

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ANGUILLA

CLAIM NO. AXAHCV2012/0040

**IN THE MATTER of the Registered Land Act, RSA Chapter
R30 Section 147**

**IN THE MATTER of an Appeal by the Appellant/Claimant to
the Court pursuant to Part 60 of the Eastern Caribbean
Supreme Court Civil Procedure Rules, 2000**

**IN THE MATTER of an Appeal of the Decision dated the 4th
day of May 2012 by the Anguilla Registrar of Lands to
determine and indicate the position of the uncertain
disputed common boundary of Parcels 107 and 136
situate in Registration Section South Central Block
38512B pursuant to Section 17 of the Anguilla Registered
Land Act c.R30**

BETWEEN:

PATRICIA YVETTE HARDING

Appellant/Claimant

And

**CYRIL MITCHELL HAZELL and
CATHERINE HAZELL**

Respondents/Defendants

Appearances:

Mr. Horace Fraser for the Appellant

.....
2013: January 21

July 29
.....

JUDGMENT

[1] **ROBERTS, J (Ag)**; This is an appeal from the decision of the Registrar of Lands of Anguilla determining the position of the boundary between two parcels of land, one being a right of way. The appeal was brought by virtue of section 147 of the Registered Land Act of Anguilla RSA c. R30. The procedure governing the appeal was that set out in Part 60 of Eastern Caribbean Supreme Court Civil Procedure Rules, 2000. Under the CPR the appeal to the High Court is by way of rehearing¹.

[2] The Appellant sought the following relief, which I will construe to be the grounds of appeal since the grounds of appeal appear not to have been annexed to the Fixed Date Claim form in accordance with the Rules²

1. *A declaration that the Registrar erred in her Decision when she found as a matter of fact and law at Paragraph 46 (h) and (i) of the decision, that the Appellant's/Claimant's application was statute barred pursuant to section 3 (1) (a) of the Limitation Act.*
2. *A Declaration that the Registrar erred in her finding of abandonment of the easement. The Registrar's finding that the encroached portion of the easement has been abandoned by the Appellant/Claimant is deeply flawed.*
3. *A Declaration that the Registrar erred in finding Maintenance of Boundary features. This finding of the Registrar is also flawed for the reasons already stated at Grounds 1 and 2.*
4. *An order that the Appellant's/Claimant's title to the property for which she is registered in the Anguilla Land Registry continues without any or such rectification as is purported by the Registrar.*
5. *An Order that the disputed common bound is fixed in accordance and pursuant to the registration of Registration South Central Block 38512B Parcel 107.*

¹ CPR 60. 8 (1).

² .Rule 60.2. (1)

6. *A Declaration that the Appellant/Claimant as a bona fide purchaser for value and the registered proprietor of Parcel 155 is entitled to the 20ft right of way as property and correctly registered by the Anguilla Land Registry.*
7. *A Declaration that the Registrar went beyond the powers vested in her pursuant to the Registered Land Act when she ordered that a new position of the common boundary of Parcels 107 and 136 be noted on the Registry Map contrary to that which was correctly registered.*
8. *A Declaration that the Registrar's finding that the bound was always in the same location is against the weight of the evidence and so perverse a finding that it ought to be struck down as being biased, unreasonable, unfair, irrational and unreliable.*
9. *An order that the Respondents/Defendants demolish and remove their wall from encroaching on the road and the costs of such work, if any, be exclusively borne by themselves and thereafter the Respondents/Defendants are to maintain their eastern boundary in accordance with the entries in common as registered by the Anguilla Land Registry in respect of Parcels 107, 136 and 155.*
10. *An Order that the Decision of the Registrar is stayed until the outcome of the appeal.*
11. *Costs*
12. *Such further or other relief as the Honourable Court shall deem fit.*

[3] The Appellant filed a fixed date Claim form on June 1st 2012. and amended it on June 15th 2012. The Appellant's affidavits in support of her appeal were filed July 15 2012 and July 30 2012 and the Respondents filed their response in an affidavit by Cyril Mitchell Hazell filed July 16th 2012.

[4] In her affidavit the Appellant deposed that she was the registered proprietor of Registration Section South Central Block 38512B Parcel 155. She "bought [the land] from my previous proprietor who had not been living in Anguilla and who had acted through a power of attorney granted to Mr. Cecil Niles". She swore that the Respondents/Defendants were her neighbours and the registered proprietors of parcel 136 and that the two properties were separated by the registered 20ft easement. The Respondents formerly had a wire fence on their eastern flank and in August 2008 they replaced the wire fence with a wall. "The wall is now built upon the right of way and particularly affects the access to, and ultimately impacts on the value of my property". In a report by Mr Douglas Sterling, land surveyor, he advised that the Respondents "had encroached into the right of way from 2.1ft to 3.8ft along my entrance."

[5]. The Appellant stated further that the Respondents/Defendants have refused to remove their wall and that they continue the nuisance each day. Their wall is causing access difficulties for my entrance in that "larger commercial vehicles, such as a water truck or a stretch limousine (on the occasion of a family funeral in

February 2012) were unable to pass". She stated further that larger vehicles approaching from the north cannot swing left into her entrance nor those coming from south turning right. The wall juts across the road. She therefore applied to the Registrar to determine and indicate the position of the uncertain disputed common boundary to Parcel 107 and 136 situate in Registration Section South Central Block 38512B.

- [6] The Respondent Cyril Mitchell Hazell in his affidavit in response stated that he and his wife were the registered proprietors of Registration South Central Block 38512B Parcel 136 since 1998. When he purchased parcel 136, he relied on the bounds placed by Mr Cecil Niles as the licensed Land Surveyor.
- [7] The Respondents' evidence was that a wire fence was placed in accordance with the measurements and bounds placed by Mr Niles and that at all times they relied on those measurements and bounds. The wire fence was replaced by a wall in August 2008.
- [8] Mr Hazell denied that the wall was built upon the right of way. He also denied that the wall affected the access to and the value of the Appellant's property. He stated that "several trucks and even ambulances make regular use of Parcel 107 in order to access the Complainant's property".

The Registrar's Decision

- [9] The Registrar after hearing the evidence including a site visit decided as follows
- (i) *I determine that the position of the common boundary is located where the fence was and wall now is located.*
 - (ii) *I order that the new position of the common boundary of parcel 136 and 107 be noted on the Registry Map.*
 - (iii) *No order as to costs.*
- [10] The Appellant challenged the decision of the Registrar on 5 grounds, namely -
1. That the Registrar erred when she found that as a matter of fact and law the Appellant's application was statute barred pursuant to section 3 (1) (a) of the Limitation Act.
 2. On the Question of the Registrar's finding on abandonment of easement or rather partial abandonment of easement.
 3. That the "Registrar erred in finding Maintenance of Boundary features."
 4. That the Registrar went beyond the powers vested in her pursuant to the Registered Land Act when she ordered that a new position of the common boundary of Parcels 107 and 136 be noted on the Registry Map contrary to that which was correctly registered.

5. That the "Registrar's finding that the bound was always in the same location is against the weight of the evidence and so perverse a finding that it ought to be struck down as being biased, unreasonable, unfair irrational and unreliable'

Finding of Facts

[11] From all the evidence before me I have made the following main findings of facts.

- (1) Parcel 107 is registered as a 20ft right of way. Parcel 136 was registered to the Respondents as joint proprietors August 25 1998. Mr Cecil Niles, a licensed land surveyor, was responsible for placing the bounds to the Parcel 136. The Respondents erected a fence along the eastern boundary of their property in 1998 relying on the bounds placed by the land surveyor.
- (2) The Applicant purchased parcel 155 from Mr Cecil Niles who was acting under a power of attorney from the proprietors who lived abroad.
- (3) Both parcel 136 and 155 derived a benefit from Parcel 107, the 20 ft right of way.
- (4) At some time in 2008 the Respondents replaced the fence with a wall. Part of the wall runs parallel to the entrance of parcel 155, Applicant's property.
- (5) In a report dated August 13 2010 Mr Douglas Sterling, Land Surveyor with the Government of Anguilla at the time, determined that the southern section of the wall is encroaching parcel 107 Block 38512B as registered by 3.8 feet and the mid section of the wall by 2.1 feet.
- (6) The bounds are and always have been in the same location as where the surveyor originally placed them. The Respondents erected the fence in line with the bounds that were placed there by the surveyor.
- (7) The Respondents are deemed to have notice that the registered width of the right of way was 20ft.

The Law

[12] The legal issues raised in this appeal involve indefeasibility of title, nuisance, interference with right of way, partial abandonment of easement and limitation of action.

Indefeasibility of Title

- [13] The Appellant sought a declaration in this appeal that “as a bona fide purchaser for value and the registered proprietor of Parcel 155 she is entitled to the 20ft right of way as properly and correctly registered by the Anguilla Land Registry”. In support the Appellant referred to the Privy Council case from the British Virgin Islands, **Racoon Limited v Harris Turnbull Executor of James Turnbull (deceased) and Harris Turnbull**³. In that case the following observations of Lord Wilberforce delivering the judgment of the Board in **Frazer v Walker**⁴ were referred to the Board. “ ...at page 580 Lord Wilberforce referred to the phrase “indefeasibility of title” and continued:-

“The expression, not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required. But as registered proprietor, and while he remains such, no adverse claim (except as specifically admitted) may be brought against him.”

- [14] The Board pointed out in the **Racoon** case,

*It is one thing to protect a proprietor with a registered title in relation to his rights over his own land. This was the position in **Frazer v. Walker** and **Breskvar v. Wall** where only one parcel of land was involved and where the issue was whether an adverse claim to land or an interest therein could succeed against the registered proprietor. It is however another thing to protect a proprietor in relation to his rights over another registered parcel of land in circumstances where the other proprietor has no knowledge of the asserted right and consequential burden.*

Interference with rights of way

- [15] **Halsbury’s Laws of England** provides a useful summary of the law of relating to interference with rights of way as follows -

*“Para 177 **What amounts to disturbance of right of way.** Any wrongful interference with a right of way constitutes a nuisance. As, however, a right of way never entitles the grantee, or those lawfully using the way under the grant, to the exclusive use of the land over which the way exists, not every obstruction of the way amounts to an unlawful interference, and no claim will lie unless there is a substantial interference with the easement granted. It will not be substantial if it does not interfere with the reasonable use of the right of way; but even occasional obstruction may amount to substantial interference ... The question whether any particular interruption amounts to an unlawful interference depends upon the nature of the right of way and of the place, and upon the*

³ PC appeal No 33 of 1995 p 85

⁴ 1967 AC 569

*general circumstances of the case. Any disturbance of a way is unlawful which renders the way unfit for the purposes for which it was granted, to the injury of the person entitled to the way.*⁵

Nuisance

[16] On the issue of nuisance in **Winfield & Jolowicz on Tort**⁶ at para 14-6, page 649 the following is noted -

Where an act constitutes a nuisance cannot be determined merely by an abstract consideration of the act itself, but by reference to all circumstances of the particular case the time and place of its commission, the seriousness of the harm, the manner of committing it, whether it is done maliciously or in the reasonable exercise of rights and the effect of its commission, that is whether it is transitory or permanent, occasional or continuous; so it is a question of fact whether or not a nuisance has been committed.

Limitation of Action

[17] The Limitation Act provides that actions founded on simple contract or on tort “shall not be brought after the expiration of 6 years from the date on which the cause of action accrued”⁷.

[18] Section 24 of the Limitation Act provides for postponement of the limitation period in a case of fraud or mistake. Section 24 reads as follows -

“24. Where, in the case of any action for which a period of limitation is prescribed by this Act-

- (a) The action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;*
- (b) The right of action is concealed by the fraud of such a person; or*
- (c) The action is for relief from the consequences of a mistake;*

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it...”

[19] In order for the Appellant to succeed under section 24 of the Limitation Act, it must be established that the nature of the underlying cause of action is based on fraud. In **Beaman v ARTS**⁸ the UK Court of Appeal

⁵ *Halsbury Laws of England, volume 16 (2), para 177.*

⁶ 17th Edition, 2006.

⁷ Limitation Act, section 3 (1) (a).

⁸ [1949] 1 All ER 465.

held that fraud should be an essential element of the plaintiff's claim if a plea based on the then Limitation Act 1939 s 26 (in the same terms as Anguilla Limitation Act section 24) was to succeed⁹.

Partial Abandonment of the Easement

[20] The law is that there can be partial abandonment of the easement. In the case of **Snell & Prideaux Led v Dutton Mirrors Ltd** Stuart-Smith LJ held that the abandonment of an easement can exist in a limited capacity. He asserted that, "*I am not persuaded that there is any logical or legal reason why there cannot be a partial abandonment of the full extent of an easement*"¹⁰.] In the **Prideaux** case, the case of **Benn v Hardinge** was cited and in particular Dillon LJ was cited as saying

"To establish abandonment of an easement the conduct of the dominant owner must, in our judgment, have been such as to make it clear that had at the relevant time a firm intention that neither he nor any successor in title of his should thereafter make use of the easement...Abandonment is not, we think, to be lightly inferred. Owners of property do not normally wish to divest themselves of it unless it is to their advantage to do so, notwithstanding that they may have no present use for it."

[21] Dillon LJ also cited the following passage from the judgment of Buckley LJ in **Gotobed v Pridmore**¹¹

: *"The benefit of an easement may of course be formally released by deed. There is ample authority to show that it may also be impliedly released where the conduct of the dominant owner is such as to manifest an intention to abandon the benefit of the easement. Mere abstinence from the use of an easement such as a right of way is insufficient to establish such an intention."*

[22] Also relevant to the issue of abandonment of a right of way is the holding in **Dear V Wilkinson** that *"although a valid grant, the fact of non-user coupled with acts done, suffered or acquiesced by the plaintiff's predecessor in title to any right of way, amount to abandonment of any such right"*¹².

[23] It is also noted that section 96 (2) of the Registered Land Act provides that

"On application of any person affected, the Registrar may cancel the registration of any easement, profit or restrictive covenant upon proof to his satisfaction that ... (c) it has been abandoned"

⁹ .Halsbury Laws of England, para 1123

¹⁰ [1995] 1EGLR 259 (page 3)

¹¹ (217) EG 759

¹² (1960) 2 WIR 309, p 309

Applying the law to the facts

[24] It was submitted by the Respondents that portion of Parcel 107 on which the bounds and wall sit amount to a partial abandonment of the easement. They contend that the bounds at the southeastern end of Parcel 136 were placed 3.8ft inside Parcel 107 in 1998. The fence was erected along the bounds placed in 1998. This obstruction of the right of way of 3.8 feet was never objected to by anyone. The encroached portion of the right of way remained enclosed when a wall was erected in place of the wire fence. As was the case with the fence there was no objection to the wall before, during and for some two (2) years after its erection. The Respondents submit

“that the encroached portion of the easement has been abandoned due to the fact that no objection was taken to the obstructions adverse to the enjoyment of the easement and that more than thirteen (13) years of non-user of the encroached portion of the easement have passed. It is further submitted that the easement has been partially abandoned to the extent encroached’

[25] The Appellant countered this partial abandonment contention by submitting that “the evidence cannot be relied upon to show abandonment”. The Appellant it was pointed out never stopped using the easement which was the road to her property.

[26] It was also submitted by the Appellant that the *“Defendant obstructed the Claimant’s use and enjoyment of the easement, they were not in adverse possession of the easement or any part thereof, in fact they themselves were not aware that they had encroached on the easement. Therefore the mental element of intention to possess is absent”*.

[27] It is a question of fact whether an act amounts to an abandonment or was intended as such. In my judgment what is involved was not the mere non-user but the acts which were done and existed for over 13 years which bring me ineluctably to the conclusion that the easement was partially abandoned to the extent of the encroachment to parcel 107.

Limitation of action

[28] On the issue of limitation of action, the Appellant makes two points. In the first place the Appellant submits that the cause of action accrued on the 9th August 2010. She asserts that there is no evidence that the Claimant knew of the existence of the nuisance before August, 2010. Further she claims that there was absolutely no evidence that the Claimant’s predecessor in title knew of the existence of the nuisance. Secondly, it was submitted by the Appellant that the Registrar failed to consider section 24 of the Limitation

Act. Section 24 was quoted above and deals with postponement of the limitation period on account of fraud. The Respondents submit that section 24 of the Limitation Act does not apply to the case at bar.

[29] It is clear that the encroachment was not caused by any fraudulent act of the Respondents or their agents. In any event the Appellant's case was not based on fraud and the evidence falls woefully short of proving any fraud. I hold therefore that Section 24 of the Limitation Act is not applicable in the present case.

[30] On the facts of this case the combined period of time of the presence of the fence and the wall is over 12 years. Interference with a right of way is a nuisance and as such a tort. By section 3 (1) (a) of the Limitation Act an action founded on tort, in this case nuisance, is statute barred after six years from the date the cause of action accrued. This formulation begs the question as to when the cause of action accrued. The Appellant submit that the nuisance was a continuing one or accrued in 2010 when the Appellant first knew of the encroachment.

[31] I do not agree with either of the two positions advanced by the Appellant. I hold that the cause of action accrued from 1998 when the fence was put down and time continued to run in 2008 when the wall was placed in the same position. Thus I come to the same conclusion as the Registrar that the six year limitation period with respect to the tort of nuisance created by the location of the bounds on the land and the fence and wall interfering with the easement had expired since 2004. I hold that the application was statute barred pursuant to section 3 (1) (a) of the Limitation Act.

The Nuisance Point

[32] This is not a case of encroachment on the land of the Appellant. The Appellant is claiming that she is hindered in her use of the right of way over parcel 107. She is claiming that the encroachment on Parcel 107 amounts to a nuisance. She is not claiming to be entitled to the exclusive use of Parcel 107. It must be noted also that when the Appellant purchased parcel 155 in 2002, the Respondents' fence was already erected in accordance with bounds placed by the licensed land surveyor, Mr Cecil Niles, and his agents. (I pause to note that this would appear to be the same person who acted under a power of attorney in selling parcel 155 to the Appellant). The Respondents' wall was erected in 2008 in the same position in which the fence was erected. There is evidence that between 2002 and 2010, the Appellant used the right of way continuously for the purpose for which it was granted. She was able to access Parcel 107, as did visitors to her property, including trucks and ambulances.

[33] In my judgment in the present case, given the extent to which the eastern bounds and Respondents' wall encroach on Parcel 107 as a result of misplaced bounds, the Respondents' wall does not interfere with the Appellant's reasonable use of the right of way. Nor does it in my judgment render the right of way unfit for

the purpose for which it was granted: There is neither a substantial interference nor an unlawful one and as such the encroachment does not amount to a nuisance.

Other grounds

[34] The Appellant also raised as a ground of her appeal that

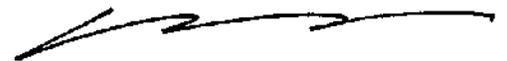
"the Registrar misdirected herself and therefore erred in law when she chose to accept the evidence of lay persons over the evidence of a trained professional in the person of Mr Douglas Sterling, licensed land surveyor, that the Defendants did encroach the easement. In accepting the lay persons' evidence she has rejected the evidence of Mr Douglas Sterling but gave no reasons for doing so. This was a failure of her duty as a fact finding tribunal".

[35] Having considered the evidence in this case, I am unable to agree that the Registrar "rejected the evidence of Mr Douglas Sterling". Indeed the findings of Mr Douglas as presented in his report were reflected in the Registrar's decision at paragraph 45 (j) and (k). I could find no evidence that the Registrar "chose to accept the evidence of lay persons over the evidence of a trained professional in the person of Mr Douglas Sterling".

CONCLUSION

[36] After re-hearing this matter I have come to the same conclusions as the Registrar of Lands. Therefore for the reasons given above the appeal is dismissed and I order as follows -

- (I) That the position of the common boundary is located where the fence was and wall now is located.
- (II) That the declared position of the common boundary of Parcel 136 and 107 be noted on the Registry Map.
- (III) Costs of this appeal to the Respondent to be assessed if not agreed.



Sir Clare K. Roberts, QC
High Court Judge (Ag)