

COMMONWEALTH OF DOMINICA
DOMHCV2009/0281

BETWEEN:

LESLIE EMMANUEL

(Personal Representative of Leopold Allan Emmanuel, deceased)

Claimant

LENNARD EMMANUEL

and

ACE ENGINEERING LIMITED

ANTHONY LEBLANC

Defendants

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. Lennox Lawrence for the Claimants

Mrs. Francine Baron-Royer for the Defendants

[2011: December 5th]

[2012: January 23rd]

[2013: May 1st]

JUDGMENT

[1] **COTTLE J:** The defendants purchased a parcel of land in September 2006 from Leopold Emanuel. The vendor retained certain lands to the east of the parcel sold to the claimant. At the entrance to the sold parcel was a gate which the vendor had maintained and kept locked. The gate gave access to a dirt road which the vendor permitted one neighbor, Dame Eugenia Charles, to use to reach a river for bathing. Upon the sale of the parcel the vendor did not reserve any right of way over the parcel he sold to permit him to reach the retained lands to the east. The vendor had left behind certain pieces of heavy industrial equipment which the defendants permitted him to store on the land for the time being.

[2] The vendor died and the present claimant became his personal representative. The defendants asked the claimant to remove the stored equipment. They allowed access during regular business hours to permit removal. The claimant failed to remove the equipment in a timely manner and the relationship between the parties broke down. The defendants locked the gate and denied the claimant entry.

- [3] The claimant has now brought the present claim. He says that there exists over the property of the defendants an easement amounting to a right of way over the land of the defendants for the benefit of the claimant's remaining lands to the east. It is the claimant's case that for well over 30 years a road existed leading from the public road at the western boundary of the parcel sold to the defendants and extending eastwards to reach the remaining lands of the vendor. This road was used by the vendor and Dame Mary Eugenia Charles. The claimant also says that the area of land occupied by the access road was not in fact sold to the defendants and remains the property of the estate of the vendor. It is convenient to dispose of this issue at this stage.
- [4] Mr. Leopold Emmanuel owned the parcel of land in issue. It was comprised in a certificate of title registered at Book O10 Folio 32 of the Book of Titles. From this title certain small building lots had been hatched off and sold to third parties. The vendor agreed with the defendants for the sale to them of the remaining lands. Mr. Gaetan Seaman, Licensed Land Surveyor prepared survey plans indicating that the land remaining admeasured 13.219 acres. The Memorandum of Transfer was prepared in that amount. At the trial, evidence was led from Mr. Vincent Robinson, another Licensed Land Surveyor. He says that he used modern survey equipment and concluded that the property originally was 14.548 acres and not 13.950 acres. After subtracting the parcels sold he found a balance of 13.623 acres. The road occupies 0.288 acres. This leaves a balance of 13.335 acres which is close to the 13.219 acres expressed to have been sold in the Memorandum of Transfer.
- [5] During the trial the court visited the locus in quo with the parties and the surveyors. It was obvious that if the contention of the claimant is correct a fundamental difficulty arises. The road would divide the defendants' land into two parcels with the road running through it. Had that been the intention of the parties the description of the property sold could not have failed to mention this. I conclude that there was a mutual error by the parties. They intended to sell and buy the remainder of the land in the certificate of title after the small lots had been subtracted. They depended on the surveyor who made a mistake in his calculation of the size of the parcel. The difference is comparatively small. The parties were ad idem as to the boundaries of the parcel sold.
- [6] I reject the claimant's suggestion that the vendor did not sell to the defendants the land occupied by the road. Acting under S.153 of the Titles by Registration Act chap 56:50 I order that the new plans of Mr. Robinson be substituted for that of Mr. Seaman.
- [7] The issue which remains for determination is whether there existed any easement or right of way across the land of the defendants. The claimant says that the road constitutes an overriding interest. The remaining lands of the vendor are 272.5 acres in extent. There is in evidence a 1967 plan which shows the estate road running west to east from the junction with the public road. This, the claimant says, shows that there was an existing access road to the vendor's retained property. The claimant also says that Mr. Leopold Emmanuel continued to use the road to access his remaining lands to the east after the sale to the defendants.
- [8] Counsel for the claimant helpfully adverted to Re Ellenborough Park[1956] ch 131 as setting out the elements required to constitute an easement. I do not reproduce them all. It is sufficient to note that there must be a dominant and a servient tenement and these must be owned by different persons. The evidence in this case reveals that both the parcel now in question and the remaining lands were owned by Leopold Emmanuel. While they shared common ownership there could be no

issue of an easement. A man may create access over his own land as he will to benefit other parts of his property. This does not constitute the creation or exercise of any right of way. Mr. Leopold Emmanuel was simply using his own property as he wished.

[9] There is no merit in the submission that the road was an existing estate road. It led nowhere except to the property of Mr. Leopold Emmanuel. I accept that he permitted his neighbor access so she could enjoy a nearby stream. This was in the form of a personal license. The evidence before the court was that Dame Eugenia Charles owned no adjacent lands, having sold her lands at the southern boundary since 1966 or 1967. In any event this permission to her does not assist the claimant who is not a successor in title to Dame Eugenia. It is to be noted that Mr. Emmanuel did not expressly reserve a right of way in the conveyance to the defendants. In certain instances the law will imply a grant of a right of way or reservation of a right of way. The ancient case of Wheeldon v Burroughs[1879] 12Ch.D.31 is said to be authority for such a rule.

[10] As far as the present case is concerned an easement of necessity will be implied if the remaining land is effectively landlocked. Counsel for the claimant submits that this is the case here. He cites Union Lighterage Co. v London Graving Dock Co. [1902] ch 557, as authority for the proposition that there can be implied an easement of necessity where part of the retained property cannot be used without the access. It is not necessary that the entire property be landlocked. This is important because the topography of the retained land is such that access to different parts can be had otherwise. On the visit to the locus in quo it was clear that public roads bound with the remaining 272.5 acres at different points. One example is that South Leopold Drive runs along a northern boundary for over 1000 feet. What was equally clear is that these alternatives do not permit access to the part of the remaining lands which one can access through the defendant's land.

[11] The claimant was however compelled to admit that a small stream was all that separated his lands from a housing development called Leopoldville. In fact during the visit of the court he volunteered that he owned the land on both banks of the stream at that point. The evidence of the claimant was that it would cost him several thousand dollars to create an access at this point. The second defendant gave evidence that access across the stream for heavy equipment could be created in a single working day. To permit easy passage by lighter motor vehicles would require the building of a small bridge. This to my mind is determinative of this issue. Counsel for the defendants referred to the learning in the Law of Real Property by Megarry and Wade 6th ed at p 1106

" If some other way exists, even if it is by water rather than over land, no way of necessity will be implied unless that other way is merely precarious and not as of right... Nor will there be a way of necessity if the other is merely inconvenient, as where the land abuts on a highway in a cutting 20 feet below; for the principle is that an easement of necessity is one "without which the property retained cannot be used at all and not one merely necessary to the reasonable enjoyment of the property."

[12] In the circumstances of this case it is not open to this court to imply an easement of necessity as the claimant has a possible alternative access to all parts of the retained land. That access might be expensive to construct but it is available. The defendants filed a counterclaim. They seek damages for trespass by the claimant. They also seek an order compelling the claimant to remove

all heavy equipment left on their hand as well as an order that the claimant apply for a new Certificate of Title for the land sold as the original Certificate of Title seems to have been lost.

[13] After the sale of the land to the defendants and the death of the vendor the defendants sought to prevent the claimant from entering on the land. The claimant applied for and obtained an injunction restraining the defendants from interfering with the passage along the road. They gave the usual undertaking as to damages. They continued to make use of the road to access lands to the east and carried out quarrying works. Large heavy trucks would pass and re-pass along the road. There was also the issue of the heavy equipment which the claimant left on the land for several years after the land was sold. That equipment has now all been removed.

[14] The Title by Registration Act at sections 20 and 21 requires the registered proprietor of lands to produce the duplicate Certificate of Title when dealing with the land. Here the claimant has failed to hand in the duplicate Certificate of Title upon the sale of the land to the defendants. As a consequence the defendants have not been able to obtain their Certificate of Title for the lands.

[15] The claimant is the personal representative of the deceased vendor. He must either produce the duplicate Certificate of Title or he must move the Registrar of Lands to act under section 146 of the Titles by Registration Act and cancel the existing Certificate of Title and issue a new one in favor of the defendants. In all the circumstances the claim is dismissed and judgment is given for the defendants on the counterclaim. If the parties are unable to agree a sum as compensation for the trespass the defendants may apply to the court to have such damages assessed. The costs of such assessment will be borne by the claimant. The claimant will pay the defendants prescribed costs consequent on the dismissal of this claim in the sum of \$7,500.00

Brian Cottle
High Court Judge

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA

SUIT NO. DOMHCV2009/0302

BETWEEN:

LESLIE EMANUEL (Personal Representative of Leopold Allan Emanuel, deceased) Claimants
LENNARD EMANUEL

and

ACE ENGINEERING LIMITED Defendants
ANTHONY LEBLANC

Before the Hon. Justice Brian Cottle
Dated the day of April, 2013
Entered the day of April, 2013

Appearances:

Mr. Lennox Lawrence for Claimants
Mrs. Francine Baron-Royer for Defendants

ORDER

1. The claim is dismissed and judgment is given for the defendants on the counterclaim
2. Damages to be agreed or assessed
3. The claimant will pay the defendants prescribed costs consequent on the dismissal of this claim in the sum of \$7,500.00

BY THE COURT

REGISTRAR –HIGH COURT