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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 00193/2004

BETWEEN	MALCOLM ROWE	CLAIMANT
AND	ROSLYN BENNETT	1ST DEFENDANT
AND	KIRK BENNETT	2ND DEFENDANT
AND	ANDREW BENNETT	3RD DEFENDANT
AND	DOUGLAS JOHNSON	4TH DEFENDANT

Mrs. Marjorie Shaw-Currie instructed by Brown & Shaw for the claimant.

Mr. Maurice Frankson instructed by Gaynair & Fraser for the defendants.

Heard: 15th, 16th, 17th July 2008 and 16th October 2009

Campbell, J.

(1) The John Crow is no longer a common sight over Jamaica. It is not an attractive bird. Its shiny black feathers is topped by a swarthy red neck and head. Its function as a scavenger has done little to improve its image, its much maligned name has become a part of the vernacular, oftentimes used to denigrate and belittle whatever object or person to whom it is likened. In this case however the John Crow Roast (JCR) Road was the road to which the claimant sought access. As so often happens, when the subject matter concerns lands, its right and privileges, the parties to this action are all related. Two of the lands in question were once owned by one Stanford Bennett, now deceased. Those two lots are presently in the possession of the defendants. Mr. Stanford Bennett was the husband of the 1st defendant, the granduncle of the claimant, the grandfather of the 2nd and 3rd defendants, and father-in law to the 4th defendant. The claimant is seeking a right of way over the lands in the occupation of the defendants.

(2) The lands are situated in the district of Allison Run, in the parish of Manchester. The claimant occupies a three-quarter of an acre lot (the dominant tenement). The dominant tenement has on its southern boundary, a quarter acre lot occupied by the 1st, 2nd and 3rd defendants (Lot 1). Lot 1 was formerly owned by one Easton Bennett, and is adjoined on its southern boundary by Lot 2. Lot 2 consists of two acres and is bounded at its other end by the JCR Road. These lands are situated in the hilly hinterland which, according to one witness, would not have enough level land to accommodate a cricket field. The lands are bounded by two roads, a section bordered on the road leading from Cobbla to Allison (Cobbla Road). The evidence is that transportation over the Cobbla Road is difficult. The other road, the JCR Road, provides for greater ease of travel. The claimant's land has access to the Cobbla Road by a 12 feet track through adjoining property. This claim concerns a right of way to access the JCR Road by way of an eight feet wide path over Lots 1 and 2 (the servient tenements).

(3) The claimant's claim is to recover damages for trespass and for an injunction. The claimant seeks declaration of an eight feet right of way through and over lands in the occupation and possession of the defendants, and Declaration that the defendants trespassed on the lands owned by the claimant by erecting a wire fence and a metal gate in such a way that the same prevented the claimant access to the said eight feet right of way.

(4) The claimant submits that he is entitled to an easement which has been created by way of prescription, or through a statutory implied grant or by necessity. The claimant's submission is that the easement was created by several events, including pre-check plans showing the right of way, the reports of two surveyors, admission and acquiescence by Stanford Bennett that persons used a track or road to gain access to Lot 1. According to the claimant, these factors have given rise to an implied grant of a right of way over the lands of Stanford Bennett.

(5) The defendants submit that there is no express grant of an easement over Stanford Bennett's two acres parcel of land, nor is there any reservation or statutory provision by which an easement has been created in favour of Easton Bennett's land or Joslyn Christopher's land.

The Historical Background

(6) There was originally a plot of land in Allison Run that lies between the two roads; these roads were the Cobbla Road and the John Crow Roast (JCR) Road. The section of the land that fronted on the Cobbla Road was owned by one Eli Morris. Stanford Bennett owned the piece that bordered the JCR Road. In or about 1954, Eli Morris donated a piece to one Noami Denton, who in 1967 sold a quarter acre to Easton Bennett and the remaining three quarter acre was sold to Joslyn Christopher. Joslyn Christopher and Easton Bennett gained access to Cobbla Road through a twelve feet right of way, across Eli Morris land. Joslyn Christopher laid the foundations for a home on the spot he purchased, but never completed it. He sold the property to the claimant in 1990. Christopher and Easton Bennett had their respective plots surveyed. Easton Bennett sold his quarter acre to Stanford Bennett in 1974. The claimant has since attempted to cut a road through Stanford Bennett's land to the JCR Road, but was obstructed by the landowner.

Claimant's Case

(7) The claimant testified that before Stanford Bennett bought the one-quarter acre, he was the owner of two pieces from which he had egress to JCR Road. He could not say whether Morris had access to Cobbla Road before he sold to Easton Bennett and Joslyn Christopher. He was not aware of any statutory instrument that provides an easement from Morris' land across Stanford Bennett's land to JCR Road. He knew of no reservation expressed or implied that grant an easement from Morris' land across Bennett's land. He asserts an implied grant which is to be

found in the pre-check plans, as well as Stanford Bennett's actions in respect of the usage of the 8 ft. right of way. He testified that he used that road until 1998; wherefore that was the first time objection was raised and a wire laid across the 8 feet. road. He maintains he did not know of an easement across Bennett's land when the land was owned by Morris.

(8) The claimant asserts that the implied grant arose in 1967 when the diagrams were done. He testifies that he would see Easton Bennett using Stanford's lands to access JCR Road and that Easton Bennett gave an easement to Joslyn Christopher to go across Easton Bennett's land. In so far as Lot 1 land is concerned, he agrees that Easton Bennett could not have given a right of way across Stanford Bennett's land. He asserted that Easton had a right of way across Stanford Bennett's land. In respect of the twelve feett to the Cobbla Rd., the claimant says that "the right of way is only on the diagram, it is not physically there, the terrain is extremely difficult and hazardous. The witness accepted that Joslyn Christopher would want to sell it if the 12 feet access to Cobbla was the only road. He admits that the declaration by Stanford Bennett makes no mention of the right of way. He claims that Stanford Bennett never stopped him from crossing the land. That he had discontinued action against Stanford Bennett before his death in 2002 or 2003. That every effort to cut off the eight-foot road has been thwarted. He complained that Joslyn Christopher led him to believe that he had a right of way. He said that Joslyn Christopher definitely had a right of way across the first piece of Stanford Bennett's land.

Defendant's Case

{9) Douglas Johnson testified that he would see Easton Bennett during his lifetime, and his family members using a track and taking different routes. He said, "The track I use to go to Easton Bennett's house is one of the tracks Easton Bennett used to go to JCR Road." He was unable to say when Joslyn Christopher sold the land to the claimant.

The evidence of Joslyn Christopher was that he had bought the land from Noami Denton around 1965; it had access to the Cobbla Road but none to JCR Road. He testified that the Cobbla Rd was so bad that he discontinued the construction he had undertaken, lost interest in the land and sold it to the claimant. He specifically denies that the land that he sold to the claimant had access to the JCR Road and testifies that such access never existed. He said that in order to get to his land, he would pass through Standford's land and Willy Bennett's land. He considered his actions in passing through Stanford Bennett's land a trespass. He testified that at the time of building his house, there was a track that access JCR Road. He said when he bought the land from Noami, if he had known that Frazier would not allow him "to pass through," he would not have bought it. He considered lot landlocked when Frazier refused him a right of way.

Prescription

(10) The claimant asserts that the conveyance specifically incorporates the survey diagram (ex.2) which he claims expressly shows the eight feett right of way over (Lot 2). The claimant argues that the unchallenged evidence of Douglas Johnson and the report of the land surveyor support the presence of this eight feet right of way. The claimant argues that Stanford Bennett had not implied but gave notice of the existence of this right of way, by his participation in the preparation of the survey diagram. Claimant admits that the starting point of the right of way and the manner in which it traverses the defendant's land is not shown on the diagram. In 1990, the claimant had purchased the dominant tenement some 16 years after Stanford Bennett bought Lot 2. The claimant argues that although access through Lot 1 'emanated' by permission from Easton Bennett, there is no evidence of permission in respect of Lot 2, to Joslyn Christopher. . , and that there was no evidence that for years preceding the sale to the claimant of the dominant

tenement, that the then owner required any permission of Stanford Bennett to enter unto either Lot 1 or Lot 2. There is evidence of persons pasturing their livestock on the servient Lot 2.

The claimant is asking for a declaration of a right of way over the defendants' lands on the ground that an easement has been created by virtue of the Prescription Act, and relies expressly on sections 2 and 5. Section 2 provides:

> S2, When any …easement… a claim of which may be lawfully made at the common law, by prescription or grant, shall actually have been enjoyed or drived upon, over or from any land …. Of any person claiming right thereto, without interruption for the full period of twenty years, the right thereto shall, subject to the provisions 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 for that purpose by deed or writing.

The Law

(11) The claimant may be met by defences admissible in a case where common law prescription is pleaded. These include that the easement claimed may not form the subject-matter of a grant, or that its enjoyment has not been without contention, secrecy or precarious. The user must be as of right. The learned authors of "Modern law of real Property" 12 ed., says at page 495.

> "All forms of prescription ultimately depend on the acquiescence of the servient owner. Why should long enjoyment confer a right protected by the courts? The answer is that, if the servient owner has allowed somebody to exercise an easement over his land for a considerable period and if he has omitted to prevent such exercise when he might very well have done so, it is only reasonable to conclude that the privilege has been rightfully enjoyed, for otherwise some attempt to interfere with it would have been made by any owner who possessed a modicum of common sense."

The authors indicate that "The servient owner cannot be said to have acquiesced in an easement that has been enjoyed vi, clam or precarious." Has there been such acquiescence on the part of the owners of Lot 1 and Lot 2 in respect of the easement sought by the claimant?

(12) The evidence of Joslyn Christopher in respect of his user of both Lot 1 and Lot 2 is instructive; he describes his relationship with Stanford and Easton as being 'good friends'. He said he would have to pass through Stanford's land, and he said he was never told "to come off his land". He said that when he bought the land, he did not know that Frazier would not allow him passage, or he would not have bought it. When Frazier refused him passage, he felt landlocked. He describes his passage through Stanford's land as a trespass. It is clear that Joslyn's traversing of the land certainly did not amount, in his mind, to a user as of right. The gist of his evidence was that although he was not told he could not proceed over Stanford's land, his user was precarious. He denies the existence of any road across Stanford's lands which allows him access to the John Crow Roast Road.

(13) I accept that Joslyn Christopher had commenced building the foundations of a house, but ceased because the Cobbla Road was very bad. I accept his testimony that he had no right to an alternative route through Stanford's lands. Easton Bennett said that he "encroached" on Stanford's land after he purchased a quarter acre from Noami Denton. In cross-examination he agreed that he was "never run off Stanford's land" whilst he sought access to JCR Road. He said the track he used was about two feet wide. Easton Bennett also testified that, he knew Joslyn Christopher and had encouraged him to purchase the land. When Joslyn was trying to build, he allowed him access through his, Easton's land to Joslyn's land. The testimony of Easton Bennett supports Joslyn that such access as Joslyn enjoyed over Easton's land was not as of

right, but was with the permission of the landowner. Easton testified that the reason he sold his land was he thought himself locked in.

Easton Bennett says that the claimant's claim is misconceived because there is no road that crosses Stanford's land. He said that he gained access to JCR Road by way of a track across his uncle's land.

(14) The Prescription Act makes necessary the enjoyment of the right, "without interruption for a full period of twenty years. Section 5 of the Act computes the time as the period before some action or suit wherein the claim or matter to which such period may relate shall have been ... brought in question." The claimant contends that he first encountered objection some eight or nine years after he had purchased the property in 1990. That is 1999 or almost forty years since Easton Bennett commenced utilizing the right of way or over thirty-two years since Joslyn commenced utilizing the right of way.

(15) In order to maintain his claim for a right of way in respect of Lot 1 and Lot 2, the claimant relies on the survey diagram. Easements are extinguished by unity of seining. If the dominant and the servient tenement become vested in the same owner, all easements come to an end. All the rights that Easton enjoyed as owner of Lot 1, over the lands in possession of Stanford in Lot 2 would, on the acquisition of Lot 1 by Stanford in 1974 become vested in the single owner of both the dominant and the servient tenements. The rights would accrue to Stanford as owner; he can do what he wishes with his land. Once the easement is destroyed by the unity in the hands of Stanford, even a subsequent severance would not operate to revive it. The claimant would therefore be unable to meet the statutory requirements in respect of Lot 2. That, to my mind, would be sufficient to dispose of the claim.

(16) Joslyn Christopher, having bought the premises in 1965, did not complete a dwelling-house on it. He ceased building when he was refused egress through Frazier's land. He never lived on the property. The only evidence of the use he made of whatever access he had over adjoining property, was to visit with Easton Bennett who was his good friend. He would visit Easton once per week. There is no evidence of Joslyn being involved with any other activity. Easton testified that he left that land some twenty years ago. Although Joslyn's property was not sold until 1990, there is no evidence before this court of any further use being made of the dominant tenement. On the evidence then, at least two years before the property was sold to the claimant, the user had ceased. Easton had removed. In any event, the visits to Easton by Joslyn could not properly be considered to be for the benefit of the dominant tenement. Clearly, if Joslyn is visiting his friend and starts his journey from some location other than from the dominant tenement, he could not be heard to say that the right of way he traversed was for the benefit of or attached to the dominant tenement. The claimant has the burden of adducing evidence capable of disclosing that a continuous right of enjoyment was being asserted. The user must be such as would cause the reasonable owner to resist it to stymie its development into permanence.

(17) In **Beach Control v Price** (1961), 3 W.I.R.115, the Court of Appeal was hearing an appeal from the Portland Resident Magistrate Court from an application for a declaration that a right of way exists across the defendant's land to the beach and a declaration that the people of the village had a right to use the beach. The court had to construe S3a of the Prescription Law, Cap 304. The court had to determine whether there was user' without interruption for the full period of twenty years, which is ippissima verba of S.2. Cools-Lartique (Ja.) at page 116.

> "A scrutiny of that section discloses that in order to succeed in his claim, the appellant must establish continuous user by the public without interruption for the full period of twenty years and section 4 of the Prescription Law makes it clear that it is twenty years before action brought"

and at page 11 letter e.

> The first point to be considered is, on who does the onus of proof lie in this matter? We are of the opinion that the onus lies on the appellant to establish twenty years of continuous uninterrupted user before action is brought. In coming to that conclusion we are not unmindful of the provisions of ss4 and 5 of the Prescription Law: These sections are the present sections 5 and 6 in Prescription Act 1969."

(18) The claimant submits that based on the survey diagram (ex.2) and the conveyance, the court is entitled to declare the existence of an easement. The claimant relies on s9 of the Conveyance Act and argues that upon the sale of Lot 1 by Easton to Stanford, the latter became the grantor of the easement endorsed on the pre-checked plan. How was this easement created? The testimony of the claimant is to the effect that it was the survey diagram that gave emergence to the implied grant. "The written submissions state it in this way, "That upon the sale of Land 1 by Easton Bennett to Stanford Bennett, Stanford Bennett became the grantor of the easement endorsed on the pre-check plan.... The grantee at this time was Joslyn Christopher. Subsequent to 1990, Malcolm Rowe became the grantee."

(19) The claimant relies on an inter vivos creation of an easement, between Stanford and Joslyn. The learned authors of Gayle Easements Sixteenth Edition at paragraph 3-12 states:

> "As already mentioned, a legal easement cannot be created inter vivos, otherwise than by deed. An easement so otherwise granted or agreed to be granted takes effect, if at all, in equity and does not bind a purchaser for value of the servient tenement without notice."

Here there is no deed. The grantor is deceased, but had resisted the claimant user of the easement in 1998. The other party to this inter vivos transaction never regarded himself as being entitled to the easement, and according to his testimony, trespassed whenever he traversed the so-called servient tenement. Joslyn claimed no grant. The court was not pointed to the terms of any such grant or any agreement between the parties. The plan is unhelpful in expressing the dimensions and route of this right of way. The claimant states in his submission that, "The exact position of the length of the right of way as to how it traverses the land of the defendant is not shown on the diagram."

Necessity

In **Lush v Duprey** (1966), 10 W.I.R. 388, the court held:

> "A way of necessity arises, where on a disposition by a common owner of part of his land, either the part disposed of or the part retained is left without any legally enforceable means of access. In such a case, the part so left inaccessible is entitled, as of necessity, to a way over the other part (see Gale on Easements (13th ed.) at page 98."

All the witnesses speak to the presence of a 12 feet right of way that leads to the Cobbla to Allison Road. The claimant himself does not deny the presence of such a right of way. The claimant describes it as starting at the southern tip of Lot 1, passes through the rest of Morris land, then to Allison to Cobbla Road. The claimant says the right of way is only on the diagram, it is not physically there. The terrain is extremely difficult and hazardous. He was prepared to undertake an extension from his mother's road. He accepts that Joslyn would want to sell the land if that was the only road.

The learned authors of Gale, Easements, state that the principle of necessity applies where both parts are disposed of simultaneously (which is not the case here), either by grant inter vios, or by will. The commentary continues that where a way of necessity arises, its line is to be

chosen by the grantor. The claimant has contended that Stanford Bennett was present at the Survey which produced the diagram which was incorporated in the conveyance. The grantor obstructed the claimant user in 1999, although action was initiated after the obstruction, it was discontinued before the death of Stanford Bennett. It is clear that the claimant had an enforceable means of access via the twelve feet road.

The claim is dismissed, the applications therein are refused. Cost to the defendants to be agreed or taxed.