

COMMONWEALTH OF DOMINICA

DOMHCV2010/0021

BETWEEN:

DR. JOHN TOUSSAINT

Claimants

SEVERIN MCKENZIE

DR. DAMIEN DUBLIN, NICHOLAS EDDIE BRUNO AND SEVERIN
MCKENZIE (suing on behalf of themselves and all owners and
occupiers of the Randall Morley Housing Development
and

PATSY SONIA HELEN CHARLES

Defendant

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. Michael Bruney for Claimants

Mrs. Francine Baron Royer for Defendant

2012: April 16th 17th
May 1st
August 15th

JUDGMENT

- [1] COTTLE J: The claimants are the occupiers and owners of homes in a housing development consisting of some 15 houses. The defendant is the registered proprietor of an adjoining parcel. Both properties were formerly owned by the same person. The defendant purchased her parcel in 1980. She received a certificate of title in 1982. There is a plan attached to that certificate of title. On that plan an annotation for a reserved road can be seen.
- [2] The 1st and 2nd claimants purchased their parcel in 1994. They developed the parcel into housing lots and sold them to the third defendants. The only motorable road into the housing development traverses the defendant's land along the area noted as a reserved road.

- [3] In 1994 the defendant first obstructed the reserved road. The 1st and 2nd claimants sought and obtained an injunction restraining the defendant from obstructing the road. Having obtained the interim injunction the claimants took no further action. The defendant abided by the court order until 2007 when she applied to the court to have the suit dismissed for inaction. The injunction was also discharged. Despite this the claimants continued to use the road without interruption until 2010 when the defendant prevented the garbage truck from passing along the road to reach the claimants' houses.
- [4] The claimants have now brought the present claim. They say the road constitutes a right of way either because it has been continuously in use as such for over 30 years or because the right of way is expressly reserved on the plan attached to the defendants' certificate of title. In the alternative they plead the existence of an easement of necessity.
- [5] The defendant denies the existence of a right of way. She says she was unaware of any such reservation of a road when she purchased. She further avers that the issue only arose in 1994 after the claimants purchased.

The Defendant's certificate of title

- [6] The plan attached to the copy of the certificate of title of the defendant at the Land Registry depicts a reserved road traversing the defendant's property and leading to the claimants' land. The plan is drawn by licensed land surveyor A. Pascal and signed by him. The claimant also has a loose copy of a plan of her land signed by Mr. Pascal. That copy shows no reserved road.
- [7] Further the defendant and her witness Mrs. Catherine Faustin seem to suggest that the signature on the registered plan might not be that of Mr. A. Pascal. The defendant also points out that memorandum of transfer does not reflect a reserved road as an encumbrance.
- [8] Counsel for the defendant urges the court to reject the reserved road as noted on the defendant's plan for several reasons. There is a letter, said to be from Mr. Pascal stating that the reserved road is not part of the land sold to the defendant. The evidence of the other surveyors, Mr. Seaman and Mr. Robinson, says that the road is in fact part of the defendant's land. Counsel thus argues that Mr. Pascal cannot be relied on. Also Mr. Pascal presented the defendant with another plan with no reserved road on it. The defendant says that Mr. Pascal showed her the boundaries and never indicated a reserved road and none is reflected on the memorandum of transfer.
- [9] These appear to be attractive arguments but they cannot negate the existence of the official registered plan showing the reserved road. There was an attempt to suggest that the plan was at the Registry and available for some unknown party to tamper with it. This is an outrageous suggestion and would require very cogent evidence to support it. No such evidence has been forthcoming. I reject the suggestion out of hand. What is far more likely is that Mr. Pascal gave the defendant a draft copy of his plan before finalizing the plan that was actually registered.
- [10] On the evidence before the court I am satisfied that there was an express reservation of a road across the defendant's land for the benefit of the claimants' parcel. I am further bolstered in my view by the fact that on the ground there is no other motorable access to the housing development.

It is not a case like in Boisson v Letrean where Hamel Smith J found that there was alternative access, albeit difficult, available. Even in the absence of an express reservation I would have been prepared to imply an easement of necessity in this case.

- [11] Counsel for the defendant also advanced another argument on her behalf. Before 1994 there was no housing development on the claimants land. It consisted of shrub land with a few scattered fruit trees. Any reserved road would have been lightly and sporadically used. The claimants' land now has 15 homes. Heavy building equipment has passed and re passed on the road. In fact the claimants have gone so far as to seek to have the road declared a public road. Counsel asks the court to determine the following question:

Where an easement has been granted by implication on the sale of a property which is used for a particular purpose what are the principles governing the extent to which the easement can still be enjoyed by the owner of that property if he changes its use and/or constructs buildings on it?

This question was considered in the case of McAdams Homes Limited v Robinson and another 2004 EWCA CIV214. The facts were that the dominant tenement housed a bakery which discharged its foul and surface drainage into the public sewer via a pipe which traversed the servient tenement. About a half of a century later the old bakery was demolished and two four bedroom houses were constructed on the dominant tenement.

- [12] Lord Justice Neuberger reviewed the authorities and posed two questions which he considered would assist in determining whether the easement could continue to subsist. (i) Whether the development of the dominant land represented a radical change in the character or change in the identity of the dominant land as opposed to a mere intensification of its use? (ii) Whether the dominant land as redeveloped would result in a substantial increase in the burden on the servient land.

- [13] Counsel for the defendant also drew the court's attention to the case of Wimbledon and Putney Commons Conservators v Dixon (1875) 1 CHD 362 and the dicta of Mellish J.

"Assuming that it is made out that (the dominant owner) and his tenants have used this way not exclusively for agricultural purposes, but for all purpose which they wanted it, in the state in which the land was at the time of the proposed grant... and assuming that there has been no material alteration in the premises since the time, does that entitle (the dominant owner) to alter substantially and increase the burden on the servient tenement to building any number of houses he pleases on his property and giving to the persons who inhabit the house the right to use the way for all purposes connected with the house?"

- [14] Mellish J concluded that this change in user would represent an unjustified imposition upon the servient tenement. Counsel for the defendant therefore argues that the change in user in the present case from unused scrubland to a housing development of 15 homes represents both a substantial change in the nature of the use of right of way and an increase in the burden on the defendant's land.

- [15] With the greatest of respect for this line of argument by counsel for the defendant I find myself unable to agree. At the time the defendant purchased her land with the easement reserved her

land was in the same condition. She has developed her land and constructed a hotel on it. At the time of her purchase she must have envisaged the development of the adjoining parcel in like manner.

[16] So while it is true that with the development of the housing scheme by the claimants has come a change in the volume of traffic passing and re passing along the reserved road it cannot be said that such an increase in use would not have been contemplated by the defendant at the time of the creation of the right of way. The uses that is now made of it is exactly the type and volume the uses which would have been expected by the owner of the servient tenement.

[17] The claimants say they have been planning permission with an effective width of 24 feet for the reserved road. It is unclear how this extent of imposition on the servient tenement came about. I do not see how the planning authorities have any power to dispose of the land of the defendants.

[18] I conclude that the claimants have established the existence of a right of way over the defendants land. This right of way is as reflected on the plan annexed to the defendant's certificate of title. The surveyor Mr. Seaman found the dimensions of the reserved road to be 14 feet wide and 142 feet long on the ground while the plan shows it to be 13.5 feet wide and 141 feet long. The difference is de minimis.

[19] I make the following order:

- 1) The claimants are declared to be entitled to a right of way across the land of the defendant registered in Book A Folio 88 in accordance with the reserved road noted in the plan annexed to the certificate of title.
- 2) The road is declared to be 14 feet wide by 142 feet long
- 3) An injunction is granted restraining the defendant, by herself, her servants or agents from obstructing or interfering with the reasonable enjoyment of the right of way by the claimants, their servants, license or workman whether on foot or with vehicles.
- 4) A declaration is granted that the claimants are entitled to maintain and repair the reserved road.
- 5) The counterclaim is dismissed.

[20] The claimants may wish to negotiate for the purchase of a strip of land adjoining the right of way if they wish to widen the reserved road. I award the claimants prescribed costs in the sum of \$7,500.00

Brian Cottle
High Court Judge