BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.19 OF 2004

BETWEEN:

DAVID CARSON

Appellant

and

1] RICHARD SILVA
[2] ELIZABETH SILVA

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC — Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Denys Barrow, SC — Justice of Appeal [Ag.]

Appearances:

Mr. David Lord with Mr. John Carrington for the Appellant
Mr. Samuel Jack Husbands for the Respondents

2005: April 25; 26;
June 27.

JUDGMENT

[1] BARROW, J.A. [AG.]: The Silvas, as I shall refer to the Respondents, contend that the Judge was wrong to reject their claim[1] to an easement by prescription over land that Mr. Carson, the Appellant, bought in 1997. The Judge found that the claim to prescription was defeated by permission. The Silvas contend that, on a proper interpretation of the relevant legislation, permission does not defeat prescription.

[1] The parties were able to settle the appeal but not the Respondents' cross appeal, which therefore proceeded as if it were the appeal.

[2] It is a specific legal point that calls for determination and this permits a bare outline of the material facts as found by the Judge.

[3] Mr. Carson bought from Dr. Douglas and Mrs. Carol Roberts. Mrs. Roberts is the sister of Mr. Silva. The Silvas and the Roberts bought adjoining parcels of land in 1977[2] from a common owner. The dispute concerns a 16 feet wide way over Mr. Carson's land that the Judge found serves Mr. Silva's lands. The way had been a generally used footpath, about 6 feet wide, and then in 1977 it was upgraded and widened to a motorable way. The Silvas paid for the upgrading and contributed money over the years towards its upkeep. The Silvas used the way as an easy and convenient alternative access[3] to their lands and buildings. The Judge had decided that the Silvas were entitled in equity to a right of way but both Counsel confirmed at the outset that the Silvas do not seek to uphold an entitlement to an equitable right of way.

[4] In relation to the claim by the Silvas for a prescriptive right of way the Judge grounded his consideration in s.138 (1) of the Registered Land Act (the RLA) which provides that an easement may be acquired without registration by peaceable, open and uninterrupted enjoyment for a period of 20 years. The Judge reminded himself that the enjoyment of an easement must be without force, open and with the knowledge of the servient owner, but without his permission (*nec vi, nec clam, nec precario).* The Judge considered that a user that is enjoyed with the permission of the servient owner is a licence[4] and that because permission can be revoked at any time, permissive user does not create an easement by prescription. The Judge found especially pertinent the proposition stated in Ironside v Cook[5] that an act of good neighbourliness cannot be converted into an easement by prescription. It was clear from Mr. Silva's own evidence, the Judge found, that the Silvas upgraded and used the right of way with the permission of the Roberts.

[2] The Silvas bought other lands subsequently
[3] There was a primary route to the Silvas' land so that the way in question was a secondary means of access to the Silvas' lands.
[4] See Gardner v Hodgsons Kingston Brewery [1903] A.C. 229
[5] (1981) 41 P & CR 326

Because of that permission the Judge rejected the claim of the Silvas to the right of way based on prescription.

[5] On appeal, the case for the Silvas was that permission does not defeat a claim for an easement under s.138 of the RLA. The argument is founded entirely upon a comparison of s.138 with s.135. The first mentioned section reads:

> "138 (1) Except in respect of Crown land, easements and profits may be acquired without registration by peaceable, open and uninterrupted enjoyment thereof for a period of twenty years: …"

Section 135 reads:

> "135 (1) The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twenty years: …"

[6] Counsel for the Silvas argues that the words 'without permission' which appear in s.135 and which do not appear in s.138 were deliberately omitted from the latter section. The position, he urged, is that permission defeats prescription to land but does not defeat prescription to an easement under s.138. The omission from s.138 of any reference to 'without permission' was intended to change the law, according to the submission on behalf of the Silvas.

[7] That would drive a horse and carriage through the very meaning of prescription, Counsel for Mr. Carson submitted. Taken to its logical conclusion it would mean that even where there is a deed between the parties by which permission is conferred, once the way has been enjoyed for 20 years the easement is acquired. It is a conclusion from which Counsel for the Silvas did not flinch.

[8] It has been the law for centuries that prescription requires user as of right, as Counsel for Mr. Carson submitted. Permission is inconsistent with right because if you have a right you do not need permission. F A R Bennion, in Statutory Interpretation Butterworths (2002) states[6] that it is a fundamental principle of

[6] At page 693

legal policy that Parliament does not change the law by a side wind but only by measured and considered provisions. Counsel submitted that if Parliament intended such a radical change to so primary a principle of land law it would have done so by clear language and not by the implication that the Silvas invite. A statute must be interpreted accordingly, according to the author.

[9] The submission of Counsel for Mr. Carson was that s.138 must be compared not with s.135 but with s.3 of the Prescription Act 1882. That section reads:

> "3. No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement … to be enjoyed or derived upon, over, or from land … 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; …"

[10] That comparison reveals that there is also no reference to 'without permission' in the progenitor provision. It is settled law, and Counsel for the Silvas fully accepted this, that permission defeats a claim under the Prescription Act. This is so notwithstanding that s.3 of the Prescription Act, like s.138 of the RLA, does not state that prescription occurs when there is user 'without permission'. The implication for the argument for the Silvas is clear. The absence of the statement in the Prescription Act, that an easement can only be acquired when the user has been without permission, does not diminish in any way that centuries-old common law proposition. It seems to me, therefore, wholly immaterial that s.138 of the RLA does not state that an easement by prescription can be acquired only when the user has been enjoyed without permission. The absence of such a statement does not make it any less the law that permission defeats prescription.

[11] I find that the interpretation of s.138 of the RLA for which Counsel for the Silvas contended is wholly unfounded. Accordingly I reject the appeal against the Judge's finding that permission operated to defeat the Silvas claim to an easement.

[12] In the alternative, the Silvas argued that the permission that previously had been granted ceased to operate when the Silvas upgraded the path because there was then an implied severance of permission. Counsel founded his argument on Healey v Hawkins.[7] In that case the plaintiff owned land on which there was a driveway and the defendant owned land immediately adjoining the plaintiff's drive. In 1928 one of the defendant's predecessors in title, C., used for motor cycle access to a dwelling on the land that the defendant later bought, a narrow pathway alongside the plaintiff's drive. In about 1935 C. widened his pathway to permit access by a three-wheeler motor car but in wet weather he used the plaintiff's drive with permission sought and given from time to time. In 1938 C. acquired a larger motor car which was too wide for the pathway and from that time regularly used the plaintiff's drive until his death. Thereafter C's son used the plaintiff's drive for his motor car when visiting C's widow who remained in occupation of the property until her death in 1961. In that year the defendant purchased the property and his tenants regularly used the drive until they left in August 1966. In an action for an injunction to restrain the defendant from using the plaintiff's drive the defendant set up a right by prescription contending that although the user was permissive in its inception, provided it continued for more than twenty years down to action brought, he had acquired a right under the Prescription Act, 1832.

[13] Goff J held, among other things, that the user, although permissive in its origin, changed its character in 1938 when C began to use the plaintiff's drive regularly and became non-permissive; that such user continued under C's widow and the defendant's tenants; and, therefore, on the facts, the plaintiff's drive had been regularly used by the defendant and his predecessors in title for upwards of twenty years on all convenient occasions.

[7] [1968] 3 All E.R. 836

[14] The reasoning underlying the result is instructive. After recognizing that the user was permissive in origin, Goff J said[8] he had to consider whether it so continued. The Judge referred to the fact that C. greatly extended the user and abandoned his own path altogether which was allowed to deteriorate and become largely blocked. I may interpose here the observation that this is not what occurred in the instant case. The learned Judge then continued: "… the plaintiff does not say he gave any permission for this new user. On the contrary, he denies that it occurred and says, which I have stated I cannot accept, that the late [C.] stopped using either his own path or the plaintiff's drive [but] parked in the splay." The Judge decided that when the late C. started to use the plaintiff's drive regularly the character of the user changed and ceased to be permissive.

[15] In the instant case there was ample evidence to support the Judge's finding of fact that the Silvas continued to use the way as a matter of agreement. The character of that user did not change. It is this factor that distinguishes the instant case from the case of Healey v Hawkins and led the Judge, rightly in my respectful view, to a different conclusion.

[16] It was further argued for the Silvas that when they built cottages on some of their lands, even if there had been no change before in the character of the user, there was a change then. It was argued that the cottages were built in 1981. The claim by Mr. Carson having been brought in December 2001, the contention on behalf of the Silvas was that they enjoyed the user of the right of way for over twenty years.

[17] The evidence of the person, Vernal Walwyn, who built the cottages, and who testified as a witness for the Silvas, was that he built the cottages in 1983. In his witness statement he had said he built them "in around 1981" but in examination in chief he specifically said that he built them in 1983. It seems to me that the Silvas are bound by the evidence which they led as part of their case. That evidence disposed of the argument that the Silvas had enjoyed the use of the right of way

[8] At 842 D

for over twenty years and made it unnecessary for me to discuss my difficulty in seeing how the building of the cottages, and the alleged user of the right of way in that connection, could have operated to change the permissive nature of the user in what the Judge clearly stated he regarded as a family arrangement.

[18] For the reasons given I would dismiss the Silvas' cross appeal, with costs to be paid by them to Mr. Carson. I note that costs of the litigation concerning the two spits of land and the right of way were ordered to be assessed before the Master and that taxation was postponed to await the outcome of the appeal. Subject to the representations of Counsel, or to any agreement on costs, I would award prescribed costs of 2/3 of the costs assessed by the Master and ascribed to the litigation of this aspect of the claim in the Court below.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal