

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. Cv3518 OF 1999

BETWEEN

ROHAN GOPAUL

PLAINTIFF

AND

**RICKIE GOPAUL
PATRICIA ALLISON GOPAUL**

DEFENDANTS

Before The Honourable Mr Justice Stollmeyer

Appearances:

Mr. D. Sirjusingh for the Plaintiff

Ms. K. Gonzales for the Defendant

JUDGMENT

These proceedings concern a parcel of land at St. Lucien Road, Diego Martin and the use of a right away providing access to and from that parcel of land. The Plaintiff owns the parcel of land in question and alleges that the Defendants have obstructed the right of way to which he is entitled by virtue of a brick wall located within the right of way and which they extended in 1992. The Plaintiff claims various declarations, injunctions and damages.

On the pleadings the Defendants say that the Plaintiff and his predecessor in title acquiesced in the obstruction and/or alternatively, that there has been in fact been no actual encroachment.

Further, although admitting construction of the extension to the brick wall, the Defendants plead that this extension does not substantially interfere with the Plaintiff's use and enjoyment of the right of way.

At the trial it became apparent that the Defendants' case is perhaps better put forward as being that the Plaintiff was never the grantee of a right of way 5 metres wide because of the existence of this brick wall; and that if he was the grantee of such a right of way, then he is required to prove that his right to use and enjoy it has been substantially interfered with, and that he has failed to do so.

Certain of the facts have been agreed or are easily discernible from the evidence.

The late Basdeo Gopaul owned a parcel of land at St. Lucien Road, Diego Martin. It comprised some 2 roods and 35 perches or nearly $\frac{3}{4}$ acre. A portion of this land was acquired by the State and compensation of some \$89,727.75 was paid. The time of the acquisition and payment are not particularly material. After the acquisition the parcel of land was rectangular in shape with its shorter boundaries of about 23 metres being on the east and the west, and the longer boundaries of some 110 and 113 metres approximately on the north and south respectively. The eastern boundary is on St. Lucien Road. The shape, boundaries and measurements of the parcel of land are clearly shown on the copies of the various survey plans which came into evidence, most of them by consent. I will refer to this parcel of land as "the parent parcel".

Basdeo Gopaul built a house at the eastern end of the parent parcel with frontage on St. Lucien Road somewhere around 1964. He also at that time built a wall some 80' long running from east to west and about 9 feet north of the southern boundary line of the parent parcel. As will become apparent this wall is about 6' south of the southern boundary of Lot 1, and within what eventually became the right of way in dispute.

An examination of the survey plans in evidence shows two other brick walls: one running east-west along the north boundary of what became known in time as Lot 1 and another running north-south along the western boundary of that lot. From this it is reasonable to infer that Basdeo, or someone else, built these three walls as demarcating the area of land on which his house stood, although there is no other evidence concerning these walls.

Basdeo Gopaul died on 17th August 1969 leaving a will dated 11th August that year and which, amongst other things, divided this parcel of land into 7 lots and devised them to his wife and six children. The will was admitted to probate on 30th March 1979, some 10 years later. In attempting to give effect to the devises it was discovered that the area of the parent parcel had been reduced by the acquisition to which I have referred, and that this made it impossible to carry out fully Basdeo's wishes as expressed in the will.

Consequently, the beneficiaries agreed with the executor and between themselves that the devises would be given effect in the following manner: first, Lot 1 comprising 553.8m² would be vested in Basdeo's widow Sonia, together with the buildings thereon and the appurtenances thereto, and also with the right of way and liberty appurtenant thereto. In the deed of assent and family arrangement (to which I will refer shortly) this is referred to as "the said right of way"; second, Lot 2 comprising 510.3m² would be vested in Bissoondath Gopaul, together with the building thereon, and also together with the said right of way; third, Lot 3 comprising 510.5m² would be vested in Kalipersad Gopaul, together with the said right of way; Lot 4 comprising 511.1m² would be vested in Ramcharan Gopaul, together with the said right of way.

The other beneficiaries of the will, who were by its terms to receive a lot of land namely Ramnarine Gopaul, Rohan Gopaul (the Plaintiff) and Deonath Gopaul, agreed to accept the amount of \$89,727.75 paid by the State as compensation for the acquisition in lieu of the parcels of land devised to them.

Approval was granted in 1986 by the Town and Country Planning Division of the Ministry of Finance and Planning to subdivide the parcel of 2085.2m² into 4 lots and an area as a road reserve 5.0 metres wide over which the right of way came to be granted.

This arrangement was effected by a deed of assent and family arrangement dated 22nd June 1989 registered as No. 15966 of 1990. For the sake of convenience I will refer to it as "the 1990 Deed". This deed at the Third Schedule sets out details of the right of way of which each of Lots 1-4 inclusive were to have the benefit. The essential terms of that right of way are that there was to be "*... full and free right and liberty.... at all times hereafter ...with or without vehicles..... for all purposes connected with the use and enjoyment of the said lands..... for whatsoever purpose they might from time to time be lawfully used an enjoyed to pass and repass over and along the Said Road 5.0 metres wide....*" for the purpose of going to and from the individual lots. There is no definition in the 1990 Deed of the expression "the Said Road 5.0 metres wide", but it is common ground that it refers to the road reserve shown on the survey plan attached to that deed.

The four lots of land are located along the northern boundary of the parcel with Lot 1 bounding on St. Lucien Road and Lot 4 being at the western end of the parent parcel. The right of way is located along the southern boundary of the parcel, starting on the east at St. Lucien Road and ending at Lot 4 on the west. Each of the four lots is described as having a southern boundary of "...a Road Reserve 5.00 metres wide..."

Sometime in 1992 the Defendants, as they admit, unlawfully extended the existing brick wall standing on what had now become the right of way for another 16 feet to the west, together with the installation of a gate, and from that point north for 6 feet to the south-west corner of Lot 1 where it joined the pre-existing wall running north-south along the west boundary of Lot 1. The Defendants thereby enclosed an area of some 600 square feet excluding all others from its use and enjoyment in any form.

By deed dated 21st October 1994, registered as No. 17597 of 1994, Sonia Gopaul conveyed by way of gift Lot 1 and the right of way to the Defendants, her son and daughter in law. By a further deed dated 23rd September 1998 registered as No. 20505 of 1998 Ramcharan Gopaul conveyed Lot 4 together with the right of way appurtenant thereto to the Plaintiff his brother for a consideration of \$50,000.00.

Having bought Lot 4 the Plaintiff cleaned and secured it and retained an architect to design a building to be constructed thereon. Building plans were submitted to the appropriate authorities for approval. The Plaintiff then spoke to the first Defendant Rickie Gopaul and asked that the brick wall standing on the right of way be demolished or removed. Rickie, depending on which expression you prefer to use, either declined or refused to do so. In the event he did not, and this wall remains in place to the present.

The Plaintiff started to have materials brought onto the site, that is Lot 4 by, truck, but was stopped by his uncle Ramkhelawan Gopaul who owns the land south of the right of way. The Plaintiff subsequently obtained permission from his uncle to use a strip of the latter's land so as to get the trucks with the building materials to Lot 4. The Plaintiff says that this strip of land over which his uncle gave him permission to pass and repass is some 270' long. Whether that is correct is really not material. The fact is that he was obliged to use a strip of his uncle's land for some distance because it was necessary to do so in order to get the trucks with the materials to Lot 4 and the trucks could not fit on the available 9' of the right of way for some 96'. That evidence is unchallenged.

It is clear, as well as being common ground, that the 1990 Deed created expressly a right of way in favour of Ramcharan Gopaul appurtenant to Lot 4 and that he subsequently conveyed both Lot 4 and the right of way to the Plaintiff. On that basis the Plaintiff is entitled to the use of the right of way and to the relief which he seeks. See Section 19 (1) of *The Conveyancing and Law of Property Ordinance* Ch. 27 No. 12.

It is also common ground, however, that the brick wall already existed for a distance of some 80' at the time of the 1990 Deed. The Defendants contend that this was known to all parties concerned at that time, and, further, that the brick wall is shown on the survey plans annexed to that deed. Their submission is that neither the parties at that time, nor the Plaintiff now or in the future, is entitled to a right of way 5 metres wide along the length of the brick wall. Their contention is that for 96' or 80' at least, the right of way is only 9' wide and that that is all to which the Plaintiff is entitled because of this knowledge on the part of the parties, and because the brick wall is shown on the survey plans. The judgment in *Dunning (A.J.) & Sons (Shopfitters) Ltd. v. Sykes & Sons (Poole) Ltd.* [1987] 1 All ER 700 was cited in support of this submission.

Obviously, a great deal turns on the provisions of the 1990 Deed. It clearly sets out the intention and agreement of the parties thereto at that time. The survey plans annexed to that deed show the same lots in terms of location, area, boundaries and sizes as are shown on the survey plan attached to the application for sub-division approval which had been made in 1986. Obviously, a right of way had to be created so as to allow access to and egress from Lots 2, 3 and 4. This road reserve is described in the Third Schedule to the 1990 deed as being 5 metres wide. Neither that schedule nor any other part of that deed describe the right of way as being subject as any impediment, encumbrance or encroachment. The Third Schedule which, as I have said, describes the right of way, does not make reference to any survey plan. The parcels of land, Lots 1-4 inclusive, however, are described as being delineated and coloured pink and shown on the various survey plans. As I have said, neither the road reserve nor the right of way are so, or similarly, described. In other words, the description of the road reserve on the right of way is not, to use the language familiar to conveyancers, "more particularly delineated and shown" on any survey plan, or in any colour on any survey plan. This latter form of wording is generally accepted as an overriding or prevailing description of a parcel of land, overriding, that is, the description by way of wording only in a schedule to a deed, in the event of a conflict between the two. There is no conflict here, however, nor any ambiguity in the written description (see e.g. *Leachman v. L & K Richardson Ltd.* [1969] 1 WLR 1129).

A survey plan is not a document of title. It is normally based upon the instructions given to a licensed Land Surveyor by his client, usually being someone claiming ownership or possession of a parcel of land. It is merely illustrative of the parcel of land in question and which is being dealt with in the deed to which it is annexed. There being no reference to a survey plan in the description of the right of way set out in the Third Schedule to the 1990 Deed and there being no conflict or ambiguity as I have said, I do not see how it can be said that the right of way excluded the area occupied, if I might use that word, by the brick wall. The decision in *Dunning's* case can therefore be distinguished since there the plan was the only description of the parcel of land,

which is not so in the present case. The fact of its existence at that time, which is not disputed, does not necessarily mean that the parties then accepted that the right of way was less than 5 metres wide at that point, or anywhere else along the length of the right of way.

The 1990 Deed is unconditional. It sets out no encumbrances affecting any of the parcels of land or the right of way. The right of way includes its use with vehicles, and a grant of right of way will be construed against a grantor in the absence of any clear indication to the contrary. It is unconditionally and unreservedly 5 metres wide with no obstruction or encumbrance whatsoever.

Further, the coming into existence of the right of way was effected by agreement of the beneficiaries of Basdeo Gopaul's will and all those who were entitled to the parcels of land. Their agreement is clearly reflected in the descriptions of the four individual lots and the right of way in the 1990 Deed, and was obviously arrived at in the full knowledge of the existence of the brick wall which had been there for some 25 years. They all clearly intended that the southern boundary of Lot 1 was to be moved northward away from where it had been for all those years, if, indeed, Lot 1 did extend southwards to the brick wall at that time. There is no evidence that it was agreed the brick wall was to reduce the width of the right of way. Indeed, the Defendants admit that the 1992 extension to it was illegal. I do not see how it can now fall to the Defendants as Sonia Gopaul's successors title, nor any of the other present owners, to say that any other position was intended or effected by the 1990 Deed. The Defendants admit that the extension to the brick wall which they carried out in 1992 was illegal. That in my view suffices to entitle the Plaintiff to the relief in respect of that additional area which was thereby enclosed.

The Defendants go on to plead that this extension to the wall does not substantially interfere with the Plaintiff's use and enjoyment of the right of way. This was pleaded in relation to the 1992 extension, but the Defendants adopted this position in relation to the entire brick wall during the trial. Having admitted the extension to be illegal, however, I do not see how they can maintain this defence successfully. It is an interference with the enjoyment of the rights of the Plaintiff and clearly remediable even if no present and substantial damage is proven. See e.g. *Lush v. Duprey* (1966) 10 WIR 389, even if not entirely opposite to the present case. In my view, however, the right of way granted expressly by the 1990 Deed was one 5 metres wide not reduced in width nor encumbered in any way by the brick wall.

As to the issue of acquiescence, which is a defence of abandonment and to all appearances not pursued, there can be no abandonment, even partial, so as to constitute an abandonment of a right of way, unless the grantee of that right of way is clearly shown to have evidence a firm intention that the right of way would not be used by him or his successors in title at any time. (See e.g.

Young v Star Omnibus Co. (1902) 86 LT 41]; "*Gale on Easements*" 15th Ed. pp 376-377 and the cases referred to there.

In the instant case, there is no evidence of non-user by the Plaintiff. There is no evidence of acquiescence, and there is no evidence of any intention to abandon by anyone. So this defence fails.

I turn then to the defence that the Plaintiff must demonstrate a substantial interference with his right to the use and enjoyment of the right of way.

The right of way included the use of vehicles going to Lot 4 for whatever purposes Lot 4 might be used lawfully at any time. That encompasses heavy vehicles such as trucks whether delivering building materials or otherwise. Lot 4 is not restricted by the terms of the deed to residential use, nor are the types of vehicles restricted. That was expressly agreed to by all these entitled to the land and the right of way. The right of way has been effectively reduced from 15' to 9'. The unchallenged evidence is that the Plaintiff's building materials could not be taken to Lot 4 by truck using the right of way. They were forced to use a strip of land belonging to the Plaintiff's uncle, Ramkhelawan Gopaul.

The grant set out in the 1990 Deed sets out very clearly the quality of the right of way and that it extends to the whole width of 5 metres. The "topographical circumstances" here, unlike those in *Keefe v. Amor* [1964] 2AllER 517, are not to be regarded as restrictive. In my view, the Plaintiff is entitled to make use of the full 5 metre wide roadway.

Even if that does not represent the correct interpretation of the law however, then in the present case the Plaintiff, who is the owner of the dominant tenement, i.e. the right of way, seeks to do no more than is reasonable in exercising his right of way and objects only to his being deprived of the opportunity to do so. He is on the evidence unable to get building materials transported by truck Lot 4. The right of way has been diminished from 15' to 9'. He has been forced to make use of someone else's lands in order to gain access to and egress from Lot 4.

In my view, the Plaintiff has shown, should it be necessary, although I am not satisfied that it is necessary for him to do so, that there has been a substantial interference with his right to use and enjoy the right of way in question.

No evidence has been led to support the Plaintiff's claim in special damages.

Consequently, there will be judgment for the Plaintiff and the following declarations and orders.

1. A declaration that the Plaintiff and his heirs, assigns, tenants, servants, visitors and licensees are entitled to a right of way in accordance with that set out in the Third Schedule to the 1990 Deed.
2. An injunction ordering the Defendants to demolish, remove and take away the brick wall and the gate standing within the right of way.
3. The demolition and removal of the gate and the brick wall and the taking away of all rubble and debris is to be completed on or before 31st January, 2002.
4. A further injunction restraining the Defendants, their servants and/or agents from at any time now or in the future erecting or maintaining any obstruction on the said right of way or in any manner whatsoever doing or causing any act or thing to be done such as will or may be calculated to prevent or interfere with the free user by the Plaintiff of the said right of way or in any way to hinder the Plaintiff his heirs successors and assigns from having the full use and enjoyment of the said right of way.

As to the question of costs there is of course no reason why costs should not follow the event. Mr. Sirjusingh was at pains to mention that he appeared with Mr. Maharaj, but the Plaintiff does not seek to have costs certified fit for two Advocates, and quite properly so.

The Plaintiff's costs are to be paid by the Defendants certified fit for one advocate only. In so far as the issue of the costs of yesterday, 20th November, are concerned, and upon which I had reserved, I make no order as to those costs.

21st November, 2001

C.V. H. Stollmeyer
Judge

