

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2014/0028

BETWEEN:

**JOSEPH W. HORSFORD
AS SOLE ADMINISTRATOR OF THE ESTATE OF WILLIAM
HORSFORD (DECEASED)**

Appellant

and

GEOFFREY CROFT

First Respondent

ERIC CONSTRUCTION & HEAVY EQUIPMENT SERVICES LTD

Second Respondent

Before:

The Hon. Dame M. Janice Pereira, DBE

Chief Justice

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mde. Clare Henry

Justice of Appeal [Ag.]

Appearances:

The Appellant in person

Mr. Dane Hamilton Jr. for the First Respondent

2017: March 1;
November 24.

Civil appeal – Trespass - Right of user – Easement of necessity – Whether respondent entitled to a right of way as a matter of necessity over the appellant's land (Parcel 281) – Whether trial judge misapplied the principle in Dabbs v Seaman [1925] 36 CLR 538 - Whether right of way granted by sale agreement more apparent than real – Whether

respondent encroached on appellant's land (Parcel 281) –Whether there is a boundary dispute between the parties – Prescribed costs

The appellant, Joseph W. Horsford, is the sole administrator of the Estate of William Horsford (deceased). The deceased's estate includes land comprising 30 acres registered as Registration Section Falmouth and Bethesda Block 34 2482B, Parcel: 26 with absolute title in the name of the appellant. Parcel 26 underwent a number of mutations and in 1996 the remainder was held as Parcel 196 with a strip of land extending from Parcel 100 to Parcel 171 on the west and Parcel 143 to Parcel 158 on the east. The strip of land was subsequently registered as Parcel 281 and the remaining lands as Parcel 280. The land, then registered as Parcel 171, was sold to Ms. Joanna Tobitt and subdivided into Parcels 217 and 218. The first respondent, Geoffrey Croft, purchased Parcel 217 from Ms. Tobitt. Parcel 217 adjoins Parcel 281.

The appellant, in the court below, claimed against the first respondent for the following: (a) a declaration that the first respondent has no right of user of Parcel 281 as access to his own property or for any other purpose whatsoever; (b) damages; (c) an injunction ordering the first respondent not to enter, without lawful permission, upon the appellant's land, whether by foot, motorized vehicle or by any other means; (d) Mesne profit for the period 1st October 2008 to date of issuance of the Claim Form, and (e) interest and costs.

The first respondent counterclaimed for (a) a declaration that he is entitled to a vehicular and pedestrian easement of necessity over Parcel 281;(b) an order directing the Registrar of Lands to register the said easement of necessity in favour of Parcel 217 on the register of both Parcel 217 and Parcel 281;(c) an injunction to restrain Mr. Horsford from interfering, whether by himself his servants or agents, with the first respondent's free and uninterrupted vehicular and pedestrian use of the said Parcel 281 as a right of way to the public road (d) damages; and (e) costs. The learned trial judge dismissed the claim and gave judgment in favour of the first respondent on the counterclaim.

The appellant appealed arguing, inter alia, that: (i) the learned trial judge failed to take into account the differences in the circumstances of the case at bar and that in **Dabbs v Seaman** [1925] 36 CLR 538 and has erred in principle by wrongly applying facts in both cases without taking into account the provisions of **The Common Law (Declaration of Application) Act**, Cap 92, Laws of Antigua and Barbuda in arriving at his judgment; (ii) the learned trial judge misdirected himself as he seemed to misunderstand which parcel of land was transferred in fee simple to the personal ownership of the appellant and has erred in ignoring the expressed intentions of the parties at the time of the transfer of Parcel 171 to the subsequent owners who later subdivided and sold to the first respondent, and (iii) the learned trial judge erred in law by ignoring the first respondent's confession of his encroachment on the claimant's land by his admission that the land belongs to the Estate of William Horsford.

In response, the first respondent submitted that: (i) he is a successor in title of Parcel 217 which requires and has always since its creation required an easement of necessity to the public road over Parcel 281; (ii) without the said easement of necessity, the respondent and any owners and users of Parcel 217 have no usable access to the public road; (iii) the right of way created by the sale agreement is in fact and in law apparent but not real; (iv)

there is no encroachment over the claimant's land as the land in question belongs to the Estate of William Horsford, deceased.

Held: allowing the appeal and setting aside the order of the learned trial judge, and awarding costs to the appellant in the court below on the prescribed basis on the amount ordered to be paid and on appeal two-thirds of that sum pursuant to rule 65.13 of the **Civil Procedure Rules, 2000**, that:

1. An easement of necessity is an easement which, under particular circumstances, the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all. Firstly, for the implication of such an easement, there must be a common owner of a legal estate in two plots of land. Secondly, it must be established that access between one of those plots and the public highway can be obtained only over the other plot. Thirdly, there must be a disposition of one of the plots without any specific grant or reservation of a right of access. On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.

Alhaji Bora Manjan v Kebba Drammeh [1991] 61 P & CR 194 applied;
Wheeldon v Burrows (1879) 12 Ch. D 31 applied.

2. The principle in **Dabbs v Seaman** [1925] 36 C.L.R. 538 is that "where, a registered proprietor of land ... transfers to B a part of his land described by a plan indicating that the transferred land is bounded on one side by a 20 ft land situated on the other part of the transferor's land and the transfers duly registered, then in the absence of either a provision to the contrary on B's certificate of title or some subsequent personal legal or equitable relation to the contrary between B and owner of the adjoining land B, as long as he remains registered proprietor of the land so transferred and described is entitled to: (1) to have the land marked twenty feet land preserved as such, and (2) to have a right of way over the land". In the instant case, the Estate of William Horsford never transferred to the first respondent a part of Parcel 171. It was the owner of Parcel 171, Ms. Joanna Tobitt, who subdivided same into two parcels, and sold one of the parcels to the first respondent. Parcel 281 is not part of the lands retained by the owner of Parcel 171. Therefore, the principle set out in **Dabbs v Seaman** is not applicable to the present circumstances as there is no common ownership or common grantor between the appellant and the first respondent in respect of Parcel 217.

Dabbs v Seaman [1925] 36 C.L.R. 538 distinguished.

3. Based on the sale agreement between the appellant in his personal capacity and Ms. Joanna Tobitt, an express easement was granted over the lower or western

road to Ms. Tobitt on the transfer of Parcel 171 to her. There is no evidence in the record of Parcel 171 ever enjoying an easement or right of way over the upper or eastern road of which the right of user is claimed by the respondent. Further, there was no finding by the learned trial judge that the lower road did not in fact lead to the public road or that the lower road would take the user over lands of a stranger to the grant. Therefore, the first respondent has no right of user as a matter of necessity over the appellant's land, Parcel 281. A right of way across the appellant's land could not be granted on the basis that it was a more convenient way.

4. Where an absolute owner of land brings an action for trespass against a person alleged to be in possession, all that the owner has to prove is his title and an intention to regain possession. If the defendant either admits the claimant's ownership or is faced with evidence, which the court accepts, that the claimant is in fact the owner, the burden is on the defendant to confess and avoid by setting up a title or right to possession consistent with the fact of ownership vested in the claimant. The first respondent, by his own admission, has encroached on the appellant's land as the appellant is the absolute owner of the lands in question in his capacity as sole administrator of the Estate of William Horsford and the evidence of the first respondent's encroachment contained in the surveyor's report remains unchallenged. Further, the claim is not a boundary dispute as the land which is the subject of the encroachment is not owned by the first respondent.

Portland Management Ltd v Harte and Others [1976] 1 All ER 225 applied.

JUDGMENT

- [1] **HENRY JA [AG.]:** The appellant, being the claimant in the court below, appeals against the decision of the trial judge. In the claim below the appellant, the owner of a parcel of land identified as Registration Section: Falmouth and Bethesda, Block 34 2482B, Parcel: 281 (Parcel 281), sought against the first respondent (Mr. Croft) the owner of the adjacent parcel 217: (a) a declaration that Mr. Croft has no right of user of Parcel 281 as access to Mr. Croft's property or for any other purpose whatsoever; (b) damages ;(c) an injunction ordering Mr. Croft not to enter, without lawful permission, upon the appellant's land, whether by foot, motorized vehicle or by any other means; (d) Mesne profit for the period 1st October 2008 to date of issuance of the Claim Form, and (e) interest and costs.

- [2] Mr. Croft resisted the claim and counterclaimed for: (a) a declaration that he is entitled to a vehicular and pedestrian easement of necessity over Parcel 281;(b) an order directing the Registrar of Lands to register the said easement of necessity in favour of Parcel 217 on the register of both Parcel 217 and Parcel 281;(c) an injunction to restrain Mr. Horsford from interfering, whether by himself his servants or agents, with Mr. Croft's free and uninterrupted vehicular and pedestrian use of the said Parcel 281 as a right of way to the public road (d) damages and (e) costs.
- [3] The court below dismissed the claim and gave judgment in favour of Mr. Croft on the counterclaim.

Grounds of Appeal

- [4] The appellant now appeals on the following grounds:
- (i) The first respondent's counterclaim is res judicata;
 - (ii) The judgement of the learned trial judge is against the evidence;
 - (iii) The learned trial judge failed to take into account the differences in the circumstances of the case at bar and that in **Dabbs v. Seaman**¹, and has erred in principle by wrongly applying the facts in both cases without taking into account the provisions of **The Common Law (Declaration of Application) Act** , Cap.92 of the Laws of Antigua and Barbuda in arriving at his judgement;
 - (iv) The learned trial judge erred in law by taking into account matters that are irrelevant, and ignoring facts that are relevant in the present case;
 - (v) The learned trial judge misdirected himself as he seemed to have misunderstood which parcel of land was transferred in fee simple to the personal ownership of Joseph W. Horsford, and has erred in ignoring the

¹ [1925] 36 C.L.R 538

expressed intentions of the parties at the time of the transfer of parcel 171 to the subsequent owners who later subdivided and sold to the respondent.

(vi) The learned trial judge erred in law by ignoring the respondent's confession of his encroachment on the claimant's land admitting that the land belongs to the Estate of William Horsford.

(vii) The learned trial judge failed to take into account relevant facts and has taken into account facts that are not relevant.

Background

[5] William Horsford died intestate on the 12th December 1934 and on 1st December 1969 Letters of Administration of his estate were granted to his widow Hilda Horsford and his son Joseph W. Horsford. Subsequently, Hilda Horsford died in 1983 leaving Joseph W Horsford as the sole Administrator. At first registration, lands comprising 30 acres were registered as Registration Section Falmouth and Bethesda, Block 34 2482B, Parcel: 26 with absolute title in the name of the Personal Representative of the Estate of William Horsford (deceased). Parcel 26 underwent a number of mutations and in 1996 the remainder was held as parcel 196 with a strip of land extending from Parcel 100 to Parcel 171 on the west and Parcel 143 to parcel 158 on the east. The strip of land was subsequently registered as Parcel 281 and the remaining lands as Parcel 280.

[6] The instant action is one of multiple actions between Mr. Croft and the Estate of William Horsford. In 2008 Mr. Croft filed an action against Joseph Horsford in his private capacity claiming that the strip of land now 281, then forming a part of Parcel 196 on the Cadastral Map is a private road. The Court of Appeal ruled that the said strip of land is not a public road. However, despite the judgment of the Court of Appeal, conflict between Mr. Croft and the Administrator of the Estate of William Horsford continued. Mr. Horsford averred in his claim that despite several

warnings, Mr. Croft would not desist, but continues to drive his vehicle over lands of the Estate, namely Parcel 281.

[7] According to Mr. Croft's pleadings in the court below, he is a successor in title of Parcel 217 of Block 34 2482B which was purchased from the claimant (the appellant) and which requires and which has always, since its creation, required an easement of necessity to the public road over Parcel 281. According to Mr. Croft, Parcel 281 is a subservient tenancy and Parcel 217 is the dominant tenancy in respect of an easement of necessity in favour of Parcel 217 and over Parcel 281. Without the said easement of necessity, Mr. Croft and any owners and users of Parcel 217 have no usable access to the public road.

[8] In reply, the appellant averred that Parcel 217 was never in the ownership of the respondent, but together with Parcel 218, comprised Parcel 171. Parcel 171 was sold to one Joanna Tobitt pursuant to a written agreement dated 31st January 2002. The access to Parcel 171 was clearly set out in the agreement, and there has been no other. Parcel 171 was later subdivided into Parcels 217 and 218. The appellant pleaded that Mr. Croft is not entitled to an easement of necessity, or otherwise, over Parcel 281 and that the said Parcel 281 is not subservient to Parcel 217 as alleged.

The Judgment Below

[9] The judgment of the court below stated:

"[3]. The First Defendant owns a parcel of land that had formed part of the estate. The claimant had sold that land to one Johanna Tobitt, who subdivided her parcel and sold one half of it to the claimant.

[4]. The conveyance agreement for that sale provides that the claimant was to clear and make useable by vehicles, the lower road that provides access to the property. The land in question is bounded by two access roads – a lower or western road and an upper or eastern road which is parcel 281.

...

[9]. The facts of this matter are not in dispute. The claimant owns parcel 281. First Defendant uses parcel 281 as his means of accessing his home. The claimant does not consent to this. On the face of the cadastral survey

maps, the First Defendant's land is bounded by two roads and it appears that he can access his property by means of the lower or western road.

[10]. This court visited the locus in quo. It was at once patent that the access via the western road was only apparent but far from real. The topography rendered it extremely difficult to build a driveway from this road onto the First Defendant's property. But more crucially, the claimant, at the locus in quo, explained that the western road is also his private property and the First Defendant would require his permission to use it. At the entrance of this road the claimant has constructed a gate which he can lock at any time effectively preventing access along this road to the First Defendant's property. The effect of all this is that the First Defendant is landlocked. He cannot access his home unless he passes along one of the roads which form his western and eastern boundaries. Both those roads are owned by the claimant. This is the epitome of an easement by necessity."

[10] The court then referred to the case of **Dabbs v Seaman**² and the judgment of Isaacs J. where it was stated:

"where, a registered proprietor of land . . . transfers to B a part of his land described by a plan indicating that the transferred land is bounded on one side by a 20 ft land situated on the other part of the transferors land and the transfers duly registered, then in the absence of either a provision to the contrary on B's certificate of title or some subsequent personal legal or equitable relation to the contrary between B and owner of the adjoining land B, as long as he remains registered proprietor of the land so transferred and described is entitled to:

- 1) To have the land marked twenty feet land preserved as such; and
- 2) To a right of way over the land."

[11] The court then concluded as follows:

"I consider Dabbs v Seaman to still be good law. Applying that learning to the present facts I find that the First Defendant is entitled to a right of way over the claimant's land, parcel 281 and he is entitled to have this preserved as a road."

[12] The appellant contends that the judge misdirected himself with regard to (a) the effect of the grant of a right of way contained in the agreement for sale between Joseph Horsford and Joanna Tobitt; (b) the application of the learning in **Dabbs v**

² [1925] 36 C.L.R. 538

Seaman to the facts of the case, and (c) the law and principles in relation to easements of necessity.

Respondent's Submissions

[13] The trial judge has found as a fact that the grant is more apparent than real, and Mr. Croft's parcel of land is landlocked. Mr. Croft submits that there was indeed sufficient evidence before the trial judge to justify and support this finding of fact. The evidence was admissible and relevant. The clear meaning to be drawn from the judgment is that the trial judge, who had the opportunity to see the appellant give his evidence, did not accept his evidence. It cannot be said that the decision was one that is wrong on the evidence and material before the trial judge.

[14] Mr. Croft's contention is that the right of way created by the 2002 agreement is in fact and in law apparent but not real for the following reasons.

(a) The western road does not in fact lead to a public road or any other access for the benefit of Mr. Croft. The appellant has not challenged this in his responses to the Court at the locus in quo nor has he addressed the evidence of his witness Oliver Joseph under cross-examination.

(b) A right of way cannot exist over land of strangers to the grant. If this is the case the trial judge was entitled to find that Mr. Croft's parcel of land was landlocked and that the grant contained in the 2002 agreement was merely apparent.

[15] Further, as Parcel 217 was landlocked with no access to the public road, there must be implied an easement (right of way) of necessity. Both parcels of land at one time formed part of the Monks Hill Estate and under the common ownership of the Administrator of the said Estate. Parcel 171 was created without the grant of easement (right of way) and was subsequently transferred, and later subdivided. Mr. Croft being the owner of Parcel 217, formerly a part of Parcel 171, is entitled to a right of way which is reasonably necessary for the comfortable enjoyment of and

occupation of the said Parcel 171. Parcel 217 is landlocked and the only access to the Public Road is over the Eastern and Upper Road.

Further, on the clear view of the law relating to acquisitions of easements and the findings of fact made by the trial judge, Mr. Croft is indeed entitled to an easement of necessity. As the learned trial judge put it the facts of this case present "...the epitome of an easement by necessity."

Grounds 2, 3, 4 and 5 – The Judgment is Against the Evidence and is Inconsistent with the Law

[16] An easement of necessity is an easement which under particular circumstances the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all.³

[17] In the Privy Council case of **Alhaji Bora Manjang v Kebba Drammeh**,⁴ Their Lordships set out the essentials of an easement of necessity. They stated:

"It seems hardly necessary to state the essentials for the implication of such an easement. There has to be found, first, a common owner of a legal estate in two plots of land. It has, secondly, to be established that access between one of those plots and the public highway can be obtained only over the other plot. Thirdly, there has to be found a disposition of one of the plots without any specific grant or reservation of a right of access. Given these conditions, it may be possible as a matter of construction of the relevant grant (see *Nickerson v Barraclough* [1981] 1 Ch. 426, 440) to imply the reservation of an easement of necessity."

[18] The court in **Wheeldon v Burrows**,⁵ having considered a number of cases, stated:

³ Halsbury's Laws of England, 5th Edition, Vol. 87, p. 759.

⁴ [1991] 61 P & CR 194; Privy Council Appeal No. 10 of 1989.

⁵ (1879) 12 Ch D 31 at p. 49.

“We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements by which of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.”

[19] It is not in dispute that by agreement dated 31st January 2002, Joseph Horsford (in his personal capacity) transferred Parcel 171 to Joanna Tobitt. The evidence is that in 1993 when Parcel 171 was transferred and registered to Joseph W. Horsford, he used as access to the public road a path west of the glebe land (the western road)⁶. So that Parcel 171 enjoyed a right of way over the lower or western road. An express easement was granted over this road to Ms. Tobitt on the transfer of Parcel 171 to her. There is no evidence in the record of Parcel 171 ever enjoying an easement or right of way over the upper or eastern road.

[20] The learned trial judge found that access via the western road was however, only apparent but far from real. He goes on to give reasons: (1) the topography rendered it extremely difficult to build a driveway from this road onto Mr. Croft's property; (2) more crucially, the claimant at the locus in quo explained that the western road is also his private property and Mr. Croft would require his permission to use it. At the entrance of this road, the claimant has constructed a gate which he can lock at any time effectively preventing access along this road to Mr. Croft's property. The judge then concluded: “the effect of all this is that Mr. Croft is landlocked. He cannot access his home unless he passes along one of the roads. Both are owned by the claimant this is the epitome of an easement by necessity.”

⁶ See paragraphs 7 and 8 of witness statement of Joseph Horsford, page 47 trial bundle.

[21] The learned trial judge based his decision on the learning in **Dabbs v Seaman**⁷ set out in paragraph 10 above. However, the Estate of William Horsford never transferred to Mr. Croft a part of Parcel 171. It was Joanna Tobitt as owner of Parcel 171 who caused same to be subdivided into two parcels, one of which was purchased by Mr. Croft. Joanna Tobitt is Mr. Croft's predecessor in title and Parcel 281 is not a part of any lands retained by Joanna Tobitt. In short, there is no common ownership or common grantor as between Mr. Horsford and Mr. Croft in respect of his Parcel 217. Therefore, the proposition set out in **Dabbs v Seaman** is not properly applicable to the facts in this case.

[22] Further, there was no finding by the learned trial judge that the lower road did not in fact lead to the public road or that the lower road would take the user over lands of a stranger to the grant as submitted by Mr. Croft. A right of way across the appellant's land could not be granted on the basis that it was a more convenient way and there was no other basis from which a way of necessity in favour of the upper or eastern road could be implied. Mr. Croft therefore has failed to meet the essentials necessary for implication of such an easement.

Encroachment onto Parcel 281

[23] The appellant contends that the learned trial judge erred in law in not considering the averment by him that Mr. Croft had encroached onto Parcel 281.

[24] In the pleadings below the appellant had averred in paragraph 18 of his Statement of Claim that:

"During the month of January 2008 the 1st defendant erected a wall on the claimant's land and in February 2011 extended the wall northward and erected a building in his yard and attached the roof over that building onto the wall thereby encroaching on the claimant's said land. The claimant demanded the 1st defendant to remove the roof and that portion of the building which is on the claimant's land. The 1st defendant refuses to remove his roof and building from the claimant's land but is now renting the said building as a dwelling house."

⁷ [1925] 36 CLR 538.

- [25] The appellant therefore sought damages for the continuing trespass and an injunction in the court below.
- [26] In paragraph 9 of his Defence and Counterclaim, Mr. Croft denied paragraph 18 of the Statement of Claim and averred that the wall and roof did not encroach over the claimant's land. He stated that the land in question is not the claimant's land but is land belonging to the Estate of William Horsford, deceased. In paragraph 20 of the Counterclaim he states that the boundary between Parcel 217 and Parcel 281 has not been fixed pursuant to section 17 of the **Registered Land Act**⁸ and the claimant's claim for damages for trespass for encroachment and for an injunction cannot be entertained by the court, there being an absolute statutory bar by virtue of section 17(4) against the court entertaining any proceedings or action relating to the dispute of the boundary until the boundary has been fixed pursuant to the said section 17.
- [27] The learned trial judge in his judgment noted the pleadings and averments of the parties. The judge then stated that the issue would not be considered in his decision as it was really a boundary dispute. He noted that specific provisions have been enacted to deal with boundary disputes. He therefore concluded that until that procedure has been complied with this court is prohibited from entertaining the averment in the present action.⁹
- [28] However, Mr. Croft has not asserted any possible ownership by him of the land upon which the wall and roof is built. On the contrary, he has pleaded affirmatively that the land belongs to the Estate of William Horsford, deceased. The claim is therefore not a boundary dispute between the parties. The respondent has pleaded a defence of lack of ownership on the part of Mr. Joseph Horsford. However, the claim is brought by Joseph Horsford as the sole Administrator of the Estate of William Horsford, deceased.

⁸ Cap. 374, Laws of Antigua and Barbuda.

⁹ Paragraph 8 of the judgment.

[29] In **Portland Management Ltd v Harte and Others**,¹⁰ the court held that where an absolute owner of land brought an action for trespass against a person alleged to be in possession, all that the owner had to prove was his title and an intention to regain possession. If the defendant either admitted the claimant's ownership or was faced with evidence, which the court accepted, that the claimant was in fact the owner, the burden was on the defendant to confess and avoid by setting up a title or right to possession consistent with the fact of ownership vested in the claimant.

[30] It follows that the learned judge ought to have considered the claim. Mr. Croft has admitted ownership of the land by the Estate of William Horsford. Further, the unchallenged report of the surveyor, Oliver Joseph establishes that the wall running along the northern border of Parcel 217 encroached on Parcel 281 and that the roof of the building has also encroached onto Parcel 281. The plan attached to his report shows the total encroachment as 420.243 sq. ft. On the record before the court, the appellant has proven his claim of trespass against Mr. Croft as a result of the encroachment of his wall and roof.

[31] The appellant had sought an injunction requiring the removal of the offending roof as well as damages in the court below. Given all the circumstances including the nature of the encroachment, I would decline the injunction and instead order damages in lieu thereof to be assessed.

[32] Accordingly, I would allow the appeal and would set aside the judgment of the court below and enter judgement for the appellant as follows:

- (1) It is declared that Mr. Croft, the first respondent, has no right of user of the land of the Personal Representative of the Estate of William Horsford, deceased, at Monks Hill and more particularly described as Registration Section: Falmouth and Bethesda, Block: 34 2482B,

¹⁰ [1976] 1 All ER 225.

Parcel 281 as access to Mr. Croft's property at Parcel 217 or for any other purpose;

- (2) Mr. Croft, the first respondent be restrained whether by himself, his servants or agents from entering upon the said Parcel 281 by motor vehicle, or howsoever otherwise whether in exercise of an alleged right of way or otherwise;
- (3) Damages to be assessed in the court below by a judge or master in respect of the unauthorised use of the private road (now Parcel 281) by Mr. Croft;
- (4) Damages in lieu of injunction to be assessed in the court below by a judge or master in respect of the encroachment by Mr. Croft's wall and roof;
- (5) We hereby set aside the costs order below in favour of the respondent, Mr. Croft, and costs are awarded pursuant to Rule 65.5(2)(a) of the **Civil Procedure Rules, 2000** ("CPR") to the appellant in the court below on the prescribed basis on the amount ordered to be paid and on appeal two-thirds of that sum pursuant to **CPR 65.13**.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar