THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2016/0525

BETWEEN:

ANN BORIEL

Claimant

and

HAROLD MARCELLIN

Defendant

APPEARANCES:

Peter Foster QC and Sahleem Charles for the Claimant
Maureen John-Xavier for the Defendant

2017 : May 29;
October 11.

JUDGMENT

[1] **SMITH J**: Ann Boriel says that Harold Marcellin is trespassing on her private road and that since there has always been an alternative vehicular access to his leased premises there is no necessity for him to use her road. She wants a permanent injunction to restrain him from using it.

[2] Mr. Marcellin mounts a vigorous defence to this claim and says, among other things, that his landlord, Mr. Sylvanus Boriel – Ms. Boriel's brother – has a title which recognizes the right of way over her road which he uses to get to his leased premises. From this tiny acorn of discord has sprung a mighty oak of litigation

which has already featured two interlocutory applications and an appeal to the court of appeal, even before the trial of the substantive issue. The parties were heedless of Dickens' warning that becoming involved in a lawsuit is like "being ground to bits in a slow mill; its being roasted at a slow fire; its being stung to death by single bees; it's being drowned by drops; its going mad by grains."

[3] When the layers of this intractable dispute are peeled back, what is revealed is a collision of business interests. Mr. Marcellin fears that if he is not allowed to use the road, running his business will become more costly and he will lose clientele. Ms. Boriel fears that if he is allowed to use it, her tenants will become disgruntled owing to the nature of his business, namely, a tailor shop by day but a bar cum gaming salon by night. Distilled to its essence, the Court must determine whether, since Ms. Boriel is the registered owner of the road, Mr. Marcellin has somehow acquired a right of way over it to his leased premises. A brief tour through the relevant background will elucidate the nature of the dispute and how it arose.

BACKGROUND

[4] It is perhaps useful to begin with what is not in dispute. Ms. Boriel was the owner of a large tract of land, namely, block number 1217C, parcel no 714. She retained licensed land surveyor Allan Hippolyte to design a survey plan for a subdivision. Parcel 714 was subdivided into parcels 707, 713, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750 and 751, out of which she transferred by deed of donation parcels 737, 738 and 739 to her brother, Sylvanus Boriel. Her brother leased parcels 737 and 738 ("the leased premises") to Mr. Marcellin in April or May of 2014. Among the parcels she retained was parcel 751, the road in dispute ("the road"). The road leads up to the leased premises but does not abut it since it is separated by a drain. Mr. Marcellin and his patrons park vehicles on the road and then walk into his bar. The road in dispute is the only means of accessing parcels 744, 745, 746, 747, 748, 749 and 750 which Ms. Boriel leases out to her tenants.

[5] What is hotly disputed is whether another road ("parcel 20"), which is a vehicular access road, can be used by Mr. Marcellin to access his leased premises. Ms. Boriel says this has always been the road to access those premises; Mr. Marcellin denies that this is so. According to her evidence, all the buildings which Parcel 20 serves have been constructed in such a way that the front of the buildings can be accessed from that road, including the leased premises. Mr. Marcellin does not agree. This is now he described the leased premises:

> "The situation on the ground is such that my only vehicular access is to the front of the building and that is on the road. My landlord owns parcels 737, 738 and 739. On 737 and 738 in particular, is one big building. However, it is separated horizontally from left to right. So, in effect although the parcels are recorded as two parcels, the buildings are built in such a way that there are separate tenants at the back of the property that I occupy whose business is directly bounded with parcel 20. As such it is impossible to access parcel 20. In effect, the buildings are built with two fronts. One front bounds parcel 20 which is occupied by a different tenant and the part of the property I occupy bounds parcel 751." (Underlining supplied)

[6] Ms. Boriel alleges that her road had always been separated from the leased premises by a drain and a fence and that Mr. Marcellin tore down the fence and modified the drain by placing concrete slabs over it to make it more convenient for him and his patrons to get access to the leased premises. She produced pictures which showed that indeed a drain and a fence separated her road from the leased premises. Mr. Marcellin's response is that she erected the fence after he moved into the leased premises and that he had nothing to do with the removal of the fence or the modification of the drain.

[7] Mr. Marcellin's counter narrative is that the road was in existence and being used as an access road even before Ms. Boriel created her subdivision of 14 lots; an inspection of the survey plan will reveal that the leased premises is bounded with the road to the south; the map sheet reveals that the road is bounded with the leased premises, the drain does not run over the road and the road touches the property; the road has been used by members of the public for both private and public use and extends to vehicular use for at least 30 years; and that the road is

intended as vehicular access to his leased premises. He also claimed that Mr. Peril Haynes (now deceased), who collected rent on behalf of Ms. Boriel, had given him permission to use the road. There was however nothing in writing to back this up nor did any other witness corroborate this. The Court could not therefore place any reliance on it.

THE ISSUES

[8] The matrix of facts and allegations throw up a number of issues for the determination of the Court. Counsel for the parties, especially the defendant, deployed their arguments in "interlocking arcs", to appropriate a military expression. The Court's approach has been to deconstruct the arguments and isolate the issues for ease of analysis. This should not be interpreted to mean that the Court did not consider, in the round, the conjoint effect of the arguments.

(1) Whether Ms. Boriel was in possession of the road at the time of the alleged trespass – the possession point

(2) Whether Mr. Marcellin acquired a right of way over the road by prescription – the prescription point

(3) Whether the survey plan establishes the road as a vehicular access to the leased premises – the survey plan point

(4) Whether Mr. Marcellin's enjoys a right of way road derived from his landlord's title which includes a right of way over the road – the appurtenances point

(5) Whether the road, or parcel 20, is the proper access road to the leased premises – the alternative access point

(6) The implied grant point

(7) Whether either party is entitled to damages.

THE POSSESSION POINT

[9] Mr. Marcellin contended that trespass is an injury to a possessory right and therefore the proper claimant in a claim of trespass is the person who was or who is deemed to have been in possession at the time of the trespass; the owner has

no right to sue in trespass if any other person was lawfully in possession of the land at the time of the trespass. Reliance was placed on a passage in the decision of the Court of Appeal of Guyana in **Isaacs and another v Rodney**[1] where it was stated that:

> "The central principle of the law of trespass was an injury to possession and not to ownership or title. In the instant case, the trial judge had not focused on the appellants' assertion of their right to bring an action for trespass against the respondent by establishing the evidential foundation that at the time of the respondent's incursion upon the land, they had been in possession and that their possession had been disturbed by the respondent's entry…"

[10] Ms. Boriel's pleadings were that she was the registered owner of the road, moved to the United States of America in 2010 and that the members of the public who used her road were her tenants or the customers of her tenants. Mr. Marcellin contended that this shows that Ms. Boriel was not in possession of the road and cannot maintain a cause of action in trespass. Further reliance is placed on an extract from **Halsbury** that "… a right of way …or any easement annexed to land, does not confer standing to sue for trespass to land if such a right does not give exclusive possession."

[11] I do not think it is an accurate statement of the law that an owner not in possession of land at the time of trespass cannot, under any circumstance, maintain an action in trespass. The owner of land has no right to sue in trespass, but only if some other person was lawfully in possession of the land at the time of the trespass. Ms. Boriel is the registered owner of the road and there is no registered incumbrances or appurtenances against it. No other person is in possession of it or claiming possession of it. It became apparent at the trial that people from the surrounding area had been crossing over the road for "generations" but they cannot be said to have been in possession of the road.

[1] 77 WIR 287.

[12] **Clerk & Lindsell on Torts**[2] states that "Proof of ownership is prima facie proof of possession, unless there is evidence that another person is in possession; but if there is a dispute as to which of two persons is in possession, the presumption is that the person having a title to the land is in possession." It further states that: "A person claiming as against the true owner cannot be said to have possession unless the true owner has been dispossessed." It would be passing strange if an absentee landowner, whose property is not in the possession of anyone else, could not maintain a claim in trespass, after it comes to her attention, because she was not physically in possession of the land at the time of the trespass. The Court is satisfied that Ms. Boriel, as the registered owner of the road which is not in the possession of any other person, can maintain an action in trespass against Mr. Marcellin.

[13] The possession point aside, the Defendant's arguments can be shoehorned into this formulation: when Ms. Boriel made the deed of donation to her brother the road had been in existence and used as a means of access to the leased premises for at least thirty years before the donation; that, according to the official map sheet and survey plan, it was intended to be a means of access and that therefore, being appurtenant to the leased premises, it passed with the property when title was conveyed by the deed of donation. Three issues are telescoped into that argument, namely, (1) whether the road was used as a right of way or means of access for at least thirty years; (2) whether the official map sheet and survey plan defined the road as a vehicular right of way; and (3) is the road an appurtenance which passed with property in the deed of donation.

THE PRESCRIPTION POINT

[14] The question of whether the road was used as a right of way, easement or vehicular access for at least thirty years can only be answered by reference to the evidence adduced at trial. Ms. Boriel, not surprisingly denied under cross-examination that people had been using the road as a shortcut for over thirty

[2] 16th edition at page 1309

years. Neither Mr. Marcellin nor his witness, Ms. Casilda James, could really have been expected to adduce any reliable evidence on this question since they had only been in the area since 2014 and 2012, respectively. They could only provide anecdotal, hearsay evidence. Mr. Hippolyte and Mr. Boriel, however, did provide evidence that shed some light on the history of how the road had been used.

[15] Mr. Hippolyte, a licensed land surveyor for the past 38 years who had designed the plan of survey for the sub-division, said that at no time was Ms. Boriel's road designed to become an access road for any property other than parcels 744 through to 750 inclusive. He further stated that at the time he designed the plan of survey he had visited the properties and there was an erect fence which stood behind the drain, which fell within Ms. Boriel's boundary, separating her private road from the leased premises and there were no concrete slabs over the drain. Under cross-examination he conceded that "people have for generations been using 751 (the road) as a short cut moving through all the lots including 737 and 738 along 751 to get to the other side."

[16] Sylvanus Boriel stated that he had lived on parcel 738 from 1976 to 1985 and on parcel 744 from 1985 to 1993. Under cross-examination he agreed that for as long as he had been living there, people had used 751 as a short cut; it was a short cut from "old" Vieux Fort to "new" Vieux Fort; many people passed along parcel 20; when he lived on 738 and 744 no one ever prevented him from using 751; even with the fence in place people were able to access the shortcut; right now its an open space with people freely moving; for the most part it was used for residential purposes; his father was the one who built the fence but he did not recall a gate to access the road; there was absolutely no kind of exit to the back of the fencing. Upon re-examination he clarified that when he lived on parcel 738 he could not access 751, his access was along parcel 20 and that when he lived on 744 his access was parcel 751. He guessed that "new" Vieux Fort was established around 2008, about ten years ago.

[17] Taken together, their evidence certainly suggests that the public at large had been generally passing freely over the road at least since 1976 when Mr. Boriel was living there. Mr. Hippolyte said it was for "generations". What is less clear is whether those people had been passing over or using the road as a means of accessing the leased premises – parcels 737 and 738. The evidence of Mr. Hippolyte suggests that this was so. Mr. Boriel, however stated that when he lived on parcel 738, which was a portion of the leased premises, he could not access the road from parcel 738. His said his access was from parcel 20. In his witness statement he had stated that for the time he lived on parcel 738 he could not access the road because of the fence that separated it from parcel 738.

[18] So while the Court can safely draw the conclusion that the public at large passed over the road to get from old Vieux Fort to new Vieux Fort, there is less clarity as to whether they passed on the road through the leased premises. However, even if people could pass through the leased premises around or over the fence, they certainly could not drive through it. In any event, the difficulty for Mr. Marcellin is that he must, according to article 2057 of the **Civil Code**, establish that his possession, or that of the person through whom he claims, was continuous, uninterrupted, peaceable, public, unequivocal and as proprietor. This he has not done. Neither am I satisfied, on a balance of probabilities, that people had been using the road, either as pedestrian or vehicular access to pass through lots 737 and 738 because of the existence of the fence which Mr. Hippolyte saw there when he was designing the survey plan for the subdivision in 1994.

THE SURVEY PLAN POINT

[19] Ms. Boriel's lodged survey plan for her sub-division and the official map sheet (which reflected the survey plan) do not show a drain separating the leased premises from the road. They show that the road actually abuts the leased premises. In his amended defence, Mr. Marcellin "vehemently denied that the parcels of land owned by the Claimant was always separated by a drain".

[20] Mr. Marcellin's contention here is that, upon the approval of the sub-division, the vehicular access became an official access road for the benefit of all lots within the subdivision. To meet Ms. Boriel's argument that the land register for the road shows no incumbrance or servitude such as a vehicular access, Mr. Marcellin relies on the **Civil Code of Saint Lucia** which provides that:

> "A real servitude arises from the natural position of the property or from the law, or is established by private act"

[21] He also relied on section 28 (b) of the **Land Registration Act** which provides that;

> "S. 28 Overriding Interest
> Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may subsist and the effect of the same, without their being noted on the register –
> (a) servitudes subsisting at the time of the first registration under this Act;
> (b) servitudes which arise from the situation of the property or which have been established by law

[22] Further, to meet Ms. Boriel's argument that the **Civil Code** provides at article 496 that "No real servitude can be established without a title; possession even immemorial, is insufficient for that purpose", Mr. Marcellin quotes from the highly respected author William DeMontmollin Marler on **The Law of Real Property – Quebec** that the term "title" is to be taken in its wide sense as an agreement of which proof may be made under common law. Marler provided the following example:

> "Where a lot was sold the right of use in the lanes bounding the lot, and the lanes were shown on a sub division plan previously made as such, this was considered sufficient…"

[23] The official records do not show the existence of the drain. The reality on the ground is that it exists. The only witness who could assist the Court in reconciling this conflict was Mr. Hippolyte. When asked by the Court what conclusion would be drawn by someone looking at the official map sheet, Mr. Hippolyte candidly replied that that person would believe that there would be access to the road by reason of the road being directly bounded to the property as shown on the map sheet. By the "property" he was referring to the leased premises. He however

went on to explain that there was an error on the map sheet which should have shown the existence of the drain as displayed on the inset of the map sheet by the double lines running between parcels 751, 737 and 738.

[24] He further explained that the inset (which the Court observed did contain the double lines) should have been used at the time to draw up the survey plan, but was not done. He stated that if the road was intended as vehicular access to the leased premises then provision would have been made for a turning point on the leased premises and this would have been drawn on the map sheet. It did not appear to have been disputed that Mr. Marcellin could not physically drive onto his leased premises from the road. He would have to park and walk across the drain.

[25] Mr. Marcellin submitted that Ms. Boriel ought to have applied to have the survey plan and the map sheet rectified; the remedy of rectification was available to her since the lodging of the survey plan on 26th June 1995; and there was no evidence before the Court that such an application had been made to the Land Registry or the Survey and Mapping Section.

[26] The Court is constrained to conclude that the survey plan and the official map sheet contained an error for the following reasons: (1) the land register for the road contains no incumbrance or appurtenance; (2) the photographs which were not challenged, show the existence of the drain; (3) Mr. Marcellin admitted that the drain was "a foot and half in the width but higher up where [he was] it's narrower"; (4) Mr. Hippolyte, who was a thoroughly honest, credible and helpful witness, stated that when he visited the area to design the subdivision, the drain was there as well as the fence; (5) the road is a dead end with a pole directly in the middle at the end and there is no turning point to allow for vehicular access to the leased premises; (6) there was evidence that the Development Control Authority (DCA) had, in June 2004, granted full approval for Ms. Boriel's proposal to develop a commercial center which would have incorporated the road as part of the development.

[27] The point was made that since the project was never executed the approval had long since expired. I think the relevance of the DCA approval, though expired, is that the DCA would not have given "full approval" to a project that incorporated a road that was officially recognized as a public vehicular access. While legal fiction is well known to the law, for this Court to find – in spite of the reality on the ground – that the road actually abuts the leased premises, as depicted in the official map sheet, would transcend the fictitious and border on the fantastical.

THE APPURTENANCES POINT

[28] The deed of donation under which Ms. Boriel transferred the leased premises to her brother stated that those parcels were bounded "partly by 751" and conveyed "together with all the appurtenances and dependencies thereof". Mr. Marcellin therefore claims as tenant of Mr. Boriel to be entitled to appurtenances which passed with the donation.

[29] It appears to be settled law that appurtenances can include an easement or right of way. In **Lister v Pickford**[3], Romilly MR stated that:

> "It is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land. The word 'appurtenances' includes all the incorporeal hereditaments attached to the land granted or demised such as rights of way, of common, or piscary, and the like but does not include lands in addition to that granted."

[30] Mr. Marcellin says he has a right to use the road as he is the tenant of Mr. Boriel whose deed of donation recognizes the right of way granted in favour of the leased premises. Mr. Boriel however says that when he lived on parcel 738 he could not access the road. Neither does the lease signed between them mention the road. Mr. Hippolyte's evidence was that there was an error in the deed of donation in terms of its description of the leased premises as being bounded by the road. In any event, there is prevailing force in the submission that proof of the existence of the drain and the fence means that the alleged right of way did not exist prior to

[3] (1865) 34 Beav. 576.

the deed of donation. There is, at a minimum, substantial doubt in the mind of the Court as to whether it existed in the manner contended for by Mr. Marcellin, that is, that the road was used as a vehicular access to the leased premises. In **Thomas v Owen**, Fry LJ stated:

> "No doubt the 'appurtenances' is not apt for the creation of a new right, and the word 'appurtenant' is not apt to describe a right which had never previously existed, and therefore the mere grant of all appurtenance or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant."

THE ALTERNATIVE ACCESS POINT

[31] Ms. Boriel contends that the proper and intended access to the leased premises is another road registered as parcel 20 which is unconnected to her road and has nothing to do with her subdivision. Unlike the land register for parcel 751, the land register for parcel 20 contains an incumbrance described as a "servitude", "a private vehicular right of way over the whole parcel".

[32] In written closing submissions, Mr. Marcellin "does not deny that parcel 20 may have been used as the vehicular access serving parcels 737 and 738. In fact, both he and his patrons are able to access the leased premises from the parcel 20 road. This was demonstrated earlier in these proceedings when Ms. Boriel had been granted a court order restraining him from using her road. Mr. Marcellin said it increased his operating expenses since, prior to the injunction, the delivery trucks could park within three yards of his establishment to unload drinks but when the injunction was in place, the trucks could only get within thirty yards of his place via parcel 20 and he had to hire two men to unload and carry the drinks. He said he also lost business as a result of this. What all of this illuminates is that it is more convenient for Mr. Marcellin to access the leased premises by way of the road. It is not the case that it is impossible for either him or his patrons to access the leased premises via parcel 20. There is no registered incumbrance on the road and the fact that it is more convenient to Mr. Marcellin to use the road to access his leased premises is not sufficient to establish a right of way.

THE IMPLIED GRANT POINT

[33] Mr. Marcellin also relied on the principle of implied grant to ground his right to use the road as a right of way. Both parties cited **Wheeldon v Burrows**[4] for an authoritative exposition of the principle of implied grant:

> "On the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed there will pass by implication to the grantee all those continuous and apparent easements and quasi easements which are necessary to the reasonable enjoyment of the property granted and have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant, save in the case of an easement of necessity the reservation of which will be implied. Otherwise, no implication can be made of the reservation of an easement to the grantor."

[34] The immediate question which arises from the above passage is whether at the time of the donation from Ms. Boriel to her brother the road was used to access the leased premises – parcels 737 and 738. Both Ms. Boriel and her brother stated that this was not so, owing to the fence and the drain. No implication of an easement can therefore arise. As to the implication of an easement of necessity, the Court has already concluded that access to the leased premises through the road was a convenience and not a necessity.

DAMAGES

[35] Ms. Boriel, in her Amended Statement of Claim and witness statement, respectively, alleged that as a result of Mr. Marcellin's trespass, she had incurred expenses totaling $27,000.00. No actual proof of these expenses was tendered into evidence by way of receipts or any other documentary evidence whatsoever. At the trial it was put to Mr. Marcellin that he had removed the fence. But there was no sufficient evidence to satisfy the Court, on a balance of probabilities, that he had done so. His disgruntled patrons, unhappy with the blocking of their convenient access, may have done it. There was evidence that he had ordered

[4] [1874-80] All ER Rep 669.

ready mix material to do cement-related work at the leased premises. Ms. Boriel said the material was used to construct the concrete slabs he built over the drain which later altered the drainage and caused flooding to her tenants. He said the material was for the extension he had made to the building on the leased premises. Under these circumstances, the Court is not satisfied that Ms. Boriel has made out a case that she is entitled to special damages. In this regard it is noteworthy that the closing written submissions on behalf of Ms. Boriel did not address the issue of damages at all.

DISPOSITION

[36] I therefore make the following orders;

(1) A permanent injunction is granted restraining the Defendant, his servants, agents from entering, remaining on, walking along, driving along, parking on or otherwise using the Claimant's private road registered in the Land Registry of Saint Lucia as Block and Parcel No. 1217C 751.

(2) The Defendant shall pay prescribed costs to the Claimant in accordance with Part 65.5 of the CPR 2000.

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE

BY THE COURT

REGISTRAR