

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2020/0034

BETWEEN

PETRA CUPID

CLAIMANT

and

ANDREA GARRAWAY

DAMION GARRAWAY

ANDRE GARRAWAY

DEFENDANTS

Before: The Hon. Mde. Justice Esco L. Henry High Court Judge

Appearances:

Mr. Richard Williams with him Ms. Dannielle France and Mr. Art Williams for the claimant.

Dr. Linton Lewis with him Ms. Maffica Lewis for the defendants.

2022: Feb. 15 & 17
Mar. 8, 24, 29 & 31
May 7
Sept. 27
Nov. 22
2023: Jan. 19

Jul. 19

JUDGMENT

BACKGROUND

[1] **Henry, J.:** Land disputes make up a sizeable proportion of all claims initiated in the High Court in Saint Vincent and the Grenadines. In this case, Ms. Petra Cupid contends that her neighbours, Andrea,

Damion and Andre Garraway have repeatedly trespassed onto property at Prospect ('the disputed land') described in Deed of Assent No 2034 of 2019, that is owned by her and of which she is in possession. Part of the disputed land comprises a road and the other part, a concrete wall adjacent to the road. Andrea Garraway owns a parcel of land bordering the wall.

- [2] Ms. Cupid claims that without her permission, the Garraways have repeatedly passed over the wall to use the road and have driven motor vehicles on the road. She averred that they have continued to do so although she has on numerous occasions asked them to stop. She asserted that on July 7th 2019 she was installing a chain link fence on the top of the wall when Damion and Andre Garraway at Andrea Garraway's behest and encouragement, trespassed onto and began destroying the wall and fence.
- [3] The Garraways denied trespassing onto the disputed land. They insist that the disputed road is a public one that was constructed by the Government of Saint Vincent and the Grenadines and that they are entitled to use it. They asserted that when the wall was constructed by Ms. Cupid's father in 1995, a space was left out through which they, their servants, agents and visitors have accessed Andrea Garraway's property and that they have continued to do so since then without interference from anyone. They pleaded that the chain link fence wrongly obstructed the way and prevented Ms. Garraway from accessing the disputed road that they and their predecessors in title have traversed peacefully for over 30 years.
- [4] Damion and Andre admitted that they broke down the chain link fence to facilitate ingress to and egress from the disputed road, but denied breaking the wall. Ms. Garraway claimed a legal easement of way over the road pursuant to section 2 of the **Prescription Act**¹.
- [5] Ms. Cupid submitted among other things that the Garraways cannot attack her legal title, she has proven that she is in possession of the disputed road and wall and that she is one of the people legally entitled to possess them. She seeks damages for trespass; a declaration that she owns the lands registered by Deed No. 1089 of 1999; a declaration that the Garraways have trespassed on

¹ Cap. 329 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

those lands, the disputed land and the wall; an injunction restraining them from entering those properties and costs.

[6] The Garraways contended that Deed 2034 of 2019 on its face describes an area of land which encompasses lots of land that have been sold to third parties and that Ms. Cupid had not adduce evidence as to the size or boundaries of the land actually vested in her by that Deed. Consequently, her reliance on that Deed is ill-placed. They submitted that she has therefore not established ownership of the disputed land and she did not produce evidence which supports her claim that she is in possession of it. They seek a declaration that Andrea Garraway, her servants and agents are entitled to use the disputed road and an injunction to restrain Ms. Cupid from obstructing their use of the said road; and costs.

[7] I have found that Andrea, Damion and Andre Garraway are not liable in trespass. Petra Cupid's claim is dismissed. Andrea, Damion and Andre Garraway's counterclaim is also dismissed.

ISSUES

[8] The issues are whether:

1. Petra Cupid owns or has possession of the land registered by Deed No. 1089 of 1999 or the disputed land.
2. Andrea, Damion and/or Andre Garraway have trespassed on the disputed land.
3. An easement exists in favour of Andrea, Damion and/or Andre Garraway.
4. To what remedy, if any, is Petra Cupid, Andrea Garraway, Damion Garraway and/or Andre Garraway entitled.

ANALYSIS

Issue 1– Does Petra Cupid own or have possession of the land registered by Deed No. 1089 of 1999 or the disputed land?

[9] Ms. Cupid testified that she owns land at Prospect comprising 1 acre and 7 perches as registered by and described in Deed of Assent No. 2034 of 2019. She explained that her predecessor in title, her father, the late Vincent Cupid, had sub-divided the land into lots and subsequently constructed an access road ('the disputed roadway') on the property to provide access to various lots. The

entire parcel of land was owned by the Cupid family at that time. Over a period of time, her father sold portions of the land including a lot to Mr. Franklyn Haynes. Some of his children also received parcels of land from the parent lot and were registered as owners of separate lots within the 1 acre and 7 perches area. Ms. Cupid occupies one lot adjoining the disputed roadway. It was originally owned and occupied by her father. She at first denied, then acknowledged, that the lands were subdivided after provision was made for the disputed road.

[10] Under cross-examination, Ms. Cupid said that she is not the sole owner of the land described in Deed No. 2034 of 2019. She averred that she relied on the deed for the purpose of indicating that it is referable to the disputed land. She stated 'I am not saying that I alone own that land. I am saying that this is the deed. ... Roxine, Mr. Franklyn Haynes owns some of it, Mr. Hadassah Cupid ... I am not the only child of my parents who owns that land. Haddeson Cupid owns a piece of that land. There and where I currently live, I am the only person in the family who owns that land.'

[11] She explained:

'Para. 4 [of my witness statement] shows that I own an acre of land from my father. That's because when the lawyer did the paperwork from my father he used the original deed. The lawyer was doing the paperwork for me in 2014. I signed this witness statement on 31st July 2020. I signed that the contents of para. 4 are accurate. Actually my documents are saying that I have 1 acre and 7 perches of land. My documents are saying that, but ... I do not have 1 acre and 7 perches of land. The reason why I signed the document saying that I have 1 acre and 7 acres of land is because I am living in the main house of my father and that accesses the one acre of land as well. My lawyer who had done the paperwork did not separate the parcel. I had many deaths in my family at that time so I could not go back to my lawyer for her to just remove the extra by my father and do a document with just the piece of land that the original house is on.'

[12] Ms. Cupid produced as exhibit PC 3, an unregistered and undated plan². In response to questions about it under cross-examination, she responded:

² At pg. 50 of the trial bundle.

'I do not understand the drawing very well ... That long black mark is the road in dispute. Point A – D1 in a straight line – a whitish line – I cannot read the diagram like that. I know it's a road and a drain attached. ... There is a backwall and a drain in that area from A – D1 and a wall in that area from A-D1. I live on lot 3 bearing plan number G2241. I am referring to the main house on lot 3. I am referring to lot 3. That is the one at the bottom with '2D' and 'G41'. That is the land I am supposed to be owning. Yes. that's correct. You are correct that it is nowhere close to one acre. I understand your concern but the document I used is my father's original deed and I cannot use anything else to do this court matter. That lot is around, G2241 lot 3, is 4,000 square feet.'

- [13] Ms. Cupid did not produce any deed or other paper title limited to the area of the road or the disputed wall. She relied almost entirely on Deed of Assent 2034 of 2019 to establish her claim in trespass and to ownership of the disputed roadway and wall. The Schedule describes the land conveyed in it as being:

'ALL THAT LOT OIECE OR PARCEL OF LAND part of Prospect Estate in the Parish of Saint George in the State of Saint Vincent and the Grenadines being Lot Number (35) Thirty-five in a plan by B.A. Spence Licensed Land Surveyor and which said lot of land contains ONE ACRE AND SEVEN PERCHES and is bounded Northerly by Harmony Hall Estate Southerly by a Road Easterly by Lot Number 36 and Westerly by Ratho Mill Estate or as is more particularly shown and described in the said Plan above mentioned or howsoever otherwise the same may be butted bounded known or described ...'.

- [14] As to the road and how it came into being, Ms. Cupid recalled that her father cut a road on the lands around 1995 and immediately neighbours started walking through 'her father's land'. To stop them, he built a wall on the Eastern Boundary that very year and the neighbours stopped walking through the land. She testified that after the general elections in 2001, the ULP administration reconstructed the road that her father had built. Under cross-examination, she asserted that her father paid Mr. Daisley to surface the road with asphalt in 2001, which he did.

- [15] Mr. Franklyn Haynes is a Civil Engineer. He was Ms. Cupid's only witness. He bought a lot of land from Mr. Vincent Cupid in 1994, being part of the land described in Deed No. 2034 of

2019. Although he was initially reluctant to purchase the property because of the state of the access, he relented and proceeded to close the sale. He explained that Mr. Cupid promised to assist with the construction of an access road.

- [16] In August 1994, he arranged for a road contractor Zera Sutherland to cut an access road within the boundary of lands owned by Mr. Cupid. He did so with Mr. Cupid's permission. He recalled that around September 1994, one Mr. Louis Daisley placed quarry waste on the dirt road surface and compacted it, on instructions from Mr. Cupid. From that time, he noticed that some of the neighbours started using the access road to get to and from their homes instead of their regular access which was a dirt track.
- [17] Mr. Haynes recalled that in early 1995, Mr. Daisley carried out further work on the access road and applied a surface dressing of hot bitumen and dusting of finely crushed stones compacted on top. After the road work was completed, Haddeson Cupid arranged for a block wall to be constructed adjacent to the access road to prevent the neighbours from using the access road. A small opening remained of about 16-18 inches which Haddeson Cupid blocked by a piece of wood and galvanize. By 2010, the galvanize and wood had fallen down and Haddeson Cupid replaced them.
- [18] In 2001, after the general elections, Mr. Haynes was assigned to the Public Works Department as Roads Maintenance Engineer responsible for road maintenance. As part of his responsibility as road maintenance engineer, he developed road maintenance programmes that were approved by the Minister of Works to be executed on a quarterly basis. As part of that scheme, approval was received to repair the Harmony Hall main road. This was done during the 4th quarter in 2001.
- [19] Mr. Haynes recalled that around the same time they also repaired the access road which is the subject of this dispute. He explained that this was done because the road surface was poorly constructed, had deteriorated and was filled with potholes. Other work undertaken by the government on the road included the construction of a slipper drain on the right side of the access road and the installation of a 2" thick pre-mixed hot asphalt concrete surface. Island Works Limited carried out this aspect of the work.

- [20] In June 2019, Mr. Haynes decided to fill in the potholes that had developed in the disputed road. He used concrete for this purpose. At the same time he worked with other people to complete the construction of the end of the wall where the galvanize had been placed initially. They also cut overhanging trees and installed a 4' chain link fencing wire onto the wall. He explained that the wall extended along the access road for approximately 50 feet.
- [21] On July 11th 2019, Mr. Haynes observed Damion and Andre Garraway demolishing the fence. He reported the demolition to the police. He does not know of Andrea Garraway using the disputed road to access her property, although he has given her rides to her home in his vehicle from time to time since 2019. He said that on those occasions she always used another access road to her property.
- [22] The Garraways put Ms. Cupid to strict proof of her assertion that she owns the disputed land³. Andrea Garraway said that from 1989 when the disputed roadway was cut on the disputed land, she and her family walked along it to get to her property, without interruption or interference from anyone. She stated that the wall was built in 1995 but a space was left open for her family and her to pass through to get onto the access road, and they have been doing so continuously since then without hindrance even after it was re-surfaced by the government. She observed members of the public using the access road in like manner without protest from anyone.
- [23] She said that in 1995 when the Harmony Hall main road was being paved, the government paved the disputed roadway and built a slipper drain. She said that the workers who were employed by Island Works told her that they were fixing the road under the NDP regime. She explained that it was at that time that wastewater from her house was channeled and directed into the drain. Immediately thereafter, the flow of the wastewater from her property was obstructed by the wall and she took matters into her own hands and burst a hole in the wall to allow the free flow of the wastewater. She averred that no one accosted her or tried to prevent her from doing so.
- [24] Andrea and Damion Garraway both testified that they have used the disputed road without hindrance since they were children. They have also observed members of the public doing so and always thought that it was a public road.

³ See para. 1 of the Defence and Counterclaim filed on 21st April 2020.

- [25] On the matter of credibility, I make the observation that Ms. Cupid wavered and changed her position on important aspects of her testimony. Where therefore her account differs from the Garraways, I accept and rely on the latter. Mr. Haynes is highly trained, is learned and skilled. I did not discern any deception in his account and accept it to the extent that it is relevant to the issues.
- [26] Andre Garraway, Damion Garraway and Andre Garraway impressed me as witnesses of truth. It was obvious to me that Ms. Garraway was not academically inclined or sharp-witted. Notwithstanding, I found her to be credible. The Garraways' narrative had the ring of truth to it and I believe them.
- [27] It is however worthy of note that Ms. Garraway's recollection that the NDP government fixed the disputed road before 2001 conflicts with Mr. Haynes, the officer in charge of the programme under which the works were being done. Ms. Garraway recollection that the repairs were done with workmen from Island Works corresponds with Mr. Haynes' account. I infer from this that Ms. Garraway is mistaken about the year the disputed road was re-surfaced by the Government and as to which political administration was in office at the time. In view of Mr. Haynes' evidence as to the timeline when the government re-surfaced the road, I accept and find that it was indeed 2001. Overall, I prefer the Garraways' recall and interpretation of events in general.

Claimant's submissions

- [28] Ms. Cupid contended that to establish her claim in trespass, she must prove that she owns or possesses the disputed roadway and wall. She submitted that after her father's death on 9th February 2011, Letters of Administration to his estate was issued to his widow Patricia Cupid. The widow executed Deed of Assent 2034 of 2019 to Ms. Cupid to facilitate administration of the estate. She indicated that her lawyer drafted the Deed of Assent by inserting in the Schedule wholesale, the description from the parent paper title which included all of the land before it was subdivided and parts sold and transferred to others. She acknowledged that by doing so, the lawyer inaccurately included in the description, areas of land which are not owned by her.

[29] She submitted that the evidence is that she owns only lot 3 depicted on plan G2241. She argued nonetheless, that it is clear from survey plans G1611⁴ and G246 that the house in her possession is located on a portion of Vincent Cupid's estate. (It is not clear which survey plan is being referred to as G246 as none with that number was produced into evidence). Ms. Cupid submitted that further, that the size of the deceased's land and the boundaries were never amended to reflect the amount of land he owned at the time of his death. She contended that notwithstanding, she has proven her legal title of the land and by extension the disputed road and wall. The description of the boundaries in the Schedule to her Deed were capable of being identified. Even if the Court does not agree, she has established her legal title to the disputed road and wall.

[30] As to possession, Ms. Cupid argued that the Garraways admitted in their Defence and Counterclaim that the access road was built on lands belonging to Vincent Cupid and this fact is therefore not disputed having been admitted by Andrea Garraway and Andre Garraway in their testimony. She also relied on survey report 'PC3' said to be prepared by Terence Latchman Licensed Land surveyor. In it, it is noted that the survey was prepared for the purpose of verifying that the paved road was in its correct position according to Plan G1314 and to advance Latchman's professional opinion on related rights and existing boundaries.

[31] In this regard, the following opinion is inscribed in the report:

1. The wall was not a common wall and was built on lands owned by Mr. Cupid who was also responsible for building the wall.
2. The 20 ft road was intended for private use by parcels of lands that came from Mr. Vincent Cupid.
3. Mr. Cupid made provisions for an access road to two parcels of land which he excised from his land, via a 20ft wide road along the boundary to the hires (sic) of Eunice Garraway.

⁴ Produced into evidence as exhibits 'AG3'.

4. The 20 ft road came from Mr. Cupid's land making the road a private road.'⁵

[32] Ms. Cupid submitted that it is not disputed that her father once owned the land on which the disputed road was constructed and the wall erected or that he built the wall or that he once owned the land on which the wall was built. She argued that it is also not in dispute that she lives on lot 3 depicted on survey plan 2241, that she moved into her father's main house on that lot in 2011 and that she occupies the property in which he once lived. She reasoned that the Garraways having admitted her possession of a house located on lands once owned by her father, that occupation is enough to maintain an action in trespass against the Garraways for unlawful use of the disputed road and for breaking the wall. She cited the **Law of Real Property by Megarry and Wade**⁶ where the learned author makes the point that possession of land suffices to ground a claim in trespass. She relied on **Isaacs and another v Rodney**⁷ for the same principle.

[33] Ms. Cupid contended that she asserted her possession of the disputed wall by her occupation of and physical presence in her father's house on the disputed land and by blocking out the space at the end of the disputed wall when the galvanize fell away in 2019. She has thereby established possession and that she is one of the persons legally entitled to it.

Defendants' submissions

[34] The Garraways argued that Ms. Cupid did not disclose Deed No. 1089 of 1999 and elicited no evidence that she owns such land. Accordingly, the court is not in a position to determine ownership of that parcel of land. They argued that in light of Ms. Cupid's admissions that the boundaries outlined in the Schedule to Deed 2034 of 2019 are not the boundaries to the two parcels of land that she owns, she has failed to establish the boundaries or her ownership of the. Further, she never asserted that the disputed road and wall are within the boundaries of the land owned by her. They invited the court to find that the roadway is a public road having being re-surfaced by the government using public funds. They did not address the court on the issue of possession.

⁵ See pgs. 49 and 53 of the Trial bundle, filed on 20th January 2021.

⁶ At para. 2, pg. 997.

⁷(2010) 77 WIR 287.

DISCUSSION

Deed No. 1089 of 1999

[35] By seeking a declaration that she owns the property held by Deed No. 1089 of 1999, Ms. Cupid places the court on inquiry into that issue. Sadly for her, she makes no reference to such land elsewhere other than in her statement of claim where she prays for that declaration. Nothing further is pleaded regarding that deed and neither Ms. Cupid nor Mr. Haynes makes any averment related to it. That deed appears to have no connection with the case. The only conclusion open to the court is that Ms. Cupid has not established that she owns any such property. I find accordingly.

Disputed road and wall

[36] Ms. Cupid's entire case in trespass is predicated on her averred ownership or possession of the land described in Deed of Assent No. 1089 of 2019. On the facts, it is clear that she has no title, interest or right to the entire 1 acre and 7 perches. On her own testimony, her lawyer made errors in the deed by transcribing wholesale the description from the parent deed without adjusting the boundaries and the extent of the land commensurate with the reality. By merely copying the exact description from the parent paper title held by Mr. Vincent Cupid before he started disposing of portions of the land, the preparer of the deed caused a wholly incorrect title to be registered in Ms. Cupid's favour.

[37] From Ms. Cupid's testimony, she claims to have ended up with title to only two lots from the 1 acre and 7 perches. One of those lots is lot 3 G2241⁸ that was previously owned by her father and is limited to a mere 4,000 sq. ft.. It comprises no part of the disputed road or wall. Similarly, from Ms. Cupid's own mouth, the other lot⁸ (Lot 1 on G2241) similarly does not encompass any part of the disputed road or wall. It appears to be of similar area as lot 3.

[38] Mr. Haynes' narrative that Mr. Vincent Cupid owned the land on which the road and wall were built is capable of belief is credible and is corroborated by the Garraways. This does not necessarily assist Ms. Cupid in the absence of proof that she inherited or succeeded to those titles from her father. Apart from her ipse dixit there is no evidence from which to conclude that she owns the disputed land. It is quite possible that although Mr. Cupid might have owned those lands when the

⁸ Depicted on the diagram on pg. 50 of the TB – on ex. PC3.

road and wall were built between 1989 and 1995, and even up to his death, that they were disposed of to some party at some point in time. Neither Ms. Cupid nor Mr. Haynes has presented evidence to the court that this did not happen or from which to find that Ms. Cupid is the owner.

[39] I gather from Ms. Cupid's evidence that the VincentCupid Estate has been administered or is in the process of being administered. Her failure to disclose the crucial details regarding how the land has been distributed before and after her father's demise and who now owns whatparts does not assist her case.

[40] Moreover, Ms. Cupid's attempt to rely on hearsay statements in exhibit 'PC3' (the survey completed by Terrence Latchman is plagued with evidentiary problems. Firstly, Mr. Latchman is said to be a licensed land surveyor and is purporting to make statements of expert opinion on the face of the survey, in circumstances where no application was made for his statements to be admitted as expert opinion in accordance with CPR part 32. This is contrary to the principle of law enunciated in the Board in **Bergan v Evans**⁹, that:

'Deployment of expert evidence is governed by rule 32.6, and is subject to the court's control of case management.'¹⁰ and

'... rule 32.6, read in conjunction with the court's and the parties' general duty to limit expert evidence in rule 32.2, ... were intended ... to work a sea-change in the approach to expert evidence in civil proceedings by subjecting the entirety of the deployment of expert evidence to active judicial control by way of case management, in the pursuit of the overriding objective and, in particular, the need to ensure proportionality and economy in the resolution of civil disputes.'¹¹

It follows that Ms. Cupid cannot simply invite the court to consider this expert evidence without first seeking leave to have Mr. Latchman deemed an expert and authorized to express an opinion on the facts.

⁹[2019] UKPC 33.

¹⁰ At. Para. 33, per Lord Briggs.

¹¹ At para. 41,per Lord Briggs.

[41] Secondly, what Ms. Cupid is attempting to do in this way, is to invite the court to rely on those notations and to treat them as hearsay evidence from her or evidence from Mr. Latchmanas to relevant and potentially probative evidence without his being subjected to cross-examination. While hearsay is admissible in this court, the court cannot countenance this unorthodoxy without leave being sought and granted so to do¹². It would be unfair and unjust to permit it. I therefore disregard the above-referenced statements.

[42] A further consideration for the court is that in the absence of credible evidence as to the individual or collective interest that Ms. Cupid or her co-beneficiaries may have in the disputed road and/or wall, there is no evidentiary basis on which to find that she owns or holds any beneficial interest to the same. I remind myself that the **Registration of Documents Act** provides that every deed registered pursuant to its provisions:

‘... shall on registration, operate both at law and in equity according to the priority of time of registration and the right, title and interest of the person conveying ... or otherwise dealing with such real estate against every other document subsequently registered with respect to such real estate.’¹³

[43] Although Ms. Cupid is registered by the Deed No. 2034 of 2019 as owner of 1 acre and 7 perches of land, the admitted inaccuracies in the description, the uncertainties about the boundaries and the extent of her holdings, undermines her claim to ownership and does not afford any basis on which to find that she owns any part of the disputed road or disputed wall. Furthermore, neither she nor any other witness produced a survey plan to identify the boundaries of the land conveyed to her from the parent deed. There is no credible independent evidence as to the boundaries and/or ownership of the disputed land.

[44] Ms. Cupid has failed to establish on a balance of probabilities that she owns either the disputed roadway or the wall. The state of the evidence is so unsatisfactory that I make no finding that she either owns or holds any interest, right or title to the property registered by Deed No. 2034 of 2019 or to any part of the disputed land.

¹² Evidence Act, Cap. 220 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009, section 43 et seq.

¹³ Cap. 132 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009, section 5(1).

Possession

[45] Ms. Cupid appears to hinge her claim in possession partially on the contents of Deed No. 2034 of 2019, partly on her occupation of her father's house and in part on the fact that she blocked out the disputed wall in 2019 when a portion fell away. None of those circumstances assist her. The fact that she lives in the house previously owned by her father does not, without more, make a connection between that house and the road or the wall. It emerged in evidence that the wall spanned the entirety of the road from the top where Mr. Haynes' house is built to the other end, beyond where Andrea Garraway's house is located. The parties produced a number of survey plans and nowhere on them, does there appear any demarcation signifying that a boundary exists between the wall and the adjacent properties. I draw no such inference and I conclude that there is none.

[46] In my opinion, Ms. Cupid's solitary act of blocking up the hole in the wall in 2019 does not, without more, establish that she possesses the wall, especially in view of the overt actions by Damion and Andre Garraway to unblock the wall immediately to assert their claim to an entitlement to use that route to enter and exit Andrea Garraway's property. Combining that with her occupation of the land previously owned by Vincent Cupid and the contents of Deed 2034 of 2019 does not advance her claim. I find therefore that Ms. Petra Cupid is not now in possession and was not any material time in possession of the disputed road or wall.

Issue 2– Have Andrea, Damion and/or Andre Garraway trespassed on the disputed land?

[47] The issue of trespass can be disposed of shortly in light of the findings on ownership and possession of the disputed land. It is trite law that trespass to land is the interference by a trespasser of the lawful possession of the land. Having found that Ms. Cupid has not established possession, it follows that she is unable to prove that the Garraways trespassed on the disputed road or wall. I find that they did not. I therefore dismiss that claim against them.

Issue 3– Does an easement exist in favour of Andrea, Damion and/or Andre Garraway?

Counterclaim by the Garraways

[48] The Garraways raise the issue of easement by way of a counterclaim. They asserted that for a period in excess of 20 years before Ms. Cupid's claim against them, Andrea Garraway has,

enjoyed as of right and without interruption, a way for herself and her servants on foot and with vehicles from the Harmony Hall Highway over the disputed road to her home and back. Her claim is for a legal easement as of right under section 2 of the **Prescription Act**.

[49] Section 2 provides:

‘(1) No claim which may be legally made at common law by custom, prescription or grant to any right of way or other easement, or to any watercourse, or the use of water to be enjoyed or derived upon, over or from any Crown Land or water belonging to the Crown, or being the property of an ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years: but nevertheless, such claim may be defeated in any other way by which the same is now liable to defend.

(2) Where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed for some consent or agreement expressly given or made for that purpose by deed or writing.’

[50] The Garraways submitted that three ingredients must be present for the creation of an easement:

1. There must be a dominant and a servient tenement;
2. The easement must accommodate the dominant tenement;
3. the owners of the dominant and servient tenements must be different; and
4. the easement must be capable of forming the subject matter of a grant.

[51] They argued that based on Ms. Cupid’s claim to ownership of the servient tenement, the other elements are easily satisfied in the absence of contrary evidence. By these assertions they appear to concede that Ms. Cupid owns the wall and road even though their case on trespass was that she

does not.

[52] Ms. Cupid argued that the Garraways have not provided evidence as to continuity of their use of the disputed road. She submitted that the Garraways' evidence that her father left a gap in the wall for them to use, is evidence of a licence to use the road and does not amount to an easement.

DISCUSSION

[53] An easement is also referred to as a servitude. It is defined as:

‘... a right enjoyed by the owner of land over the lands of another: such as rights of way, rights of light, rights of support, rights to a flow of air or water. An easement must exist for the accommodation and better enjoyment of the land to which it is annexed; otherwise it may amount to a mere licence. Easements are created by express grant or prescription. The dominant tenement is the land owned by the possessor of the easement, and the servient tenement is the land over which the right is enjoyed.

An easement confers no proprietary rights on its owner: if it does it is not an easement. It is a privilege without a profit.’¹⁴

[54] The foregoing definition makes it clear that ownership of the servient and dominant tenement must be established if a finding is to be made as to the existence of an easement. In light of the earlier finding that Ms. Cupid has not established ownership of the disputed road and wall, and there consequently being no proof of ownership in this case, it is not open to the Court to conclude that a legal or equitable easement exists in Ms. Garraway or the Garraways' favour. I therefore make no finding that any easement exists in the Garraways' favour under section 2 of the **Prescription Act**. I accordingly dismiss the Garraways' counterclaim.

Issue 4- To what remedy, if any, is Petra Cupid, Andrea Garraway, Damion Garraway and/or Andre Garraway entitled?

[55] The parties have not established a claim against an opposing party. It is not necessary to address the question of remedies. Suffice it to say that Ms. Cupid's prayer for damages, injunctive and

¹⁴Osborn's Concise Law Dictionary, Seventh Edition by Roger Bird, pg. 127 (Sweet and Maxwell).

declaratory relief fails as does the Garraways' claim for injunctive and declaratory remedies.

COSTS

[56] The parties have each suffered the same fate in that their respective claims have been dismissed.

In the circumstances, the appropriate order is that each party bears his or her own costs.

DISPOSITION

[57] It is accordingly ordered:

1. Petra Cupid's claim is dismissed.
2. Andrea Garraway's, Damion Garraway's and Andre Garraway's ancillary claims are dismissed.
3. Each party shall bear his or her own costs.

[58] I am grateful to the legal practitioners for their submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar