



[2022] JMCC Comm 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00529

BETWEEN	PALM BEACH RUNAWAY BAY LIMITED	CLAIMANT
AND	BENBECULA LIMITED	FIRST DEFENDANT
	MALCOLM MCDONALD	SECOND DEFENDANT

Application for summary judgment- Registered land –Registered easement (road reservation) -Limitation of Actions Act- Possessory title - Whether right to road reservation extinguished.

Michael Hylton QC, Kevin Powell and Daynia Allen instructed by Hylton Powell for the Claimant

Denise Kitson QC and Regina Wong instructed by Messrs. Grant Stewart Phillips & Co. for Defendants

Heard: 19th & 20th January, 2nd February and, 1st March, 2022.

In Chambers by ZOOM

Cor: Batts J.

[1] This is an application for summary judgment. The facts, although rather involved, are not much in dispute. At any rate it is the Claimant's position that, even accepting all material facts to be as the Defendant contends, there should be judgment for the Claimant.

[2] The issue concerns land and an easement over land. The land is registered and so too is the easement. The easement has not been used for some considerable time. Also for a long time the land, over which the easement passes, has been fenced in and thereby co-opted onto a parcel of land owned by the First Defendant. The Defendants assert a possessory title over the land containing the easement. They say that, by virtue of the Limitation of Actions Act, any right to exercise the easement has been extinguished.

[3] The detailed facts, as gleaned from the respective affidavits, are as follows:

- i. The Claimant is the registered owner of lots 2,3,4,5,6,7,13,14 and, the canal located between lots 4 and 5 and 7 and 8, all registered at Volume 1505 Folio 947 of the Register Book of Titles [hereinafter referred to as the Claimant's land].
- ii. The First Defendant is the registered owner of lot 8 which is registered at Volume 1267 Folio 64 of the Register Book of Titles [the First Defendant's land]. It adjoins the Claimant's land. The plan annexed to the title shows a roadway marked "*reserved road 26 feet wide.*" [The reserved road].
- iii. The Second Defendant is a director, and the general manager of the 1st Defendant, who at all material times acted as its agent.
- iv. The reserved road is adjacent to the 1st Defendant's land and to the Claimant's land. It allows for an alternate access to the Claimant's and the 1st Defendant's land.
- v. The Defendants erected a fence/wall and gate across the reserved road. It is alleged by the Claimant that the

Defendants also erected a generator house, dog kennels and a gate house on the reserved road. The gate and fence/wall effectively prevented access to the reserved road which in any event had not been used for a long time.

- vi. The Claimant has an alternate access to its property and conveniently used that entrance during certain work of construction.
- vii. By letter dated the 13th November 2020 the St. Ann Municipal Corporation called upon the 2nd Defendant to remove these obstructions see, exhibit FM2 to the Affidavit of Frederick Moe filed on the 6th October 2021.
- viii. By affidavit filed on the 6th October 2021 Mr. Grantley Fitzgerald Kindness, a commissioned land surveyor, reviewed the relevant titles, plans and easement. He rendered an opinion and concluded at paragraph 17:

“a. The Reserved Road is still part of the land registered at Volume 698 Folio 45; and

b. Both Palm Beach [the Claimant’s land] and Benbecula [the Defendants land] are entitled to a right of way over the Reserved Road and to use that roadway to access their respective properties.”

- ix. The Defendants, in an affidavit sworn to by the 2nd Defendant and filed on the 18th January 2022, admit the *“physical outlay of the parties’ properties in paragraph 3 – 5”* of Mr. Moe’s affidavit filed on behalf of the Claimant. The Defendants say that the reserved

road originally ended in a cul de sac which would have been the access point for adjoining owners.

- x. The 2st Defendant says, at paragraph 18 of their said affidavit, that: *“1st Defendant and I have enjoyed exclusive occupation and use of and access to the reserved road since 1996 which has extinguished any right of way to the use of the reserved road by any other proprietor...”* The possession was manifested by a wrought iron gate and fence referenced at paragraph (v) above. This was erected in 1996 and there was no protest until long after the 12-year limitation period had elapsed.
- xi. The structures were erected because there was no parochial road, just a track, and the nearby premises were unoccupied. The Defendants therefore had security concerns. The fence was eventually replaced with a concrete wall.
- xii. The Defendants admit paragraphs 6 – 9 of Mr. Kindness’ affidavit but reiterate that the right of way has been extinguished.
- xiii. The Defendants’ position is supported by the affidavits, of Wentworth Prendergast and Gavin Pirson, both filed on the 18th January 2022. They confirm the erection of the fence and wall across the reserved road, for a period exceeding 12 years, and the Defendants’ exclusive possession.

[4] The Claimant urges me at this stage to resolve the primary issue being whether or not a possessory title, acquired by virtue of the Limitation of Actions Act, can

extinguish an easement. The Claimant says that, since a possessory title cannot defeat an easement, there should be judgment entered. The Defendants say that the issue should be resolved at trial. They submit that the question, whether or not a possessory title is effective to extinguish the Claimant's right to the easement, involves issues of fact.

[5] I am satisfied that this is an appropriate matter for summary determination. The material facts are not in dispute. Furthermore, the question, whether or not the limitation statute can defeat an easement, is a matter of law and therefore appropriate for determination at this stage.

[6] The Defendants in written, supplemental and, oral submissions, as well as submissions sent by email after the close of arguments, rely on several authorities. Much of this effort was concerned to demonstrate that whether or not a possessory claim extinguishes an owner's title is a question of fact. However, as the Claimant's only argument in this application is that a possessory title can never extinguish an easement, I need not review those cases. For purposes of this application I am entitled to assume that the Defendants had the necessary intent, exclusivity and, possessed the reserved road for the period, necessary to acquire a possessory title. The question, and the only question, is whether the possessory title extinguished, or is capable of extinguishing, a right of way created by an easement in the form of the reserved road.

[7] The authorities relied on, in that regard, by the Defendants are as follows:

i. Section 3 of the Limitation of Actions Act which provides:

"No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to

any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.”

ii. Section 21 of the Limitation of Actions Act

“When the right of any person to make an entry, or bring an action to recover any land or rent to which he may have been entitled for an estate or an interest in possession, shall have been barred by the determination of the period hereinbefore limited which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or the same land or rent, no entry, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest or gift which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

iii. Section 30 of Limitation of Actions Act

“At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been

made or brought within such period, shall be extinguished.”

iv. A decision of the California Court of Appeal, **Viera Enterprises Inc. v McCoy 8 Cal App. 5th 1057 (Col. 6th Appellate District 2017)**.

v. **J.A. Pye (Oxford) Ltd. and others v Graham and Another [2002] UK HL30**.

vi. **Amirtharaja and another v. White and another [2021] EWHC 330 Ch**.

vii. **Littlesdale v Liverpool College [1898] 1 Ch. 19, upheld on appeal at [2022] EWCA Civ.11**.

[8] The Claimant filed submissions and supplemental submissions. Mr. Hylton’s oral argument was delivered in his usual clear, if somewhat laconic, style. As I have found favour with his position I shall not summarise the submissions.

[9] All counsel involved should rest assured that their submissions, written and oral, have been carefully considered. I even read the application and material emailed to the court after I had reserved. I noted also the Claimant’s objection and response. The profession is to be reminded that the practice is not to be encouraged, see **Kingston Legal Aid Clinic Limited v Barbican Law Clinic et al [2020] JMCC Comm 30 (unreported judgment delivered 14th October 2020) at paragraph 34**, applying **Traille Caribbean Ltd v Cable and Wireless Jamaica Limited t/a Lime [2020] JMCA App 45 (unreported judgment dated 9th October 2020)**.

[10] I am satisfied that sections 3, 21 and 30, of the Limitation of Actions Act do not impact rights to pass over land whether acquired by prescription, registration or grant of easement. In the first place the proposition is contrary to the clear meaning of the words of the statute. The Act precludes an entry, or the bringing of action

or suit, *“to recover any land or rent.”* The passage over land is not an *“entry”* which can recover land or rent. The term *“entry”* is utilised when landlords seek to recover possession or mortgagees take steps to foreclose on their mortgage. Passage over land, with or without permission, is not in law an entry which affects possession or its exclusivity. An entry, on the other hand, can be used as a means to recover possession within the meaning of Section 3.

[11] In Section 21 the words *“entry”*, *“an action”* and, *“to recover any land or rent”*, are followed by the words *“to which he may have been entitled for an estate or interest in possession.”* A right to pass over land is neither an estate nor an interest in possession. Prescriptive rights have never given the person entitled to the benefit an interest in the land. It is a mere right of passage, there is no element of ownership or control, over the land. Section 21 is clearly prohibiting entry or action *“to recover such land or rent.”*

[12] The position is made pellucid by Section 30 which refers to :

“.... the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought.”

Manifestly therefore the Limitation of Actions Act has no application to a claim to exercise prescriptive rights. It only applies in this regard to claims for ownership, possession or rent.

[13] The authorities referenced in paragraph 7, as having been cited by the Defendants, are not applicable to this case. The decision from California turns on the wording of their civil code which expressly defines rights of way so as to allow their Limitation Statutes to apply. The dicta in **Littedales’ case** must be understood in the context of the facts and what was decided. That case concerned a defendant to whom a parcel of land, located between two others also owned by the defendant, had been transferred. The plaintiff claimed to have been in possession of the said parcel of land for the requisite period under the limitation statute. He therefore urged that, as the land was now his, the transfer to the defendant was of no effect.

It was the defendant's contention, with which the court agreed, that the plaintiff was not entitled to a possessory title. This was because his fencing off of the said parcel of land was done, not as a demonstration of an intention to own or possess, but with an intention to bar passage from one of the parcels to the other. It was the plaintiff claiming a possessory title who previously had a right of way. Hence the words of the following judges:

Lindley MR (at page 23)

"I am myself convinced that the gates were put up, not to exclude the defendants, but to protect the plaintiff's right of way, and to prevent the public from going along the strip of land now claimed by the plaintiffs."

and per Sir F. H. Jenune (at 25):

"But on the whole, I am not prepared to take the responsibility by differing from him [the judge below], because all through there has been an undoubted right of way in the plaintiffs as against the defendants, and it is very difficult to distinguish the acts done by the plaintiffs from acts which they would do, and would have a right to do, in exercise of their right of way."

- [14] That court correctly decided that the plaintiffs could not defeat the validity, or effect, of the conveyance to the defendant of the parcel (or strip) of land. The defendant's title was therefore not defeated by the plaintiff's alleged possessory title. In similar vein is dicta in the case of **Amirtharaja**, at paras 54 and 58 of the judgment, to be understood. The high court, on appeal from a decision of the county court, decided that there was no *animus possidendi* so as to enable the owner's title to be defeated, per Green J at para 64:

“Although the Judge then went on to consider Mr. Bright’s evidence as to the use of the Passageway, the analysis shows that the Judge did not consider that the equivocal acts were fatal to a claim for adverse possession. If the gate was there to discourage youths from coming into the garden of Hollis House, there was no unequivocal intention to possess the passageway as in Littedale. The intention was to protect Hollis House from unauthorised intruders gaining access through the Passageway over which the owners of Hollis House had a right of way. There was no need to take possession of the Passageway because the right of way was all that the owners of Hollis House needed and it was what they were protecting. The judge does not appear to have considered the intention question from this perspective.”

- [15] What is not equivocal, however, is the decision of the Judicial Committee of the Privy Council on which Mr. Hylton QC relied. In, **Icebird Limited v Alicia P. Winegardner PCA NO. 72 of 2007 (delivered 2nd June 2009)**, the appellant claimed a right of way running over the respondent’s servient property. The claim was struck out at first instance, because of an inordinate delay in its prosecution, and the Court of Appeal agreed. The appellant (claimant) appealed to their Lordships Board to have his case restored. Their Lordships, although agreeing that the delay was inordinate, decided that the claim ought not to be struck out unless there was prejudice to the defendant. It was in the latter regard that they contemplated the merits of the matter and the evidence available to the respective parties.
- [16] The appellant (claimant) was seeking to enforce a right of way over land owned by the respondent. It was the respondent’s case that the right of way (which had been granted by a conveyance) had never been exercised and was abandoned and further that the cause of action was barred by statute of limitation. The court concluded that the appeal would be allowed and the plaintiff’s case restored because of the strength of the plaintiff’s case and as the delay had caused the defendant no real prejudice.

[17] Relevant to the issue before me is the observation by the Judicial Committee that mere non-user of an easement does not suffice to establish its abandonment. There must also be an “intention” to abandon. Secondly, and more to the point of the issue before me, the court stated that the statute of limitation under consideration (which is similar in relevant respects to the one I have to consider) does not bar an action to enforce a prescriptive right to passage over land. In the words of Lord Scott of Foscote, at para 16:

“Finally there are the time bar points. Their Lordships feel bound to say that the respondent’s submissions based on the effect of the Limitation Act 1995 and its Statutory predecessors appear to them to be misconceived. The appellant’s claim is not a claim for the recovery of land and is not subject to the twelve-year limitation period for such a claim prescribed by Section 16(3) of the 1995 Act or to the twenty-year period prescribed by Section 1 of the Real Property Limitation Act 1874. Neither of these statutory provisions have any application to a claim for an injunction to restrain interference with an easement. If the appellant’s easement is still subsisting i.e. has not been extinguished by abandonment, interference with it is a common law nuisance....”

[18] The Board referenced the possibility of a defence of laches and, in restoring the claim, directed that a summons for directions be issued. This has caused me pause. However, I am not considering whether or not a claim has been properly dismissed for want of prosecution. I am considering an application for summary judgment. The only issue for me is whether, on the statements of case filed and the evidence placed before me, the defence has a real prospect of success. The answer as a matter of law is clearly in the negative. The Defendants have not pleaded laches but, in paragraph 9 of their defence, “abandonment” is pleaded.

There is not much, by way of affidavit evidence, to support the assertion that the right of way has been abandoned because it has not been used since the 1950's. In any event it must be a rare case indeed that a party, who fails to exercise a right of way which has been fenced, could be said to have the necessary intent to abandon. As to laches, I observe that their Lordships were considering a common law right of way granted by conveyance. I very much doubt that such a plea is available, to the holder of the servient property, with respect to a registered easement on registered land. That need not detain me however as I am satisfied that on the evidence the defence in this case has no real prospect of success.

[19] Finally, I considered dismissing the claim against the 2nd Defendant who was not the registered owner of any land in this case. He asserts that at all times he was an agent of the 1st Defendant. However, when regard is had to his affidavit, and in particular to the passage referenced at paragraph 3(x) above, it is clear he regarded both himself and the 1st Defendant as being in possession. I cannot say therefore he was wrongly joined as a defendant.

[20] There will therefore be Summary Judgment for the Claimant as follows:

1. It is Declared that the Claimant is entitled to a right of way over the roadway marked "Road Reserved 26 Feet wide" as shown on the plan annexed to Certificate of Title registered at Volume 1505 Folio 947 of the Register Book of Titles (the Reserved Road)
2. A Case Management Conference for the assessment of damages and the consideration of other remedies is to be fixed
3. Costs to the Claimant to be agreed or taxed.

David Batts
Puisne Judge.