evidence was that when he returned in 2013 the Disputed Track was blocked by walls on either side of the entrance off the main road. The Claimant was certain no such wall, steps or any other obstruction to the Disputed Track was present at any point prior to his return in 2013. The Claimant did testify that he observed the Disputed Track had become overgrown when he returned in 2013. He also recalled the presence of a guinep tree on the border of the Disputed Track but noted it did not block a vehicle from passing.

[15] The Claimant testified that his nephew, Lester Lindsey lived at Lot 92 from around 2015 through to 2018 while there doing renovations. According to the Claimant, Lester Lindsey then complained to him of having difficulties driving his vehicle over the Disputed Track "due to the concrete blocks that were placed on the right of way". The Claimant gave no evidence of Lester Lindsey accessing Lot 92 by vehicle at any time.

[16] The Claimant testified that he drove over the Disputed Track one additional time in 2021 after he had dismantled the wall at the entrance. The wall was subsequently repaired as depicted in photographs filed by the Claimant at pages 6. and 7. of Trial Bundle 3 with his witness statement. The Claimant says he has been prevented from accessing the Disputed Track by motor vehicle since then to the present depending instead on permission to travel over the land of Thomas Greenaway to access Lot 92.

[17] The Claimant had one witness testify in support of his claim, namely Franklyn Greaves.

- [18] Mr. Greaves provided his evidence remotely from England where he now resides. He testified that he was born in Montserrat in 1966 and was raised in Friths, Salem. Mr. Greaves relocated off the island in the early 1990's.
- [19] Mr. Greaves testified to his knowledge of what he described as an "access road" from Friths main road to Lot 92.
- [20] Mr. Greaves' evidence was that, "as a child", he "regularly" visited the Claimant's parents, John Lindsey and Sarah Lindsey when they were resident on Lot 92. Mr. Greaves testified that he did at times travel by foot over the Disputed Track to the Lindsey residence. That said, Mr. Greaves' evidence was that he "vividly" recalls "on numerous occasions" riding on the back of John Lindsey's pickup truck travelling the "access road going to his home", including when "helping with logs".
- [21] Mr. Greaves also offered his knowledge of the Claimant's brother Mervin, his wife and children living at Lot 92 for "several years". Mr. Greaves' evidence was that Mervin drove his work vehicle, namely a Montserrat Department of Agriculture Land Rover, "on the access road on a daily basis". He advised that he drove with Mervin Lindsey in the Department of Agriculture Land Rover over the Disputed Track to Lot 92 "all the time".
- [22] Mr. Greaves stated that the Claimant bought Lot 92 after Mervin relocated to Antigua and occupied it "for several years".
- [23] Mr. Greaves' evidence was that each of John Lindsey, Mervin Lindsey and the Claimant "regularly used the road to access" Lot 92 by motor vehicle.
- [24] Mr. Greaves did agree that there was a stone wall leading from what is now the Defendant's property to the Disputed Track dating back to the time it was owned by the Defendant's grandparents who operated a store from that location, which Mr. Greaves frequented.

The Evidence for the Defendant

- [25] The Defendant testified that she was born in Montserrat in 1986 and raised in Friths, Salem by her grandparents Katherine John and King David John at Lot 94. She advised that the property has been in her family's ownership since the 1960's. The Defendant lived at Lot 94 with her grandparents until their death when she acquired the property. She resides there with her spouse and two young children. The Defendant is a teacher by profession who also works from her residence operating a tutoring service for children.
- [26] The Defendant described the Disputed Track as a dirt footpath that divides Lot 94 such that her house is on one side of path and her garage the opposite side. The Defendant described the Disputed Track being bounded at the entrance on each side by two feet high stone walls with steps built in the 1960's by her uncle, Franklyn "Jackie Fire" Hixon. The wall runs from her house about 60 feet to the Disputed Track. The Defendant says the Disputed Track varies in width starting at five feet at the entrance off the Frith's main road then narrowing then wider.
- [27] The Defendant was adamant in her evidence that there "has never been vehicular access across the footpath". Her evidence is that Lot 92 has always been accessed by foot only. She testified that the footpath was never blocked for pedestrians, including the Claimant.
- [28] The Defendant's evidence was that the Disputed Track was overgrown prior to the Claimant relocating off island in 1997. The Defendant testified that she purchased Lot 94 from her grandmother in 2014/2015. She stated that the Disputed Track then remained covered with dense vegetation, grass and fruit trees that her husband started clearing but a large guinep tree remained along the path until blown over by a hurricane in 2017. The Defendant testified that the guinep tree also made it impossible for a vehicle to pass along the Disputed Track.
- [29] The Defendant testified that the stone wall and steps built by her uncle remained in place until dismantled by Lester Lindsey. The Defendant was the person who called the police in response to Lester Lindsey doing so. The Defendant's

husband then repaired the damage by building a concrete block replacement wall and steps.

[30] The Defendant stated that this initial replacement wall and steps was dismantled by the Claimant in 2021. The Defendant's husband for the second time repaired the damage by building a concrete block replacement wall and steps.

[31] The Defendant testified that part of original wall built by her uncle remains to the present located beside the concrete block replacement wall at the entrance to the Disputed Track. Her evidence was that the remnants of the original stone wall could be seen to the side of the replacement wall along with what is left of the stone steps as shown in the pictures she filed as KA2 and KA5 and the photograph filed by the Claimant at pages 6. and 7. of Trial Bundle 3.

[32] The Defendant denies that the Claimant or his family travelled over the Disputed Track by motor vehicle to access Lot 92. She testified that she was aware Mervin Lindsey, his wife and children lived at Lot 92 for a number of years. The Defendant's evidence was that Mervin Lindsey and family walked the footpath the entire time they lived at Lot 92 even when it was raining or when carrying groceries. Similarly, the Defendant's evidence was that the Claimant accessed the property over the Disputed Track by foot only.

[33] The Defendant had one witness testify in support of her case, namely Daniel James.

[34] Mr. James is now 75 years old. He moved to Montserrat in 1965 when starting his policing career. He testified that he would visit the Friths, Salem area regularly after moving to Montserrat as he did bicycle patrol in the area three times weekly and began dating a woman living there who is now his wife.

[35] Mr. James testified that he purchased Parcel 155, Block 11/05 Salem Registration ("Lot 155") in 1984 building his home in 1987 where he has lived ever since. His lot is adjacent to the Disputed Track and that part of the

Defendant's Lot 94 where her garage is located. Katherine John and King David John were his neighbours and now the Defendant.

- [36] Mr. James' evidence was that the Disputed Track varies in size but measured less than five feet wide where it runs along the edge of his property and narrowed in other places to as little as three feet. He did not challenge the suggestion by Claimant's counsel that it is as wide as eight feet elsewhere. He also agreed that the length of the Disputed Track from the main road to Lot 92 was about one hundred and fifty feet.
- [37] Mr. James' evidence was that there was a "traditional" stone wall running from Lot 94 to the Disputed Track when he moved to Montserrat in 1965 continuing up to a large guinep tree on the boundary of Lots 94 and 155. Mr. James testified that there were then also stone steps on the footpath for people to walk up or down. He said the steps were needed because the entrance to the Disputed Track was "a bit steep". Mr. James confirmed that the stone wall and steps were built by Katherine John's son, Franklyn "Jackie Fire" Hixon.
- [38] Mr. James testified that it was not possible for a vehicle to access the Disputed Track while the stone wall and guinep tree were there. Mr. James testified that the guinep tree remained in place until it was destroyed by a hurricane in 2017.
- [39] Mr. James testified that Disputed Track was overgrown until the Defendant acquired Lot 94 and undertook clearing.
- [40] Mr. James testified to having a conversation where the Claimant asked permission to drive over part of his property, which Mr. James declined.
- [41] Mr. James' evidence was that the original stone wall and steps at the entrance of the Disputed Track were there since 1965 when he came to Montserrat and remained until Lester Lindsey knocked some of it down in 2014. Mr. James testified to being present to witness Lester Lindsay dismantling the stone wall at the entrance and observing the police attending. Mr. James testified that the Defendant then replaced the wall with concrete blocks.

[42] Mr. James testified to having a good view of the Disputed Track and its use over the years. He recalled Mervin Lindsey living at Lot 92 with his wife and children in the late 1980's, which he referenced in relation to it being a date after Mr. James returned from his training position in the Barbados in 1980. Mr. James testified that Mervin Lindsey and his family ceased residing at Lot 92 in the early 1990's.

[43] Mr. James' evidence was Mervin Lindsey and family always and only accessed Lot 92 by foot even when it was raining. Mr. James recalled that Mervin drove a Department of Agriculture Land Rover when residing at Lot 92 but said they always parked at the Frith's main road and walked to the property. He stated that visitors would also access Lot 92 by walking the Disputed Track after leaving any vehicle parked on the main road.

[44] Mr. James testified that the Claimant began renovating the residence on Lot 92 in 1995. His evidence was that all materials for the renovation were transported through the land of a neighbour, Thomas Greenaway. Mr. James stated that no vehicle could pass over the Disputed Track. Mr. James further testified that the Claimant would occasionally visit the property beginning in the 2000s and that the Claimant would always walk along the Disputed Track to Lot 92 after parking his vehicle on the main road.

[45] Mr. James' testified that he recently did a check on the Disputed Track and confirmed for himself that it is not accessible to a motor vehicle due to overgrowth and the dimensions, which would necessitate driving over the four properties abutting the Disputed Track.

Is There An Easement Over the Disputed Track?

[46] An easement is simply where one property owner has a right to use a part of the property owned by another person for some benefit. The property owner who has the benefit of the use is referred to as the dominant tenement while the owner of the property being used is referred to as the servient tenement. The two

pieces of land must be in sufficient proximity to facilitate the intended benefit but do not necessarily have to be adjoining (see: *Todrick v. Western National Omnibus Co.* [1934] Ch. 561 Court of Appeal). Easements can be created in a variety of ways, namely by express grant, by implication, by prescription or by statute. Easements can also vary in terms of the use or benefit permitted.

- [47] The Land Registry Survey Plan filed during this trial shows all of the parcels comprising Block 11/05, including Lot 92, the Defendant's Lot 94 and the Disputed Track. This Survey Plan does not identify the Disputed Track as an easement, right of way or otherwise. The Land Registry title extract for Lot 92 makes no mention of the Disputed Track, any right of way, easement or other like feature associated with this property. That said, the case here is straightforward regarding the existence of an easement. The parties and both witnesses testified that the Disputed Track has been used for decades for pedestrian travel to and from the Friths main road. In other words, the parties agree there is an easement permitting pedestrians to use the Disputed Track to travel between the Friths main road and the various adjoining lots, including Lot 92.

Can the Disputed Track be Accessed by Motor Vehicles?

- [48] The fundamental issue for this Court is whether the use of the Disputed Track includes by motor vehicle. For the reasons that follow, I conclude it does not.
- [49] The Claimant is adamant that the Disputed Track could accommodate and was accessible to vehicles at all times prior to his attendance at Lot 92 in 2013. That said, the Claimant gave no evidence respecting any of his grandmother or parents traversing the Disputed Track in a vehicle or otherwise than by foot. His evidence was that his parents did not have a vehicle.
- [50] The Claimant testified that his brother accessed Lot 92 with vehicles over a period of ten years leading up to the Claimant's purchase of the property. The Claimant says that he accessed Lot 92 by vehicle after purchasing the property.

- [51] The Claimant's evidence was that vehicular access by his family commenced in the 1970s. I question the accuracy of this timeframe. The extract from the Land Registry identifies that the Claimant took ownership of Lot 92 in July, 1993. I accept the July, 2013 date noted in that extract as the date the Claimant acquired Lot 92.
- [52] With the July, 2013 purchase date as an anchor, I take the Claimant's evidence to be that his brother, Mervin accessed Lot 92 by vehicle over the Disputed Track in the 1980's while resident there for ten years prior to the Claimant's ownership not the 1970's as alleged by the Claimant. The Claimant says he did so himself once he acquired the property, which we know was in 1993, until he relocated to the United States in 1997. Having corrected the Claimant's timeline, I will move on to address other concerns with the Claimant's evidence.
- [53] The Claimant testified to his recollection of Mervin "driving regularly" over the right of way while he and his family lived at Lot 92. However, no evidence was provided regarding where the Claimant was then living, about his relationship with Mervin or any other details of the Claimant's opportunity to make these regular observations.
- [54] I have difficulty with the Claimant's failure to call his brother, Mervin Lindsey to provide testimony. The Claimant decided not to call Mervin Lindsey or Lester Lindsey as witnesses because they were "involved parties" choosing instead "to get someone more impartial".
- [55] The decision not to call Mervin in particular deprived this Court of hearing evidence from the person who the Claimant alleges had the longest continuous use of the Disputed Track with a motor vehicle. Surely the Claimant understood the fundamental importance of Mervin's testimony to the success of his case. Instead, the Claimant presented Mr. Greaves. Mr. Greaves had much less to offer as a witness and, therefore, was not a true substitute. While a challenge to Mervin's impartiality on the basis of the family relationship would be expected, this challenge would presumably be denied and Mervin's evidence corroborated, at least in part, by that of the Claimant and Mr. Greaves.

- [56] The foundation of the Claimant's case rests on his assertion that there was no wall or other impediment to the use of the Disputed Track by motor vehicles until his return to visit the property in 2013. He says there was none at 1997 when he left. Mervin's evidence was vital to support the Claimant's evidence as to the state of the entrance to and use of the Disputed Track leading up to 1997 when the Claimant relocated from Montserrat. This is amplified when reviewing the evidence of Mr. Greaves who agreed in cross-examination that there was in fact a stone wall present when he grew up in Friths that went to the Disputed Track. This is completely contrary to the Claimant's evidence that there was no wall there before 2013 shining another light on the need for Mervin's evidence if it supported the Claimant's case.
- [57] The Claimant's rationale for not calling his brother makes little sense especially with consideration to the importance of Mervin to the overall factual narrative and continuity. Mervin Lindsay was a necessary witness whose absence leaves a significant evidentiary gap. It would have been entirely logical for the Claimant to produce Mervin as a witness if his expected evidence favoured the Claimant's case. The failure to call Mervin instructs that the Claimant knew Mervin's evidence would not be supportive. That is the only credible inference available to the Court and one the Court makes.
- [58] I, above, referenced the fundamental conflict between the Claimant's evidence that there was no wall at the Disputed Track prior to 2013 and that of Mr. Greaves who said there was a wall present when he was growing up in Friths during the 1970s. There is another material conflict between the evidence of the Claimant and Mr. Greaves.
- [59] Mr. Greaves testified that he "vividly" recalled, as a school age child, "on numerous occasions" riding on the back of John Lindsey's pickup truck travelling the "access road going to his home", including when "helping with logs". John Lindsey is the Claimant's father. There are two reasons I reject the reliability of Mr. Greaves' recollection here.

[60] Firstly, the Claimant's evidence was that his parents did not own a vehicle. It cannot be then that Mr. Greaves travelled "numerous" times along the Disputed Track in John Lindsey's vehicle since John Lindsey did not own a vehicle. In addition, there was no evidence of John Lindsey driving over the Disputed Track from his own son, the Claimant who would presumably have much greater opportunities to observe such vehicular access if it had occurred. The Claimant's silence on this point is instructive and consistent with his evidence that his parents had no vehicle.

[61] Secondly, the earliest that this childhood recollection of Mr. Greaves could have occurred would be in the 1970's given he was born in 1966. The Claimant's evidence was that he relocated from the home of his mother on Lot 92 to the "nearby" home of his father in 1969. Mr. Greaves could not have been travelling in a vehicle with John Lindsey numerous times along the "access road going to his home" in the 1970's because the Claimant's father was not residing at Lot 92 or along the Disputed Track from at least 1969 forward.

[62] Mr. Greaves' evidence was that each of John Lindsey, Mervin Lindsey and the Claimant by motor vehicle "regularly used the road to access" Lot 92. As noted, Mr. Greaves is mistaken about his recollection respecting the Claimant's father, John Lindsey.

[63] Mr. Greaves testified that he drove with Mervin Lindsey in the Department of Agriculture Land Rover over the Disputed Track to Lot 92 "all the time". He did not offer any evidence respecting what relationship he then had with Mervin Lindsey that would have availed him of the opportunity to ride in Mervin's vehicle over the Disputed Track "all of the time". This lack of detail is critical given his mistaken recollection about accompanying John Lindsey and the related need to offer as much substance as possible to bolster the accuracy of his memory for trips with other members of the Lindsey family over the Disputed Track.

[64] Mr. Greaves, similar to his evidence respecting Mervin, offered no insight into his opportunity to observe the Claimant's regular use of the Disputed Track. He did not testify to being in the Claimant's motor vehicle on such occasions.

Further, Mr. Greaves evidence was that he relocated from Montserrat in the “early 1990’s”. The Claimant only acquired Lot 92 in July, 1993 and, by his evidence, accessed the property by vehicle thereafter. This would present a limited timeframe for Mr. Greaves to make any observations about the use the Claimant made of the Disputed Track.

[65] I also take issue with the Claimant’s failure to call the surveyor who he apparently retained to measure the Disputed Track. It was not clear to me whether the Claimant was referring to the surveyor who allegedly pegged the Disputed Track, Dawn Bramble or another surveyor. In any event, the measurements for the Disputed Track are an important issue in this case and are contested. The Claimant offered no explanation as to why this third party, professional witness was not called to give evidence. As such, I am left with the hearsay evidence of the Claimant who offered his testimony as to the width of the Disputed Track based on what this non-witness surveyor allegedly told him after determining dimensions through the use of a ruler. Such hearsay is, clearly, not admissible.

[66] The Defendant’s evidence was that she was born on Montserrat in 1986 and raised by her grandparents on Lot 94. The Defendant acquired the property around 2014. Her grandparents are deceased but shared history for the property according to the Defendant. The Defendant testified that the stone wall running from Lot 94 to the Disputed Track and stone steps leading up the lane were there throughout her life. Her evidence was that her uncle built that wall and steps in the 1960’s. Clearly, the Defendant was not alive when this construction was undertaken. I infer she was told this by her grandparents. This hearsay is not admissible. Mr. James also testified to the wall being built by the Defendant’s uncle but did not identify his source for this information. Regardless, the identity of the builder of the wall is not terribly important to the outcome of this case. The existence and timeline for the wall is critical.

[67] The Claimant says there was no stone wall prior to 2013. Mr. James testified that there was a stone wall running from Lot 94 to the Disputed Track when he arrived in Montserrat in 1965. His evidence was that there then was a stone wall on each side of the entrance to the Disputed Track with stone steps leading up the

steep path. Mr. Greaves testified to the presence of the same stone wall running from Lot 94 to the Disputed Path during the time he lived in Friths from the 1970's to the early 1990's. The Defendant testified that the stone wall running from Lot 94 to the Disputed Track was present throughout her life lived on Lot 94, including the walls on each side of the entrance and stone steps leading up the path.

[68] The Defendant testified that the original wall and steps remained in place until partially dismantled by the Claimant's nephew, Lester Lindsey. It was the Defendant who called the police to attend in response. Mr. James saw Lester Lindsey dismantling the wall and steps in 2014 and was witness to the police attending. This evidence of Lester Lindsey dismantling the wall and steps at the entrance was unchallenged. The Defendant and her husband then did their first concrete block replacement for the wall and steps at the entrance. The Claimant admitted to dismantling this in 2021. The Defendant and her husband then did their second concrete block replacement, which remains to the present.

[69] The last evidence to reference pertaining to the wall existence and timeline is the photographs filed by the Claimant and the Defendant. Reviewing the pictures the Defendant filed as KA2 and KA5 and the photographs filed by the Claimant at pages 6. and 7. of Trial Bundle 3 evidences the original stone wall and remnants, which can be seen in those photographs to the sides of the replacement wall along with what is left of the stone steps. These photographs corroborate the evidence of each of the Defendant, Mr. James and Mr. Greaves about the original stone wall being present from 1960's through to 2014 when partially destroyed and then replaced.

[70] Overall, the Court preferred the evidence of the Defendant and Mr. James where in conflict with the case presented by the Claimant.

[71] As detailed above, the Claimant's testimony had serious flaws.

[72] The Claimant was the only witness to say there was no wall present prior to 2013. Each of the Defendant, Mr. James and Mr. Greaves gave contrary evidence. The Claimant's evidence respecting the stone wall is also contradicted by the

photographs filed of the original stone wall and remnants. The Claimant is simply mistaken on this fundamental point.

[73] The Claimant was also in error where he suggested that he acquired Lot 92 in the 1980's. Related to this, the Claimant was mistaken where he said that his family, namely Mervin since his parents had no vehicle, traversed the Disputed Track by vehicle commencing in the 1970's for the ten years prior to the Claimant's acquisition. The Land Registry records confirm that the Claimant acquired the property in 1993 thereby adjusting the timeline of his narrative forward by a decade.

[74] In addition, the Court has drawn the negative inference that the Claimant chose not to call Mervin as a witness knowing Mervin's evidence would not support the Claimant's case. Finally, the Claimant failed to call the surveyor who he retained to peg and/or measure the dimensions for the Disputed Track knowing this would be a critical matter of disputed fact.

[75] The evidence of the Claimant's supporting witness, Mr. Greaves also suffered from frailties. Mr. Greaves was mistaken in his recollection of riding in John Lindsey's vehicle travelling to Mr. Lindsey's home at Lot 92. This mistaken recollection contaminates the reliability of his testimony of subsequently doing so in Mervin Lindsey's vehicle and to any observations of the Claimant doing so. Mr. Greaves' evidence respecting his observations of vehicular access lacked details that could have shored up any reliability concerns. As noted, there was no evidence from Mervin corroborating that of Mr. Greaves. By contrast, the evidence of Mr. Greaves regarding the presence of the original stone wall since the 1970's was corroborated by the Defendant, Mr. James and the photographs filed thereby enhancing the reliability of his evidence on that point.

[76] In short, the Claimant's testimony was externally inconsistent (i.e. his timeline for the acquisition of Lot 92 and related evidence) compared with the Land Registry title extract for Lot 92. His testimony was also externally in conflict with that of Mr. Greaves and the photographs filed (i.e. the presence of the stone wall before

2013). Both his testimony and that of Mr. Greaves suffered from the other frailties noted. This speaks to the lack of reliability for that evidence.

[77] Conversely, there was no material internal or external inconsistency in the testimony of the Defendant and her supporting witness, Mr. James. Respecting the fundamental issue of the existence and timeline for the wall, the Claimant, Mr. James, Mr. Greaves and the above noted photographs are all consistent and corroborative. The Claimant was able to anchor her testimony in direct observations flowing from being raised on and subsequently purchasing Lot 94 where she remains resident. Similarly, the foundation of Mr. James opportunity for direct observation was provided by his initial, regular attendance in Friths as part of his police patrol area and to court his future wife followed by his residency there since the mid to late 1980's. Mr. James also linked his evidence of Mervin Lindsey being resident at Lot 92 in the 1980's to when Mr. James returned to Montserrat following his training posting in the Barbados. The evidence of the Claimant and Mr. James was, on the whole, reliable.

[78] Efforts were made by both sides to cast aspersions on the credibility of the other. I did not consider any such efforts successful. There is no doubt that the Claimant and the Defendant each have a vested interest in the outcome of the case. The Claimant wants to have vehicular access and the Defendant is opposed. Mr. James was clear the he wants to ensure nobody trespasses on his property. Mr. Greaves apparently was and may still be a friend of the Lindsey family. He expressed his support for the Claimant. Having an interest in the outcome of a case does not alone equate to a witness lacking credibility or being proven dishonest. None of this rises to any meaningful attack on the credibility of any of the participants in this trial. Accordingly, I make no adverse credibility finding against any of witness heard in this matter.

Conclusion

[79] The whole of the evidence directs this Court to the finding that there was a stone wall running from Lot 94 to the Disputed Track, including the walls on each side of the entrance and stone steps leading up the path, from at least 1965 until

partially dismantled by the Claimant's nephew, Lester around 2014. The Court also finds that this stone wall and steps blocked access by motor vehicles. Why else would Lester Lindsey bother to dismantle the stone wall and steps at the entrance if a vehicle could otherwise pass and drive along the Disputed Track to and from Lot 92? The only logical conclusion is that the original stone wall plus steps acted to block vehicular access and Lester was attempting to remedy that hindrance to make his residency and renovations at Lot 92 more convenient.

[80] The Court rejected the Claimant's hearsay evidence respecting the width measurements for the Disputed Track. As such, the Court was left with the Claimant's evidence that the width of the Disputed Track varies and that its length was approximately 150 feet from the Frith's main road to the start of Lot 92. Mr. Greaves did not provide any evidence on this issue. The Defendant and Mr. James both agreed that the width of the path varies. The Defendant's evidence was that the Disputed Track was five feet at the entrance off Frith's main road then narrowing and subsequently wider. Mr. James stated that the path was five feet in width where abutting his property then narrowed to about three feet wide. He agreed with the suggestion from Claimant's counsel that the path was as much as eight feet in width elsewhere and that the length was one hundred and fifty feet from Frith's road to the edge of Lot 92. Both the Defendant and Mr. James testified that the Disputed Track could not be used by motor vehicles due to the dimensions.

[81] The Court makes the following findings of fact:

- a. That the Disputed Track is a dirt path approximately five feet in width at the entrance then varying anywhere from as little as three feet to as much as eight feet wide along the approximately one hundred and fifty feet length from the Frith's main road to the edge of Lot 92.
- b. That a two feet tall stone wall was built in the 1960's running 60 feet along the front boundary of Lot 94 more or less parallel with the Friths main road down to the entrance of the Disputed Track, including on each side of the path with stone steps leading up the path entrance.
- c. That the original stone wall and steps built in the 1960's blocked vehicular access to the Disputed Track but were no hindrance to pedestrian traffic.

- d. That the width of the Disputed Path, at parts, was too narrow for a vehicle to traverse without having to trespass on neighbouring lands.
- e. That the original stone wall and steps remained until 2014 when Lester Lindsey partially dismantled the wall and steps at the entrance to the Disputed Track in an effort to access Lot 92 by vehicle.
- f. That the damage to the stone wall and steps caused by Lester Lindsey was repaired in short order by the Defendant and her spouse erecting a replacement made of concrete blocks at the entrance to the Disputed Track.
- g. That the concrete replacement wall and steps blocked vehicular access to the Disputed Track but were no hindrance to pedestrian traffic.
- h. That the concrete replacement wall and steps remained until 2021 when the Claimant dismantled the replacement wall and steps at the entrance to the Disputed Track in an effort to access Lot 92 by vehicle.
- i. That the damage to the concrete replacement wall and steps caused by the Claimant was repaired in short order by the Defendant and her spouse erecting a second replacement made of concrete blocks at the entrance to the Disputed Track.
- j. That the second concrete replacement wall and steps blocked vehicular access to the Disputed Track but were no hindrance to pedestrian traffic.
- k. That the second concrete replacement wall and steps remain in place presently.
- l. That neither the Claimant, his brother, Mervin Lindsay nor any other member of the Lindsey family or any other person regularly, in terms of frequency and continuity of use, accessed Lot 92 by vehicle over the Disputed Track.

[82] Here, the Claimant seeks a declaration confirming his right to traverse the Disputed Track by motor vehicle from the entrance off of the Frith's main road to Lot 92. The Claimant argues that he has an unfettered use of the Disputed Track because "the right of way is demarcated in the Land Register" or, alternatively, by necessity on the basis that Lot 92 is "landlocked" otherwise (see: Claimant's Statement of Claim at paragraph 6.).

[83] I will first address the argument that a right of way for all uses arises from it being demarcated in the Land Registry. As noted, the Claimant was shown and identified a Land Registry Survey Plan being an overhead view for the numerous properties comprising Block 11/05. This Plan shows all of the parcels comprising Block 11/05, including Lot 92, the Defendant's Lot 94 and the Disputed Track. This Registry Survey Plan does not identify the Disputed Track as an easement, right of way or otherwise. The Survey does not provide measurements for the Disputed Track or any information as to permitted use or restrictions. The Land Registry title extract for Lot 92 makes no mention of the Disputed Track, any right of way, easement or other like feature associated with this property. No witness or other evidence was presented on behalf of the Land Registry respecting the Block 11/05 Survey Plan, the title extract, the Disputed Track or otherwise. I do not accept that the Claimant can simply point to a track coloured in yellow on a survey of block lots without anything more and thereby establish a right of way for all uses as he submits.

[84] I also reject the Claimant's argument of a right of way for all uses by necessity on the basis that Lot 92 is otherwise landlocked. The seminal difficulty with the Claimant's case in this regard is the complete lack of evidence about the creation of Lot 92, Lot 94 and the Disputed Track. There is simply an evidentiary void here. As a result, I have no evidence, for example, even suggesting that Lots 92 and 94 shared a common predecessor owner or any other narrative that could be instructive in support of the Claimant's argument of a right of way by necessity. Further, I have no evidence of any kind pertaining to the express or implied intentions of the parties participating in the creation of the Disputed Track about the then or future use. In this void, I am left to determine the issue of necessity based on the evidence of the property features (see: *Todrick v. Western National Omnibus Co.*) and historic use for the Disputed Track, which I have detailed above and summarize below.

[85] The accepted evidence before this Court is unambiguous. The Disputed Track is a dirt path right of way that was created to provide pedestrian access for Lots 94, 154, 155, 92 and one property not numbered on the Block 11/05 Land Registry survey filed in this trial but referenced as the "Buntain" property. The

dimensions of the right of way are consistent with an intention and facility for foot traffic only not vehicular. In other words, the dimensions of the right of way are inconsistent with an intention or capacity for vehicular use. Complementary to this, a stone wall was erected in the 1960's on each side of the entrance with stone steps leading up the steep embankment to assist those on foot to traverse the path. The stone wall at the entrance to the Disputed Track prevents vehicular access and has done so since the 1960's without formal challenge until the Claimant commenced this action in 2022. The only regular use of the right of way, in terms of frequency and continuity, has in fact been pedestrian. This is the use available to the Claimant to access Lot 92.

[86] Given all of the above, the Claimant's argument that Lot 92 is landlocked thereby necessitating a right to vehicular access is rejected. The Claimant's property is not landlocked. There has at all material times been pedestrian access over the right of way, which continues to the present. I am unaware of any judgment or other source that directs vehicular access as being a mandatory appurtenance to a residential lot. Clearly, vehicular access would be more convenient and likely increase the market value for the property. That, however, is insufficient to support a claim of necessity.

[87] In conclusion, the Claimant has failed to prove his case on the civil standard. Accordingly, the Claimant's Statement of Claim is dismissed entirely.

IT IS HEREBY ORDERED THAT:

1. The Claimant's Statement of Claim is dismissed.
2. This matter shall return before me on a date to be scheduled to speak to the issue of the costs of this trial and action.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

By the Court

REGISTRAR