

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM SUIT NO. 560 OF 2002

BETWEEN:

ELIZABETH CORDICE MAPP of Arnos Vale

Claimant

And

CAMMIE MATTHEWS of Arnos Vale

Defendant

Appearances:

Mr. Parnell Campbell QC for the Claimant
Mr. Joseph Delves for the Defendant

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2007: March 26th
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JUDGMENT

- [1] **Blenman, J;** This is a claim and counterclaim in relation to a right of way.
- [2] Mrs. Elizabeth Cordice Mapp (Mrs. Mapp) in her claim against Mr. Cammie Matthews (Mr. Matthews) seeks the following reliefs:
- (1) A Declaration that she is the fee simple owner in possession of the hereditaments conveyed to her by an Indenture dated the 28th day of May 1979 and made between Arthur Francis Williams Executor of the Estate of George Ebenezer Samuel of the One part and Mrs. Elizabeth Cordice Mapp of the Other Part and registered at the Registry of the State of Saint Vincent and the Grenadines bearing Registration Number 843 of 1979 and described as follows:

“ALL THAT LOT piece or parcel of land situate at Arnos Vale in the Parish of Saint George in the State of Saint Vincent and the Grenadines admeasuring Three Thousand Eight Hundred and Eighty-one Square Feet (3,881 sq. ft) and numbered LOT 9 on a plan prepared by Stinson Campbell a Licensed Land Surveyor and which said plan is numbered G580 and approved on the 9th day of August, 1967 and being abutted and bounded on the North by Lot Number 8 by one Brown on the South by Lot Number 10 owned by Sandy on the East by lands of D. Fernandez and E. Simon on the West by a Three

(3) feet drain and land of H. James and Part of Lot Number 11 or howsoever otherwise the same may be abutted bounded known distinguished or described together with all ways water watercourses rights lights liberties privileges easements and appurtenances thereto belonging or usually held used occupied and enjoyed therewith or reputed to belong or be appurtenant thereto”

Subject however to a right of way in favour of Everil Fernandez and her successors in title described as follows:

“a right of way 10 feet by 49.2 feet extending from an existing right of way and shown on a plan drawn by S. Campbell Licensed Land Surveyor and dated the 22nd day of February, 1967 and numbered 25 of 1967. This right of way extends along the extreme Northern boundary of Lot No. 9 and ends on the lands owned and occupied by the Plaintiff. This right of way to be used by foot and/or vehicle”

- (2) A declaration that the successors in title to Everil Fernandez, including Mr. Matthews, are entitled to use the said right of way for passing and repassing by foot and/or vehicle **BUT ARE NOT ENTITLED TO USE THE SAID RIGHT OF WAY FOR THE PARKING OF VEHICLES THEREON.**
- (3) An injunction to restrain Mr. Matthews by himself his servants or agents or visitors to Mr. Matthews’ premises or invitees to his premises or howsoever otherwise from parking vehicles on or along the said right of way or any part thereof, unless the halting of a vehicle on the said right of way.
 - (a) is merely incidental to the boarding and setting down of passengers and does not involve the turning off of the vehicle’s engine; or
 - (b) is merely incidental to the loading or unloading of vehicles, and does not involve the turning off the vehicle’s engines; and
 - (c) In any event the duration of such halting of a vehicle on the said right of way does not exceed the time reasonably necessary to accomplish the loading or unloading of passengers and goods.
- (4) Damages for trespass in respect of the parking by Mr. Matthews of a motor-car on the said right of way from January 2002 up to the date hereof and continuing.
- (5) Damages for Nuisance.

[3] Mr. Matthews denies Mrs. Cordice Mapp's allegations that he has trespassed on her property or has infringed her rights to her property as alleged, or at all and he counterclaims against Mrs. Cordice Mapp and seeks the following reliefs:

- (a) A perpetual injunction restraining Mrs. Cordice Mapp from parking on the access way to his property in such a way as to prevent him from driving to his house.
- (b) A declaration that he is entitled to park his vehicle within touching distance of his premises.

[4] Further, Mr. Matthews strongly denies that the right of way is on Mrs. Cordice Mapp's land, as alleged or at all. He alleges that for 'decades' the right of way has been the only access to the premises which he now owns. He contends that since the 1950's his predecessors in title had cut a road from his premises to the public road. He maintains that his predecessors in title at all times parked their car "right up to and inches from" his house. Mr. Matthews denies that he has ever blocked the entrance to Mrs. Cordice Mapp's house.

[5] While Mr. Matthews acknowledges the Order of His Lordship, Mr. Justice Renwick dated 21st May 1981 he says that the issue before the Court in that Suit namely No. 142 of 1979 was not the appellation of the access but the nature of its user, "having regard to its history."

[6] In addition, Mr. Matthews alleges that it would be unjust to allow Mrs. Cordice Mapp to institute the present action in so far as she sat back for in excess of 50 years and allowed both his predecessors and himself to park their motor vehicles on the said land; he alleges that by so doing, she has waived her right, if any against him. Alternatively, Mr. Matthews contends that Mrs. Cordice Mapp's title, if any, to the property is statute barred.

Background

[7] I find it convenient to utilize the chronology referred to by Mrs. Cordice Mapp, as I hereby do. This claim and counterclaim have their genesis in a Deed dated 28th day of May 1989 made between Arthur Francis Williams Executor of the Estate of George Ebenezer Samuel of the One Part and Mrs. Mapp of the Other part and registered at the Registry of the State

of Saint Vincent and the Grenadines bearing Registration Number 843 of 1979 and described as follows:

“ALL THAT LOT piece or parcel of land situate at Arnos vale in the Parish of Saint George in the State of Saint Vincent and admeasuring Three Thousand Eight Hundred and Eighty-one Square Feet (3,881 sq. ft) and numbered LOT 9 on a plan prepared by Stinson Campbell a Licensed Land Surveyor and which said plan is numbered G580 and approved on the 9th day of August, 1967 and being abutted and bounded on the North by Lot Number 8 by one Brown on the South by Lot Number 10 owned by Sandy on the East by lands of D. Fernandez and E. Simon on the West by a Three (3) feet drain and land of H. James and Part of Lot Number 11 or howsoever otherwise the same may be abutted bounded known distinguished or described together with all ways water watercourses rights lights liberties privileges easements and appurtenances thereto belonging or usually held used occupied and enjoyed therewith or reputed to belong or be appurtenant thereto.”

[8] Mrs. Cordice Mapp says that she became the fee simple owner in possession of the said hereditaments and has remained continuously in possession of the said hereditaments from the date of the said Indenture until the present date and continuing.

[9] On the 21st day of May 1981, an Order of Court was made by His Lordship Mr. Justice J.D.B. Renwick in High Court Action Number 142 of 1979 between Everil Fernandez as Plaintiff and Mrs. Mapp and others. The said Order of Court stated as follows:

(1) A declaration that the plaintiff and her successors in title are entitled to a right of way 10 feet by 49.2 feet extending from an existing right of way and shown on a plan drawn by S. Campbell Licensed Land Surveyor and dated the 22nd day of February, 1977 and numbered 25 of 1967. This right of way extends along the extreme Northern boundary of Lot No. 9 and ends on the lands owned and occupied by the Plaintiff. This right of way to be used by foot and/or vehicle.” (“the said right of way”)

(2) Mr. Matthews whether by himself his servants and or agents are hereby restrained forever from preventing the plaintiff and her successors in title from passing and re-passing whether on foot or on vehicle over a right of way extending from an existing right of way and shown on a plan drawn by S. Campbell Licensed Land Surveyor and dated the 22nd day of February, 1967. The right of way extends along

the Northern boundary of Lot No. 9 and ends on the lands owned and occupied by the plaintiff.

(3) That Mr. Matthews do pay to the Plaintiff her taxed costs.

[10] By virtue of an Indenture dated 13th day of February 2001 and registered as Deed Number 662 of 2001 and made between Jo-Ann Barriere of the One Part and Mr. Matthews, Shirley Matthews and Cordel Matthews of the Other Part, Mr. Matthews and Shirley Matthews therein recorded as husband and wife and the parents of Cordel Matthews, Mr. Matthews and his family became seised in fee simple of a parcel of land on the eastern boundary of Mrs. Cordice Mapp's said hereditaments and described in the schedule thereto as follows:

“ALL THAT LOT PIECE OF PARCEL OF LAND situate at Arnos Vale in the Island of Saint Vincent and the Grenadines containing Four Thousand Six hundred and eight-eight (4,688) Square feet more or less and abutted and bounded on the North by an Allotment Road and lands of Grafton Jarvis on the South by lands of Ethaline Diamond on the East by lands of Augustine Haynes and on the West by lands of Rhoda Patrick or howsoever otherwise the same may be abutted bonded known or described together with all buildings and erections and all ways water watercourses easements privileges advantages and appurtenances thereto belonging or usually held used occupied and enjoyed therewith or reputed to belong or be appurtenant thereto.”

[11] In about 1977, Dick Fernandez began driving his vehicle across the northern end of Lot 9 to access his home from time to time. Mrs. Cordice Mapp alleges that she protested the said trespass on her land. In about June 1979 she took steps to remove stones from the northern end of Lot 9 intending to plant crops thereon. Her said action gave rise to protests by the Fernandez and they brought High Court Action Number 142 of 1979 against her and other members of her family seeking an injunction and other reliefs. It was in those circumstances, she says that the Order of Court dated 21st May 1981 was made.

[12] In her claim, Mrs. Cordice Mapp contends that Everil Fernandez is Mr. Matthews' predecessor in title. Everil Fernandez's daughter Jo-Ann Barriere (nee Fernandez) inherited Mr. Matthews' premises from her mother Everil and sold the same to Mr. Matthews and his family jointly.

[13] Mrs. Cordice Mapp asserts that the right of way which forms the subject of this action, is located entirely on her land, thereby rendering her in law the fee simple owner of the said right of way. Mrs. Cordice Mapp does not deny that Mr. Matthews has the right to use the said right of way as a right of way, that is to say, as a means of getting to and from his residence. Mrs. Cordice Mapp, however, denies that Mr. Matthews has the legal or equitable right to park his vehicle on the said right of way and to allow his vehicle to remain so parked for prolonged periods during the day and entirely at night. Mrs. Cordice Mapp says that Mr. Matthews' parking on the said right of way amounts in law to a trespass on her land, in that the parking of the vehicle on the right of way is outside and beyond the scope of the said Order of Court dated the 21st May 1981 and is not a permissible user of the said right to way, especially since the said right of way is a private right of way and not a public right of way.

[14] Mrs. Cordice Mapp further asserts that the said right of way ends at the boundary between Mr. Matthews' premises and her property. By parking his vehicle on the said right of way Mr. Matthews renders it extremely difficult for her to enjoy reasonable access to her own premises, with her motorcar. Whenever Mr. Matthews' motorcar is parked on the said right of way, if her motorcar is parked in her yard, her motorcar can exit only with extreme difficulty if at all; and if her motorcar is not in her yard, she cannot have unhindered access to her home by her motorcar. Mrs. Cordice Mapp, therefore, says that Mr. Matthews' said parking of his motorcar on the right of way amounts in law to a nuisance as an unjustified interference with her own natural and reasonable user of her property.

[15] The issues that arise for the Court's determination are as follows:-

- (a) Whether Mr. Matthews has the right to park his vehicle on the right of way for an unlimited period of time.
- (b) Whether Mr. Matthews is estopped from seeking to reopen the issues that were dealt with in Suit No. 142 of 1979.
- (c) Whether Mrs. Cordice Mapp is debarred from insisting on her legal rights.

- (d) Whether Mr. Matthews is entitled to an injunction restricting Mrs. Cordice Mapp from parking her car in such a manner as to prevent him from driving to his house, on the right of way.

Evidence

[16] Mrs. Cordice Mapp testified on her own behalf and called Mr. Robert Sandy (Mr. Sandy) as her witness. She also tendered several documents into evidence, in support of her claim.

[17] In relation to the counterclaim, Mr. Matthews testified on his own behalf and called Mrs. Johannah, also referred to as Jo-Ann Barriere nee Fernandez (Mrs. Barriere) on his behalf. Mr. Matthews also tendered several documents in support of his counterclaim.

Claimant's Evidence

[18] Mrs. Cordice Mapp in her witness summary stated as follows:-

"In 1970 her (Mrs. Mapp's) common-law husband George Samuel purchased a parcel of land at Arnos Vale from Alfred Fitzpatrick, by Deed of Conveyance Number 586 of 1970, the land having been delineated on a 1967 Survey Plan as Lot 9 on Plan G580 and admeasuring 3881 square feet.

Alfred Fitzpatrick had by Plan G580 prepared a subdivision of his land into 14 allotments, ranging in various sizes one of which was 3881 square feet.

There are two parcels of land abutting and abounding Lot 9 on its eastern side. The northern of those two parcels of land was owned and occupied by Mr. Dick Fernandez and his wife Mrs. Everil Fernandez, admeasuring 4,688 square feet. The southern of those two parcels of land was owned by one E. Simon.

Between 1970, and 1975 when her (Mrs. Cordice Mapp) common law husband George Samuel died, we both worked Lot 9 planting crops thereon.

In about 1973, the Fernandez' attempted to establish a footpath along the northern boundary of Lot 9, but her common law husband caused a Solicitor's letter to be written to the Fernandez to protest their trespass on his land. The Fernandez ceases their said activity and requested the said George Samuel to sell to them a strip of Lot 9, but Mr. Samuel refused to sell the same.

Following the death of the said George Samuel in 1975, she moved a chattel house on to Lot 9 and resided therein with the children she had produced with George Samuel. By a Deed of Assent Number 843 of 1979 she became the fee simple owner of Lot 9. From about 1975 to 1979 she owned a motor car which she would park along the northern end of Lot 9.

On 25th May 1981 an Order was made in Suit 142 of 1979 in the terms set out therein.

She has traveled to the United States of America where she has a residence, and back to St Vincent and the Grenadines, on a frequent basis since about 1980. When she is away from St Vincent and the Grenadines her house is sometimes occupied by members of her family and is sometimes vacant.

Dick Fernandez did not own a vehicle initially. He drove a government jeep and up to about 1979 he normally parked the jeep at the side of the public road near to the residence of Robert Sandy, some distance away from her residence and the Fernandez' residence. Then Mr. Fernandez drove a truck and he would park it mainly at the side of the public road. Occasionally, she would permit him to park the vehicle on her property at the northern end of Lot 9. Eventually Dick Fernandez acquired and drove a taxi up to the time he took ill shortly before his death. The relationship between herself and the Fernandez was sometimes good and sometimes bad. She is a seamstress and she sewed for the Fernandez' family from time to time. When they were on good terms she would allow the Fernandez to park on her property. When they were not on good terms she would not allow them to park on her property.

After the death of Dick Fernandez and Mrs. Fernandez their son-in-law Carl Bristol lived at the Fernandez' residence for about two years. Carl Bristol drove a motor car but he never parked on her property; he parked at the side of the public road. After Carl Bristol left the Fernandez' residence the house was vacant for about a year. Then Mr. Fernandez' relative by the name of Don Ashton occupied the Fernandez' residence. He did not own a motor car but he apparently worked at a garage and occasionally he would bring a different motor car and she would permit him to park on her property. But he tried to park a truck on her property and she prevented him parking the truck there. That was around 2000.

When Joanne Barriere put up the Fernandez' property for the sale she made it clear that she would not allow any parking on her property, although she has never sought to prevent the Fernandez or their

family or visitors from walking through her property along what the Court had declared to be a right of way.

One week after Mr. Cammie Matthews and his family moved into the Fernandez property Mrs. Mapp told Mrs. Matthews that they had no right to park on her property. Mrs. Matthews told her that she (Mrs. Matthews) and her husband were aware that they did not have the right to park on her property. In spite of that, Mr. Matthews and his son and their visitors have been parking vehicles on her property to her detriment.”

[19] During cross examination by learned counsel Mr. Joseph Delves, Mrs. Cordice Mapp stated that the Fernandez used a strip of land situate on her property to access their house. She stated that in the previous suit that she was not asserting that the Fernandez had no right of access across Lot 9. She, later said that the Fernandez had no access to her property; however, in the previous suit which “was heard behind her back” the Court gave them the right to pass, the Court matter dealt with “passage” and not “parking”. Mrs. Cordice Mapp was adamant that the Fernandez did not use her land since 1975 and stated that Mr. Matthews’ land is not land locked.

[20] Mrs. Cordice Mapp maintained that while she has prevented Mr. Matthews from parking his vehicle on the right of way she has not prevented him from using the right of way. She did not “stop” Mr. Matthews or his visitors from using the right of way but admitted that she had put up a notice to say that there was no road there. She maintained that initially the place was not drivable and Mr. Fernandez, at that time, used to park his vehicle on the main road. During further cross examination, Mrs. Cordice Mapp said that while Mr. Fernandez used to walk across her land; the part of her land that he (previously) used is not the same part over which Mr. Matthews is claiming a right of way. She said for several years and once per year she blocked the right of way using stones and this was up to 2000 when she (then) learnt of the Court’s order. She denied that when she obstructed Mr. Fernandez’s use of the right of way that Mr. Fernandez parked his vehicle next to the stones. She accepted that she did not move the Court until 2002.

[21] Mrs. Cordice Mapp was adamant that up to 1975 the right of way in issue was not drivable; it was just like a footpath. She reiterated that there are three access roads to Mr.

Matthews' property including the right of way; there is the allotment road to the north of Mr. Matthews' land and there is a smaller path that needs to be cleared.

[22] During re-examination, by Learned Queens Counsel Mr. Campbell, Mrs. Cordice Mapp said that shortly after taking up their residence near to Mrs. Mapp's home, Mrs. Matthews told her that she was aware that the Matthews were not allowed to park their vehicle on the right of way. At the time when she spoke to Mrs. Matthews, (her husband) Mr. Matthews did not own a vehicle.

[23] The next witness was Mr. Robert Sandy. He stated in his witness statement as follows:

"The parcel of land known as Lot 9 was purchased by George Samuel around 1970. George died in 1975 and his common law wife Elizabeth Cordice moved a house onto Lot 9 and lived there with her and George's children.

You get to Lot 9 by means of a right of way running between Lot 12 and 13. The Fernandez residence is bounded with Lot 9. The Fernandez used to walk on foot at the bottom of Lot 9 to get to the public road.

Dick Fernandez used to work with the Surveys Department and he drove a jeep belonging to the Government. In those days he did not own a vehicle. Mr. Fernandez would park the jeep on a vacant lot at the side of the public road very near to my own residence, and he would walk down the hill and at the bottom of Lot 9 to get to his home.

Eventually, Mr. Fernandez started driving a truck and he would also park the truck on the vacant lot next to my home.

Mrs. Cordice had a motor car for some years and she used to park it in her yard.

After Mr. Fernandez stopped working for the Government he went into taxi business. Sometimes I would see his taxi parked on the vacant lot next to me, and sometimes I would see it parked in Mrs. Cordice Mapp's yard.

After Mr. Fernandez died, there was hardly any parking in Mrs. Cordice Mapp's yard by anybody except her daughter Loraine and occasionally by a fellow Ashton who lived in the Fernandez house. There was an occasion on which there was some disturbance over the parking of a truck by Ashton, which Mrs. Cordice had prevented him from doing.

The Fernandez' property was up for sale for a few years because prospective buyers who came there noticed that there was no proper access except through Mrs. Cordice Mapp's yard."

[24] Further, Mr. Sandy said during cross examination, by learned counsel Mr. Delves that he owns an adjoining plot, to the right of way in dispute, for in excess of 20 years. Mr. Sandy said that Mr. Fernandez used to park his vehicle, in the 1960's and 70's on a vacant lot. At other times, Mr. Fernandez would park his vehicle near the right of way and very close to his (Fernandez) house. He agreed that where Mr. Matthews now parks his vehicle is where Mr. Fernandez used to park his vehicle. There was an ongoing dispute between the Fernandez and Mrs. Cordice Mapp for several years, in relation to the right of way. He was clear that Mr. Fernandez parked his vehicle on the right of way, despite the protestations of Mrs. Cordice Mapp.

Defendant's Evidence

[25] Mr. Matthews in his witness statement said as follows:

"For decades the present access which is sometimes called a "right of way" has been the only access to our premises.

Further, there is no road which is passable now or which can be cut and developed into the future on the north, south or east of our premises as there are private land owners on those sides. Our premises are land locked. (Necessity requires that we use the access as a right and park our vehicle where in fact we do (inches away from our house) as there are no other places for us to park our vehicles within a reasonable distance of our home.

In the 1950's my predecessors in title cut a road from our premises out to the public road and has been passing and re-passing by foot and vehicle and parking vehicles over and on the same continuously. It is this same road which is sometimes referred to as a right of way.

My premises were ""initially" owned by the Warner's family. They sold same to Mrs. Everil Fernandez. Her husband used to park his vehicle, a truck, on this road/right of way every single day since the 1950's. My premises were conveyed to Everil Fernandez's daughter, Joann Barriere nee Fernandez, by Deed of Assent No. 2825 of 1998.

Joann Barriere before and after she became the legal owner of the said premises always parked her father's said vehicle on the said road/right of

way. Thus, the Fernandez family has parked their vehicle exactly where I park my vehicle from the 1950's until they sold their premises to us in 2001.

Like my predecessors in title, I always parked my car on the said access but right up to, and inches from my house. At no time did I position my vehicle so as to block Mrs. Mapp's easy entrance or exit from her driveway.

We do not park on the roadway/right of way, in such a manner as to hinder Mrs. Cordice Mapp's ingress to or egress from her house."

[26] Learned Counsel, Mr. Parnell Campbell QC cross examined Mr. Matthews at length. Mr. Matthews stated that he went to live on the property in March 2001, when he purchased the property. Prior to 2001, he knew nothing about the property.

[27] Mr. Matthews admitted that he obtained a mortgage from NCB to purchase the property and said that when he bought the property he was aware that "there was an issue between Mr. Fernandez and Mrs. Cordice Mapp in relation to the land that had to be sorted out. He knew that "the Court had dealt with the matter and that it was finished." He said that there is a right to park his vehicle based on the Court's Order. He was adamant that there is a "road" leading from the top of Mrs. Cordice Mapp's land over to his land. He maintained that when he bought his property he "was advised that there was a road to the land and that he could have parked his vehicle on the road." From his house to the main road is about 3 minutes walking distance. He admitted that part of his "driveway" is on Mrs. Cordice Mapp's land and that he was told that that it was a road to his property.

[28] Mr. Matthews maintained that he has a right to park his vehicle for an unlimited period of time on the right of way. Mr. Matthews said that Mrs. Cordice Mapp does not have a right to prevent him from parking his vehicle as close as possible to his house. He admitted that Mrs. Cordice Mapp does not seek to prevent persons from passing and re-passing on the right of way but she tries to prevent him from parking his vehicle on the right of way. Mr. Matthews admitted that if he were to park on the right of way no one would be able to get in and out of the driveway; nor would Mrs. Cordice Mapp be able to drive pass his vehicle in order to get to her home.

[29] Mrs. Barriere stated in her witness statement as follows.

“My mom is Everil Fernandez; she and my father bought the property now owned by Mr. Matthews from the Warners in 1956.

The road, which is presently the subject of dispute, was cut and built for us by Mrs. Warner. This was around 1957. This was after we bought the land. After that road was made for us, sometime in 1970 Mrs. Cordice Mapp’s boyfriend bought the land; as far as I know, eventually he gave it to her. Without the road, we would have had no access to the subject property.

Mrs. Cordice Mapp can reverse quite easily into her driveway.

I sued Mrs. Cordice Mapp in relation to the road. I was trying to sell my house; the same one Mr. Matthews now lives in. Ms Cordice Mapp was telling everybody not to pass there and that there is no road there. So she was hampering my sale.

She has now changed her tune; instead of saying there is no road there, she is saying that Mr. Matthews cannot park there and that his car prevents her from going in and out of the road; but her intent is still the same to block people using the road. She wants to be the only one using the road.

When I was using the house and living there we use to park our car right where Mr. Matthews parks his car now. My father used to park his truck right there. Mrs. Cordice Mapp could access her driveway easily.

There is no road on the north; there is a huge gutter. As I said, there is no other access to Mr. Matthews’ premises

[30] During cross examination by Mr. Campbell QC, Mrs. Barriere said that if Mr. Matthews were to park his car close to his house on the drive way, Mrs. Cordice Mapp would have to “pull out and reverse her car in order to exist her yard.” She said there is a difference between going and coming and parking. Mrs. Barriere stated that where Mr. Matthews parks his vehicle near to the step of his house and that this is on his land.

Defendant’s Submissions

[31] Learned Counsel Mr. Joseph Delves submitted that there is no evidence to support Mrs. Cordice Mapp’s averment that Mr. Matthews or other members of his family park their

vehicles in such a manner as to make it impossible for her (Mrs. Cordice Mapp) to drive in or out of her yard. In fact, Mrs. Cordice Mapp seems to have abandoned this aspect of her case. The evidence as to where exactly Mr. Matthews positions his vehicle comes from him and his witness, Joanne Barriere nee Fernandez. They both stated that he parks inches away from his house. One wonders then how that could possibly be on Mrs. Cordice Mapp's land, stated Mr. Delves.

Easement of Necessity

[32] Mr. Delves, further, said that the issue which deals with whether or not parking by Mr. Matthews is an unreasonable user, lies, at the heart of Mr. Matthews' defence. To answer any question on user or an easement the Court always construes the instrument which created the easement. Usually there is a conveyance or grant and then the facts surrounding the making of the conveyance are examined. So for example, in **Bulstrode v Lambert [1953] All ER 738**, the question for determination was whether a right of way "to pass and re-pass" over a yard 'with or without vehicles' included an implied right to stop vehicles for the purpose of loading and unloading. The Court, in answering the question in the affirmative, considered issues of convenience, access, and delay and tried to determine the object of the reservation. His Lordship Mr. Justice Upjohn as he was then, opined that the rights of the parties were determined by the conveyance which had to be construed. His Lordship said:

*"To construe the deed of conveyance, I must know the facts at the time of the grant. As is stated in **Gale on Easements 12th edition p 315:***

In the case of a grant the language of the instrument can be referred to. It is for the court to construe that language, and, in the absence of any clear indication of the parties, the maxim that a grant must be construed most strongly against a grantor must be applied.

In particular, in construing a grant the court will consider (1) the locus in quo over which the way is granted, (2) the nature of the terminus ad quem and (3) the purpose for which the way is to be used. In **Callard v Beeney** Wright J said in [1930] 1 KB 360:

As Lord Wensleydale said in Lord **Waterpark v Fennell 7 H.C. Cas 684:** *The construction of a deed is always for the Court, but in order*

to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed so as to place the Court in the situation of the grantor.”

- [33] Next, Mr. Delves referred the Court to **Peacock v Custins [2001] 2 All ER 827** in which the issue was: when the owner of the dominant land has a right of way for “all purposes” over servient land, can the owner of the dominant land make any use of that right of way to access other land adjacent to the dominant land; in answering that question in the negative, the Court construed the grant to see what was or was not a reasonable user of the right of way given the purpose for which the right of way was granted. The test is whether the ‘new’ or purported use included the ordinary and reasonable use; if no additional burden was cast upon the servient tenement, the court might well find that there had only been the ordinary and reasonable use of the right of way.

Estoppel by Record

- [34] Mr. Delves, next, stated that Mr. Matthews appreciates that there is no deed to construe in the instant case “the disputed access was not created by a conveyance but by verbal agreement, then custom and enforced by Court order.” But in determining whether or not parking is a reasonable user of the access, Mr. Matthews invites the court to use the same approach, “as respectfully, it is fraught with good sense”. Therefore, the context in which the Court made the order and the facts upon which it made that decision must be reviewed.
- [35] Mr. Delves stated that estoppel by record does not arise in the case at Bar. Mr. Delves argued that Mr. Matthews’ repeated contention is that the Court has never before considered the issue of parking and that the Court Order dated 21st May 1981 declared the physical size of the access without necessarily restricting the scope and extent of the user. Mr. Delves submitted that the court in that case was declaring an access to the Fernandez’s land and everyone considered this access, for all intents and purposes, to be a road and that in the circumstances of this particular case, parking is not an unreasonable user but is part and parcel of the user or is an implied right.

[36] Mr. Delves further argued that Mr. Matthews' parking casts no burden on Mrs. Cordice Mapp additional to or different from past usage; and, applying the test in **Hutton v Hamboro (1860) 2 F + F 218**, practically and substantially, the right can be exercised as conveniently as before. In that case Cockburn CJ at p 219 instructed the jury as follows:

"The question is whether practically and substantially the right of way cannot be exercised as conveniently as before or whether practically and substantially the right of way can be exercised as conveniently as before" or whether the Defendant has really lost anything by the alteration made by the former owner and continued by the plaintiff? If you think that for all practical and useful purposes the way is the same as before, find for the plaintiff, if you think otherwise, find for the defendant."

Prescriptive Rights

[37] Mr. Delves said the next issue in the case at Bar deals with the issue whether Mr. Matthews has acquired any prescriptive rights that may assist; Mr. Delves submitted that he has. The Prescription Act Cap 246 of the Laws of Saint Vincent and the Grenadines Sections 2 and 4 of the Act, provide as follows:

"No claim which may be lawfully made at the common law by custom, prescription or grant to any right of way or other easement, or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any Crown land or water belonging to the Crown, or being the property of an ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned 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 or other matter 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.

Where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right therefore shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit of action wherein the Claim or matter to which such period may relate shall have been, or shall be brought into question, and no act

or matter shall be deemed to be an interruption within the meaning of the Act unless the same shall have been, or shall be submitted to or acquiesced in for one year after the party interrupted shall have had, or shall have, notice thereof, and of the person making or authorizing the same to be made.”

[38] Mr. Delves said that the above Act (by section 2) permits the establishment of an easement where the right was enjoyed for twenty years *nec vi, nec claim, nee precario* (not by force, nor stealth, nor the license of the owner). This means that generally the enjoyment must not be by violence, must not be secret, be precarious (i.e, not dependent on another’s will or permission), nor enjoyed under a mistake, but must be with the knowledge of the servient owner, be capable of interruption, be definite and continuous and in compliance with custom or statute. Counsel referred the Court to **Gale on Easements 15th edition at pp 191-209**; and **Carson v Silva BVI HCA 130/2001**.

[39] Mr. Delves urged the Court to find that Mr. Matthews has, through his predecessors in title, acquired a right to park on the right of way since he has met all of the requirements of the section 2 above stated. Mrs. Cordice Mapp may well argue that Mr. Matthews’ user is/was not continuous. In particular, Mrs. Cordice Mapp may refer to Johannah Barriere’s affidavit in Suit 142 of 1979 filed on 12.3.03 where she deposed that Mrs. Cordice Mapp packed blocks on the road, built a column to impede “far access” (sic) parked her car in front of the gate and told persons that there is no road to the house. However these acts are not sufficient to make the enjoyment not continuous within the meaning of the tests. It is always a matter of fact and degree whether the user is continuous. Professor Kodilinye at page 197 puts the point this way:

“This requirement does not necessarily demand that the user be non stop or on a 24 hour basis. Rather, the degree of continuity needed depends on the type of easement claimed. For instance, an easement to receive support from a building must necessarily be enjoyed ‘round the clock’; whereas an easement to receive an uninterrupted flow of light must be enjoyed during the daylight hours. As easement of way on the other hand, will be regarded as sufficiently continuous even where it is used only intermittently, for, by its very nature, it will be used from time to time. If, however, the user is very occasional, as for example, in one case where a way was used only three times in 36 years, clearly there can be no claim to an easement by prescription. Whether the user of the way

is sufficiently continuous is thus a matter of degree. **Megarry and Wade** suggest that user whenever the circumstances require it will normally be sufficient to satisfy the requirement of continuity, provided the intervals are not excessive. It may also be noted that the user need not have been by the successive owners or occupiers of the dominant tenement, which would be the most usual case, nor need the user be by the owner or occupier personally. It is sufficient if members of his family or regular employees enjoy the user: **Gilbert Kodilinye Commonwealth Caribbean Property Law, 2003**

[40] Mr. Delves said that in **Gale on Easements at page 207**, the point is articulated this way:

“Continuity may be interrupted by the act of the servient owner or by that of the person claiming the prescriptive right. In the first case, section 4 of the Prescription Act 1832 will apply, in the second case it is mainly a question of fact and degree whether the nature of a given enjoyment establishes an easement of an intermittent character or whether the enjoyment is so lacking in continuity as to be otiose. Thus it is not to be understood that the enjoyment of an easement must necessarily be incessant; although, in a great variety of cases, would obviously be so, eg. In the case of windows, or right to water. In those easement which require the repeated acts of man for their enjoyment, as rights of way, it would appear to be sufficient if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement that a right is claimed against him an indication that would not be afforded by a mere accidental or occasional exercise. On the other hand, the evidence may disclose a casual use, dependent for its continuance upon the tolerance and good nature of the servient owner and not such as to put him on notice that a right is being asserted.

[41] On the question of interruption, which is governed by section 4, Mr. Delves make the following points:

- (a) Firstly, the right is established once the court finds that for 20 years prior to the commencement of this action on December 24 2002, Mr. Matthews used the right of way (to park) in such a manner as to have made to clear to Mrs. Cordice Mapp or her predecessors in title that this right to parking was being asserted and should be resisted if such right was denied or not recognized and if resistance to the parking is intended See: **Hollins v Verney (1884) 13 QBD 305; Gale On Easements at p 169.**
- (b) Secondly, the interruption cannot be brief, transient, or sporadic but must be acquiesced for a year.

- (c) Thirdly, commencement of proceedings by the servient landowner is not an interruption.
- (d) Fourthly, to be properly regarded as an obstruction within the meaning of the section, there must be something more than the physical obstruction itself.

[42] Mr. Delves refers to *Gale* in which it is stated as follows:

“A person asserting an interruption must prove that some notice other than the mere existence of a physical obstruction was given to the person interrupted. Acquiesce is then a question of fact. It may be negative by evidence of protests made in anticipation of the interruption even if not subsequently renewed during the year following its completion. In order to negative submission or acquiescence, it is not essential to bring an action or to remove an obstruction. **Gale on Easements at pp 170 – 171”**

[43] Mr. Delves advocated that while Mrs. Cordice Mapp may (without any admission) have put obstructions (to both access and parking), since the 1950's, neither Mr. Matthews nor his predecessors in title ever acquiesced in any interruption for a year and that vociferous protests (which includes committal proceedings brought by Mrs. Barriere) were always made on any obstruction. Mr. Delves therefore submitted that Mr. Matthews' use of the right of way for parking has been established within the meaning of both sections 2(1) and 2(2) of the above mentioned Act.

Estoppel/Limitation

[44] Mr. Delves next said that in the event that the court finds that the abovementioned section does not assist Mr. Matthews that is not the end of the matter; Mr. Matthews has pleaded that Mrs. Cordice Mapp is estopped from asserting that there is no right to park where he parks. He invokes equity. Equity can assist and bolster the prescriptive claim of a landowner. As Lord Bingham said in **R v City of Sunderland ex parte Beresford [2003] UKHL 60** that; if permission to enjoy a right, capable of constituting an easement, is given by the landowner in terms likely to lead, and that do lead, the beneficiary of the permission to believe he is entitled on a permanent basis to enjoy the right and in that belief he sufficiently alters his position to his detriment, by expenditure of money or otherwise, he may become entitled in equity to the easement by proprietary estoppel (see **ER Ives Investment Ltd v High [1967] 2 QB 379**). The landowner would not be able to withdraw

the permission he had given. Mr. Delves next stated that Mr. Matthews' 20 years' enjoyment of the equitable right would surely enable the beneficiary of the permission to claim a legal easement of the right pursuant to the original permission as enjoyment by a person "claiming right thereto". In such a case the original permission would be the foundation of the claim of right but the enjoyment would not have been precario.

Claimants Submissions Estoppel by Record

[45] Learned Counsel Mr. Campbell QC submitted that the Court Order dated 21st May 1981 is clear in its terms. It established a right of way over Lot 9, which is Mrs. Cordice Mapp's land, in favour of Mr. Matthew's predecessor in title. It is common ground that Lot 9 consists of 3881 square feet (paragraph 2 of the Statement of Claim, as admitted by paragraph 1 of the Defence) Mr. Matthews admitted in cross examination that the said right of way being "10 feet by 49.2 feet," amounts to 492 square feet of land. The said Order of Court describes the right of way as "extending along the extreme Northern boundary of Lot No. 9 and ends on the lands owned and occupied by the Plaintiff, the Plaintiff in that case being Mr. Matthews' predecessor in title. Mr. Matthews in paragraph 1 of his defence has admitted the fact pleaded in paragraph 2 of the Statement of Claim that Mrs. Cordice Mapp "became fee simple owner in possession of Lot 9 from [1979] until the present date and continuing." It is common ground, therefore, that the right of way described in the said Order of Court exists entirely on Mrs. Cordice Mapp's land. Mr. Matthews in fact admitted that fact in cross examination. Nothing in the said Court Order refers to a right to park on Mrs. Cordice Mapp's land. The Order specifically refers to the "passing and re-passing whether on foot or vehicle over the right of way" Mr. Campbell QC next submitted that there is a world of difference between the rights to "pass and re-pass" and the right to park.

[46] Mr. Campbell QC relied on the principles of res judicata and issue estoppel. Mr. Campbell stated that Mr. Matthews cannot re-litigate the subject matter of High Court Suit Number 142 of 1979; nor can he seek to enlarge the scope or nature of the Court Order of 21st May

1981; that Order established a right way to pass and re-pass; the Order did not establish a general right to park such as is contended for by Mr. Matthews in this case.

[47] In advancing his submissions on the principles of estoppel, Mr. Campbell QC relied on the learning found in Halsbury's Law of England (Fourth Edition), Volume 16, paragraphs 951-989, and on the cases mentioned therein. In the particular, the Court's attention was drawn to the following passages in the said text namely:

“Paragraph 953. Estoppel by record or quasi by record. Estoppel by record or quasi by record, also known as estoppel per res judicata.

- i where an issue of fact has been judicially determined in a final manner between the parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the same parties (this is sometimes known as cause of action estoppel):
- ii where the first determination was by a court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the same parties (this is sometimes known as issue estoppel);
- iii in some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a tribunal having jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil or criminal proceedings between any parties whatever.

Where the earlier decision is that of a Court to record, the resulting estoppel is said to be “by record”, where it is that of any other tribunal, whether constituted by agreement of the parties or otherwise, the estoppel is said to be quasi by record. The fact that the earlier decision or determination was made by an inferior Court does not prevent estoppel by record or quasi by record arising.

[48] In **Armstrong v Whitfield [1973] 2 ALL ER 546** it was held that a decision of the Court of quarter sessions that a path was a public path was a decision in rem which was binding on that Court and could not be relitigated by that Court. Thus a person who blocked the access to the path and was charged with willful obstruction of a highway was not allowed

to call evidence in his defence to show that the path was not a public path. Lord Widgery CJ said (at page 55 a-c)

“But what happened in fact was that some delay occurred between the hearing of this application before quarter sessions and the publication of the definitive map, and in that interval the appellant locked the gate and obstructed the path, as the justices have found. When he was prosecuted for that offence before the justices, the prosecution, the county counsel, merely proved the previous decision of the quarter sessions on this question and submitted that that was conclusive of the matter and that the justices were not entitled to go afresh into the question of whether this path was or was not a public path. The appellant submitted that the justices were required to go into the matter again; he sought to open it again and the justices’ finding as stated in their opinion is that the appellant was estopped from calling evidence on this issue, the estoppel being based on the earlier decision of quarter sessions under s 31. It is a nice point as anyone who hears the circumstances will appreciate. The main argument for the respondent below was that this was a case of issue estoppel; this was a case in which the issue, public path or not, having been decided by a competent Court, any subsequent Court was estoppel from rehearing the matter, and indeed the appellant was estopped from calling evidence with a view to hearing the issue afresh.”

[49] Mr. Campbell QC said that the Eastern Caribbean Court of Appeal has confirmed that the principles of estoppel by record are firmly entrenched in St Vincent and the Grenadines. The issues were fully argued in the recent St Vincent and the Grenadines case **Etoile Commerciale SA v Owens Bank Limited (1992) 42 W.I.R 128**. In the premises, Mr. Campbell QC submitted that all averments in the Defence and Counterclaim which state or imply that Mr. Matthews is entitled to enjoy rights over Mrs. Mapp’s land which exceed the right to use the right of way “to pass and re-pass” on foot or by vehicle should be struck out as an impermissible attempt to relitigate an issue which was conclusively determined since 1981 at the instance of Mr. Matthews predecessors in title.

[50] Mr. Campbell QC told the Court that Mr. Matthews has also contended that the right of way is a “road” and that the Order of 21st May 1981, was meant to create or establish a “road”. Just how that characterization arises from Suit 142 of 1979 is not apparent. Clearly, if the right of way is a road then the portion of land would cease to be a portion of Lot 9; it would cease to belong to Mrs. Cordice Mapp; it would become either public property or the

property of Mr. Matthews; it cannot at one and the same time be a road and be owned by Mrs. Cordice Mapp in circumstances where she cannot park her vehicle on that portion of land: in what sense, then, will it be “owned” by her? In what sense would she be seised of that portion of her yard? Asked Mr. Campbell.

Easement of Necessity

[51] Next, Mr. Campbell QC said that where there is a vehicular right of way leading into the yard of the servient tenement, the owner of the dominant tenement must be entitled to remain in the yard for such time as is necessary to enable him to enjoy his easement of bringing his vehicle into the yard for such time as it takes to load or unload his vehicle: **Bulstrode v. Lambert [1953] 2 ALL E.R 728**. In principle, therefore, the easement cannot extend to a general right to park a vehicle in the yard.

[52] Next Mr. Campbell QC stated that the right to park cars can exist as an easement provided that, in relation to the area over which it is granted, it is not such that it would leave the servient owner without any reasonable use of his land. **London & Blenheim Estates Ltd vs. Ladbroke Retail Parks Ltd. [1992] 1 W.L.R 1278**

[53] Queen Counsel Mr. Campbell next said that where a landowner would not be able to use his own land for parking if another person enjoyed a right to park a vehicle on the landowner’s property, and the landowner’s right to use his land for any other purpose was curtailed altogether for intermittent periods throughout the week, such a restriction would make the landowner’s ownership of his land illusory, and such a claimed right to park on the landowner’s land was not capable of being an easement. **Batchelor v Marlow [2003] 4 All. E.R. 78**.

[54] Mr. Campbell QC reiterated that Mrs. Cordice Mapp does not seek to deny the existence of the right of way over her property for Mr. Matthews to pass and re-pass. Mrs. Cordice Mapp consequently concedes the ancillary right of Mr. Matthews to keep his vehicle stationary on the right of way for the purposes of loading and unloading his vehicle, and for taking up and setting down passengers. What Mrs. Mapp denies, however, is Mr.

Matthews claimed right to park generally on her right of way. Mr. Campbell referred the Court to Judge Paul Barker QC in the **London & Blenheim** *ibid* who had this to say:

“That leaves the main point under this head, whether the right to park cars can exist at all as an easement. I would not regard it as a valid objection that charges are made, whether for the parking itself or for the general upkeep of the park. The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant. The rights sought in the present case do not appear to approach anywhere near that degree of invasion of the servient land. If that is so and I emphasise that I have not gone into the facts I would regard the right claimed as a valid easement.”

[55] Mr. Campbell QC stated that Mrs. Cordice Mapp’s position is simple, straightforward, and accords with principle. By virtue of the Judgment dated 27th April 1981 and entered on 21st May 1981, Mrs. Cordice Mapp is obliged to recognize the existence of a right of way over her land leading to the lands owned and occupied by Mr. Matthews. Mrs. Cordice Mapp also recognizes the right of Mr. Matthews to pass and re-pass over the said right of way on foot or by vehicle. What Mrs. Cordice Mapp denies, however, is the claim by Mr. Matthews that he is entitled to park his motor car on the said right of way, unless such parking is for a very short period which is merely incidental to the right to pass and re-pass as, for example, for the purpose of taking up and setting down passengers or goods.

[56] Mr. Campbell QC said Mr. Matthews recognizes that there is in law no right to use a right of way for the purposes of parking his vehicle; he therefore seeks to deny that the right of way is a right of way, and endeavours to refer to the right of way as a “road”; he is endeavouring to amend the 1981 judgment to fit his untenable characterization of the easement declared therein.

[57] Mr. Campbell QC emphasized that if authority is needed for the proposition that prolonged parking of a vehicle by a person who enjoyed an easement to pass and re-pass over a right of way is an excessive and thus impermissible user of the right of way, such authority can be found in the case **Bulstrode v Lambert** *ibid*. In that case it was held that a right “to

pass and re-pass with or without vehicles over and along [the yard] for the purpose of obtaining access to the building at the rear of the premises known as the auction mart” carried with it the right to keep vehicles in the yard only for such time as was necessary to load and unload those vehicles.

[58] Queen Counsel next stated that the right to use a right of way was determined by the terms of the grant, and that trespass was whatever was not permitted by the grant. **Peacock v Custins [2001] 2 ALL ER 827**. It was said in that case that any use of a right of way is, in contemplation of law, a burden, and it was necessary to ask whether the grantor agreed to the grantee making use of the right of way for a purpose not specifically covered by the grant. The Court in that case cited a dictum by Vaughn Williams J in **Harris v Flower (1904) L J Chapter 127,132**:

“The reason for it is that a right of way of this sort restricts the owner of the dominant tenement to the legitimate user of his right; and the Court will not allow that which is in its nature a burthen on the owner of the servient tenement to be increased without his consent and beyond the terms of the grant... the burthen imposed on the servient tenement must not be increased by allowing the owner of the dominant tenement to make a use of the way in excess of the grant.”

Court Analyses and Findings

[59] I have reviewed the evidence and the following represents my findings of fact. Mrs. Cordice Mapp owns Lot 9, and in relation to a portion of which the Fernandez claimed a right of way. There were on going disputes between Mrs. Cordice Mapp and the Fernandez this resulted in litigation in Suit No. 142 of 1979 between Everil Fernandez who is Mr. Matthews predecessor in title and Mrs. Cordice and others as she then was. The litigation was in relation to the right of way which forms the basis of this dispute. At that time, Mrs. Cordice Mapp was contending that the Fernandez had no right to use the strip of land which is situate on Mrs. Cordice Mapp’s property. The Court, on 21st May 1981, ruled in favour of the Fernandez and ordered that they have a right of way as stated above. The right of way over Lot 9 consists of the entire Northern portion of Lot 9 ending at the boundary with Mr. Matthews’ property. The right of way is entirely in Mrs. Cordice Mapp’s yard, 10 feet wide by 49.2 feet long, for a total of 492 square feet, equivalent

arithmetically to 12.76 percent of the square footage of Lot Number 9. The right of way is Mrs. Cordice Mapp's only entry to her two-storey dwelling house erected on Lot 9. The right of way can accommodate three vehicles parked one behind the other. Any vehicle parked on the right of way would be parked wholly on Mrs. Cordice Mapp's land in her yard. There is no room on the right of way for two vehicles to be parked alongside each other. Mrs. Cordice Mapp's vehicle can only gain access to her house by driving over the right of way. If more than one vehicle is parked on the right of way, Mrs. Mapp's vehicle would have no access to her house. If one vehicle is parked on the right of way right up to Mr. Matthews' property Mrs. Cordice Mapp cannot turn her vehicle around to drive out from her yard, but would have to reverse the distance out to the main road.

[60] Mrs. Cordice Mapp was unhappy with the Court's ruling and at every step of the way sought through different means to assert her ownership of the right of way and at times used methods to ensure that the Fernandez did not use the right of way as if it were their property. As stated earlier, the right of way is the only access that Mrs. Cordice Mapp has to her house. Mrs. Cordice Mapp had a car which she used at one time and drove on the right of way. Mr. Fernandez also used the right of way, and at times drove his motor vehicle on the right of way in order to get to his home. Mr. Fernandez however on occasion parked his motor vehicle close to his home but part of his vehicle was on the right of way; this never found favour with Mrs. Cordice Mapp who consistently made her displeasure known, whenever she was in Saint Vincent and the Grenadines. Mrs. Barriere who is the daughter of Mrs. Fernandez deceased inherited her parents' home which she subsequently sold to Mr. Matthews. During this time, Mrs. Cordice Mapp continued to assert her ownership of the right of way and at times would put up notices which stated that there was no road to Mrs. Barriere's property. Mrs. Barriere was desirous of selling her home and the notices that were placed by Mrs. Cordice Mapp served to deter potential buyers. Eventually, Mr. Matthews purchased the property from Mrs. Barriere in 2001 and at all material times he was aware of the dispute in relation to the right of way.

[61] Mrs. Cordice Mapp did not relent in asserting that while Mr. Matthews and his guests could use the right of way by foot and vehicle to access his home but, they could not park any

motor vehicles on the right of way. Mr. Matthews maintained that he has the right to use the right of way to access his house both by foot and vehicle; in addition he asserts that he has the right to park his vehicle on the right of way but close to his house for an unlimited period of time without hindrance from Mrs. Cordice Mapp; while Mrs. Cordice Mapp accepts that Mr. Matthews has the right to use the right of way, which is situate entirely on her property to access his home she is adamant that Mr. Matthews has no right to park his vehicle on the right of way for an unlimited period of time.

Court's Analyses and Findings

[62] I have given careful and deliberate consideration to the very helpful submissions made by both learned counsel; it seems to me that to a large extent, the resolution of this matter lies in the Court's interpretation of the Order of Court dated 21st May 1981. In addition, I am of the view that it is equally important to consider and determine whether Mr. Matthews has obtained any rights to the right of way "over and above" the right "to pass and repass" by both vehicle and foot.

Estoppel by Record

[63] At this juncture, I must state that while I find the arguments advocated by Mr. Delves to be very attractive, I am highly persuaded by the submissions advanced by Mr. Campbell QC. I accept Mr. Campbell's submissions in preference to that of Mr. Delves.

[64] I am mindful of the fact that it is not open to me to seek to revisit the order of 21st May 1981 with a view of changing that order since I am not entitled and have no jurisdiction to review the order of Court in this manner; this function falls exclusively within the domain of the appellate court

[65] I have no doubt that in Action Number 142 of 1979 brought by Everil Fernandez who is Mr. Matthews' (predecessor in title) against Mrs. Cordice Mapp and others the order of Court dated 27th April 1981 clearly declared the right Mrs. Fernandez and her successors to use the right of way in accordance with that Order. It also stated the use to which Mrs.

Fernandez could make of the right of way and by extension the use which Mr. Matthews who is her successors in title is entitled to make of the right of way. I am also of the respectful view that in so far as the Court declared the rights of the parties thereto, it is not open to me to seek to have the issue re litigated with a view to changing or varying that order of Court (in an indirect way). In this regard I accept and apply the principles of law referred to by Mr. Campbell QC and very helpfully stated by Lord Widgery CJ at p 550 CJ in **Armstrong v Witfield** *ibid*. I have no doubt that the order of the Court referred to above and dated 21st May 1981 is binding on the Court and cannot be relitigated. I am of the further view that since the said issue of fact has been judicially determined in a final manner between the Mrs. Cordice Mapp and Mr. Matthews predecessor in title, by that Court with whom this Court has concurrent jurisdiction, the same issue having come directly or incidentally in question, in the present proceedings estoppel by record arises.

[66] I am fortified in the above view based on the decision “our Court of Appeal in **Etoile Commerciale SV v Owens Bank Ltd** *ibid* which gave judicial recognition to the fact that where an issue has been litigated and determined by a Court; a party to that issue is prevented from raising and re litigating that issue. I am guided by this decision.

[67] Accordingly, I am of the respectful view that the Order of Court of the 21st May 1981 entitles/authorises Mr. Matthews predecessors, through whom he claims, to use the right of way “to pass and repass” and this of course includes the right to park for a very short period which is incidental to the right “to pass and repass”. I have no doubt that the Court did not intend by its order to confer on Mr. Matthews’ predecessor the right to park vehicles on the right of way for an indefinite period of time. I therefore, accept Mr. Campbell’s submissions that Mr. Matthews’ prolonged parking on his motor car on the right of way is an excessive and impermissible user of the right of way. Mr. Matthews is not permitted to park his vehicle on the right of way in such a manner to infringe with Mrs. Cordice Mapp’s user of it; To put another way, I am of the considered opinion that while Mr. Matthews has the right to use the right of way in order to get to and from his house he has no similar right to park his vehicle on the right of way for “an unlimited time”. He is only allowed to park his vehicle for the sole purpose of embarking and disembarking. Equally, Mrs. Cordice Mapp

has no legal right to use the right of way in such a manner so as to prevent Mr. Matthews or impede his user of the right of way either by vehicle or foot as stated above.

Proprietary Estoppel

[68] I come now to address the issue of proprietary estoppel. I have no doubt, having listened carefully to Mr. Matthews, that at the time of purchasing the property he was aware of the dispute in relation to the right of way. I am not of the view that he was led to believe that it was resolved in so far as “parking of motor vehicle by his predecessor” was concerned. However, I am convinced that Mr. Matthews was keenly aware that Mrs. Cordice Mapp at all times maintained that the right of way was on her land and at all times she refused to accept that his predecessor had a right to park on the right of way. Mr. Matthews, therefore, cannot rely on the principles stated in **R v City of Sunderland ex parte Beresford [2003] UK HL 60** nor on the principles of **ER Ives Investment Ltd v High [1967] 2 Q 379** in so far as I have found that at no time did Mrs. Cordice Mapp lead him or his predecessor in title to believe that either of them were entitled to enjoy the right of way for the purpose of parking for unlimited periods of time. Further, Mr. Matthews cannot properly say that he altered his position to his detriment, by expenditure of money of otherwise, so as to become entitled in “equity to the easement by way of proprietary estoppel.”

[69] I am therefore of the respectful view that Mr. Matthews’ user of the right of way must be in accordance with the Order of Court 21st May 1981 unless he can show that since the date of order he has acquired a greater right of usage of the right of way than that granted by the Court. This brings me to the third limb of his contention.

Prescriptive Rights

[70] I am not at all of the view that sections 2 and 4 of the Prescription Act can avail Mr. Matthews, in the present circumstances. I have absolutely no doubt, as stated earlier, that throughout the years Mrs. Cordice Mapp has continually resisted attempts by Mr. Matthews and his predecessors in title to use the right of way for purposes other than “passage and repassage”.

[71] For what it is worth, I pause to note that Mrs. Barriere during cross examination seemed to be saying that she and her father always parked their respective cars on their land and not on Mrs. Cordice Mapp's land; if this was so there would therefore be no dispute engaging the Court's attention. I fail to see how Mr. Matthews can now claim that he acquired the right to park a vehicle on the right of way due to the user of the right of way by his predecessors, when Ms. Barriere says in cross examination that they always parked "on their land". I am equally far from persuaded that Mr. Matthews or his predecessors were ever able to successfully assert, over the years, their respective rights to park their respective vehicles on the right of way. It is very clear to me that at every step of the way and on a continuous basis Mrs. Cordice Mapp asserted her ownership of the right of way and made it well nigh impossible for Mr. Matthews and his predecessor to park their vehicles. The Court does not, need any clearer evidence of this in addition to that adduced by Mrs. Barriere herself which in my view, is supportive of Mrs. Cordice Mapp's claim. In my respectful view, Mr. Matthews has failed to meet the threshold required to establish that he has acquired prescriptive rights to the right of way.

Limitation

[72] Finally, I am not at all of the view that Mr. Matthews can properly rely on the principles of limitation in an effort to defeat Mrs. Cordice Mapp's claim. I also take cognizance of the fact that Mr. Matthews acquired his property by a Deed of Conveyance dated 13th February 2001 and Mrs. Cordice Mapp instituted the present proceedings against him on the 24th December 2002.

[73] Further, Mr. Matthews has not led any credible evidence to sustain a defence of adverse possession in relation to the right of way. To the contrary, the evidence adduced by Mr. Matthews and his witness Mrs. Barriere is consistent with Mrs. Cordice Mapp's claim in so far as it is clear to me that there has been no exclusive, peaceful, continuous or adverse user of the right of way for a period of 12 years before Mr. Matthews filed his counterclaim. Mrs. Cordice Mapp has consistently opposed Mr. Matthews, and his predecessors in title, usage of the right of way in a manner that is consistent with her ownership.

[74] For the above reasons and in view of the above circumstances, I am of the considered view that Mrs. Elizabeth Cordice Mapp has established her claim against Mr. Cammie Matthews while Mr. Cammie Matthews has only proven part of his counterclaim against Mrs. Elizabeth Cordice Mapp.

Counterclaim

[75] In the case at bar, I have no doubt that Mr. Matthews has trespassed on Mrs. Cordice Mapp's property by virtue of his prolonged parking of his vehicle on the right of way. However, no evidence was led by the Mrs. Cordice Mapp in relation to the loss which she has suffered as a result of Mr. Matthews' parking of his vehicle on the right of way (trespass); I therefore, award her nominal damage for the trespass, in the sum of \$2,000.00

Conclusion

[76] In conclusion, I give judgment for Mrs. Elizabeth Cordice Mapp against Mr. Cammie Matthews and make the following orders:

- (1) A Declaration that Mrs. Elizabeth Cordice Mapp is the fee simple owner in possession of the hereditaments conveyed to her by an Indenture dated the 28th day of May 1979 and made between Arthur Francis Williams Executor of the Estate of George Ebenezer Samuel of the One part and Mrs. Elizabeth Cordice Mapp of the Other Part and registered at the Registry of the State of Saint Vincent and the Grenadines bearing Registration Number 843 of 1979 and described as follows:

“ALL THAT LOT piece or parcel of land situate at Arnos Vale in the Parish of Saint George in the State of Saint Vincent and the Grenadines and admeasuring Three Thousand Eight Hundred and Eighty-one Square Feet (3,881 sq. ft) and numbered LOT 9 on a plan prepared by Stinson Campbell a Licensed Land Surveyor and which said plan is numbered **G580** and approved on the 9th day of August, 1967 and being abutted and bounded on the North by Lot Number 8 by one Brown on the South by Lot Number 10 owned by Sandy on the East by lands of D. Fernandez and E. Simon on the West by a Three (3) feet drain and land of H. James and Part of Lot Number 11 or howsoever otherwise the same may be abutted bounded known distinguished or described together with all ways water watercourses rights lights liberties privileges easements and appurtenances thereto belonging or usually held used occupied and enjoyed therewith or

reputed to belong or be appurtenant thereto” (“the said hereditaments”),

Subject however to a right of way in favour of Everil Fernandez and her successors in title described as follows:

“a right of way 10 feet by 49.2 feet extending from an existing right of way and shown on a plan drawn by S. Campbell Licensed Land Surveyor and dated the 22nd day of February, 1967 and numbered 25 of 1967. This right of way extends along the extreme Northern boundary of Lot No. 9 and ends on the lands owned and occupied by the Plaintiff. This right of way to be used by foot and/or vehicle”

- (2) A declaration that the successors in title to Everil Fernandez, including Mr. Cammie Matthews, are entitled to use the said right of way for passing and repassing by foot and/or vehicle BUT ARE NOT ENTITLED TO USE THE SAID RIGHT OF WAY FOR THE PARKING OF VEHICLES THEREON for indefinitely or prolonged periods of time.
- (3) An injunction to restrain Mr. Cammie Matthews by himself his servants or agents or visitors to Mr. Matthew’s premises or invitees to his premises or howsoever otherwise from parking vehicles on or along the said right of way or any part thereof, unless the halting of a vehicle on the said right of way.
 - (a) Is merely incidental to the boarding and setting down of passengers; or
 - (b) Is merely incidental to the loading or unloading of vehicles, and
 - (c) In any event the duration of such halting of a vehicle on the said right of way does not exceed the time reasonably necessary to accomplish the loading or unloading of passengers and goods.
- (4) Mr. Matthews do pay Mrs. Cordice Mapp damages in the sum of \$2,000.
- (5) An injunction is granted restraining Mrs. Cordice Mapp, her agents or howsoever from parking on the right of way in such a manner so as to prevent Mr. Matthews from driving to his house.

[77] In the exercise of my discretion and in the interest of justice, I order that each party is to bear its own costs.

[78] I thank both learned counsel for their invaluable assistance.

Louise Esther Blenman
High Court Judge

P.S

The conclusion of the hearing of this matter took far longer than I would have expected and this despite my best efforts, in the main this was occasioned by administrative difficulties, over which I have no control and which are well known to all concerned. The Court nevertheless apologizes for the delay.