

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2013/0069

BETWEEN

MC CARTHY PHILLIPS
of Union Vale Bequia

CLAIMANT

AND

KENNETH GLYNN
of Port Elizabeth Bequia

AND

KENWORTH GLYNN
of Port Elizabeth Bequia

DEFENDANTS

Appearances:

Mr. Richard Williams with him Ms. Danielle France for the claimant.
Mr. Joseph Delves for the defendant.

2019: Oct. 29
Dec. 4

JUDGMENT

BACKGROUND

[1] **Henry, J.:** Mr. Mc Carthy Phillips and Mr. Kenneth Glynnbought adjoining properties on the Grenadine island of Bequia, from the Government of Saint Vincent and the Grenadines many years ago. They acquired title to the respective parcels of land at different times. Mr. Kenneth Glynn's title is

registered by Crown Grant No. 52 of 1984. It is identified as lot 15¹. He claimed that he bought and owned the land in 1982 even before receiving the Crown Grant. His son, Mr. Kenworth Glynn occupies the property. Mr. Phillips title was registered 20 years later by Crown Grant 45 of 2004. That parcel is referred to as lot 26¹.

- [2] Mr. Phillips complained that from around 2004 until the present, Mr. Kenneth Glynn and his son have trespassed on his property and have continued doing so to access Mr. Glynn's adjoining property. He alleged that they have done so by passing through the disputed strip of land (the disputed land'). He alleged that the Glynns trespassed on his property in January 2013 and constructed a concrete retaining wall on it. The Glynns rejoined that a retaining wall was built by Kenworth Glynn but on the western boundary of lot 15 and therefore does not touch and concern Mr. Phillips' land or the disputed area. Mr. Phillips claimed further that Mr. Kenworth Glynn habitually lights a fire close to his (Phillips') boundary causing smoke to 'inundate' his property, soil his clothing and linen, thereby making it unbearable.
- [3] Mr. Phillips filed this claim² in the High Court against the Glynns, in which he sought a declaration that he owns the land on which the alleged trespass has taken place. He also claimed damages for trespass; a restraining order to prevent the Glynns from trespassing on his land, and from continuing with the alleged nuisance; an order compelling Mr. Kenneth Glynn to remove a portion of wall from his (Phillips' land) and costs.
- [4] Messieurs Kenneth and Kenworth Glynn denied that they have trespassed on Mr. Phillips' property. They averred that they have always entered Mr. Glynn's property lawfully from the road along its northern boundary as shown on his registered deed and plan. They asserted that Mr. Phillips has acquiesced to their use of the disputed road and has therefore waived his rights. They asserted that he is estopped from saying that they have not done so; and is prohibited from enforcing any rights to the disputed land. They contended that Mr. Phillips has delayed in bringing this action and seeking the redress claimed in this suit. They pleaded that by his delay, Mr. Phillips led them to

¹On the plan attached to the Crown Grant.

² On 15th April 2013.

believe that he did not intend to assert his claim to the land, and as a consequence they acted to their prejudice, which is compounded by the fact that there is now no other reasonable access to their land; and no action against the Chief Surveyor who they alleged purported to cancel the road on the northern boundary shown on his (Glynn's) plan.

- [5] The Glynn's claimed that Mr. Phillips has repeatedly thrown garbage on Kenneth Glynn's land. They sought an injunction restraining Mr. Phillips from doing so and damages for nuisance. They contended that Mr. Phillips' claim is statute-barred, having not been brought within the 12 year limitation period for making such claim. They sought a declaration that they are entitled to access Mr. Glynn's land by passing and re-passing via the disputed land by foot and by vehicle; a permanent injunction restraining Mr. Phillips from preventing them from using that strip of land; and an order that they are entitled to an easement by passing through it. Judgment is entered for Mr. Phillips. Mr. Kenneth Glynn's and Mr. Kenworth Glynn's ancillary claim is dismissed.

ISSUES

- [6] The issues which arise for consideration are whether:

- (1) Mr. Mc Carthy Phillips owns the disputed property, comprising the referenced 'access' road?
- (2) An easement exists through the disputed land?
- (3) Mr. Kenneth Glynn or Mr. Kenworth Glynn has trespassed on the disputed property?
- (4) Mr. Mc Carthy Phillips, Mr. Kenneth Glynn or Mr. Kenworth Glynn is liable for the alleged nuisance?
- (5) To what remedies are Mr. Mc Carthy Phillips, Mr. Kenneth Glynn and/or Mr. Kenworth Glynn entitled?

ANALYSIS

Issue 1 – Does Mr. Mc Carthy Phillips own the disputed property comprising the referenced 'access' road?

- [7] Mr. Phillips and Mr. Kenneth Glynn were the only persons who testified at the trial. Mr. Phillips claimed that he purchased a parcel of land at Union Vale, Bequia, being lot 26 on survey plan Gr303, and comprising 9,186 sq. ft., as described in Crown Grant 45 of 2004 and depicted on the attached plan. He testified that he was allotted the land in 1986 and took possession of it by clearing it. He stated that he was a poor struggling man at that time and was unable to pay for the land in full or make a downpayment. He averred that he cultivated it between 1988 and 1990 by

planting corn, pigeon peas and sweet potatoes. He recalled starting construction of his house around 1990, the year that his daughter Janelle was born. He said he did not complete the construction until 1998 due to lack of funds. He claimed that he lived there in the house even before the windows were installed.

[8] Mr. Phillips produced a copy of the referenced Crown Grant which reflected that he bought the land at a cost of \$11,941.80³. The boundaries described in it indicate that it is bounded on the north by a 20 ft. road; on the south by Gr232 and a drain; on the east by a 20 ft. road and on the west by a road. The Grant states that the attached diagram also depicts the land conveyed. The diagram on the plan shows a triangular shaped plot of land marked '26'³. It is framed by a 20 ft. road on the northern boundary which ends at a point on the western side; another 20 ft. road on the eastern boundary; and land described as Gr232 on the southern side. The plan is signed by Adolphus Ollivierre as Chief Surveyor and contains a notation that it was admitted to the Registry⁴ by the Registrar.

[9] Mr. Phillips acknowledged that Mr. Kenneth Glynn owns an adjoining parcel of land which is shown as lot 15 on survey plan Gr232. Lot 15 is not shown on Mr. Phillips survey diagram. Mr. Glynn produced Crown Grant 3 of 1984 which identifies him as purchaser and owner of that parcel of land comprising 8,740 sq. ft. at a cost of \$8,740.00. The boundaries are not expressly set out in the Grant, but are outlined in the attached diagram. Unlike Mr. Phillips survey plan, the copy of the diagram produced in evidence as being the one attached to Mr. Glynn's Crown Grant, does not appear to contain the signature of the Chief Surveyor, in the space provided for his signature.

[10] The diagram shows a parcel of land resembling a square. The northern and western boundaries are described as roads; the eastern boundary is shown as a drain and the southern boundary is a parcel of land with the number '14'⁵ inscribed there. The Grant bears the Registrar's signature. It

³ Presumably lot 26.

⁴ The Registry of Deeds, which is managed and administered by the Registrar.

⁵ Presumably lot 14.

does not depict lot 26 which is registered to Mr. Phillips. Both Crown Grants are signed by the Governor-General on behalf of the Crown.

- [11] Mr. Glynn attached a copy of survey plan Gr232⁶ to his Defence. It was not certified as a true copy of the original and it was not produced in evidence. Therefore, the court cannot have regard to it for purposes of this judgment. Mr. Glynn claimed that his land is bounded on the north by a road; on the south by lot 14; on the east by a drain and lots 1 and 2; and on the west by a road. Part of his northern boundary and part of Mr. Phillips' southern boundary is the area of contention.
- [12] Mr. Glynn testified that his lot measures 8,740 sq. ft. in area. He recalled that before 1982, a Mr. Dave Fredericks, land surveyor in the Ministry of Land and Survey 'cut out' lot 15 for himself but changed his mind and decided not to keep it. He said that Mr. Frederick's aunt Mabel used to farm the land with corn and other produce. He claimed that when his family took over the land in 1982 they met it under cultivation with those crops and they took over the cultivation with assistance from his (Glynn's) wife's brother and other family members.
- [13] He explained that Mr. Phillips' and his mother cultivated a piece of land to the north-east of Lot 15, on which Mr. Phillips subsequently built his house in 1988. Mr. Glynn testified that the access to lot 15 was always from the north western corner of the parcel. He recalled that Mabel had started the practice of getting to the land from that north western area and he and his family just continued to use that access route. Accordingly to him, it was a footpath and not a motorable road in 1982. He claimed that it was only in 2012 that Mr. Phillips attempted to stop them from using that access.
- [14] Mr. Glynn testified that there was also a rough track on the western side of lot 15, but he remarked that the elevation was very steep and would require them to climb up a bank to get onto their land. He explained that the rough track leads to other lands and has been converted to a concrete road since about 2006. He claimed that because of the elevation, it is impossible to access their house on lot 15 from this road. He stated that no one used that road to get to lot 15, but instead used the

⁶Dated 20th December 1976.

footpath to the north. Mr. Phillips asserted that in terms of elevation, his land is much higher than the Glynn's land.

[15] Mr. Phillips denied that the Glynn's ever used the northern boundary as their access route, during the time that he occupied his land. He testified that he never saw Kenneth Glynn, his wife or his children farming lot 15 as he (Kenneth Glynn) claimed. He maintained that it was occupied for the first time in late June 2003 or early 2004 when construction of the Glynn house started. He recalled that there was no paved road on lot 15's western boundary at that time.

[16] Mr. Phillips explained that sometime in 2004 when the Glynn house was being built, he was in the process of clearing some big trees on his western boundary to enable him to fence his property. He recalled that Mr. Kenneth Glynn approached him using obscene language, told him it was squat land and directing him not to trim it. He said he never retreated and that the matter was constantly in verbal dispute until he brought this action to assert his rights.

[17] Mr. Kenneth Glynn testified that his wife showed Mr. Phillips and his (Phillips') mother the deed, presumably to lot 15. He explained that about two or three years after Mr. Phillips built his house he (Phillips) used chicken wire and fenced 4 sides of the land he was occupying. He claimed that Mr. Phillips left out a large space on the north western boundary of his (Glynn's) land so that they could access lot 15. He asserted that Mr. Phillips' fence did not hinder them from getting onto their land.

[18] During cross-examination, Mr. Phillips stated that when he fenced his property he left an area for the defendants to get onto their land, because it was a confusion land, 'plenty confusion'. He accepted that he already owned the land then. He stated that he got his deed in 2004 and has not changed the fence since then. He explained that he did not carry his fence 'right down' because Kenworth Glynn threatened him with violence and death. He said that the other reason was because he did not yet have his deed. He recalled that Kenworth Glynn told him that he 'could not run the fence'.

- [19] During cross-examination, Mr. Phillips said that his averments in his pleadings about threats from Mr. Kenworth Glynn are true. I note that in the pleadings, the threats of violence and death are attributed to the 'first defendant' who is Kenneth Glynn and not to his son. Mr. Phillips struck me as a simple unlearned man. I suspect that he did not appreciate the difference between first and second defendant or even understand the term. He said that this took place a long time ago in the 80s. I do not believe that he was lying, just perhaps mistaken regarding the terminology. I found him to be a credible witness. Mr. Glynn appeared much more savvy and knowledgeable about the related issues. He was frank even about unflattering details of his encounters with Mr. Phillips. I preferred Mr. Phillips' account where they diverged.
- [20] Mr. Glynn recalled that around 2005 or 2006 Mr. Phillips came with ranger Willie Leslie to see him. He stated that Leslie told him that he was walking on Mr. Phillip's land. He recalled telling Mr. Leslie that he (Leslie) is not a surveyor and furthermore, he has been walking there all along. He stated that he went to see Chief Surveyor Mr. Ollivierre a couple of days later; that Mr. Ollivierre promised to 'come and see the position' but never did. Mr. Glynn testified that around the same time Mr. Phillips began digging about 3 or 4 holes for fencing and he (Glynn) blocked up the holes and told him that he could not fence there. He said that nothing further happened until about 2012 when Mr. Phillips prevented Kenworth Glynn from passing there with his vehicle.
- [21] Mr. Glynn stated that after he received a letter from Mr. Phillips' lawyers in 2013 he again went to see Mr. Ollivierre, and was able to see the acting Chief Surveyor Mr. Francis who promised to send someone but did not follow through. He claimed that he subsequently made other attempts to contact Mr. Ollivierre but could never reach him. He reiterated that even though Mr. Phillips was claiming the disputed land as his around 2005 or 2006, he did not actively prevent them from walking there until 2012. He added that for all that time, it was not a problem for them.
- [22] Mr. Phillips denied that he fenced his property and left room for Mr. Glynn and his family to pass to get to lot 15. This appears to conflict with other testimony where he claimed he left the space 'unfenced' because it was a lot of confusion. He explained that until he got his title, he left that area out of the fenced portion. He insisted that from since 2004 he has made attempts to block the

disputed access route to lot 15. He asserted that from 2004 through 2009, he prevented Mr. Kenneth Glynn from exercising any rights over the disputed land. He explained that he would chase away truck drivers who attempted to use that route to go to the Glynn vacant house to load fresh water for sale during the dry season. He said that the truck drivers going to Mr. Glynn's house for water used the footpath to get there.

[23] He recalled that William 'Willy' King, who was forest ranger until 2004, advised Mr. Kenneth Glynn that the disputed land belonged to him (Phillips). He stated that when Mr. Kenworth Glynn came to occupy the house on lot 15 in 2011, matters came to a head regularly. He averred that Mr. Kenworth Glynn would habitually drive his car across the disputed land; and would also bring a truck from his workplace (WAG gas station); drive his vehicle out and leave the truck behind, thereby constantly trespassing. He asserted that Mr. Kenneth Glynn brought a surveyor to the property on 11th April 2013 who advised him that he was trespassing.

[24] Mr. Kenneth Glynn described the road to the north of lot 15 as a dirt road and a footpath. He explained that it was manageable. He averred that when he bought his land, both the northern footpath and the western road were dirt roads. He stated that the western road has since been built into a concrete road. He described the northern road as his right of way. He stated that it should be about 25 feet in length and could be around 8 or 12 feet wide. He accepted that his deed does not contain specifics regarding the boundaries. He acknowledged that there is no measurement on his plan which indicates how wide the road is; and that the road is outlined by dotted lines on his plan. He admitted that a 20 foot road is depicted by solid lines on the north of the plan on Mr. Mc Carthy's deed.

[25] Mr. Glynn insisted that he is asking the court to give him a right of way to get to his land. He stated that with respect to his plan from 1982, the alignment has changed resulting in different measurements from 2004 in relation to Mr. Mc Carthy's land. He insisted that while there is a concrete road on the western portion of his land, he does not access his land from that road because the elevation of the road is too high. He claimed that it is not possible to access his land

and building from the western side. He accepted that the confusion about the right of way started about 1998 or 2000, before he built the house.

- [26] The Glynnns contended that they do not accept that Mr. Phillips owns the land described in Crown Grant 45 of 2004. They argued that Mr. Kenneth Glynn acquired and has owned lot 15 from 1982 and has, with his family and others, lawfully accessed it from that time via the road shown on the northern boundary of his property. He submitted that his title was confirmed by Crown Grant some 29 years before Mr. Phillips brought this claim against him. He and Kenneth Glynn contended that Mr. Phillips began squatting on a part of the road they have used to access lot 15. They submitted that he has never interfered with their access.

Transfer of half the road

- [27] The Glynnns submitted that where a conveyance of land describes the land conveyed as bound by a road, it will be construed as passing half of the road, from the edge of the land to the middle of the road '*ad medium filum viae*' unless there is something in the evidence or in the language of the instrument to show that that was not the parties' intention. They relied on a statement to this effect in **Halsbury's Laws of England**⁷ and the decision in **Holmes v Bellingham**⁸. They argued that from the moment his deed was issued in 1984, Mr. Kenneth Glynn is deemed to own half of the road depicted on his northern boundary on the plan.
- [28] The Glynnns contended that parties to deeds are bound by their deeds, as are their privies and persons taking from them. They submitted that the Crown could not be heard to say to Kenneth Glynn that there was no road on his northern boundary, and similarly Mr. Phillips cannot make that assertion. They contended that Mr. Phillips elected not to join the Crown in a title dispute between him and his neighbor, whose deed was first in time by 10 years. They submitted that the Crown wronged Mr. Phillips by selling him land which was included in Kenneth Glynn's road. They contended that Mr. Phillips' claim must fail for this reason.

⁷ (2012) Vol. 32, para. 433.

⁸ 7C.B (N.S) 328.

[29] Mr. Phillips countered that Mr. Glynn's survey shows only a proposed road. He argued that this is supported by the fact that the road on the survey is delineated by broken lines; that the road was never in actual existence; and that the Mr. Glynn's deed does not reflect that he was bounded by any road. He submitted that the reason for these omissions is that no road ever existed. He argued that a public road can only be created by dedication and acceptance and that neither was present in the instant case. He cited **Halsbury's Laws of England**⁹ in support. Under the rubric '*Creation of Highways*, the learned authors stated:

'A claim to a public right of way may be based either upon dedication and acceptance, or upon some statute.'⁹

[30] Mr. Phillips argued that 'the road was eventually created in a different location as is depicted in the survey attached to his deed. He contended that if a road had been created there 'it would have been a Class 3, 12 foot road... .' Mr. Phillips did not explain how he arrived at this hypothesis and conclusion. He did not elaborate so I am not sure how he did. Conceivably, it might have been by reference to provisions in the Roads Act¹⁰ which provide for the classification of public roads.

[31] I note too that all roads through the island of Bequia, except those in Port Elizabeth are classified as class 3 roads by virtue of the First Schedule, Part II to the Roads Act. It also provides that such roads shall be 16 feet in width, inclusive of any lateral drains or ditches. I make no finding that such a road in Bequia in the vicinity of lot 15 would have been a Class 3, 12 foot road, because this is mere conjecture which cannot assist the court. Furthermore, a 3rd class road is declared by law to be 16 feet and not 12 feet in width. Mr. Phillips reasoned that if the Glynn's feel aggrieved then their cause of action is against the State and not against him.

[32] The Glynn's and Mr. Phillips advanced the common law position regarding on the one hand, the extent land bounded by a public road which conveyed between a seller and buyer; and on the other hand, creation of a road by dedication and acceptance. They did not make submissions as to whether the legislation in Saint Vincent and the Grenadines addresses this issue. For purposes of

⁹ 3rd Ed. Vol. 19, para. 60.

¹⁰ Cap. 484 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009; in particular sections 3, 4 and the Schedules.

illustration, I will summarize the applicable provisions in the UK and then compare them with those which obtain in Saint Vincent and the Grenadines.

[33] The learned authors of **Halsbury's Laws of England** have outlined what obtains under the legislative framework which exists in the United Kingdom ('UK'). They have also contrasted the common law reality with the statutory dictates. In this regard, they pointed out that 'a claim to a public right of way may be based either on the common law doctrine of dedication and acceptance or on some statutory provision.' They added that 'public user for a period of 20 years may give rise to the presumption that a way is a highway, unless there is sufficient evidence that there was no intention to dedicate the way.'¹¹

[34] They noted that:

'public footpaths ... are highways, and the general law as to highways applies to them except where they are excluded by the terms of a particular enactment or are subject to enactments applicable to them only. Like other highways, public footpaths ... owe their origin either to express or inferred dedication or to some statute. If a public footpath is claimed by inferred dedication, it is necessary to bear in mind the rule that the public cannot acquire a right to wander freely over land except by statute, and also the possibility of a restricted dedication. Footpaths, more often than any other kind of highway, are dedicated subject to rights reserved by the owner.'¹²

[35] The learned authors referred to the UK Highways Act 1980 and noted that pursuant to its provisions:

'A highway may be created by agreement under a statutory power, and a similar power exists for the creation of walkways. A highway may also be created over a road which is already in existence as a private way. Where a highway is created by statutory powers, no user by the public or act of any party is necessary to complete its creation. Where the statute merely authorises the setting out or making of a public road, then, in the absence of user amounting to adoption by the public of the road in an unfinished condition, no

¹¹(2019) Vol. 55, para. 141.

¹²(2019) Vol. 55, para. 616.

highway comes into existence until the road has been set out or made in substantial conformity with the statutory requirements. However, if the public regularly uses a road which has never been completed in the manner required by statute, a dedication and acceptance of it as a highway in its unfinished condition may be inferred. Most highways are now maintainable at the public expense.¹³

- [36] The terminology used in the State of Saint Vincent and the Grenadines is 'public roads' as opposed to 'highway'. In Saint Vincent and the Grenadines, public roads are created by the Governor General by proclamation in the *Gazette*, in accordance with the provisions of the Roads Act¹⁴. Roads are classified by district and class and listed in the Schedules. The Roads Act came into force on January 1st 1956. It would therefore govern the creation of the roads surrounding lot 15 and lot 26 on Bequia.
- [37] The Glynns' submission that the disputed land is a public road must necessarily be grounded in the provisions of the Roads Act or Regulations made under it. They have pointed to no such provision. The evidence adduced in this case does not sufficiently identify the disputed access strip of land to enable the Court to find that it is a public road so designated by law. In this regard, its location in relation to other roadways was not stated and it is not clear if it is situated in Port Elizabeth or elsewhere. I therefore make no finding that it was a public road in 1982 or has become one since then.
- [38] The Glynns' contention that the Crown passed title to half of the disputed land to them, based on the principle of '*ad medium filum viae*' is refutable. However, Mr. Phillips did not seek to answer it. '*Ad medium filum viae*' is a presumption which is rebuttable as noted by Cotton LJ in the case of **Micklethwait v Newlay Bridge Co**¹⁵, which was referred to approvingly in the **Halsbury's Laws of England** passage referenced by the Glynns. Cotton LJ opined that a court may examine the surrounding circumstances within which the conveyance was made to see if there were any facts

¹³(2019) Vol. 55, para. 169.

¹⁴By section 44.

¹⁵(1886) 33 ChD 133 at 145, CA.

which existed at the time of the conveyance and known to both parties, which demonstrated that the seller intended to do something with the soil in half of the road, other than part with it to the purchaser. He stated that it was immaterial whether those facts appeared on the face of the conveyance, provided that it could be inferred that it was not the parties' intention that the presumption should apply in their case.

- [39] The learned Lord Justice referred to the case of **Leigh v. Jack**¹⁶ in which the Court of Appeal held that the rule did not apply. The Court found in that case the property was laid out for building and the property conveyed to the vendor was bounded by a proposed road. The Court held that 'it was obviously necessary that the vendor should retain the soil of that intended road in order that he might construct and make it into a road and then dedicate it to the public.'¹⁶ It determined that the use of the land for a road was reflected in the conveyance and the buyer must have known that half of it was not to pass to him.
- [40] Of what relevance therefore is the presumption to the case at bar? It seems to me that the Government having delineated two areas as 'road' on the plan attached to Mr. Glynn's Crown Grant, thereby signified their intention to reserve those areas for roads. Mr. Glynn acknowledged that when he bought his property there was no road in the disputed area, of which he now claims to own 50% by virtue of the presumption '*ad medium filum viae*'. Interestingly, he did not claim in his pleadings or testimony that he was entitled to half of the road. He sought a right of way. It is arguable and doubtful that he can establish it if he did not plead it.
- [41] The diagram which is attached to his Crown Grant depicts two roads on opposing boundaries to his lot. No doubt this signified to Mr. Glynn at the time that he bought the land that the Government was considering creating roads to provide him and any other buyers of land and neighbouring lands with access. This would have signaled to any reasonable purchaser or observer that the areas reserved for the creation of such roads were not being conveyed.

¹⁶(1879) LR 5 Ex. D. 264.

[42] I harbor no doubt that Mr. Kenneth Glynn knew and accepted when he bought his property in the 1980s that the Government did not include in his allotment, half of the land which is depicted on his northern boundary as a road. By including a diagram which depicted non-existent roads, the Government clearly signaled that they had other plans for the lands so demarcated. I am satisfied from those circumstances that the presumption '*ad medium filum viae*' does not apply in this case. I find that it does not.

[43] Moreover, in view of the provisions of the statute by which public roads are created and in light of the evidence adduced, I infer that the Governor- General had not created a road on the disputed access strip when Mr. Glynn bought lot 15 or at any time after. I am bolstered in this conviction and conclusion based on the statutory duty imposed on the Chief Engineer¹⁷ to repair and keep public roads in proper order and width as required by law. It is evident that no such creation, designation, maintenance and supervision had been exercised over the disputed land by the Chief Engineer during the relevant periods. This lack of attention belies the claim that it was ever a public road legally created and made part of the road network in Bequia, Saint Vincent and the Grenadines. It was therefore not a road which could have been conveyed pursuant to the presumption '*ad medium filum viae*' as claimed by the Glynnns.

Easement and Laches

[44] The Glynnns contended that they have been using the disputed land as an access road from 1982. They adduced no evidence regarding the frequency of such use. They submitted that the survey plan on which they rely has been approved and lodged at the Lands and Survey Department since 1976. No such survey plan was adduced into evidence.

[45] The Glynnns argued further that although Mr. Phillips fenced his land, he excluded the road from the confines of his fence and allowed them to pass as usual over the road. They submitted that:

'A claimant in equity is bound to prosecute his claim without undue delay ... in pursuance of the principle which has overlain the statutes of limitation "equity aids the vigilant, not the indolent" or "delay defeats inequities". A court of equity refuses its aid to stale demands, where the

¹⁷By section 5 of the Roads Act.

claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (laches)'.¹⁸

[46] They submitted that Mr. Phillips knew of their position regarding the road since at least 2004, a period of 9 years before he wrote them a letter or sued. They reasoned that the delay is unreasonable and that it would be extremely unjust to injunct them from what they have been doing for so long - coming and going from their house. They contended that this delay amounts to a waiver of those rights. They relied on the decision in **Lester v Woodgate**¹⁹. They argued that the underlying test is unconscionability. They submitted that Mr. Phillips should not be declared the owner of the road and that the equitable defences they have raised preclude the making of the equitable orders sought by him.

[47] Mr. Phillips contended that at the highest, the Glynns are unable to claim anything more than an easement to access the disputed road by a footpath. He submitted that they cannot claim an easement to a motorable road. He submitted that this is because the evidence led by them is that they accessed the disputed land by foot for many years, since it was not motorable until the 1990s. He argued that the evidence demonstrated that they only began accessing the disputed land by motor vehicle after construction on their house.

[48] Mr. Phillips argued that the Glynns did not plead the creation or existence of any such easement, but rather that they had a right to the proposed road on the plan, even though it was never created in that particular location but somewhere else. He contended that based on his (Phillips') testimony they never trespassed on the disputed land until construction of the house on lot 15 commenced around 2003 or 2004. He argued that they have not supplied any cogent evidence as to their use and occupation of the purported right of way or the frequency of such use. He submitted further that the Glynns have not pleaded any prescriptive right to the land and that this is fatal to any claim of an easement. He placed reliance on **Halsbury's Laws of England**²⁰.

¹⁸ Halsbury's Laws of England, (2014) Vol. 47, para. 253.

¹⁹ [2010] EWCA Civ 199, para. 20.

²⁰ 3rd Ed. Vol. 12, para. 1178.

[49] Easements may be created by express reservation or grant, implied reservation or grant, or by prescription. A person entitled to the benefit of an easement may bring an action for disturbance of an easement;²¹ and may recover damages for his loss.²² An easement is characterized by four features:

1. There must be a dominant and servient tenement.
2. The two tenements must be owned by different persons.
3. The easement accommodates the dominant tenement.
4. The easement must be capable of forming the subject matter of a grant.²³

[50] The Glynns did not expressly describe their claim as one for an easement (except when outlining the relief). However, they particularized their claim in such a way, that it can be gleaned from their pleadings that they were relying on their alleged use of the disputed land, as an access through land formerly owned by the Government and now claimed by Mr. Phillips as part of lot 26.

[51] Significantly, throughout their pleadings, the Glynns failed to acknowledge that Mr. Phillips succeeded the Government as owner of the disputed land. Therein lies their difficulty in succeeding with the claim for an easement. Their insistence that they owned half the disputed land and that their half comprised the entirety of the portion over which they claimed an easement, undermines their claim. This is because they cannot simultaneously be the owner of the dominant and subservient tenements served by an easement.

[52] Moreover, they provided no specifics about the frequency with which they allegedly traversed the disputed land. It is now accepted that an easement is established only through continuous use;²⁴ and that long lapses in such use defeats such claims.²⁵ The degree of continuity which is required

²¹ *Kidgill v Moor* (1850) 9 CB 364.

²² *Bower v Hill* (1835) 1 Bing NC 549 at 555.

²³ *Halsbury's Laws of England*, (2017) Vol. 87, para. 737. *Re Ellenborough Park*, *Re Davies*, *Powell v Maddison* [1956] Ch 131 at 163 CA, per Evershed MR.

²⁴ *Williams v Sandy Lane (Chester) Ltd* [2006] EWCA Civ 1738.

²⁵ *Llewellyn (dec'd) v Lorey* [2011] EWCA Civ 37.

to establish an easement varies. In the case at bar, Mr. Glynn did not indicate with any degree of specificity how often he, his family, servants and agents or members of the public enjoyed the use of the disputed land as a footpath. In the premises, the Glynn's claim for an easement is defeated on both scores. Their claim is therefore dismissed.

[53] As to the defence of laches, it is established that it will succeed if there is no statutory bar to the claim.²⁶ Accordingly, if the Limitation Act²⁷ or any other legislation provides a limitation period after which a cause of action cannot be prosecuted, the defence of laches would not be maintainable. Mr. Phillips initiated his claim in tort for relief in respect of alleged repeated acts of trespass; and nuisance. Claims for torts must be initiated within 6 years of the date that the cause of action arose,²⁸ to escape the limitation bar. Mr. Phillips charged that the alleged trespass spanned a period of years from 2004 through 2011 and up to the date he filed his claim in April 2013.

[54] Trespass is actionable for each fresh occurrence. This means that the limitation period is calculated from the time of the most recent act of trespass. Mr. Kenneth Glynn admitted that he prevented Mr. Phillips from fencing the disputed land. He certainly had actual notice by then that Mr. Phillips' had bought lot 26 and intended to assert his rights to it. He willfully closed his eyes and refused to accept or to secure a surveyor or other expert to advise him. He cannot now be heard to complain. I accept Mr. Phillips testimony that he was sending truck drivers away and was in verbal spats with the Glynn's over their use of the disputed land. I find that he sought to assert his right and interest to the subject property and was met with resistance and threats from the Glynn's.

[55] The Glynn's' assertion that they have only one access to their property is not borne out by the survey plan or Mr. Kenneth Glynn's testimony. While they might have chosen for convenience not to access lot 15 from the western route by the concrete public road, that does not render that road non-existent. It is accessible directly from lot 15, even if it means that Mr. Glynn might need to take

²⁶Halsbury's Laws of England (2014) Vol. 47, para. 253.

²⁷ Cap.129 of the Laws of Saint Vincent and the Grenadines, Revised Edition, 2009.

²⁸ Section 4 of the Limitation Act.

appropriate steps to plot and even pave a driveway to the property. This is nothing less than what many homeowners do to facilitate entry and exit from their properties. It is part and parcel of the steps taken when building a house. The Glynnns could have done that during the construction of their house and may do so now. Mr. Phillips should not have to deprive himself of any of the land he paid for to afford Mr. Glynn a second access to lot 15.

- [56] The Glynnns having accepted that they have habitually used and continue to use the disputed land, as recently as 2013, have acknowledged that the cause of action is not spent. Their defence of laches is not sustainable. To the extent that acquiescence and waiver of rights are elements of laches, those contentions are not made out²⁹. Furthermore, I am satisfied for those reasons that Mr. Phillips is not estopped from asserting his claim to the disputed land. In light of the foregoing, I find that Mr. Mc Carthy Phillips has established that he is the owner of the disputed land comprising the access road and amounting to 9,186 sq. ft. I so find.

Issue 2 – Has Mr. Kenneth Glynn or Mr. Kenworth Glynn has trespassed on the disputed property?

- [57] Trespass to property is committed when someone other than the owner enters land belonging to another and performs a physical act there without the owner's consent, and thereby interferes with his or her possession.³⁰ I accept that Mr. Phillips did not give permission to Mr. Kenneth Glynn or Mr. Kenworth Glynn to enter lot 26 and pass through the disputed land to lot 15. Each time they entered lot 26 without Mr. Phillips' consent they were trespassing.
- [58] They are liable for any unlawful entries which took place in the 6 years immediately preceding 15th April 2013 when the claim was filed. Mr. Kenneth Glynn admitted that he and Kenworth Glynn have used the disputed land repeatedly during the material period. Mr. Kenworth Glynn did not testify. He presumably placed reliance on his father's testimony which coincides with Mr. Phillips in relation to the period during which they have entered Mr. Phillips' property without his permission. I accept that they have done so from around 2001 and have continued to do so up to present. I find that Mr. Kenworth Glynn routinely drives his vehicles through that property on a daily basis, and

²⁹Halsbury's Laws of England (2014) Vol. 47, para. 255.

³⁰ Southport Corporation v Esso Petroleum Co. [1954] 2 Q.B. 182.

that Mr. Kenneth Glynn by his own admission enters the property occasionally. They have thereby trespassed on Mr. Phillips property.

Issue 3 – Is Mr. Mc Carthy Phillips, Mr. Kenneth Glynn or Mr. Kenworth Glynn liable for the alleged nuisance?

[59] During the trial, Mr. Richard Williams, learned counsel for Mr. Phillips, indicated that he was considering making an oral application to amend the statement of claim by deleting paragraph 8; and paragraph D of the relief seeking a declaration to restrain the Glynnns for continuing the alleged nuisance. Paragraph 8 of the statement of claim outlines the allegations as to the alleged nuisance. Learned counsel stated then that he wished to defer presentation of the proposed application to a time when he would have given consideration to it.

[60] In closing submissions filed subsequently³¹, Mr. Phillips submitted that he abandoned 'his claim of nuisance'. In such circumstances, he is taken to have withdrawn that claim. It is accordingly dismissed against Mr. Kenneth Glynn and Mr. Kenworth Glynn.

[61] Learned counsel Mr. Joseph Delves represented to the court while the trial was ongoing, that Mr. Kenneth Glynn and Mr. Kenworth Glynn were considering parallel applications in relation to their claim that Mr. Phillips disposed of garbage on lot 15 belonging to Mr. Kenneth Glynn. They filed no closing submissions and did not revisit this proposition.

[62] In their counterclaim, they averred that Mr. Phillips has 'on divers occasion' dumped garbage 'onto lot 15; and the Defendant's land and the said dwelling house thereon has been rendered unhealthy and uncomfortable to live on and in'. They alleged that they and members of their family have suffered great discomfort, inconvenience, disturbance and upset. They concluded 'the claimant has suffered loss and damage'. They must have meant 'the defendants'. However, they made no application for amendment to correct this statement.

[63] The Glynnns claimed a permanent injunction to restrain Mr. Phillips, his servants and agents from throwing garbage onto lot 15. Mr. Kenneth Glynn provided no testimony regarding the allegations of nuisance by Mr. Phillips. He and his son have failed to prove on a balance of probabilities that

³¹ On 8th November 2019.

Mr. Phillips dumped garbage on lot 15 as alleged. I make no finding that he did. The Glynn's claim for damages for nuisance and for a permanent injunction to restrain such nuisance is dismissed.

Issue 4 – To what remedies are Mr. Mc Carthy Phillips, Mr. Kenneth Glynn and/or Mr. Kenworth Glynn entitled?

Declaration and injunction

[64] Declarations and injunctions are equitable remedies which the Court will grant in appropriate cases if it is just and equitable to do so. The learned authors of **Halsbury's Laws of England** included in their treatise, a concise statement as to the availability of such relief, in actions for trespass to land. It is worth setting it out:

'The court may grant an injunction ... to prevent a continuance or threatened repetition of a trespass to land. ... Where the trespass is of a 'trifling' nature, or where damages are a sufficient remedy, or where the granting of an injunction would be oppressive, an injunction may be refused. Where the defendant claims a right to enter upon the land in question, the court, in addition to or in substitution for damages or an injunction, may make a declaration concerning that claim.'³²

[65] Having found that Mr. Mc Carthy Phillips owns the disputed parcel of land, and in view of the history between him and Mr. Kenneth Glynn regarding dealings with it, it is just and equitable that this court makes certain declaratory pronouncements in a bid to bring some finality to the feud. I take into account that Mr. Kenneth Glynn admitted that he stopped Mr. Phillips from fencing the disputed land by blocking the holes he had made, and also told him 'he can't fence there.'

[66] Mr. Phillips has been deprived from fully enjoying the land that he sacrificed and paid for over a number of years. There is no good reason why this should last any longer. It is accordingly declared that Mr. Mc Carthy Phillips is the fee simple owner of and entitled to all legal and beneficial title, rights and interests in the subject property registered by Crown Grant 45 of 2004.

[67] I am satisfied that Mr. Phillips took reasonable steps to bring about an amicable resolution to this dispute and that he brought this action within a reasonable period of time after he obtained title and

³²(2015) Vol. 97, para. 592.

after the most recent acts of trespass. I am concerned that if injunctive relief is not granted, that it is highly likely that the Glynnns will persist in accessing their property through Mr. Phillips'. If this continues, Mr. Phillips would likely suffer irremediable damage to the enjoyment of his property. Damages would probably not be adequate compensation in such case.

- [68] Mr. Phillips has been deprived of the full and exclusive use of his own property for several years while Mr. Kenneth Glynn and his son Kenworth have defied him and made a motorway through his 'yard'. This is inequitable and unjust. It is therefore ordered that with immediate effect, Mr. Kenneth Glynn and Mr. Kenworth Glynn are restrained whether by themselves, their servants and/or agents from trespassing on the subject property or from interfering, hindering, or obstructing in any way Mc Carthy Phillips' and/or his servants' and/or his agents' enjoyment of the subject property, registered by Crown Grant⁴⁵ of 2004 and depicted in the survey plan attached to it. I make no order for the Glynnns to remove the concrete wall allegedly built by them on lot 15. In my opinion, justice, peace and order can best be achieved by keeping the parties separated and out of one another's space.

Damages

- [69] Trespass to land is actionable *per se*. A person who is found liable for trespass is entitled to recover damages. Mr. Phillips has established on a balance of probabilities that Mr. Kenneth Glynn and Mr. Kenworth Glynn have repeatedly trespassed on his land at Bequia, without legal justification. He must prove the extent of his loss which he is entitled to recover from the Glynnns. Mr. Phillips must therefore file an application for assessment of damages within 2 months of today's date (i.e. on or before 5th February, 2020).

Costs

- [70] A litigant who succeeds at trial is generally awarded costs. There is no reason why Mr. Phillips should not recover his costs from Mr. Kenneth Glynn and Mr. Kenworth Glynn. Mr. Phillips did not specify a particular sum³³ in respect of the damages claimed. The parties are at liberty to agree an amount for costs. If there is no agreement, costs are to be calculated based on a sum stipulated by the court as the value of the claim. Neither party made submissions on this aspect of the case. It is

³³In accordance with CPR 65.5 (2) (a).

fitting that they be invited to do so during the assessment stage failing agreement on quantum of costs. Mr. Kenneth Glynn and Mr. Kenworth Glynn shall pay to Mr. Phillips costs to be determined at the assessment stage based on the court's stipulation³³, if not agreed.

ORDER

[71] It is declared and ordered:

- (1) Mr. Mc Carthy Phillips is the fee simple ownerof and entitled to all legal and beneficial title, rights and interests in the subject property registered by Crown Grant45 of 2004.
- (2) Mr. Kenneth Glynn and Mr. Kenworth Glynn are liable to Mr. Mc Carthy Phillips in damages for trespass, to be assessedon application to be made on or before 5th February, 2020.
- (3) With immediate effect, Mr. Kenneth Glynn and Mr. Kenworth Glynn are restrained whether by themselves, their servants and/or agents from trespassing on the subject property or from in any way, interfering, hindering, or obstructing Mr. Mc Carthy Phillips and/or his servants' and/or his agents' enjoyment of the subject property, registered by Crown Grant45 of 2004 and depicted in the survey plan attached to it.
- (4) Mr. Kenneth Glynn's and Mr. Kenworth Glynn's claim is dismissed.
- (5) Mr. Mc Carthy Phillips' claim in nuisance is dismissed.
- (6) Mr. Kenneth Glynn and Mr. Kenworth Glynn shall pay to Mr. Mc Carthy Phillips costs to be determined at the assessment stage based on the court's stipulation, if not agreed.

[72] I am grateful to counsel for their written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar