[2015] JMSC Civ. 261

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014 HCV 01222

IN THE MATTER OF THE PRESCTIPTION ACT

AND

IN THE MATTER OF ALL THAT PARCL OF LAND PART OF NUMBER FIVE HILLCREST AVENUE IN THE PARISH OF SAINT ANDREW BEING THE LAND COMPRISED IN DUPLICATE CERTIFICATE OF TITLE REGISTERED AT VOLUME 649 FOLIO 27 OF THE REGISTER BOOK OF TITLES.

BETWEEN	**BRADLEY MILTON MILLINGEN**	**CLAIMANT**
AND	**SIMONE THOMAS**	**SECOND CLAIMANT**
AND	**LISA STODDART MILLINGEN**	**DEFENDANT**

Miss Aurine Bernard instructed by Forsythe and Forsythe for the Claimants.

Ransford Braham Q.C., and Miss Grace-AnnThomas instructed by BrahamLegal for the Defendant.

HEARD: 21 May 2015 and 9 June 2015

HIBBERT, J.

[1] On 9 June 2015 I gave an oral judgment in this matter and now reduce it, with amplification into writing.

[2] Richard Milton Millingen, an Attorney-at-Law was the owner of three adjoining parcels of land in the parish of Saint Andrew registered at Volume 979 Folio 70, Volume 408 Folio 2 and Volume 649 Folio 27.

[3] The property registered at Volume 979 Folio70 fronts onto Hillcrest Avenue and is otherwise surrounded by other properties. It bears the civic address of 5 Hillcrest Avenue and is so referred to on the registered title.

[4] The property registered at Volume 408 Folio 2 is situated behind that which is registered at Volume 979 Folio 70 and is completely landlocked.

[5] the property, registered at Volume 649 Folio 27 is also situated behind that at Volume 979 Folio 70. This property is, however, not landlocked as it borders onto Lilford Avenue.

[6] On 17 February 1986 Richard M. Millingen transferred all three properties to two of his sons, Peter Martin Millingen and Richard William Millingen. He however, continued to reside at 5 Hillcrest Avenue.

[7] The second claimant Simone Thomas was employed to Richard M. Millingen and resided with him at 5 Hillcrest Avenue. On 19 October 1994 she gave birth to a son Bradley Milton Millingen, the first claimant herein. He was fathered by Richard M. Millingen and lived with his parents. His father died on 30 October 2010. Subsequently the claimants were allowed to occupy one of the apartments located on the property registered at Volume 649 Folio 27 as tenants at will.

[8] On 1 March 2012 the properties registered at Volume 979 Folio 70 and Volume 408 Folio 2 were transferred to Lisa McDaniel-Millingen, the defendant herein. In 2008 she became the wife of Jeremy Millingen and the sister-in-law of the transferors. She and her husband reside at 5 Hillcrest Avenue.

[9] In June 2012 the defendant caused a wall to be constructed thereby blocking access between the properties which were transferred to her and that which is registered at Volume 649 Folio 27. This also blocked access to that property from Hillcrest Avenue. Access to the property was therefore gained from Lilford Avenue.

[10] On 30 October 2012 the property registered at Volume 649 Folio 27 was transferred to the first claimant.

[11] As a result of erection of the wall and its attendant consequences the claimants filed a Fixed Date Claim dated 10 March 2014 claiming the following declarations and orders:

1. A Declaration that the Claimants by prescriptive right have the entrance to all that parcel of land known as 5 Hillcrest Avenue, in the parish of Saint Andrew containing by survey Four Thousand, Seven Hundred and Fifty Nine Square and Sixty Four Hundreds of a Square Foot of the shape and dimensions and butting as appears by the plan thereof and being the land comprised in Certificate of Title registered at Volume 649 Folio 27 of the Register Book of Titles at land being the frontage of 5 Hillcrest Avenue, Kingston 6, Saint Andrew.

2. A Declaration that the Claimants by prescriptive right be and are allowed to use and continue to enjoy the use of the existing gate and driveway established at the frontage of 5 Hillcrest Avenue, Kingston 6, Saint Andrew.

3. A Declaration that the National Water Commission, the Jamaica Public Service and Cable & Wireless Jamaica Limited and any other provider of such public utilities inclusive of telephone, electricity, internet cable and water have a right to run such conduits, lines, wires, pipes whether underground or above land in the airspace such appurtenances for the provision and supply of those such services to the Claimants and any other lawful occupants of the said Claimants property.

4. A Declaration that the Claimants are entitled by prescriptive right to the continued use of their established gate entrance and driveway to access their property at 5 Hillcrest Avenue, Kingston 6, Saint Andrew.

5. A Declaration that the Claimants are entitled to reasonable access to their entranceway and gate established since time immemorial.

6. A Declaration that the Claimants residential address e and is 5 Hillcrest Avenue, Kingston 6, in the parish of Saint Andrew.

7. An Order that the Defendant demolish the concrete wall and any other barrier erected since August 2012 blocking the Claimants access and use of their entrance, gate and driveway to 5 Hillcrest Avenue, Kingston 6, Saint Andrew.

8. A Order restraining the Defendant, her servants, agents, trustees, assignees, heirs and oar successors from interfering with the Claimants right to use the entrance and driveway established at 5 Hillcrest Avenue, Kingston 5, Saint Andrew.

9. An Order restraining the Defendant, her servants, agents, trustees, assignees, heirs and or successors from interfering with the Claimants' right to peaceful, quiet and unmolested occupation of their property and premises at 5 Hillcrest Avenue, Kingston 6, Saint Andrew.

10. An Order restraining the Defendant, her servants, agents, trustees, assignees, heirs and or successors from harassing, threatening and or intimidating the Claimants.

11. And the Claimant claims damages against the Defendant arising from the Defendant preventing them access to and the enjoyment of their established gate, entrance and driveway since August 2012.

12. And the Claimants claim INTEREST pursuant to the Law Reform (Miscellaneous Provisions) Act.

13. And the Claimant claims claim COSTS AND ATTORNEY'S COSTS.

14. And the Claimants pray that there be any such further order and or relief as this Honourable Court may deem fit.

[12] This claim was supported by the affidavit of the first claimant. In this affidavit he stated that he had always known that access to the property which was transferred to him was from Hillcrest Avenue. Furthermore he had been advised that this was so even before his father acquired the three properties and remained so until the defendant caused the wall to be constructed. Access, he said, was by way of a driveway which ran along the edge of the property owned by the defendant.

[13] The first claimant further stated that the blockage of the driveway has forced the claimants and their tenants to use an entrance at the back of their premises from Lilford Avenue which is made difficult by motor vehicles which are constantly parked in that vicinity. Additionally, he stated, the erection of the wall which has forced him to use an entrance along Lilford Avenue has deprived him and his tenants of the use of the civic address of 5 Hillcrest Avenue for the purposes of receiving mails and packages or for obtaining basic services such as taxi services.

[14] The first claimant also stated that on 16 February 2014 he and the other occupants of his premises received notices from the defendant that they should make arrangements to have all overhead cables, telephone and electric lines which run through her property removed.

[15] In response to the first claimants affidavit the defendant filed two affidavits. She stated that Lilford Avenue is no less a public street than Hillcrest Avenue and there are several dwelling houses located along Lilford Avenue and that there is no difficulty or issue with access to those premises. She further stated that the first claimant's premises have similar and more than adequate access from Lilford Avenue. Additionally all the premises on Lilford Avenue access utility services from Lilford

Avenue and that this can be achieved by the claimant without inconvenience or difficulty.

[16] Jeremy Millingen, the husband of the defendant also submitted two affidavits. He stated that at the time the wall enclosing the defendant's property was being constructed the access to the first claimant's premises was upgraded. A new gate which was largely the design of the second claimant was installed at her direction and no objection was taken to the construction of the wall.

[17] Jeremy Millingen also denied that the second claimant had any interest in any of the properties or has any right to make any claim against the defendant.

[18] On 18 July 2014 a Notice of Application for Court Orders was filed on behalf of the Defendant seeking orders and stating the grounds on which it is made. They are:

> 1. The Fixed Date Claim Form/Statement of Case is struck out.
> 2. Costs of this application and the claim be paid by the Claimants.
> 3. Any or other further orders, directions or relief as this Honourable Court deems fit.
>
> The grounds on which the Defendant is seeking the Orders are as follows:
>
> (1) The application is brought pursuant to Civil Procedure Rules 26.3 and under the inherent jurisdiction of the Court.

(2) The Fixed Date Claim Form/Statement of Case discloses no reasonable grounds for bringing the claim.

(3) The claim is vexatious, frivolous and an abuse of the process of the Court.

[19] At the hearing of this application Mr. Braham Q.C., made the following submissions:

1) A claim, such as the one filed on behalf of the claimants, which is based on prescription may be made in one of three forms:

   (a) at common law which required a user from time immemorial (deemed to be from 1189)
   (b) based on last modern grant and
   (c) based on Section 2 of the Prescription Act.

2) In order for a claim to be made out under section 2 of `the Prescription Act, as the claimants are seeking to do, it must be established that the properties concerned with the easement were owned by two separate persons. For this, he relied on the judgment in **Simmons v. Dobson** [1991] 1 WLR 72B.

3) Neither of the claimants had any interest in the property for 20 years and so could not have obtained an easement of right of way by prescription.

4) The pleadings do not contemplate any other type of easement so the question of easement by implication does not arise. He further submitted that the decision in **Adams v. Cullen** 268 P. 2d 451 (Was.1954) would therefore be inapplicable.

5) Even if easement by implication arose, the facts of this case would defeat that implication.

6) There was no necessity for an easement as access to the first claimant's property was gained from Lilford Avenue.

[20] Miss Bernard on behalf of the claimants/respondents agreed that their claim is based on prescription. She, however, submitted that where declarations are sought the court may use any other law, apart from that which is pleaded, to reach a decision. Miss Bernard further submitted that the question of quasi easement is disclosed in the affidavit evidence and that the easement is necessary as the claimants have been deprived of their civic address and that there is little space at the back to accommodate parking. Consequently, she submitted the evidence discloses a right accruing to the first claimant, thus there is a triable issue.

[21] Section 2 of the Prescript on Act upon which the claim is primarily based states:

> 2. What any profit or benefit, or any way or easement, or any watercourse, or the use of any water, a claim to which may be lawfully made at the common law, by custom, prescription or grant, shall have been actually enjoyed or derived upon, over or from any land or water of Her Majesty the Queen, or of any person, or of any body corporate, by any person claiming right thereto, without interruption for the full period of twenty years, the right thereto shall, subject to

> the provisos hereinafter contained be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given that purpose by deed or writing.

[22] What are the characteristics of an easement was considered in **Re Ellenborough Park [1955]** 3 All E.R. 667. At page 673 paragraphs H to I of the judgment it was stated:

> "For the purposes of the argument before us Counsel were content to adopt, as correct, the four characteristics formulated in Dr. Cheshire's Modern Real Property (7th Edn.), p. 456 et seq They are i) There must be a dominant and a servient tenement; ii) an easement must accommodate the dominant tenement; iii) dominant and servient owners must be different persons; and iv) a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant."

[23] That the dominant and servient owners must be different, was discussed in Halsbury's Laws of England 4th Edition Volume 14 at page 8, paragraph 16. There it was stated:

> "16. **Dominant and servient owners must be different**. It is an essential characteristic of an easement that the owner of the dominant tenement and the owner of the servient tenement must be different persons. A man cannot have an easement over his own land, because all acts which he does upon his own land are acts done in respect of his rights as the owner of the land, and the law does not allow the co-existence of an easement over land with the possession of the land itself. However, it follows that an owner of land can grant an easement over his own land if he is not in

possession; thus the owner of two parcels of land can grant an easement over one parcel to a tenant of the other parcel."

[24] This issue was also discussed at page 39 at paragraph 78 which stated:

"**Grant presumed to be by owner in fee simple.** In all prescriptions, except as regards prescriptive claims to light under the Prescription Act 1832, the grant which is presumed is a grant by the owner of the fee simple of the servient tenement to the owner of the fee simple of the dominant tenement. The whole theory of prescription at common law militates against the presumption of any grant or covenant by anyone except an owner in fee. For this reason, where an easement is claimed by prescription it must be claimed in favour of the fee simple of the dominant tenement as against the fee simple of the servient tenement; however, it is sufficient to show that the user began against the fee simple owner, even thought the servient tenement was subsequently settled or let. Consequently, no easement can be claimed by prescription for an estate or interest less than a perpetual one. For the same reason a tenant cannot acquire an easement by prescription against his landlord, but by user over the land of a stranger he may gain a prescriptive right in fee for his landlord, which he will be able to enjoy as tenant. An easement for an estate less than an absolute interest may, however, be created by express grant or may arise otherwise by operation of law."

[25] The judgment of Fox LJ in **Simmons v. Dobson and Another [1991]** WLR 720 is also instructive. At page 723 paragraph C to F he stated:

"Now in relation to common law prescription generally, user has to be by or on behalf of a fee simple owner against a fee simple owner. An easement can be granted expressly by a tenant for life or tenant for years so as to bind their respective limited interests, but such rights cannot be acquired by prescription: see **Wheaton v. Maple & Co. [1893]** 3 Ch. 48 and **Kilgour v. Gaddes [1904]** 1 K.B. 457. Thus Lindley L.J. in the former case said [1893] 3 Ch. 48, 63:

> "The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years."

In **Kilgour v. Gaddes [1904]** 1 K.B. that was cited with approval by Collins M.R., at p. 465, Mathew L.J., said, at p. 467:

> "I agree. In this case the fee simple of the supposed dominant and servient tenements belonged to the same person. It is clear that, under such circumstances, an easement like a right of way could not have been created by prescription at common law. Such an easement can only be acquired by prescription at common law where the dominant and servient tenements respectively belong to different owners in fee, the essential nature of such an easement being that it is a right acquired by the owner in fee of the dominant tenement against the owner in fee of the servient tenement. If authorities were necessary for that proposition, the case of

Wheaton v. Maple & Co., [1893] 3 Ch. 48 and 2 Wms, Saunders, 175(f), (i) would suffice."

[26] The judgment in **Simmons v. Dobson and Another** also addresses the question of immemorial user. At page 722 H to 723 A Fox L.J., stated:

> "I come then to the contention that the plaintiff succeeds on the basis of lost modern grant. That doctrine arises from the inadequacies of common law prescription. At common law, acquisition of a prescriptive right depended upon the claimant establishing (amongst other things) the requisite period of user. Thus, common law prescription was based upon a presumed grant. The grant would be presumed only where the appropriate user had continued from time immemorial. That was fixed as the year 1189; that date originated in a mediaeval statute. It was usually impossible to satisfy that test. Accordingly, the courts held that if user "as of right" for 20 years or more was established, continued user since 1189 would be presumed. That was satisfactory as far as it went, but there were gaps. In particular the presumption of immemorial user could be rebutted by showing that, at some time since 1189, the right did not exist. For example, an easement of light could not be claimed in respect of a house built after 1189."

[27] Relative to section 2 of the Prescription Act 1832 [UK] Fox L.J. stated:

> "The purpose of that section is to shorten the period required by common law prescription to 20 years prior to the bringing of the action."

For this he found support in Dalton v. Henry angus & Co., 6 App. Cos. 740, 800 where Lord Selbourne L.C. said:

> "The effect of [section 2], as I understand is to apply the law of prescription, properly so called, to an easement enjoyed as of right for 20 years, subject to all defences to which a claim by prescription would previously have been open, except that of showing a commencement within time of legal memory."

[28] The authorities clearly show that no easement could have been created prior to 2012 as, before the transfer to the defendant of two of the three properties, all three were owned by the same owner.

[29] The issue of quasi or implied easement, though not pleaded, was raised in the submission of Miss Bernard on behalf of the claimant. The case of **Adams v. Cullen** is easily distinguished from the case under consideration as it relates to the factual situation and the legal issue to be determined. In the judgment, however, the decision in **Wreggitt v. Porterfield** 36 Wn ($2^{d)}$ 638, 639 was referred to. The court in that case started:

> "In order to establish an easement by implication, one must prove three essentials. They are generally, (i) unity of title and subsequent separation by grant of the dominant tenement, (2) apparent and continuous user, and (3) the easement must be reasonably necessary to be the proper enjoyment of the dominant tenement."

In the instant case the property held by the first claimant is said to be the dominant tenement.

[30] At the time of the transfer of two properties to the defendant, Peter and Richard W. Millingen retained ownership of the third property which was subsequently transferred to the first claimant. In **Wheeldon v. Burrows** (1879) 12 Ch. D 31 the issue

arose as to whether a quasi easement would be implied in favour of a transferor who retains possession of the dominant tenement. Thesiger L.J. at page 49 stated:

> "If the grantor intends to retain a right over the land, it is his duty to reserve it expressly in the grant"

Further he stated:

> "As a general rule there will be no implication in his favour."

There is nothing in the instant case to show that any such reservation was made.

[31] At the time of the transfer of the property to the first claimant there was no access to that property from Hillcrest Avenue as the defendant had already erected a wall barring such access. At that time access was being obtained from Lilford Avenue.

[32] An examination of the statement of case of the claimant clearly reveals that the claimants could not successfully claim a prescriptive right to access through the defendant's property. Neither could they successfully claim a quasi or implied easement which was not pleaded and, even if pleaded, would fail as it would not have been necessary.

[33] Accordingly, in exercise of my powers under Rule 26.3 (i) (c) of the Civil Procedure Rules the statement of case of the claimants is struck out as it discloses no reasonable grounds for bringing the claim. Costs are awarded to the defendant to be taxed if not agreed.