

GRENADA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 598 OF 1992

BETWEEN:

LENNARD BAPTISTE

Plaintiff

and

CUTHBERT SYLVESTER

Defendant

Appearances:

Mr. G. Prime for Plaintiff.

Mrs. C. Edwards for Defendant.

2001: January 17
February 05

JUDGMENT

[1] **ST. PAUL, J.:** On 21st September, 1992 the Plaintiff filed a Writ of Summons asking for the following:

- (a) A declaration that the plaintiff is entitled to pass and repass over a road approximately 8 feet wide known as the Peterfield Road situate at St. Paul's in the parish of Saint George in the island of Grenada for the purpose of access to his land situate at Peterfield, La Borie, St. Paul's aforesaid;
- (b) An injunction to restrain the defendant by himself, his servants or agent or howsoever otherwise from obstructing the said road or otherwise preventing the plaintiff from gaining access to his said land or from doing any act whereby the plaintiff may be hindered or obstructed in the free use of the said road;

- (c) An order that the defendant do forthwith break down and remove the concrete shed erected by him across the said road;
- (d) Damages;
- (e) Costs;
- (f) Such other or further relief as to the Court may seem just.

[2] On 15th December, 1992 the Defendant filed a defence in which he admits that many years ago there was a footpath across the Plaintiff's land from La Borie Road to Peterfield Road. The footpath was not used by anyone in particular nor by the Plaintiff for well over ten years. However, although the footpath was not used, he caused a 9 feet road to be cleared along his northern boundary to facilitate persons wishing to pass from La Borie Road to Peterfield Road and vice versa. He further denies causing loss or damage to the Plaintiff.

[3] By order entered on the 13th May 1998, Mr. Henry Ogilvie, Licensed Land Surveyor, was appointed to view the area on which the building was constructed by the Defendant and relative to the alleged allowed road. Mr. Ogilvie was also to examine the topography of the land at the rear of the said construction relative to the suitability of an equivalent passage and to advise the Court on the same without prejudice to the individual rights of the respective parties.

[4] On the 25th May, 1998 Mr. Ogilvie submitted his report. In his report he opined that an alternative road could be established on the site without demolishing the Defendant's house. According to him, however, the Defendant's house is built upon and across the road shown on Thomas Ogilvie's plan. Thomas Ogilvie, Licensed Land Surveyor, in April 1896 in a survey plan shows a road running diagonally across the property from its northern corner to its southern corner.

[5] At the close of the case for the Plaintiff, Counsel for the Defendant offered no evidence but with leave addressed the Court. In her address Counsel contended that there was an abandonment of the easement. If that is not accepted the Court

has a judicial discretion to do what is right in the circumstances for a peaceful resolution to the problem and in her view Ogilvie's report will prove helpful.

[6] Counsel for the Plaintiff contended that the report of Henry Ogilvie is extremely valuable and helpful. He further submitted in the light of the issue before it the Court is asked to bring its judicial mind to bear, notwithstanding the claim itself the Court is asked to exercise that in all cases of this kind the Court is bound to take the Plaintiff as having made out his case.

[7] If on the other hand it is more probable than not that what the Defendant is alleging is capable of belief the Court should exercise prudence in reaching a solution in this matter which has taken such a long time to conclude.

[8] In the defence filed on 15th December, 1992 the Defendant admits that many years ago there was a footpath across his land from La Borie Road to the Peterfield Road. The footpath was not used by anybody and in particular not by the Plaintiff for well over ten years. It appears that the Defendant is pleading abandonment of the right of way which was created by the way of an easement.

[9] An easement may be claimed under the Prescription Act (Cap. 252) of the 1990 Edition of the Revised Laws of Grenada. Section 2 of the Act provides as follows:

"When 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 common law by custom, prescription, or grant, has been actually taken and enjoyed or derived upon, over, or from any land or water of Her Majesty or of any person, by any person or owner of land 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 appears that it was enjoyed by some consent or agreement made or given for that purpose in writing."

Section 4 of the said Act provides as follows:

"Each of the periods hereinbefore mentioned shall be deemed to be the period before some action wherein the claim or matter to which the period relates shall have been brought in question; and no act or other matter shall be deemed to be an interruption within the meaning of this Act

unless it has been submitted to or acquiesced in for one year after the party interrupted has had notice of it and of the person making or authorizing it.”

[10] The only period of time which the user has to satisfy is the statutory period of twenty years before the action is brought.

[11] I am of the view that the right of way has been established under the Prescription Act over the servient tenement, that is, the land of the Defendant with ingress and egress from La Borie Road to Peterfield Road.

[12] Counsel for the Defendant is asking the Court to say that if there was a right of way it has been abandoned.

[13] Non-user by itself, if that is established, does not necessarily constitute abandonment. There must be other circumstances to show abandonment. Abandonment of an easement is not lightly inferred.

[14] In **Ward v Ward** [1852] 155 ALL ER 1189, Alderson, B. said:

“The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption.”

And in **R v Chorley** [1848] 12 Q.B. 515, Lord Denman, C.J, in delivering the judgment of the Court, said:

“The cesser of use coupled with any act clearly indicative of any intention to abandon the right will have the same effect (i.e., of release) without any relevance to time.”

It was held in **Lewis v Thomas** [1950] 1 ALL ER 116:

“Not every interruption is an abandonment.”

[15] The Plaintiff said in evidence that he passed on that road with his father from the time he was five until 22nd December, 1989. He got no permission from anyone to use that road. In 1992 he was going to his land by passing along the said road, that is, the road he used since he was five and he observed a concrete

construction in that road. There was no room for him to pass. He spoke to the Defendant about the obstruction. The Defendant gave him a new way to pass. He did not accept it.

Under cross-examination he said:

"I spent about 22 years in England going and coming. I first went to England in September 1959. I spent 1 year 6 months and came back. I went back up in 1959 for two years. I came back in 1961 but went back in 1962. I stayed for 7½ years before coming back to Grenada. I went back to England in 1970. I came back in 1972. I went back to England. I came back in 1979. Between 1979 and 1989 I went to my land every day except Sunday. I passed in the said road which is now blocked. I first saw the construction on the land housing the generator on 2nd February, 1992. That construction is on the footpath. I never complained to the Defendant that the back column of his house was on the footpath."

[16] In his evidence Mr. Henry Ogilvie, Licensed Land Surveyor, said:

"On 5th November, 1992 I observed that there was some indication that there might have been a path in the south corner of the land running in the direction indicated by the broken lines on the plan I came to the conclusion that there was a trace at the southern end of the property... "

[17] From Ogilvie's evidence it appears that if there was an allowed road it was not in regular use or may have fallen into disuse. However, it appears from Ogilvie's report submitted on 25th May, 1998 that the parties can settle the issue amicably. It also appears that both Counsel are of that view.

[18] Ogilvie said in his report:

"It is my opinion that an alternative road could be established on the site without demolishing Sylvester's house."

[19] It also appears that the Defendant is willing to provide an alternative path at his own expense. That should be followed up.

[20] The Plaintiff claims the sum of \$1600.00 by way of special damage. He claims:

"To loss of income to date from the sale of fruits and vegetables \$1600.00."

This is a bald claim which will not suffice.

[21] In **Hayward v Pullinger and Partners Ltd.** [1950] 1 All ER 873, it was held that the Plaintiff will not be allowed at the trial to give evidence of any special damage which is not claimed explicitly either in his pleadings or particulars. And in **Ilkiw v Samuels** [1963] 1 WLR 991, it was held that special damage in the sense of a monetary loss which the Plaintiff has sustained up to the date of trial must be pleaded and particularized otherwise it cannot be recovered.

[22] In the light of the above the claim to special damage is denied.

[23] As regards para (c) of the Plaintiff's claim that too is denied. The Defendant to provide a suitable alternate route at his expense.

[24] I make no order for general damages.

[25] Costs to the Plaintiff to be agreed or taxed.

L. K. St. Paul, C.B.E.
High Court Judge