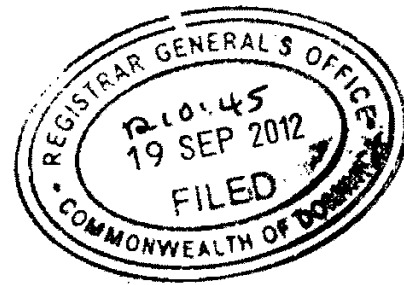


IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA
DOMHCV2004/0039
[CIVIL]



BETWEEN:

VERDUN DAVID

Claimant

and

ELWIN BEDNEAU

Defendant

Before:

The Hon. Justice Brian Cottle

Appearances:

Mr. Micheal Bruney for the Claimant
Mrs. Joan Prevost for the Defendant

[2012: March 21st
: September 19th

JUDGMENT

[1] **COTTLE J:** The claimant is joint owner of a parcel of land in Roseau registered at Folio 75 of Book D13 in the Book of Titles. The other co-owner is her daughter Sheila Cox. In her own right the claimant owns another smaller portion which adjoins the land in issue. The defendant is registered proprietor of an abutting parcel. All three properties originally were owned by a single proprietor. The only access to the parcel at Book D13 Folio 75 is via a footpath emanating from Great George Street in the city of Roseau.

- [2] The claimant and her daughter bought the parcel in 1998. They built a structure on it. The defendant too bought his lot in 1998. He demolished the old building on his parcel and a few years after the claimant, he built the edifice which now stands on the lot. In his cross-examination the defendant says he began his construction in 2002.
- [3] The present claim was instituted by the claimant averring that the defendant has blocked the right of way leading from Great George Street to the parcel registered at Book D13 Folio 75. In her statement of claim the claimant says the defendant has built a set of concrete steps and erected a gate across the right of way which completely denies her access to the parcel. In his defence the defendant admits constructing the steps in question but alleges that the claimant had first encroached on the right of way by erecting a step that protrudes some three inches into the right of way and by having cantilevers on her building which project over the right of way. He counterclaim for an order for the demolition of the cantilever.

The Evidence

- [4] During the trial the court heard from two licensed land surveyors, Mr. Clement Fingal for the claimant and Mr. Clifford Nicholas for the defendant. From their joint testimony several facts emerge. The claimant's building does not obstruct the right of way except where the right of way turns at a right angle. There the claimant's wall projects into the right of way to a minimal extent. Both surveyors agree that there is a cantilever attached to the claimant's building on the parcel on certificate at Book D13 Folio 75. This cantilever over hangs the right of way. It is 10-12 feet above the ground permitting easy passage beneath it.
- [5] As far as the defendant is concerned, all witnesses agree that he has built steps which completely obstruct the right of way. When he was cross-examined the defendant agreed that the building plans be submitted to the planning authorities and had approved, showed no steps where he has now erected the offending structure. In fact it emerged that the road frontage of the defendant's parcel along Great George Street is 25 feet 3 inches. The foundation of his building along Great George Street admeasures 25 feet.

[6] From these facts it is clear that the defendant has obstructed the right of way. His explanation for his behaviour is that the claimant has partially obstructed the entrance to the right of way by having her step project 3 inches into the 4 feet foot path, reducing it to 3 feet 9 inches at the entry. He adds that the cantilever which projects over part of the right of way constitutes an obstruction by the claimant. Because of these he felt justified in knowingly blocking the right of way, the only access to the parcel at the rear, (certificate of title at Book D13 Folio 75).

[7] In her closing written submissions, counsel for the defendant argues that the right of way existed for the benefit of the defendant as well as the claimant. I have no difficulty with that proposition. This is not a question of an easement over a servient tenement giving access to a dominant tenement. The common vendor expressly reserved the right of way as a foot path and did not convey it to either party in this case or their predecessors in title. This is a footpath which does not belong to the parties and which they are not permitted to obstruct. Counsel submits that the cantilever substantially obstructs the right of way, as the defendant cannot use ladders in that area to access the upper levels of his building.

[8] Having carefully considered the evidence and the argument of counsel for the defendant, I find myself unable to agree. The three inch encroachment at the entry to the right of way and the projecting wall at the right angle bend are de minimis. They do not substantially impede the defendant from passing and re-passing along the reserved foot path. As far as the cantilever goes, this too does not prevent the defendant's passage along the right of way. The permission to pass along a right of way cannot be enlarged to include a permission to erect ladders and scaffolds on the right of way. I find that the claimant's actions do not impede the free passage of persons along the foot path.

[9] I cannot say the same about the steps put up by the defendant. He admits that he knew before the building his steps that they would completely block the right of way. Yet he proceeded to do so.

The Counter Claim

[10] The defendant filed a counterclaim. He complains that the cantilever attached to the claimant's building obstructs the right of way. He also averred that the claimant demolished a wall and

concrete slab. At the trial the defendant admits that he was not present at the demolition. He could not say who demolished part of the old building that was on his lot before he erected his present building. Yet his witness Lennox Cadette testified that he was the one who demolished the old building. I find there is no evidence to support this part of the counterclaim. As outlined above I do not agree that the cantilever obstructs the use of the right of way as a footpath. The counterclaim fails and is dismissed.

[11] It follows from the foregoing analysis that I find that the claimant has proved that the defendant blocked the foot path. I therefore find for the claimant. The defendant is ordered to remove the steps and gate which obstruct the right of way. The injunction prayed for is also granted restraining the defendant, his servants or agents from erecting any other structure which will block the right of way. The defendant will pay costs to the claimant in the sum of \$7,500.00 being prescribed costs under the CPR 2000.



Brian Cottle
Brian Cottle

High Court Judge