

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV 2015/111

BETWEEN:

**DELMA MADURO
UTIA SCATLIFFE
PAUL VALACK
RUTH DANCIA PENN
KELVIN LAWRENCE PENN
EVADNEY HODGE**

Claimants

And

**KISHMA PENN
RAPHALA JUANITA PENN**

Defendants

Appearances: Mr. Sydney Bennett, QC with Ms. Anthea Smith, Counsel for the Claimants
Ms. Kishma Penn, Defendant in Person

2017: November 7

JUDGMENT

[1] **Ellis J.:** In this Claim, the Claimants who are Administrators of the Estate of Idalia Davies claim against the Defendants the following relief:

- i. An order for rectification of the Land Register for Parcels 156, 157, 197, 199, 200, 201 and 249 which:
 - (a) Inserts into the encumbrances section of the Registers for Parcels 199 and 249 details of the proposed Right of Way shown on Plan of Subdivision No. CA-3139-59-T.

(b) Inserts into the appurtenances section of the Registers for Parcels 156, 157, 197, 198, 199, 200 and 201, the details of the proposed Right of Way shown in Plan of Subdivision No. CA-3139-59-T.

- ii. Alternatively, a declaration that the Claimants are entitled to a Right of Way of necessity over Parcels 199 and 249 for themselves, their agents and licensees on foot and with or without vehicles and other conveyances at all times for the purpose of access to the public road.
- iii. Costs.
- iv. Such further or other relief.

[2] This Claim stems from the transmutation of Parcel 55 of Block 3139B of East End Registration Section. Originally, this Parcel measured 7.75 acres and was held in common and in 4 equal shares by the following proprietors:

- 1. Haldane and Marshall Davies, co-executors of the estate of Claremond Davies
- 2. Pauline Jacobs
- 3. Pearline Flax
- 4. Rosetta Carrot, Administratrix of the Estate of Mary Davies

[3] In 1990, these four co-owners agreed to subdivide Parcel 55 into four Parcels. They retained the services of a licensed Land Surveyor, Mr. Harold Llewellyn who on 29th January, 1990 prepared Survey Plan No. CA-3139-59-T for that purpose. Mutation No. 61/1991 subdivided Parcel 55 into: Lot A – Parcel 154, Lot B – Parcel 155, Lot C – Parcel 156 and Lot D – Parcel 157.

[4] The resulting parcels were so situated that only the northernmost parcel (Lot A – Parcel 154) had direct access to the public road. The plan of subdivision therefore expressly provided for and depicted a 20 foot Right of Way from the northern boundary of southernmost parcel (Lot D – Parcel 157) over the other parcels (Lot C – Parcel 156, Lot B – Parcel 155 Lot A – Parcel 154), which leads to the public road (the Right of Way). The Right of Way was created for the benefit of each of the four newly created Parcels and served to ensure that none of them would be landlocked.

[5] This plan of subdivision was approved for the general boundaries by the Chief Surveyor on 3rd August 1990. By Mutation No. 61/1991 dated 23rd April 1991, the Registrar of Lands requested that the Chief Surveyor “*give effect to the attached subdivision in accordance with Survey Plan No.*

CA-3139-59-T.” In the Schedule of Easements on this Plan depicted a 20 foot Right of Way from the northern boundary of the southernmost lot over all of the other Parcels to the public road.

- [6] The Claimants contend that upon entry of the newly created Parcels 154, 155, 156 and 157 into the land register, the proposed Right of Way shown on the Survey Plan No. CA-3139-59-T was omitted. They contended that the omission of the proposed Right of Way from these registers was an oversight and a mistake because the Right of Way was clearly represented in the Schedule of Easements to the Plan.
- [7] The Claimants assert that because of the omission of the proposed Right of Way in the encumbrances Section of Parcels 154, 155, 156 and 157, the subdivision created three parcels which would be landlocked when, as contemplated, the parcels would come into separate ownership.
- [8] These difficulties manifested when, in 1994, Parcel 155 was subdivided into Parcels 197, 198, 199, 200 and 201 pursuant to Mutation 51/1994. On that plan of subdivision, a 20 foot Right of Way is reflected in the approximate position of the 20 foot Right of Way depicted on the 1990 subdivision and granted Parcels 197 and 198, access to the public road over Parcel 154. The Land Registers for these Parcels reflected a 20 foot Right of Way for their benefit over Parcels 200 and 154.
- [9] The Claimants contend that the remaining Parcels 156, 157, 200 and 201 are entitled to the benefit of the same Right of Way.
- [10] On 16th June 1998, Parcel 154 was subdivided into Parcels 248 and 249 pursuant to Mutation 38/1998. The application for subdivision was advanced by the registered proprietors of the then Parcel 154 and was supported by the Plan of Subdivision No. CA-3139B-90-T. The 20 foot Right of Way which gave access to Parcels 197 and 198 was then located in the center of the newly created Parcel 249.
- [11] On 9th August 2005, the Defendants became the registered joint owners of Parcel 249. At that date, the encumbrances section of the land register for Parcel 249 reflected the Right of Way in

favour of and for the benefit of Parcels 197 and 198 only. The Claimants contend that because of this erroneous omission, Parcels 156, 157, 197, 198, 200, 201 remain landlocked.

- [12] On 25th October 2012, the then registered proprietors collectively applied to the Registrar of Lands to have the encumbrances sections of the registers for Parcels 199 and 249 rectified to show the Right of Way for the benefit of not only Parcels 197 and 198 but for all of the other parcels resulting from the original subdivision of Parcel 55. All of the proprietors of the parcels resulting from the subdivision of Parcel 55 consented to this application save for the Defendants. The consequence is that the Right of Way goes up to the boundary of Parcel 249 only, such that Parcels 156, 157, 199, 200 and 201 are essentially landlocked. As a result, the Claimants have commenced this Claim for relief.

THE DEFENDANTS' ROLE IN THE PROCEEDINGS

- [13] By case management order dated 5th April 2016, the Parties were ordered to complete standard disclosure and to exchange Witness Statements. A further case managements order was made on 26th September 2016 in which standard disclosure and exchange of witness statements were again ordered. In addition, the parties were ordered to produce a joint statement of facts and issues by a prescribed date. In the event that agreement could not be reached, the parties were ordered to file separate statements.
- [14] The Defendants failed to comply with any of these orders and they failed to seek relief from the sanctions which were imposed by Civil Procedure Rules Part 28.13 and Part 29.11. Therefore, this Court only had regard to the statement of issues identified by the Claimants in their statement filed on 1st November 2016. Moreover, in accordance with the Civil Procedure Rules, the Defendants were not permitted to call witnesses and or to rely on or produce any documents to support their case.
- [15] In addition, by the date of trial, both Defendants were not legally represented. The First Defendant appeared pro se and the Second Defendant made no appearance.

- [16] Nevertheless, the Defendants oppose the Claim. First, they contend that in the absence of an implied or express easements, the Claimants cannot rely on Plan No. CA-3139B-59-T to prove the existence and or establishment of a purported easement over Parcel 249 (formerly part of Parcel 154 formerly part of Parcel 55). They assert that the registered owners at that time could not have legally created any easement in view of the fact that they did not hold the legal beneficial interest in Parcel 55 and the resulting lots, because Haldane Davies and Marshall Davies, Pauline Jacobs, Pearline Flax, Rosetta Carrot held as trustees or personal representatives with respect to the beneficial interests of the Penn family. They further state that a restriction against dealings had been placed on Parcel 55 by Basil Penn. They contend that this restriction was still validly registered at the time of the purported mutation.
- [17] The Defendants therefore assert that the entry of the Right of Way in the encumbrances section of the land registers prior to the vesting of the legal and beneficial interests of the parcel in the Penn family was void and of no effect.
- [18] The Defendant also contended that the Right of Way reflected in the Plan No. CA-3139B-59-T was only a proposed easement which was subject to the consent and approval of the beneficially entitled owners, including the late Basil Penn. They say that on the plan of subdivision, the proposed Right of Way appears in the form of a dotted line, which constitutes little more than a suggestion which must be approved by the parties who are legally and beneficially entitled to the Property and they submit that until such approval has been validly and conclusively obtained, the proposed Right of Way cannot crystallize.
- [19] The Defendants further contend that the Registrar of Lands did not omit the purported Right of Way by mistake because the proposed easement had not become one which could properly be included as an encumbrances. They therefore assert that the Registrar acted with due regard to the law. They further contend that the entry of the Right of Way over Parcel 249 in favour of Parcels 197 and 198 is in fact a patent error which is void and of no effect.
- [20] The Defendants also advance that Parcels 156, 157, 199, 200 and 201 are not landlocked as there are alternate means of access to the said Parcels.

[21] Finally, the Defendants say that they have always been interested in developing Parcel 249 which measures approximately 0.558 acres. Because the proposed Right of Way slices Parcel 249 down the middle, they submit that it leaves no scope for development and would all but render their property useless. They assert that if the proposed easement is granted, it will deprive them of the benefit of their property. In the event, that the easement is approved, they submit that the Court must order that the Claimant compensate the Defendants for the loss of their property and its use.

EASEMENTS

[22] An easement confers the right to use the land of another in some way and for a specified purpose. Once it is deemed a legal easement, it permanently binds the land over which it is exercisable and permanently avails the lands which it benefits. The essential elements of an easement have long been settled. **Re Ellenborough Park**¹ prescribed that to qualify as an easement;

1. There must be a 'dominant' and 'servient' tenement. This means that one plot of land must have the benefit of the right and another plot must have the burden. The right cannot exist independently of the ownership of land. An easement which is appurtenant to dominant tenement will pass on the transfer of land.
2. The right must 'accommodate and serve' the dominant tenement. This means that it must be of benefit to the land and not a personal right granted by the owner.
3. The dominant and servient tenements must be owned and occupied by different persons; and
4. The easement must be capable of forming the subject matter of a grant.
5. The right must also be within the nature of rights capable of being easements and it must be sufficiently definite.

[23] Easements may be acquired expressly, by implication or by prescription. The Claimants contended that the Right of Way which burdens Parcel 249 was created expressly and by implication. The Court must therefore consider both of the legal bases advanced.

[24] An easement may be created or acquired by grant. No special form of words is required but the extent of the easement and the description of the dominant and servient tenement must be reasonably clear.

¹ [1956] Ch. 131

- [25] An easement may also be created or acquired expressly by reservation. This arises where an owner land sells a part of it and wishes to reserve an easement over the land sold in favour of the land retained by him.²
- [26] The Claimants have not advanced that any express wording created a grant or a reservation of the Right of Way. Instead, they rely on the notation in Plan No. CA-3139B-59-T which reflects a 20 foot easement with the dominant tenement recorded a Lot A, B, C and D and the servient tenement listed as Parcel 55. Applying the legal principles adumbrated in **Re Ellenborough Park** and also **London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd**³, the Court is satisfied that this recording would not *without more* have created a legal easement. This is because at the time this Plan was recorded, Parcel 55 and its proposed subdivided lots would have been owned by the same parties. On the Claimant's own evidence, the ownership of the Parcels was only divided after the resulting Mutation would have been registered.
- [27] It is apparent that when the Registrar of Lands gave effect to Mutation (No. 61/1991), he/she did not record the proposed 20 foot Right of Way on the newly created Parcels 154, 155, 156 and 157. This omission is fully supported by legal principle because a person cannot have an easement over his own land. The essence of an easement is that it is a right **over the land of another**. At the relevant date, the co-owners would simply have been exercising their rights of ownership over their own land.
- [28] In written submissions before the Court, the Claimants nevertheless argued that the process of subdivision supported the creation of an easement. They relied on the expert Report of the Surveyor, Mr. Winston Donovan who concluded that:
- “... the Plan of Subdivision inclusive of proposed lots and easement is approved as an integrated whole. Upon approval by the Planning Authority it is authenticated by the Survey department. Parcel numbers are assigned and easements noted as part of the process of approval and registration, both on the cadastral map and mutation form and filed at the Land Registry.”

² Johnstone v Holdway [1963] 1 ALL ER 432

³ [1993] 4 ALL ER 157

[29] This expert evidence very helpfully described the procedural requirements for obtaining planning permission for a subdivision. It may well be that a subdivision depicting landlocked lots would not secure planning permission. In the Court's judgment, having a subdivision plan approved by the planning authority would not in any way compel the Registrar of Lands to register an easement in circumstances where Parcel 55 and the lots derived from the subdivision remained in common ownership. There could at law be no registered easement from any one lot over any other because the registered proprietors were all entitled to use the entirety of the land.

[30] In the Court's judgment, this issue is critical to the outcome of the claim for rectification relief.

RECTIFICATION OF LAND REGISTER

[31] The Claimants ask the Court to order the rectification of the named registers and they do so pursuant to Section 140 of the Registered Land Act. This section provides as follows:

- "(1) Subject to the provisions of subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

[32] In the Court's judgment, the power given to the Court to rectify the register by Section 140 (1) of the Registered Land Act is not to be exercised lightly and "*is premised on the Court being satisfied that any registration, including a first registration, was obtained, made or omitted by fraud or mistake.*" This provision makes it clear that the party seeking rectification bears the onus of proof to establish that any registration in the chain of titles was obtained by fraud or mistake. **Carmine Emy Cabanas v Jesus Cowo**⁴

⁴ Claim No. 388 of 2011 2014, January 21

[33] The Claimants in the case at bar do not alleged fraud in their pleadings. Instead, they contend that the 20 foot Right of Way shown on Survey Plan No. CA-3239B-59-T dated 29th January 1990 was omitted from the Land Register relating to Parcels 154, 155, 156 and 157 by mistake. They assert that such omission constituted an inadvertent failure to give effect to the subdivision of Parcel 55 which had been approved. They further contend that Mutation No. 61/1991 required the Chief Surveyor to “*give effect to the attached sub-division in accordance with Survey Plan No. CA-3139B-59-T.....*”

[34] The word “mistake” in this provision is not defined in the Registered Land Act. However, English case law has been somewhat instructive. In **Chowood v Lyall**⁵, the Court was careful to ensure that the definition is not unduly limited in scope. The Court stated:

“The other point was that the case has not been brought within section 82, because the registration of the plaintiffs' title was not a mistake within the meaning of sub-section 1 (h) of that section. I disagree with that contention. I see no reason to limit the word "mistake" in that section to any particular kind of mistake. The Court must determine in every case whether there has been a mistake in the registration of the title, and if so, whether justice requires that the register should be rectified.”

[35] The case of **NRAM Ltd v Paul Morgan Evans and Anor**⁶ is particularly instructive. At paragraphs 49 – 51, the English Court of Appeal reiterated the position;

49. “It is therefore of no surprise that the term is generally understood to have a broad if somewhat uncertain scope and to encompass a wide range of circumstances, including, for example, the accidental registration of particular land in two different titles....

50. Despite the scope and largely undefined nature of the term "mistake" in this context, the Law Commission noted in its 2016 Consultation Paper No. 227 entitled "Updating the Land Registration Act 2002" at 13.79 to 13.80 that a degree of consensus appeared to be emerging as to its boundaries. In that regard the Law Commission referred to **Megarry & Wade, The Law of Real Property 8th ed.** whose editors observe at 7 – 133 that:

"What constitutes a mistake is widely interpreted and is not confined to any particular kind of mistake. It is suggested therefore that there will be a mistake whenever the registrar would have done something different had he known the true facts at the time at which he made or deleted the relevant entry in the register, as by:

⁵ (No. 2) [1930] 2 Ch. 156

⁶ [2017] EWCA Civ 1013

- (i) making an entry in the register that he would not have made or would not have made in the form in which it was made;
- (ii) deleting an entry which he would not have deleted; or
- (iii) failing to make an entry in the register which he would otherwise have made." (footnotes omitted)

51. The Law Commission also referred to ***Ruoff & Roper, Registered Conveyancing looseleaf ed.***, the authors of this work adopt, at 46.009, very much the same formulation as that of the editors of ***Megarry & Wade, The Law of Real Property***:

"Mistake" is not itself specifically defined in the 2002 Act, but it is suggested that there will be a mistake whenever the Registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that he would not have made in the form in which it was made; (iii) fails to make an entry in the register which he would otherwise have made; or (iv) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion. The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration.... "

[36] However, relevant case law also makes it clear that timing is critical. A court exercising its discretion under Section 140 of the Act must focus on the position at the point in time that the relevant entry was made. In other words, if an entry, deletion or omission is correct at the time that it is made, *"it is very hard to see how it can be called a mistake."*⁷

[37] It follows that where a legal condition which is a prerequisite for registration of an easement has not been satisfied, a Registrar could not properly record this easement as an encumbrance in the land register. This position appears to have been conceded by the Claimants who rely on Mr. Donovan's expert evidence that:⁸

"Based on my knowledge of the function of the Land Registry, the parcels created are recorded on the Register into the name of the owner of the property, including any easements created. That on sale or transfer of parcels to other persons, the owner grants an easement (the Dominant Tenement) over the easement (the Servient Tenement). From what has been observed, it appears that the Chief Registrar of Lands does not have to ensure that all parcels are granted an easement on the registration of the plan as approved to have access to the public road, only to those transferred, being that those not transferred are retained by the original owner."

⁷ NRAM Ltd v Paul Morgan Evans and Another

⁸ Paragraph 5 of the Report dated 10th January, 2017

- [38] During the course of the trial, Counsel for the Claimants readily conceded that when a subdivision takes place, the registrar will assign the lots in the name of the original owner. As ownership of the lots changes (through sale or otherwise) easements would be granted or reserved on the transfer of lots. Counsel correctly submitted that an easement is only recorded when there are separate owners. If the land is in one name; there is no need to record an easement.
- [39] It was not disputed that at the time of subdivision and the recording of Mutation No. (61/1991), the lots were still jointly held by the same registered proprietors. While the Court has no doubt that the Survey Plan No. CA-3139-59-T with its proposed easement was sanctioned and approved by the then co-proprietors, for the purposes of the Registered Land Act and the law of easements, the Right of Way could only harken to a future contingency.
- [40] The Claimants submitted that once the lots were separately held, then that easement should have “kicked in”. They were however unable to provide the Court with any evidence of how and when co-ownership was partitioned. Instead, they merely assert that subsequent subdivisions appeared to have followed the original Plan.
- [41] A review of the registers provided reveals that:
- i. Block 3139B Parcel 156 reflects in the **Appurtenances Section** a 20 foot Right of Way over Block 3139B Parcel 199 and in the **Encumbrances Section** a 20 foot Right of Way in favour of Block 3139B Parcel 157 by virtue of Instrument 666/2013 dated 17th April 2013. This Instrument was not provided to the Court.
 - ii. Block 3139B Parcel 157 reflects in the **Appurtenances Section** a 20 foot Right of Way over Block 3139B Parcels 156 and 199 by virtue of Instrument 666/2013 dated 17th April 2013. This Instrument was not provided to the Court. There is no encumbrance recorded.
 - iii. In 1994, Block 3139B Parcel 155 was mutated into Parcels 197, 198, 199, 200 and 201.
 - (a) Block 3139B Parcel 197 reflects in the **Appurtenances Section** a 20 foot Right of Way over Block 3139B Parcels 154 and 199. The basis of this Appurtenance is not indicated. There is no encumbrance recorded.

- (b) Block 3139B Parcel 198 reflects in the **Appurtenances Section** a 20 foot Right of Way over Block 3139B Parcels 154 and 199. The basis of this Appurtenance is not indicated. There is no encumbrance recorded.
- (c) Block 3139B Parcel 199 reflects no appurtenances. However, in the **encumbrances Section** a 20 foot Right of Way is given in favour of Block 3139B Parcel 197 and 198 by virtue of Instrument 672/1994, dated 14th April 1994 and a 20 foot Right of Way is given in favour of Block 3139B Parcels 157 and 156 by virtue of Instrument 666/2013 dated 17th April 2013. The latter Instrument was not provided to the Court. However, Instrument 672/1994 is an Application for subdivision of Parcel 155, in accordance with Survey Plans No. CA-3139B-70-T and No. CA-3139B-71-T.
- (d) Block 3139B Parcel 200 reflects no appurtenances or encumbrances.
- (e) Block 3139B Parcel 201 reflects no appurtenances or encumbrances.
- iv. Block 3139B Parcels 48 and 154 were mutated into Parcels 247, 248, 249 and 250. The Court was provided only with the land register in respect of Block 3139B Parcel 249 and that reflects no appurtenances. In the **Encumbrances Section** a 20 foot Right of Way in favour of Block 3139B Parcels 197 and 198 by virtue of Instrument 672/1994 dated 14th April 1994. Instrument 672/1994 is an Application for subdivision of Parcel 155 in accordance with Survey Plans No. CA-3139B-70-T and No. CA- 3139B-71-T.

[42] It follows that the easement which currently burdens Block 3139B Parcel 249 was registered in 1994 in favour of Parties who are not before the Court. Moreover, its registration followed a process which is not entirely clear to this Court. This Court can therefore draw no conclusion in that regard. However, the Claimants have not advanced that there was a grant or reservation of a Right of Way which meets the legal requirements for registration. Instead, they rely on the original subdivision plan for Parcel 55. The Claimants have not satisfied the Court that an automatic “kicking in” of an easement is without more a means by which a Right of Way can be legally acquired. In the Court’s judgment, the case for rectification has not been made out on either of the preconditions for rectification under Section 140 (1). This claim for relief is therefore denied.

EASEMENTS OF NECESSITY

- [43] In the alternative, the Claimants seek a declaration that they are entitled to a Right of Way by way of necessity over Block 3139B Parcels 199 and 249. This is one of three categories by which an easement can be implied in favour of a landowner.
- [44] An easement of necessity is implied only where the right is essential for the use of the land granted or retained. The question is not whether it is necessary for the reasonable enjoyment of the land but whether the land can be used at all without the implied grant or reservation. An easement will not be implied by this route merely because it makes it more convenient to use the land. It will also not be implied where there is some other means of access, even if that route is difficult and expensive to use. **Barry v Haseldine**⁹.
- [45] In **Boisson v Letrean**¹⁰, Hamel-Smith J. refused to imply an easement of necessity where there was a means of access, albeit over mountainous and difficult terrain. The learned Judge stated:
- “The law is clear. The right only arises by way of necessity, not convenience. I fully appreciate that this is mountainous terrain and access....to the dominant land is going to be difficult. But there is access and a way of necessity can only exist where the alleged implied grantee of the easement has no other means of reaching his land. If other means of access exist, no matter how inconvenient, an easement of necessity cannot arise for the mere inconvenience of an alternative way will not itself give rise to a way of necessity.”
- [46] In another case¹¹, Hamel-Smith J. made it clear that a claimant has established that his property is landlocked, the onus then shifts to the defendant to show the existence of an alternative route. The Defendant must show that there is a legally enforceable means of access. Any access over private land, where use is by permission of the owner, will be disregarded.
- [47] In the case at bar, the Claimant contended that a right of way of necessity arises from the fact that unless a right of way over Parcel 249 is implied, Parcels 156, 157 and all Parcels resulting from the subdivision of Parcel 55 will be landlocked. Because of the limited participation of the Defendants

⁹ [1952] Ch. 835

¹⁰ (1989) High Court Trinidad and Tobago, No. 4435 of 1985 unreported

¹¹ Rampersad v Jattan (1989) High Court Trinidad and Tobago No. 4556 of 1988 unreported; Ramdass v Ramdass (1989) High Court, Trinidad and Tobago No. 1171 of 1988 unreported

during the course of the trial brought about that the automatic sanctions which followed their refusal to comply with case management orders, the Defendants did little to discharge their burden of proof. Instead, during the course of the trial, the First Defendant questioned the Claimants' witnesses about the possibility of obtaining access to the main road over lands of other landowners whose lands were not derived from Parcel 55. The First Claimant testified that they had made attempts to do so but there was no success. She asserted that they have no entitlement to access the main road over the lands other than Parcels 199 and 249.

- [48] The Claimants categorically submit that unless there is a right of way from Parcel 156 over Parcel 249, then the Claimants land is landlocked. When the Court had regard to the totality of the evidence advance, it is clear that this contention was not successfully traversed by the Defendants.

INTENDED EASEMENT

- [49] Moreover, the Court is satisfied that the Claimant's case makes out a strong case for the implication of an easement on the basis of the common intention. The Court is guided by the following dictum of Lord Parker in **Pwllbach Colliery v Woodman**¹²:

"The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used...But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

- [50] Lord Parker went on to clarify that¹³:

"... it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

¹² [1915] AC 634 at 646-647

¹³ Ibid at page

- [51] In considering the circumstances in which a court will imply an easement, the learned authors of **Gray, Elements of Land Law**¹⁴ highlighted the parallels between easements of necessity and intended easements. They point to the fact that a common intention to grant an easement will normally exist only in the case of necessity. The English case of **Nickerson v Barraclough**¹⁵ is illustrative. It concerned a plot of land that had formed part of a larger estate. The estate had been divided into a number of plots (including that owned by the plaintiff). It was contemplated that the plots would be used for building purposes. The plans prepared at the time of the sale in 1906 had shown the intended line of the roads to be built to serve the development. The conveyance had, however, expressly stated that the line of the roads might be changed and that no easements were granted over any part of the seller's land until the roads had been completed.
- [52] The English Court of Appeal held that easements of necessity are based on the presumed intention of the parties. However, the Court went on to hold that a clearly expressed intention not to grant an easement would prevent an easement of necessity from arising.
- [53] In **Stafford and another v Lee and Another**¹⁶, the plaintiffs obtained planning permission for a house that fronted a driveway belonging to the defendants. In 1955, the land had been conveyed by deed of gift to the plaintiffs' predecessors in title by the defendants' predecessors in title, but the deed contained no express grant of a right of way to use the driveway. The defendants asserted that the plaintiffs had no right to pass along their driveway for any residential purposes. The plaintiffs obtained a declaration in the Exeter County Court that they were entitled to an implied easement or right of way over the defendants' driveway. The defendants appealed. The Court of Appeal concurred with the trial judge that the 1955 deed and the plan attached thereto showed that the land was to be used in some definite and particular manner and that the easement claimed was necessary to give effect to that use.
- [54] Another case which illustrates the view that intention is the basis of necessity is the Jamaican case of **J & O Operations Ltd. v Kingston and St. Andre Corporation**. Here, a developer in seeking approval to subdivide the area of the proposed development and secure registered titles must have

¹⁴ 1987

¹⁵ [1981] Ch 426, CA

¹⁶ [1992] A.C.3 in 1989

intended that the claimant's lots should have access over the defendant's adjacent parking lot, as "in all other directions they would cross onto lands of other registered proprietors."¹⁷ Ultimately, the Privy Council held that no easement should be implied as there was a public right of way between various lots and the principle streets of the development which was available to the appellants in the same way as to any member of the public. This case is particularly useful because it considers the acquisition of an easement in the context of a subdivision plan.

[55] The Court must therefore consider whether there was a common intention of the parties that an easement should exist. Ultimately, the essence of the Claimants' case is that an implied easement arose from the original subdivision of Parcel 55, which enabled lot owners in the subdivision to use the Right of Way on the approved subdivision plan, without requiring a specific grant of easement to each new lot when first conveyed. They submitted that the subdivision, inclusive of the easement thereby created, must be taken to have resulted from an agreement between the then proprietors of Parcel 55. Counsel for the Claimants submitted that the original proprietors/applicants for subdivision contemplated that once mutated, the resulting parcels would be held in separate ownership. He argued that they must have been well aware that unless provision was made for the resulting parcels to have access to the public road all but the northernmost parcel would be landlocked. Accordingly, they commissioned a survey plan which provided for a Right of Way measuring 20 feet and in the location identified on the plan. Counsel submitted that the existence of this plan is the clearest evidence of the intention of the proprietors of the parent parcel as to the creation, size and location of the Right of Way intended to grant access to parcels resulting from the subdivision of that land when those parcels ceased to be in common ownership.

[56] Counsel further pointed out that the subsequent subdivisions of the relevant lands created easements which except for minor variations in orientation were consistent with the easements shown in Survey Plan No. CA-3139B-59-T. This consensual intent is further illustrated by the fact that all of the current owners have consented to the rectification save for the Defendants.

¹⁷ (2005) Supreme Court, Jamaica, No CLJ-116 of 1999, unreported

- [57] The Court has no doubt that the creation, size and location of the proposed easement was the result of an agreement by the original registered proprietors of Parcel 55. The Court is not persuaded by the argument that these original registered co-proprietors would not have been legally empowered to agree to a subdivision in the terms presented and in accordance with the Plan. The Defendants have advanced no legal authority which circumscribes the powers of a personal representative in the way suggested.
- [58] The implication of an easement of necessity is based on what the parties must have intended, given the fact that land is landlocked and they are unlikely to have intended this. While neither side provided relied on the evidence of the original proprietors to the mutated lots, they must all be taken to have been aware of the approved and registered plans for the mutation of this land since the proposed easement was clearly indicated in the registered subdivision plan.
- [59] In **Pwllbach Colliery Co Ltd v Woodman**, Lord Parker stated that: *“The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes for which the land was granted or some land retained by the grantor to be used.... But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use.”* In the case at bar, the Parties clearly intended to subdivide and mutate the Parcel with a view to eventually partitioning ownership. The Right of Way is clearly indicated in the Schedule of Easements and its proposed location is delineated on the drawing. This plan was approved by the Chief Surveyor and duly registered.
- [60] The evidence of this common intention is also convincingly illustrated in the application for subdivision of Parcels 48 and 154 filed on 16th February 1998. Parcels 48 and 154 were later mutated to create four parcels including Parcel 249. This application was advanced by the then co-proprietors, Dauntless Penn, Bailey Penn and Godwin Penn and it attached Survey Plan No. CA-3139B-90-T which reflected the same Right of Way. The relevant land register then records this Right of Way in the encumbrances section in favour of the contiguous Parcels 197 and 198.

[61] The Defendants do not appear to dispute this. Instead, the First Defendant submitted that the positioning of the Right of Way should be adjusted because the current position results in two undersized Parcels which unduly limits the Defendants ability to develop their property. She submitted that the Court should not approve a right of way which would leave the servient owner without reasonable use of their Property.

Should the Court decline to imply the Right of Way where it would substantially deprive the Defendants of the reasonable use of their Property?

[62] The First Defendant pointed out that she owns Parcel 249 in common with her sister, the Second Defendant. She contended that in the event that they both wished to construct homes on the Parcel, the current configuration of the Right of Way splits the Parcel in two, leaving lots which would not meet the residential or commercial development requirements as it relates to hillside property. She submitted that any attempt at partition would be fruitless because the dimensions of the resultant parcels would be less than the minimum prescribed by law.

[63] The First Defendant relied on a numbers of cases which extol the principle that an easement must not amount to occupation which would substantially deprive the servient land owner of possession; (see: **Clos Farming Estates v Easton**);¹⁸ or which would give exclusive and unrestricted use to the dominant land owner (see: **Reilly v Booth**);¹⁹ or which would leave the servient land owner without reasonable use of his land (see: **London Blenheim v Estates v Ladbroke Retail**)²⁰.

[64] The relevant authorities make it clear that it is irrelevant what other land the servient owner owns; exclusive possession is to be judged on the area of land subject to the easement only. In the Court's judgment, there is no evidence that the grant of the Right of Way would give exclusive and unrestricted use to the dominant landowner such as to deprive the Defendants of possession of their property. It has not been suggested that the Claimants intend to use the Right of Way in a manner which would amount to a claim to exclusive possession of any part of the Defendant's

¹⁸ [2002] NSWCA 389

¹⁹ (1890) 44 Ch. D 12

²⁰ [1993] 4 ALL ER 157

property. The only obligation which the Defendants would have would be to refrain from any action which would impede the enjoyment of the Right of Way.

- [65] In regard to the contention that they would be left without reasonable use of their land, the Court is satisfied that the cited English Court of Appeal judgment of **London Blenheim v Estates**²¹ does not assist the Defendants. The correct judgment which specifically discusses this issue is cited at **[1993] 3 ALL ER 307** which sets out the first instance judgment of Paul Baker QC (later affirmed by the Court of Appeal) at page 317, the learned Judge stated:

“The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant.”

- [66] That case concerned the grant of a right to park. The owners of land over which the local Co-op store had an easement for car parking which provided for additional rights of car parking if the servient owner (London and Blenheim) acquired more adjoining land. The Co-op sold their dominant land to Ladbroke, who in turned claimed additional parking rights once London & Blenheim Estates acquired more land. The Court was asked to consider whether Ladbroke was entitled to more parking rights. Ultimately, the Court of Appeal held that London & Blenheim Estates could not claim a car parking right for additional land, because the alleged dominant tenement was not adequately identified. The Court reasoned that such a claim would undermine the certainty of the easement, potentially depriving the servient landowner of the reasonable use of unidentified land in the future.

- [67] This judgment was approved in **Batchelor v Marlow**²², which concerned a use/right allowing the dominant owner to park three cars on a space in the servient tenement only large enough to accommodate those three cars. Tuckey L J. in the Court of Appeal (with whom the rest of the court agreed) applied the London and Blenheim Estates test. He asked whether the right nonetheless left the servient owner with reasonable use of his land, ultimately holding that a right to park for nine hours a day curtailed the servient owner's ability to use the land, rendering his very ownership ‘illusory’.

²¹ [1993] 4 ALL ER 157

²² [2003] 1 WLR 764

- [68] These cases demonstrate the principle that “there can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected.”²³ The gravamen in each case was the contention that the rights asserted were both uncertain and too extravagant for example, in **Batchelor**, the Claimant’s land could not be used during important periods.
- [69] Where the right to park was exercised in such a way that no other use could be made of the land when cars were parked on it, a Court could have no reservation in concluding that such highly intrusive use is inconsistent with the grant of an easement.
- [70] The critical distinction here is that the Defendants do not complain of the intrusiveness of the intended exercise of the Right of Way. Instead, their difficulty lies in the fact that the proposed location of the proposed Right of Way will likely impact their ability to partition and later develop the entirety of their land. It follows that the Defendants are not so much concerned with amount of the land which is subject to the Right of Way or the extents and quality of the user.
- [71] In the Court’s judgment, the principle of English law which requires an owner who entitled to exercise a servitudal right over the land of his neighbour, to exercise such right reasonably and without undue interference with the servient owner’s enjoyment of his own land is equally applicable in this Territory. The Court is also satisfied that the use of the Right of Way must be within the intended scope and must not impose an undue burden on the servient tenement.
- [72] The nature of this incorporeal right prescribes that the dominant and servient landowners negotiate to secure an arrangement which is mutually acceptable. They would be personally familiar with the land in question, its terrain and location and they would also have the best idea as to the general costs which are likely to be incurred in facilitating passage. A critical factor which should be considered is the location of the passage. The parties would in the normal course consider the location which causes the least inconvenience to neighbors and which produces the most benefits for landlocked owners. Ultimately, the location and use of the easement should not impose an undue burden on the servient tenement.

²³ Dyce v Hay (1852) 1 Macq 305

[73] In the case at bar, the Defendants challenge to the Claim hinges on the purported positioning of the easement on their land. This no doubt stems from the incontrovertible fact that Defendants' land is currently encumbered by a registered Right of Way in favour of Parcels 197 and 198. The Court notes that that encumbrance was not an issue in dispute in this Trial. The Parties before the Court disclosed that no steps have been taken to actually construct the proposed road and so there is still an opportunity for the Parties to negotiate a consensual position. The Court urges then to do so. The simple reality is that this Court has not been provided with sufficiently cogent evidence upon which it can determine whether it is appropriate or even possible for prescribed easement to be adjusted. The Defendants have simply not done enough to advance their bare contention.

[74] In the Court's judgment, the rights sought in the present case do not appear to approach the degree of incursion complained of in the Defendant's authorities. Ultimately, the Court is satisfied that the Claimants are entitled to the declaratory relief sought.

[75] For the reasons set out herein, the Court hereby declares as follows:

- i. **The owners of Block 3139B Parcel 156 are entitled to a 20 foot Right of Way over Block 3139B Parcel 249 for themselves, their agents and licencees for the purpose of access to the public road.**
- ii. **The Claimants will have their costs to be assessed on a prescribed basis, if not agreed.**

**Vicki Ann Ellis
High Court Judge**

By the Court

[SEAL]

Registrar