ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO.111 OF 1997

BETWEEN:

LEONARD TESHIRA

Plaintiff

and

GAYLENE SHALLOW
GERARD SHALLOW

Defendants

Appearances:

Mr John Bayliss Frederick for the Plaintiff
Ms Zhinga Horne for the Defendants

2000: June 13, 19, 26

JUDGMENT

[1] MITCHELL, J: This is a land dispute between neighbours. The question before the court was the existence by prescription of a disputed right of way.

[2] The witnesses for the Plaintiff were the Plaintiff himself, Mr Sebastian Alexander licensed land surveyor, Mr Henry Miguel, and Mrs Hyacinth Williams. Giving evidence for the defence were the two Defendants, and Vincent DaSouza, and Jonathan Cupid.

[3] The facts can be shortly stated. The Plaintiff's deed for his property goes back to 27 January 1956. His property lies alongside the main road. The main road is to the east and north of his property, and his house is very close to the main road. He can easily access his house from the main road. To the south and west of his

property, the Plaintiff has planted fruit trees and crops. Because of the steep slope towards the south of the property, it is difficult to take the produce of his fruit trees and crops out directly onto the main road. The Plaintiff testified that to the south of his property there used to be a pre-existing private road that he used as a footpath to access his garden to get out his crops. He testified that other neighbours of his to his west and south, such as Ellen Miguel from whom he had acquired his property, her grandson Henry Miguel whose house and property lies along an extension of the disputed road, and a Mr St Cyr used the disputed road as well. The Defendants now own the property to the south of the Plaintiff. The 1st Defendant is a granddaughter of an earlier owner. She and her husband got their deed in 1995. They built up their house on the land and fenced it in. The Plaintiff claims the Defendants have fenced in the road that he and other neighbours used.

[4] The Plaintiff claims a right of way over the Defendants' land by prescription. This right in St Vincent and the Grenadines is governed by the Prescription Act, Cap 246. The Act first came into effect as a part of the law of the State in the year 1869. The Act provides at section 2 that

> (1) No claim which may be lawfully made at the common law by . . . prescription . . . to any right of way . . . over . . . any . . . property of a . . lay person . . . when such way . . . shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years shall be defeated or destroyed by showing only that such way . . . was first enjoyed at any time prior to such period of twenty years: but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated.
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> (2) Where such way . . . shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible . . . .

[5] The Defendants denied in their testimony the existence of a private road of ancient use by the Plaintiff and others. They denied that they incorporated the roadway into their fenced-in area. They testified that the area of their land that the Plaintiff and his witnesses say bore the right of way was always covered in fruit trees, and that no passageway lay through there. Their witnesses Mr DaSouza and Mr Cupid support them. The following evidence contradicts them:

(1) First, there is the evidence visible on the plan kept by the Lands and Surveys Department of the Government of St Vincent. This plan was compiled from air photographs done in 1970 and 1977. It was completed by field work done by the government surveyors in 1981. The plan shows a broken line right where the Plaintiff claims his private road to be. The Defendants testified that the broken line on the map may represent the drain that runs in that location. But, I find from the evidence of Mr Alexander that the broken line signifies a road or track. It is true that the legend on the map warns that a road marked on the plan is no evidence of the existence of a right of way. This is a sensible warning. I do not find that the plan shows a right of way. What the plan does show is an obvious or apparent path or road where the Defendants claim that none existed.

(2) Secondly, there is the survey done by Mr Alexander in March 2000 for the purpose of the case. That survey shows the road going from the main road and, interrupted only by the fenced-in area of the Defendants' yard, continuing on the other side of the Defendants' fence. One can see from looking at Mr Alexander's map that the road continued from the main road past the Defendants' property, past the St Cyr property, and on to the Miguel property. Even if I believed the evidence of the Defendants, that they recently built and widened the road up to their yard on the east, there is no explanation for the identical road continuing to the west on the other side of their yard. They deny that the road is there to the west. They say it is simply not a road, it is just a

recently cleared spot. But, I accept the evidence of Mr Alexander that it seemed to him to be a road, and a continuation of the road to the east.

(3) Third, there is the matter of the colour photos of various aspects of the disputed road taken by Mr Alexander and incorporated into his report. They appear to me to show a road approximately 6 feet wide. Mr Alexander measured the road and gave its width as 6 feet. The part of the road that is to the east of the Defendants' home appears well used, as one would expect because the Defendant use it currently to access their newly built home. The third and fifth photos show the road on the other side of their fenced-in yard. That part of the road is now, as appears from the photos, grassy and apparently unused, as one would expect from a road that, as a result of the thick hedge planted by the Defendants, cannot be used as it has been blocked and now leads nowhere.

(4) Fourth, there is the matter of the water pipe and the electricity poles and lines put in alongside the disputed road at some unknown time in the past. The Water Authority and the Electricity Department, from common experience, do not lay water and electricity utilities through private land to get to a group of houses without first saying something to the owner of the land. They do not cross through the middle of private lands to get to houses when there is an alternative access by a road or path alongside which they can install their pipes and poles and wires. Service needs dictate such a preference. The existence of the water pipe, poles and lines, suggest that the Water Authority and the Electricity Department had reason to believe that the road was an access to the properties lying to the west beyond the Defendants' house. Mr DaSouza, a witness for the Defendants testified that the water and electricity were only laid down three or four years ago, ie, in 1996 or 1997. I cannot accept that. Those utilities must have been laid down before the access was blocked in 1995. The utility workmen would not have been able to transport the heavy poles and water pipes to the sites where they are erected and laid

down if the fence was in place blocking their way. I believe that Mr DaSouza's memory was faulty on dates. I believe they were laid down before the road was blocked.

(5) Fifthly, and most significantly, there is the deed of Mr DaSouza. That is the smoking gun that gives the game away. Mr DaSouza is a neighbour of both the Plaintiff and the Defendants. He testified that the grandparents of the 1st Defendant had permitted him access to his property from the disputed road. He claims that only he and the Defendants ever use that road. He claims to remember constructing the road with the permission of the 1st Defendant's grandparents during the time of the Cato Administration (which would have been sometime in the 1960s or 1970s). He denies there was ever an access there before he built the road. He claims never in the past 40-odd years to have seen a soul but himself and the Defendants use that road. He has always lived even as a child with his mother on that site from before he got his deed from Ellen Miguel to the parcel on the 12 May 1961. Incredibly, he testified that he has never once walked up past his boundary to see if the road continues beyond the spot where the Defendants, his virtual neighbours, have built their house. He has never seen a road continue there. All that despite the fact that he has lived on the site all his life. But, his deed confounds him. His deed describes his western boundary as "a private road and a gutter." That western boundary of Mr DaSouza is, according to the survey plan prepared by Mr Alexander, a shared boundary with the Defendants. It is precisely in that part of the land of the Defendants that the Plaintiff complains that the road has been taken in and enclosed by the fence of the Defendants. The Plaintiff complains that the Defendants took in the road to his south and to the west of Mr DaSouza. Mr DaSouza denied that there was ever any road to the west of him. But, his deed says differently. Counsel for the Defendants asks the court to find that it was an error in drafting the deed. The correct description in Mr DaSouza's deed, she submits, should have had the gutter and the road to the south, not to the west of his property. But, even if there

was an error, of which I am not convinced, Mr DaSouza gave evidence that he only helped create the road to the south of his property during the Cato Administration, sometime during the 1960s or 1970s. Yet, it was in place early enough to be mentioned as a boundary in his 1961 deed. I find it easier to believe that out of loyalty to his old friends the grandparents and their granddaughter, the 1st Defendant, Mr DaSouza came to tell a false story to support the Defendants. I similarly found Jonathan Cupid a very unreliable witness. As he gave his evidence, it was difficult to know whether he was describing the Defendants' land or confusing it with the DaSouza land.

[6] I believe the Plaintiff that he always enjoyed the use of the private road over the land now owned by the Defendants. I believe the witness Henry Miguel that the footpath in question was created by his grandmother, Ellen Miguel, the original owner of all the properties, for her use and the use of persons who subsequently purchased land in the area. I accept the evidence that it is merely a 6 ft wide footpath. I believe that in years past when Ellen Miguel and Mr St Cyr were alive and the Plaintiff was younger and more mobile than he is now, that path was well travelled. The Plaintiff got his deed in 1956 from Ellen Miguel. That would make the footpath over 40 years old when the action commenced. I believe that when the Defendants came to own that land they found two things that influenced them to fence in the area occupied by the footpath passing over their land. First, the path was little used by the Plaintiff and others. I believe it was used regularly only by Ellen Miguel, Henry Miguel, Mr St Cyr deceased, and the Plaintiff, and their visitors. Ellen Miguel must be very old if she is still alive. Mr St Cyr had died in 1992. The Plaintiff is getting old and now hardly used the road any longer. Henry Miguel could always exit onto the main road to the north at the other end of the disputed road through the land of his grandmother. The Defendants took a chance to incorporate the pathway into their property. I do not believe their testimony that the Plaintiff told them that there was no path there and that they were free to enclose the area and fence it off. Secondly, their deed stated that their northern boundary was the Plaintiff's southern boundary. They were

adamant that their deed did not mention a road as their northern boundary. They considered this significant, they testified. They put in evidence all the deeds of the surrounding properties to show that the right of way was not mentioned in any of them. They did not pause to consider that their northern boundary could be Mr Teshira's southern boundary, but that a right of way in his favour could be passing over their land along their northern boundary that they had no right to fence in. A mere right of way over someone's land is unlikely to be mentioned as a boundary. No survey of any of those lands had taken place, or even to today has taken place, so that no draughtsman would take the risk of mentioning a road as a boundary or even of describing the location of a specific right of way over any of the properties. I do not consider it legally significant that the majority of the deeds do not refer to a right of way in that area. Draughtsmen commonly deal with footpaths in the descriptions of land being conveyed by general words covering easements and other rights. The Defendants acted hastily and took the risk that none of these aging neighbours would challenge them. Unfortunately for them, that is just what the Plaintiff did.

[7] Having found as I have, there will be judgment for the Plaintiff as follows. He is entitled to general damages for having been wrongfully deprived of his access to the back of his property over his right of way for the past 5 years. The sum of $5,000.00, while not being a mere token, is no more than a reasonable amount of compensation. The Plaintiff is also entitled to an injunction restraining the Defendants whether by themselves their servants or agents or howsoever otherwise from the repetition or continuance of the acts complained or similar thereto. The Defendants are to take up the hedge that they have planted in the way of the right of way and remove it to a position at least 6 feet to the south of the drain. They are to restore the surface of the original 6-foot right of way to make it passable on foot. The Plaintiff will be entitled to his costs to be taxed if not agreed.

[8] Before closing, I must thank both counsel for having reduced their submissions to writing. This greatly reduced the need for the court to take dictation, and speeded up the arriving at a decision. Though I have not quoted from the authorities, as I find that this dispute was essentially one of fact rather than of law, the law produced, particularly by counsel for the Defendants, was helpful in clarifying the legal concepts and issues involved in this case.

I D MITCHELL, QC
High Court Judge