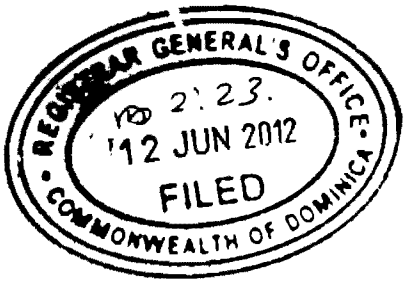
The Eastern Caribbean Supreme Court
In the High Court of Justice
Commonwealth of Dominica



DOM HCV 2011/0144

Between:

CECIL JAMES **NATHALIE JAMES**	**Claimant**
and	
GLOUSTER PIERRE **EUDORA PIERRE**	**Defendant**

Before the Hon. Justice Brian Cottle

Appearances: Mrs. Noelize Knight-Didier for the Claimant
Mrs Laurina Vidal-Telemacque for the Defendant

2012: February
May 3rd, 4th
June 12th

Judgment

[1] **Cottle, J:** The parties are registered proprietors of two neighboring parcels of land at Morne Daniel. The claimant's land is bounded on the North-East by the defendant's land. Both parcels had initially formed part of the Canefield Estate. The claimant's certificate of title has a plan annexed. It shows that the west and north west of the claimant's land is bounded by a road.

[2] In reliance on this, the claimants have constructed the garage to their home at the north western corner of their land and propose to drive out of their garage onto the road as shown on their plan.

[3] The defendants hold a certificate of title with a plan annexed. That plan shows that the south west boundary of the defendants land is in fact the claimant's property. The roads are depicted as entering the defendants' land a short distance from the claimant's land. In order to reach the road the claimants would have to traverse a portion of the defendant's land to reach the road.

[4] The claimants bought their land in 2001 their certificate of title is dated 29th March 2001. The defendants bought their land in 2008. Their certificate of title is dated 17th July 2008. The original

certificate of title for the parcel that the claimants now own was first issued one day prior to the certificate of title of the defendants' predecessor in title.

[5] The issue which now falls for determination is whether the claimants are entitled to traverse the portion of land expressed to be a part of the parcel owned by the defendants to enter and leave their garage. Having seen the report of Mr. Gaeton Seaman, licensed land surveyor it is clear what the position on the ground is. In order to reach the road, labeled on the claimants plan as "to public road" the claimants must pass over a small portion of the defendants land.

[6] The court had the benefit of a visit to the locus in quo. Despite what appears on the various plans which are annexed to the certificate of title of the parties it is clear that the only access the claimants have to enter or leave their garage and reach the road- the only one being used at present to reach the public road- requires passing over the defendants' land. The suggestion by the defendants that the claimant has other access is more apparent than real. It would have been obvious to the defendants when they bought their land that the only real access to the claimants' property lay across the south western corner of the defendant's parcel. It was apparent to all that this road was being used by the claimants.

[6] The genesis of the contest in this claim lies in the fact that the registered plans of the parties are inconsistent. The claimants' plan shows them the road abutting the North West boundary of their property. The plan of the defendants shows that at that point of the boundary the road does not reach the claimants' land but terminates at the defendants' land.

The submissions

[7] The claimants say that as their plan is registered first in time it should prevail. Section 6(1) of the Title by Registration Act provides that all dealings with land brought under the operation of the Act take effect from the date and act of registration. The plan and certificate of title of the claimants' parcel was registered before that of the defendants.

[8] The claimants also submit that, as the lands of the parties were originally owned by a common owner, the principle of non derogation of grant should apply. Counsel advances the argument that the claimants were sold a parcel of land bounded by two roads which met at a V shaped junction at the boundary of their land. Thus the original vendor and his successions in title cannot sell an adjoining parcel which effectively takes away this road access. This principle – when applied to easements is known as the rule in Wheeldon v Burroughs. The learned authors of Megany and Wade's Law of Real Property 6th edition sets out the rule at paragraph 411. It is that upon the grant of part of a tenement there would pass to the grantee as easement, all quasi-easements over the land retained which

i. Were continuous and apparent,
ii. Were necessary to the reasonable enjoyment of the land granted and

iii. Had been and were, at the time of the grant, used by the Grantor for the benefit of the part granted

[9] Counsel for the claimant also cited the case of Dabs v Seaman [1925] 36 C.L.R538 in which Isaacs J stated the following proposition which he held to be good law: " ***where , a registered proprietor of land... transfers to B a part of his land described by a plan indicating that the transferred land is bounded on one side by a 20 ft lane situated on the other part of the transferors land and the transfer is duly registered, then, in the absence of either a provision to the contrary on B's certificate of title or some subsequent personal legal or equitable relation to the contrary between B and owner of the adjoining land B, as long as he remains registered proprietor of the land so transferred and described is entitled***,

1) To have the land marked twenty feet land preserved as such and
2) To a right of way over the land "

[10] The defendants in their submissions urge the court not to apply the principle in Wheeldon v Burroughs. They say the plan of the claimant shows that the "road to Morne Daniel" was to be the access to the claimants land. They rely on the case of Wheeler v Saunders 1995 2 All ER 697 where a court refused to find a grant of an implied easement where the court found that there existed alternative access to the land in question and as such easement sought was not enjoyment of the granted property.

[11] Counsel for the defendants also point to section 25 of the Title by Registration Act. The section reads " ***whenever any easement or any incorporeal right in or over any land is to be added to any land contained in a certificate of title, the person selling, granting, or transferring the right shall execute a memorandum of transfer in Form 7, and the Registrar of Titles shall file the same when presented, and either grant a new certificate of title to the registered proprietor, with the easement or other right mentioned therein added to the land, whenever required to do so, or shall note the acquisition of the easement or incorporeal right on the existing certificate of title of the land to which it is added, as well as on the certificate of title of the land to be thenceforth subject to the easement or right***"

[12] They say no memorandum of transfer of the right of way claimed has been executed. They seek to distinguish the Dabs v Seaman case on the facts. They say in Dabs the 20 ft lane was noted as a boundary whereas in the instant case the boundary at the North West is the "Road to Morne Daniel". This proposition is not supported by an examination of the facts. The plan annexed to the claimants' Certificate of Title shows that two roads meet at a junction at the North West corner of the land. The plan merely says that the boundary is a "road" The evidence of Mr. Seaman licensed land surveyor for the defendants assisted the court. He admitted that the two roads merged. This was also patent at the visit to the locus in quo by the court.

[13] It was also quite evident that the Road to Morne Daniel is in fact not motorable. If it ever existed, it clearly has not been used for many years. It was instructive that on the day of the trial the

defendants had their workmen attempt to clear the vegetation which over grows this abandoned access.

[14] When all the factors are taken into account I conclude that judgment must be given for the claimants. I arrive at this conclusion for many reasons. Firstly the claimants' certificate of title and the plan attached are registered first. While the boundaries of the claimants' land accord with the boundaries shown on the defendants' certificate of title, the existence of the road over part of the defendants land is a significant omission from the defendants' plan.

[15] Secondly the claimants built their garage and were using the access, which I find had been used by their predecessors in title, before the defendants acquired their certificate of title. The use of the access was continuous and apparent from the time the original grant was made to the predecessors in title, of the parties to this claim. I find that there is in fact no other reasonable access to the claimants' property. This would be an apt case to apply the principle of Wheeldon v Burroughs. And finally, the initial grant to the predecessor in title of the claimants obviously intended the access to the claimant's property to be the junction of the two roads as indicated on the plan attached to the certificate of title.

[16] I find that this case is on all fours with the Dabs v Seaman case and I am content to apply the principle therein enunciated.

[17] The claimants are entitled to a right of way over that portion of the defendants land which joins the road to public road as shown on the claimants plan. The defendants are ordered to do nothing which would impede the exercise of the claimants of the right of way. The defendants will pay the claimants prescribed costs in the sum of $7,500.00

EASTERN CARIBBEAN SUPREME COURT
FIAT JUSTITIA
HIGH COURT OF JUSTICE DOMINICA

Justice Brian Cottle

High Court Judge