

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(Sub-Registry Tobago)

H.C.A. No. 144 of 1996

BETWEEN

EUGENIA MCPHERSON

PLAINTIFF

AND

**ROSE GRANT
DONALD PAUL
OSWALD HILLS
SUN BOY RAM**

DEFENDANTS

Before: The Honourable Justice N. Bereaux

Appearances: C. Gift for Plaintiff.
J Phillip for Defendants

JUDGMENT

THE PLEADINGS

The plaintiff claims damages for excessive user of right of way, as well as a declaration that she is entitled to a right of way by necessity over a road reserve 3.05 meters wide, as appears on the survey plan No. 126/94 RD 1911/1981, for herself, her servants and licensees on foot and with motor vehicle and/any other conveyance at all times used for all purposes. She also seeks an order for removal of all physical obstruction along the road reserve and an injunction restraining the defendants, their servants and agents from placing anything as would substantially interfere with its normal usage.

By her Statement of Claim she contends that she is owner in fee simple of one lot of land which she purchased in 1981. That land was part of a larger parcel under the common ownership of one Ernest Edward Augustus Smart. The lands occupied by the defendants also formed part of the larger parcel as did lands of Lawrence Andrews and Michael Collins. She adds that upon the death of Ernest Smart his estate was administered by his wife Leonora Smart. Her lot of land is on the southern extremity of all lands originally the property of Mr. Smart.

She contends that the road reserve is 3.05 meters wide and is so identified on the survey plan No. 126194 R.D 1911/1981 of Andrew Bowles, a licensed Land Surveyor. The road reserve was used by her prior and subsequent to the purchase of the lot of land. There was no dispute or conflict over, or interference with, the plaintiff's use of the road reserve up until May 1996, when the plaintiff and some of the adjoining land owners began a process of upgrading the road reserve and she was threatened by the first named defendant's son. The defendants blocked the road reserve with two galvanized barriers on 2nd June, 1996. Since then the plaintiff has had to trespass over neighbouring lands to gain access to and egress from her property despite her protest to the first defendant.

The defendants' counterclaim

The defendants counter claim for a declaration that the first named defendant is the owner in fee simple of a parcel of land comprising 891.8 metres. That acreage includes the acreage which the plaintiff claims is the road reserve. They also seek a declaration that the first named defendant has acquired possessory title of the property.

The defendants deny the existence of any road reserve and contend that much of the area claimed by the plaintiff as a road reserve is a verdant valley, part of which is usually quite damp and swampy. They contend that the area was and still is cultivated by the first named defendant with food crops. They say that the

plaintiff at all times used a right of way over lands of the Incorporated Trustees of the Seventh Day Adventist Church to get to her home.

The first named defendant contends that she rented a portion of land from Leonora Smart the boundaries of which were pointed out to her by Mrs. Smart as being the following:

On the North and South by lands of Leonora Smart;

On the East by lands of the Incorporated Trustees of the Seventh Day Adventist Church;

On the West by a right of way over the lands of the Incorporated Trustees of the Seventh Day Adventist Church.

She contends that she immediately entered into possession planting various produce. After approximately 10 years, she purchased the land. However, Mrs. Smart died before a deed of conveyance could be executed. In 1964 when she began actual occupation she was the only occupier.

Four persons gave evidence on behalf of the Plaintiff. They were: the plaintiff, Michael Collins, Lawrence Andrews and Sonny Belfast. All four defendants testified on their own behalf. Also testifying for the defendants were Peter Goodridge, Land Surveyor, Eric Neptune, and Glenis Ram, wife of the fourth named defendant, and who is also the daughter of the first named defendant.

The main witnesses for the plaintiff were the plaintiff, Lawrence Andrews, and Sonny Belfast. For the defendants the main witness was the first named defendant.

The plaintiff's evidence

The plaintiff testified that she purchased the parcel of land from one Margaret Alleyne. To get to her premises she used a ten foot wide road. There were two pickets to the front of the land delimiting the boundaries. Proceeding from her

house, the road reserve led to Darryl Spring Main Road northwards along the properties of Loretta Prescott, and the late Mr. Charles Taylor. Mr. Taylor's property is on the west; on the east were the lands of the Incorporated Trustees of the Seventh Day Adventists. It turned left or west at the lands of Charles Taylor, at which point the lands of Michael Collins are on the north. On the south are the lands of Selina Ward. The road reserve then turned south or left and then right or west onto the Darryl Spring Main Road. As I recall her evidence, the plaintiff stated that because the road reserve had become over grown with bush in the area close to the bridge, she and other villagers used a short cut through Mr. Eric Neptune's land.

She said that a survey was done of the road by Andrew Bowles, Land Surveyor, after due notice to the defendants.

Two deeds of conveyance "EM1" and "EM2" were admitted into evidence. "EM1" was a deed of conveyance between Martha Alleyne and the plaintiff, "EM2" a deed of conveyance between one Matilda Leandra Smart and Margaret Alleyne. By the latter deed Ms Alleyne acquired title to the lot of land which she transferred to the plaintiff by way of "EM1". Neither deed describes a road reserve as being part of the northern boundary. "EM4", however, which was also admitted into evidence (without objection) through the plaintiff, was the Bowles survey plan which demarcates and sets out a road reserve proceeding northwards and then westwards, from the north-eastern extremity of the plaintiff's lot.

The plaintiff testified that without use of the road reserve, she had no other lawful access to her property. The only other access was to trespass over the lands of the trustees of the Seventh Day Adventists. She had been using the road since 1978 without any prior problems. On 26th May, 1996 there was an altercation with the defendants. They subsequently blocked the road with galvanized sheets on or about 2nd June, 1996. She obtained an injunction against the defendants. The defendants only removed the blockage on the day of trial. She was not able to use

the roadway while the blockage existed, but used instead, a track along a hill through the lands of the Incorporated Trustees of the Seventh Day Adventist Church. It was very inconvenient. During the rainy season she fell and her clothes were damaged. Her waterline which ran along the road reserve suffered a major leak but she could not repair it because of the blockage. She was without effective pipe-borne water but was able to collect water by leaving a bucket under the open faucet and allowing what little water which dripped through it to collect overnight.

It was put to her by Miss Phillip that there was no road reserve but a swampy area which was drained and cultivated by the defendants. This was stoutly denied by the plaintiff. It was also suggested to the plaintiff that there was a road reserve west of the plaintiff's land which provided access to her property. This the plaintiff also denied.

Michael Collins, Lawrence Andrews and Sonny Belfast all gave evidence which corroborated the evidence of the plaintiff. All three witnesses had been in the area long before the plaintiff arrived in 1978. Mr. Collins and Mr. Andrews, who are brothers, own adjoining lands. Both testified that, like the plaintiff's parcel, theirs were also part of a larger parent parcel owned by Mr. Smart.

Mr. Andrews, who was a most impressive witness testified that he and his mother were the first to occupy property in that neighbourhood. He first went there in 1964. The area was known as "*free ground*". He knew the first defendant with whom he had had an intimate relationship. That relationship coincided with the period of his initial occupation of the property. Indeed, they had many an intimate rendezvous at "*free ground*". She was living at the home of Selina Ward. Miss Ward was herself involved in a common-law relationship with Mr. Belfast. Mr. Andrews stated that he had a pipe-borne water supply which utilizes the access of the road reserve.

Mr. Collins testified that he was present when the original owners did the survey of the parent parcel in 1964 and that provision was made for the road reserve. The boundaries to his land and the road reserve were pointed out to him by the owners in 1964.

Mr. Belfast testified that he knew the first named defendant since 1958, through her close association with Selina Ward with whom he had a common-law relationship. Both women were very good friends. The first defendant was not yet living at her present location. She was living elsewhere in Darryl Spring. Miss Ward eventually acquired property at "*free ground*" and both he and Selina Ward went to live there. The first named defendant eventually followed them there. He too testified of the existence of the road reserve and of its use by adjoining land owners. He testified as well that the road reserve was pointed out to him by the Smarts. All three witnesses were cross-examined by Ms. Phillip.

The evidence on behalf of the defendant

The first named defendant, Rose Grant testified that she lived at Darryl Spring for 36 years, commencing in 1963. She first rented from Leonora Smart. A bundle of seventy receipts were put into evidence. She later bought the lands for \$2,000.00. The first named defendant could give no clear account of how much land she rented or purchased from Mrs. Smart. She stated that before she went to live at "*free ground*" she lived "*over the hill by the Adventist*". She denied living with Selina Ward but lived instead in "*a little house outside the yard*" which Miss Ward built for her.

She left that house after it was damaged when Tobago was struck by Hurricane Flora. She stayed by Selina Ward for three weeks but ultimately went to her present location where she constructed a shack. She stated that she was the first to live there. The first defendant testified that Lawrence Andrews came to live there around 1983-1985 when he built his house. There was never any road as described by the plaintiff and her witnesses. There was no road between "*the*

Adventists” and her land. There was no road east of Mr. Taylor’s land. She did not know the plaintiff to use part of that land as a road, neither did she know Michael Collins and Lawrence Andrews using that area as an access road. The Plaintiff used the route over the “*Adventist land*” to get to her house. The plaintiff’s predecessor, Martha Alleyne gained access to her property by using a road reserve to the west, which passed behind the defendant’s house. That access provided the right of way to the Plaintiff’s property.

The first named defendant stated that the area to the east of her house was swampy. Her common-law husband, Mr. Paul and her son-in-law, Mr. Ram constructed a drain to clear the excess water. She denied ever receiving notice from the plaintiff with respect to a survey of her land and the road reserve. She stated that she placed a barricade on the land based on the advice given to her by her surveyor, Mr. Peter Goodridge, who had surveyed her property after due notice was given to the plaintiff.

The first named defendant was not always a persuasive witness. Her contention that there was a road reserve to the west of her land was not borne out when the court paid two visits to the site. She could not identify how much property she purchased from the Smarts, nor did she produce any deed for the property. Indeed, the evidence as demonstrated by Mr. Goodridge’s subsequent testimony, was that her son, Oswald Hill had encroached onto the lands of Selina Ward.

The first named defendant was even less convincing under cross-examination. She was confronted with an affidavit sworn to in the interlocutory application for the injunction. In that affidavit she stated she first visited “*free ground*” in 1962. Her response was to state she needed to get her glasses in order to read the affidavit. When she was able to retrieve her glasses, she contended that she still could not read it clearly. She then retracted her statement in the affidavit and stated that she moved to “*free ground*” towards the end of 1963 to 1964. She

could not remember exactly when. In my judgment she was not a witness of truth.

Mr. Oswald Hills testified that he was eight years old when his mother went to live at “*free ground*” around 1963. He lives at Calder Hall Trace. He has a house on land occupied by his mother at Darryl Spring. He knew of no road between his mother’s land and “*the Adventists*”, nor did he know of Mr. Andrews and Mr. Collins cleaning or clearing any road there.

He testified that the plaintiff got to her house “*by tracks over Andrews land and the Adventists land*”. He denied threatening the plaintiff in May of 1996. Under cross-examination by Mr. Gift, Mr. Hill conceded that he encroached upon the lands of Selina Ward in constructing his house and that a fence enclosing his property extended all the way back to the concrete drain.

He claimed not to know of any alternative route via Darryl Spring Road used by the plaintiff in accessing her lot and readily admitted to putting up the barrier to prevent the plaintiff from using the road reserve.

Mr. Paul and Mr. Ram gave evidence also denying existence of any road reserve. Both contended that the first named defendant’s property extended eastwards and ended at the lands of the Trustees of the Seventh Day Adventists. Both contended that the area was swampy and that they constructed a drain to clear the lands.

Mr Eric Neptune’s evidence was devoted in the main to defending his ownership of his property. He denied that there was any road reserve which passed through his property. Glenis Ram, wife of the fourth named defendant also testified on behalf of the defendants. Her evidence was directed at the provision by the plaintiff of notice of the Bowles survey to the defendants. In my judgment her evidence added nothing to the defendants’ case.

The defendants also called Mr. Peter Goodridge, Land Surveyor, to give evidence on their behalf. He testified to surveying Miss Grant's parcel of land after giving notice to all adjoining neighbours including the plaintiff. The survey took place a short time subsequent to the 19th May, 1996, the date of his first visit to the neighbourhood. Miss McPherson did provide him with a copy of her survey plan "E.M. 4" which was drafted by Mr. Andrew Bowles. He also consulted a survey plan of Mr. Hugo Sumarsingh (admitted into evidence as "P.G.1") which was a survey of the property owned by Miss Ward. He consulted as well a survey conducted on May 20, 1966 a copy of which was admitted into evidence as "P.G. 2". Based on the survey plans, he re-established the southern, eastern and northern boundaries of the defendants' parcel. That survey plan was admitted into evidence as "P.G.3". There was a major point of difference between Mr. Bowles' plan and his. Mr. Bowles' plan showed a road reserve 305 metres wide. His plan did not. The area of the road reserve was included in his plan as part of the plaintiff's property.

According to Mr. Goodridge:

"When I saw the plan marked "E.M.4" I approached my client and asked her if she was aware of any road reserve. The reason for doing so was to find out if my client was present when the "E.M.4" survey was conducted in May 1987. My client was not aware that there existed a road reserve to the east of her parcel and showed me concrete pillars or monuments that outlined the eastern boundary of her parcel."

He added that -

"What I found strange with EM4 was that the western boundary was not defined. The bearing and distance of the northern boundary were not shown on the plan as well as no boundary markers were placed to establish that western boundary ... If they had been placed there it would have been indicated by red circles as well as written information that the irons were put there or were found".

Mr. Goodridge added:

“I was guided by Miss Grant in ascertaining the boundaries of the land I surveyed for her. I did not see any road reserve or signs thereof on Miss Grant’s parcel, adjoining the boundary with the Seventh Day Adventists. I did not see signs of a survey on the northern boundary of Miss Grant’s parcel.”

Under cross-examination by Mr. Gift, Mr. Goodridge made a number of candid and significant admissions. He stated that the purpose of his survey was to show lands occupied by the first defendant. It was not concerned with defining access to the parcel but with defining and showing the land area she occupied. His survey did not and could not determine ownership. The plan was simply a representation of the wishes of his client, Rose Grant. In answer to the court, Mr. Goodridge stated that surveying was not only a measurement science, but also a social science. Consideration is to be given to persons who lived on the lands for quite some time in order to be aware of how they lived on the land.

In answer to the Court, Mr. Goodridge added that to the extent that the survey reflected his client’s instructions, it did not necessarily mean that there was no road reserve.

Mr. Goodridge’s comments were especially helpful in arriving at my decision. I shall return to them in due course.

The site visits

The court as a jury of fact, made two visits to the site. This was agreed at an earlier sitting before hearing commenced before me. At both visits the parties and their witnesses pointed out and illustrated their evidence. Significantly, the first defendant could not point out any access along the concrete drain to the plaintiff’s land as she had contended in her evidence in chief and as was put to the plaintiff by Ms. Phillip. It was also vividly demonstrated that other than the alleged road

reserve, the plaintiff's access to her property was by trespassing over the lands of the Incorporated Trustees of the Seventh Day Adventists. In addition to the various witnesses illustrating their evidence, it was apparent that the area alleged to be a road reserve was not always well defined and sometimes overgrown with grass. It was also apparent that water collected in certain areas along what the plaintiff alleged to be the eastern boundaries of the defendants' property. Further, the visits revealed that the alleged road reserve, as it approached the first named defendant's property from the Lawrence Andrews parcel, narrowed significantly and did not always conform to the 10 foot dimensions set out in Mr. Bowles' survey plan "EM4". The plaintiff and Mr. Andrews were able to point out the water pipeline which followed the access they claimed to be a road reserve.

Findings of fact

The issue for me is essentially one of fact.

I accept the evidence on behalf of the plaintiff. In the first place, she and her witnesses impressed me as truthful witnesses. I also accept the evidence of Mr. Michael Collins, Mr. Lawrence Andrews and Mr. Belfast as to the existence of the road reserve.

Secondly, I found none of the defendants to be truthful witnesses. The first named defendant under cross-examination could not tell the court the exact acreage of land she allegedly purchased from Lenora Smart. She gave her date of entry into the land variously as 1962, 1963 and 1963 to 1964. She pretended to be unable to see clearly when confronted with her affidavit. At the site visits she could not point to any road access to the plaintiff's land along her western boundary despite saying so in her evidence in chief and despite those instructions to her Attorney-at-law.

In my judgment the other defendants' evidence was similarly flawed. Mr. Paul's denial of knowledge of the existence of the road reserve was feeble and

unconvincing, so too the evidence of the third and fourth defendants. As to the testimony of Mr. Goodridge, it is clear from his evidence, that the survey plan “PG2” merely reflected the instructions of his client, Miss Grant. This candid admission was that he was guided by the first defendant in ascertaining the boundaries of the land he had surveyed on her behalf. His survey was simply a representation of his client’s wishes and was not concerned with defining access to the land. In that regard, the survey was infected with what I consider to be the misrepresentations of Miss Grant as to the size and acreage of her property and as to the existence of the road reserve.

There were several survey plans put into evidence in this case. As Mr. Goodridge so helpfully put it, surveying is also a social science. As such, survey plans are the reflections of the input and instructions of those persons who live in the area or on the property in question. They are of valuable assistance to the court in adjudicating on disputes as to ownership, access and acreage of land. But, to the extent that they rely on directions and instructions of those who live on the subject parcel or on adjoining properties, surveys may not always reflect the true position and in cases of dispute, the court must make its assessment primarily on the oral evidence of those parties living in the area who may have testified at the trial. There were two survey plans which were in direct conflict in this case, the plaintiff’s survey plan “EM4” and the first defendant’s survey plan “PG2”. “EM4” showed what was alleged to be the road reserve. “PG2” showed that area alleged to be the road reserve as being the defendants’ property. I am satisfied that Miss Grant’s instructions to Mr. Goodridge are not to be believed and, to the extent that the defendants claim that their properties extend eastwards to the boundaries of the lands of the Incorporated Trustees of the Seventh Day Adventists, I reject it.

In my judgment the area has been the subject of arbitrary and unplanned development with little regard having been paid to the town and country planning laws. Road access to the parcels sold in the area has not been clearly defined,

planned or developed, nor have the present users properly maintained it. Very little regard has been paid to drainage with the consequence that it was necessary for the defendants to construct a drain to allow the flow of excess water from the area. Other examples of the arbitrary nature of the development of the area were Mr. Paul's unashamed admission that he had encroached onto the lands of Selina Ward and his testimony that access to his home along the concrete drain is blocked by a garage constructed by his neighbour. This latter statement was borne out at the site visits.

I find as follows:

1. The plaintiff's parcel of land was part of a larger parcel of land commonly owned by Ernest and Lenora Smart which was sub-divided and sold by them and by their descendants to the plaintiff and to other persons including Lawrence Andrews and Michael Collins;
2. There was a road reserve the use of which allowed the plaintiff access to the Darryl Spring Road from her home.
3. That because of the haphazard manner in which the road reserve has been developed that it does not always, on its eastern boundary, maintain a width of 10 feet or 3.05 meters as set out in "EM4" but narrows significantly to 6 feet or less as it approaches the property of the first named defendant, Rose Grant and the fourth named defendant Mr. Rajcoomar Ram. Consequently, any access to the plaintiff's land on the road reserve as the road reserve abuts the defendants' property can only be by foot access and not by motor vehicle.
4. The defendants have in fact encroached on the road reserve and that the road reserve passes along the eastern boundaries of the first defendants' land and it separates

those eastern boundaries from the lands of the Incorporated Trustees of the Seventh Day Adventists. I find as well that the western boundary of the road reserve is as set out in the Bowles Plan "EM4" and that the western boundary of the road reserve delimits the eastern boundary of the defendant's property.

5. That the road reserve proceeds northward from the plaintiff's property and then westwards and ends at the concrete drain which borders the land of Eric Neptune.

The question of whether the access road reserve passes through Mr. Neptune's land or whether the plaintiff has a right of way over Mr. Neptune's land is not in issue before me, so that any finding or observation I shall make has no binding effect on Mr. Neptune or the plaintiff. But I did not understand the plaintiff's claim or her evidence to be that the road reserve passes over Mr. Neptune's land; rather it is that the road reserve proceeds southwards on the eastern boundary of the concrete drain between the lands of Selina Ward and the drain, and then westwards across the drain onto the Darryl Spring Road.

That the evidence was corroborated by Mr. Belfast and by the survey plan of Mr Sumairsingh, Land Surveyor, which was admitted into evidence as "PG1" through Mr. Goodridge. That survey plan indicates a road reserve on the western boundary of the lands of Miss Ward and on the eastern boundary of the concrete drain. I shall merely make the observation that on the evidence in court and as demonstrated by the various witnesses at the site, there is no road reserve which enters Mr. Neptune's property. Indeed, Mr. Neptune's evidence of the non-existence of any road reserve over his property was extremely persuasive.

The defendants' counterclaim is dismissed. There shall be judgment for the plaintiff on her writ of summons and I shall make the following orders:

- (1) The plaintiff is entitled to right of way over the road reserve as appears on the survey plan No. 126194 RD 1911/1981 for herself, her servants and licensees. However, such right of way, where the road reserve abuts the first named defendant's and fourth defendant's eastern boundaries, shall not include motor vehicle access, having regard to the nature and extent of the road reserve. The plaintiff shall be permitted a six foot access along the road reserve, starting from the eastern boundary of the first defendant's property.

Any motor vehicular access shall, where the access road abuts the first defendant's property, be with the consent of the defendants, unless a redefinition is done of the road reserve and it is shown to be in fact 10 feet wide from the first defendant's eastern boundary or the road reserve is widened on its easternmost side with the consent of the Incorporated Trustees of the Seventh Day Adventists Church;

- (2) That the defendants by themselves, their servants and agents or howsoever otherwise, do clear and remove all the galvanized obstruction and/or any other impediment creating a barrier and obstruction along the said road reserve;
- (3) That the defendants by themselves, their servants and agents or howsoever otherwise are restrained from placing or allowing to be placed on the said road reserve anything as would substantially interfere with its normal usage;
- (4) The plaintiff is entitled to damages, such damages to be assessed before a judge in chambers, she having been prevented from using and accessing her property through the road reserve.

- (5) The defendants shall pay the plaintiff's costs certified fit for Advocate Attorney.

There shall be liberty to apply.

Dated this 24th day of March, 2000

Nolan P. G. Breaux
Judge