

**THE EASTERN CARIBBEAN SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
(HIGH COURT OF JUSTICE)
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2001/0659

BETWEEN:

HENRY B. AUGUSTINE

Complainant

-and-

GLORIA AUGUSTINE

Defendant

Appearances:

Mrs. B. Wardally – Beaumont for the Claimant
Dr. F. Alexis for the Defendant

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2003: JUNE 25 & 26
2011: SEPTEMBER 1
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JUDGMENT

- [1]. **BENJAMIN, J:** The Claimant and the Defendant are in occupation of separate adjoining properties. The Claimant's property is on Chapel Lane and the Defendant's property is at corner of Depradine Street and Chapel Lane both in Gouyave in the parish of Saint John in Grenada. The Claimant's property measures 1693 square feet and is held by a Deed of Conveyance dated the 28th day of March 1998. The Defendant's property consists of a two-storey concrete building on land measuring 976 square feet. The Defendant's possession is averred to be by reference of a Statutory Declaration executed by Lloyd

Bernadine dated the 23rd day of May, 2000 and which declares that the paid property was given by Theodore Alexander Snagg to his daughter, the Claimant, in the year 1988 before his death.

[2]. On December 4, 2001, the Claimant brought suit against the Defendant for alleged encroachments upon his property seeking the following relief:

- a. *"A declaration that the Defendant is not entitled to enter or cross the Claimant's said land leading from the Claimant's land situated at Chapel Lane, Gouyave, St. John's.*
- b. *An injunction to restrain the Defendant whether by herself or her servants or agents or however from entering or crossing the Claimant's said lands.*
- c. *An order that the Defendant remove his pipes situation on the Claimant's land*
- d. *An order that the Defendant remove the portion of her roofing on her building situate at Chapel Lane, Gouyave, St. John's that is overhanging the Claimant's land.*
- e. *Special damages of \$3,200.00*
- f. *Damages*
- g. *Further or other relief as the Court deems just.*
- h. *Costs."*

[3]. In his Statement of Claim, the Claimant detailed three areas of complaint. Firstly, it was alleged that in refurbishing her building the defendant installed a concrete floor and a new

roof on the upper storey and that the said roof overhangs the Claimant's land by two or three feet. No date was given for this refurbishment. Secondly, the Claimant alleged that in a further refurbishment in 2001 the Defendant installed pipes leading from her premises onto the Claimant's land to carry waste water from the Defendant's premises in front the public drain in front of the Claimant's premises. Thirdly, the Claimant complained of encroachment in 2001 by the erecting of steps where there previously is located a platform which projects one foot onto the Claimant's land. The Claimant asserted that since the construction of the step the Defendant and her servants or agents have been traversing his land to enter her premises.

- [4]. It was pleaded that on October 5, 2001, the Claimant caused a wire fence to be erected on his land and the said fence was destroyed by the Defendant, her servants or agents. It is these three acts complained of and the incident referred to that were the fons et origo of the present suit.
- [5]. The Defendant filed a Defence and Counterclaim. In written submissions and at trial, learned Counsel for the Defendant conceded the Claimant's right to have the offending portion of the overhanging roof as well as the water-pipe removed. Accordingly, orders will be made to reflect these undertakings as the Claim succeeds to this extent.
- [6]. The main area of dispute relates to the Defendant's use of a portion of the Claimant's land to access the existing main and sole entrance to her dwelling on the upper storey of her building. The lower storey of the building is separately tenanted and enjoys its own access through doors on both Chapel Lane and Depradine Street. The Defendant has counterclaimed for a declaration of her right to traverse a walkway three to four feet wide and twelve (12) feet in length on the Claimant's land in order to access the Chapel Lane from the steps of her dwelling-house. The Defendant asserts the existence of a right of way or easement over the Claimant's land enjoyed without interruption for more than twenty (20) years before the present action was filed. In the alternative, it was contended

that the Defendant is entitled to the walkway attached to the steps and platform by adverse possession under the Limitation of Actions Act, Chapter 173.

THE EVIDENCE

- [7]. The Claimant asserted knowledge of the Defendant's property and its occupants from the late or early 1960's and he stated that he went to the premises in the 1970's when Mr. G. J. Boyke occupied the same with a lady. As a young boy he frequented the shop and later he would visit Peter Boyke, class-mate and son of G. J. Boyke. He admitted that there was concrete platform behind the house during the 1960's and that there was a door to the upstairs of the house leading from that platform which one had to climb onto from Chapel Lane. He said that there were a few treaders leading from the platform to the house upwards but there were no steps or any walkway from the platform to the road.
- [8]. The Claimant told the Court that the Defendant made new steps from the ground to the platform where there were no steps before. He specifically denied that the walkway was in use since the 1960's to access the Defendant's premises. In his witness statement he iterated that access to the upper floor before the refurbishment was by means of an inner staircase from the lower floor.
- [9]. The Claimant revealed that he left Grenada for England and since 1974 he has spent two months every year or every two years in Grenada. He recounted a conversation with the Defendant during which he asked her to sign a document but she refused. The conversation pertained to the walkway. The Claimant did recall that in his presence, Dr. Redhead, the Defendant's husband, told the Police that there was an allowed road on the land leading to the steps.
- [10]. George Wilson was presented as a witness on behalf of the Claimant on the basis that he lived in close proximity to the Defendant's property for thirty-seven (37) years. He insisted

that the premises had inside steps which granted access to the upper floor and there was no other entrance to that floor. Although this witness admitted there was a platform to the back of the building, he said that there were never any steps from the ground to that platform nor any steps to the door at the upper floor. However, his viva voce testimony conflicted with his witness statement where he stated in two places that the steps to the back of the building on Chapel Lane was not used as the main means of access and he continued "the said steps was in existence but rarely used by the occupants of the building." Later in his said statement, he said that there was "a stone step" to the back of the building which did not extend to the platform.

- [11]. George Wilson asserted that the use of the walkway is of recent vintage by the defendant as previous occupants of the premises never used the Claimant's land as a right of way. This was altogether confusing as the witness agreed that there was an exit door to the back of the premises upstairs and that the means of access by the platform was 'rarely' used. No explanation was given as to how this exit door was accessed when used.
- [12]. Jessie Thomas gave evidence in support of the Claimant's case. He said in his testimony that there were steps from the platform to the ground since the late 1980's. He categorically stated that there was no walkway to the steps although he himself used to jump up on the platform from Chapel Street. Contrary to what George Wilson and other witnesses said, this witness insisted that there was no outside door upstairs nor were there any steps from the platform to the upper floor. This was contradicted when he wrote in his statement: 'To my knowledge there was an old stone step to the rear of the house the Defendant now occupies. Then the bottom end of the step was not located where it is at present.' He did not say where that bottom end was located. However since the platform abuts Chapel Lane, one surely had to walk on the Claimant's land to access that step.
- [13]. The brother of the Claimant, Paul Richards, testified as to an incident on October 5, 2001 when he said the Defendant removing a wire fence on the Claimant's property. This

witness said in his witness statement that although there was a door at the back end of the building at Chapel Street, there was no exit there until the Defendant renovated the building and built steps to gain access to a platform already in existence.

[14]. Paul Richards admitted hearing the defendant say in the presence of the Claimant and two Police Officers that there was an allowed road which had been in use for years.

[15]. The history of the occupancy of the Defendant's property was provided by the Defendant and her two witnesses who were Everette Boyke and Gloria Bonaparte. The Defendant said in her statement that lived in the upper of the premises with G.J. Boyke and her grand-aunt from 1957 to 1962, when her grand-aunt, Rose Alocum Boyke nee Francis, died. She remained in the house until 1964 during which time G.K. Boyke's two sons, Godfrey and Peter, came to live with them. G.J. Boyke died in 1971. Everette Boyke stated that he had known the property since 1938 when he was five years old. He occupied the building using downstairs as a shop and renting the upper floor. The persons renting the upper-floor accessed the premises along the disputed walkway from Chapel Street. The witness said in his statement: "From the time I was a little boy about five (5) years old in 1938 I have always known that walkway to be there and to afford access to the building from Chapel Lane." In his cross-examination he said that there was an inside stairway from the shop and there was access to the upper floor from the steps inside as well as from the steps outside. He agreed that after he gave the premises sometime after 1982, the premises may have remained unoccupied for as long as five years.

[16]. The Defendant stated that she took possession of the property from 1985 but she did not go into occupation until 1988. Renovations were carried out in 1988-1989. In 1985, the inside step no longer existed although they were there up to 1971 when, G.J. Boyke, who was blind, used them to get upstairs. She denied making any addition to the steps. She recalled using the walkway a child. In addition, she added that the walkway was used by others.

- [17]. Gloria Bonaparte lived on Chapel Street for thirty-six (36) years. She asserted knowledge of the Defendant's property from the 1960's where she was six (6) years old. She recalled G.J. Boyke occupying the premises with his two sons until 1971 when he died. Thereafter one Tano ran a business. Ms. Bonaparte stated that there were always steps at the back and those steps are in the same spot even after the renovation. Those steps lead up to the platform and another flight of steps leads to the top floor. She denied that the steps were only recently put there.
- [18]. The Court had the benefit of the three photographs disclosed as part of the case. Two of the photographs show the platform and stairs leading from that platform to the ground as part of the Defendant's property. In addition, the Court paid a visit to the locus with the parties and their Counsel. The platform was observed and the steps appeared to be not of recent construction but of long standing.
- [19]. Two of the Claimant's witnesses, George Wilson and Jessie Thomas, both admitted the prior existence of a platform and a step to the back of the building. Both the Claimant and his brother testified that the steps were built by the Defendant where there were none before. In contrast, the Defendant and her witnesses, who displayed a more intimate knowledge of the premises and their history, consistently confirmed that there was access to the upper floor using the walkway to access steps to a platform and to an outside door upstairs from as early as 1938, or in any event, from the 1960's.
- [20]. The weight of the evidence is in favour of the Defendant and against the Claimant. Accordingly, I find that on the balance of probabilities, there was access to the upper floor of the Defendant's property by means of the walkway measuring three to four feet in width for a distance of twelve (12) feet from the boundary with Chapel Lane from 1938.

[21]. **EASEMENTS**

An easement is a right in rem which is a right to do something or a right to prevent something and binds the land over which it is exercisable. It confers a benefit on the dominant tenement over the servient tenement. In law, a private or other right of way can amount to an easement.

[22]. The Defendant is in possession of the property at Depradine Street and Chapel Lane in Guayave. Her possession is exclusive and no competing claim to possession has been asserted. Accordingly, the Statutory Declaration is of no moment and the Defendant is not precluded from asserting the right to an easement. The Defendant is in full occupation of the upper floor where she lives and she has rented the lower floor to a tenant.

[23]. The common law is supplemented by the Prescription Act, Chapter 252. Section 2 of the Act provides:-

"When any profit or benefit, or any way or easement, 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 previous 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."

In the present case, there is no express grant in writing nor, as admitted by the Defendant, is the disputed walkway reflected in the plan of her property. The issue therefore is whether the right to use the walkway has been in existence for upwards of twenty years.

[24]. By section 4 of the Act, time is computed backwards from the date of filing of suit questioning the right as claimed. Dating back to the 1960's there can be no demur that a period of twenty years has elapsed. Further, there is no evidence to support an interruption pursuant to notice by or authorized by the Claimant to the Defendant, submitted to or acquiesced in by the Defendant.

[25]. The Claimant has submitted that the right of way may have been abandoned. This was never pleaded by the Claimant. Nevertheless, it has been held that more non-user is not decisive of the matter (see: R.v. Chorley (1848) 12 Q.B.515). There must be proof that the owner of the dominant tenement intended to give up his right. The matter was put thus in Swan v. Sinclair [1924] Ch. 254 at p. 266:-

"Non-user is not by itself conclusive evidence that a private right of easement is abandoned. The non-user must be considered with, and may be explained by, the surrounding circumstances. If those circumstances clearly indicate an intention of not resuming the user then a presumption of a release of the easement will, in general, be implied and the easement will be lost."

In this case, on the contrary, the evidence discloses an intention by the defendant to preserve and exercise the right of way.

[26]. Having regard to my finding as to the existence of an easement, it is otiose to address the question of adverse possession under the Limitations of Actions Act.

ORDERS

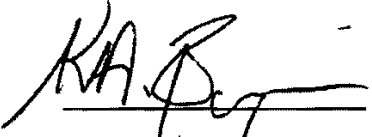
[27]. In the premises, the Claimant is entitled to orders pursuant to the concession made by the Defendant with regard to the pipes and the overhanging roof. The action for trespass with regard to the walkway fails and the Claimant is not entitled to damages.

[28]. On the counterclaim, the Defendant is entitled to a declaration as to the existence of a right of way and the Court so declares.

[29]. On the question of costs, in as much as the defendant grudgingly conceded the overhanging of the roof prior to action, no attempt was made to rectify the encroachment. However, the Defendant has succeeded in her counterclaim. In my discretion I would award the Claimant half of the full costs on the Claim and full costs to the Defendant on the counterclaim.

[30]. It is ordered as follows:-

1. *The claim for a declaration and an injunction by the Claimant shall stand dismissed.*
2. *The Defendant shall remove her pipes situate on the Claimant's land situate at Chapel Street in Guayave in the parish of Saint John forthwith.*
3. *The Defendant shall remove such portion of the roof of her building situate at Depradine Street and Chapel Lane, Guayave aforesaid in so far as it overhangs and encroaching upon the Claimant's said land.*
4. *Costs to the Claimant in the sum of \$3,500.00.*
5. *On the counterclaim, it is declared that the Defendant are entitled to a right to enter and cross the Claimant's said land to the extent of four feet in width and twelve (12) feet in length.*
6. *The Claimant shall pay the costs of the Defendant on the counterclaim fixed in the sum of \$7,000.00*



KENNETH BENJAMIN
HIGH COURT JUDGE