

SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 575 OF 2000

BETWEEN:

LAWRENCE LYNFORD WYLLIE

Complainant

and

1. CLAIR URBAN OTTLEY
2. EILEEN AGATHA OTTLEY

Defendant

Appearances:

Mr. Arthur Williams for the claimant
Mr. Joseph Delves for the respondent

2001:November 21, 22, 28.

JUDGMENT

ALLEYNE J.

[1] In the course of the hearing Counsel agreed that the issues in this case are confined to the question of the location of the right of way, and if it was on the same path as the road built by the defendant, whether the defendant has excluded the claimant from the use as of right of the said way for the duration of the relevant limitation period.

[2] The court heard the viva voce evidence and cross-examination of the claimant, of his witness George London, and of the first-named defendant. In addition the court had before it the witness statement of the claimant's witness Vincent Bailey, who died recently, and whose evidence was therefore not tested by cross-

examination. This evidence is consequently not admissible, bearing in mind the provisions of CPR 2000, R 29.2(1)(a), 29.2(2), and the related learning in *Civil Procedure 2000 (The White Book)* Volume 1 paragraph 32.5.3. The court also had before it the evidence by way of witness statements of the defendants' witnesses Nolan Marks and Henrick Bullock, whose evidence Learned Counsel for the claimant admitted from the Bar is true and unchallenged. Counsel consented to this evidence being admitted without the necessity of calling the witnesses in person.

[3] Further the court had the advantage of visiting the *locus* in the presence of Counsel, the parties and the relevant witnesses, a visit which was most helpful in clarifying the issues in dispute and in the court's assessment of the evidence.

[4] Also in evidence was the report of licensed Land Surveyor C. Mc Arthur Robertson, dated July 6, 2001, as well as the several deeds on which the titles of the claimant and the defendants are based.

[5] The common predecessor in title of the parties is Sydney Ottley, father of the defendant, now deceased. By Indenture dated the 31st March, 1962, he, as vendor, conveyed to N.A. Commissiong, Superintendent Minister of the Methodist Church for and on behalf of the Methodist Missionary Trust Association, a certain portion of land at Evesham "TOGETHER with a right of way six (6) feet wide leading to and from the Public Highway".

[6] The precise location of the right of way is not set out in the deed, nor in deed No. 1520/1970, which conveys the said land to the claimant from the Methodist Church. In fact the latter deed makes no specific reference to the right of way, and the deed whereby the defendant obtained his title, dated September 3, 1971 and recorded as deed No. 27/1972 also fails to make reference to the right of way which had been created by the vendor of both portions of land, for the benefit of the dominant tenement, i.e. the land of the claimant.

- [7] The court's visit to the *locus* made it apparent that the right of way created by the deed of 1962 is the only reasonable access to the claimant's land, and that if the said easement had not been conferred by the deed, the claimant's predecessor in title would have been entitled to claim from the vendor, the defendant's father and the parties' common predecessor in title, an easement of necessity over the land now held by the defendant, the servient tenement.
- [8] Since the sale of the two pieces of land, the defendants have cut the land sold to them so as to construct a road to their land, thus altering significantly the topography of the land, and making it impossible to precisely locate the right of way. Even the common boundary between the parties has not been established with precision, and the deeds are not entirely helpful in that regard. The surveyor in his report admits to the uncertainty regarding the common boundary.
- [9] It became apparent from the evidence and the visit to the *locus*, however, that the said easement, being six feet in width, would extend approximately from the bottom of the bank along the line demarcated by the points M6 to M5 on the plan prepared by the Surveyor Robertson. This area, within the boundaries of the servient tenement, would encroach, to some extent, on the defendant's concreted wheel tracks, but would not include the entire road comprised of the said wheel tracks.
- [10] It being impossible to precisely locate the right of way given the radically altered topography of the land as a result of the cutting of the road and subsequent erosion of the bank, it is necessary to define an access path which is practical and realistic, which can only follow the path at the foot of the bank to the west of the road cut and paved with wheel tracks by the defendants.
- [11] It is declared that the claimant is entitled to pass and repass, for the purpose of access to and egress from his land, along a six foot wide strip of land bounded on the western side by the line demarcated by the points M6 to M5 on the plan surveyed and drawn by C. Mc Arthur Robertson, licensed Land Surveyor and

admitted in this action as exhibit S.D.5, and running in a northerly direction to the entrance to the claimant's land, demarcated on the said plan by the points M5 and M4.

[12] I find as a fact that the claimant had never abandoned the use of this easement, and that the defendant had never dispossessed him thereof.

[13] The claimant is entitled to the injunction claimed, and it is ordered that the defendants be restrained, and they are hereby restrained, whether by themselves, their servants or agents or howsoever otherwise, from molesting the claimant, his servants and or agents or visitors from using and enjoying the said easement of way for the purpose of access and egress to and from his said property.

[14] I award damages against the defendants in the sum of two hundred dollars (\$200.00), and costs of the claim to be agreed or assessed.

[15] The defendants are entitled to the declaration of title claimed in their counterclaim, subject to the easement of way hereinbefore referred to, and it is accordingly declared that, subject to the claimant's said easement of way, the defendants are the sole owners in possession of the said concreted roadway.

[16] I find no ground for the defendants' claims for injunctive relief, and the counterclaim for said relief is dismissed.

[17] I make no order for costs on the counterclaim.

Brian G.K. Alleyne
High Court Judge