



THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
SVGHCV2013/249

BETWEEN:

LENORE COX

CLAIMANT

-AND-

HERMUS PATRICK

1st DEFENDANT

ROBERT PATRICK

2nd DEFENDANT

Appearances: Ms Nicole Sylvester and Ms Vilette Benjamin for the Claimant, Ms Elizabeth Ryan for the First Defendant. No appearance by the Second Defendant or by Counsel on his behalf.

2014: June 18
Oct. 20

JUDGMENT

[1] **Henry, J. (Ag.):** This is a claim initiated by the Claimant Lenore Cox against the defendants by Fixed Date Claim Form. The claimant seeks against the defendants:

- a) a declaration that she is entitled to the use an access road to her dwelling house which she contends was constructed through the first defendant's property¹ with his consent;

¹ lot number 1 plan A423

- b) a declaration that the defendants, their servants and agents are not entitled to prevent the claimant, her servants, agents, assigns and heirs from using the said road;
- c) an injunction restraining the defendants, their servants and agents from blocking and interfering with the access to the said road;
- d) special damages,
- e) damages including aggravated damages,
- f) such other consequential relief as the court may deem fit; and
- g) costs.

[2] The first defendant counterclaims against the claimant, damages for trespass arising out of the claimant's alleged use of his² land to construct a road, alleged construction of a concrete wall by the claimant on the his property, alleged subsequent demolition of the wall and storage of the resulting debris by the claimant on his land and alleged damage to, removal and use by the claimant of rabacca tree portions and sand belonging to the first defendant. The first defendant seeks against the claimant:

- a) a declaration that the clamant is not the owner of the remaining portion of lot 1 on plan A423,
- b) an injunction restraining the claimant, her servants and agents from trespassing on the said property,
- c) special damages of \$12,854.60,
- d) general damages for trespass; and
- e) costs.

² The defendant's

Preliminary Matters

[3] The hearing into this matter took place on June 18, 2014. Just before the trial commenced, learned counsel Ms Nicole Sylvester indicated to the court that the claimant would discontinue the claim against the second defendant as he lives in the UK. She undertook to file the Notice of Discontinuance on June 19, 2014. The Notice of Discontinuance was filed on October 15, 2014. The decision is written and accordingly proceeds on the basis that there is one defendant, namely Hermus Patrick.³ He is referred to hereafter as “the defendant”.

[4] The claimant and defendant respectively filed on June 6, 2014, applications for extension of time to file witness statements⁴, orders deeming witness statements filed outside of time properly filed and for relief from sanctions for non-compliance with directions⁵ given by the court *inter alia* stipulating timelines⁶ within which to file and serve witness statements. The parties had no objections to the cross applications and were granted the respective orders sought. Accordingly, the claimant was relieved from sanctions and granted extension of time to file the witness statements of Lenore Cox, Vernon Scott, Noreen Scott, the witness summary of Sly Piard⁷ and the further witness statement of Lenore Cox⁸ and they were deemed properly filed. Likewise, the defendant was relieved from sanctions and granted extension of time to file the witness statement of Bryan Alexander⁹ and it was deemed properly filed. The trial proceeded thereafter.

³ The first defendant will accordingly be referred to hereafter as “the defendant”.

⁴ And witness summary in the case of the claimant.

⁵ Dated April 2, 2014

⁶ Being May 15, 2014.

⁷ Filed on May 27, 2014.

⁸ Filed on June 4, 2014.

⁹ Filed on June 6, 2014.

Background

[5] The claimant and the defendant are sister and brother. The claimant lives at Pembroke on land she acquired from the defendant, by Deed of Gift 2210/2002 made June 27, 2002 and registered at the Registrar's Office on June 28, 2002. The Deed of Gift is expressed to be made "in consideration of natural love and affection and for other reasons and considerations...for divers other good causes and considerations..." Those "other reasons and considerations" and "divers other good causes and considerations" are not rehearsed in the deed. It is noteworthy however that the transfer was exempted from payment of stamp duty¹⁰, being certified¹¹ as a "voluntary disposition inter vivos for no consideration in money or money's worth".

[6] The land conveyed to the claimant by the defendant is part of a larger parcel then owned by the defendant and registered in November 2001 as Deed of Conveyance 3872/2001 between the then vendor Bernard Punnett and Barclays Bank Plc and Hermus Patrick, purchaser. It emerged from the testimony of witnesses in this case that the defendant has retained the rest of the property which forms the northern, eastern and southern boundaries to the claimant's property. The claimant accesses the public road through the disputed road and is entitled to use another access which she claims is inaccessible, being undeveloped. The defendant maintains that the other access is motorable and can be used by the claimant.

¹⁰ Pursuant to the proviso to Item 24 of the Stamp Act, Chapter 318 of the Revised Laws of Saint Vincent and the Grenadines 1990.

¹¹ See statutory declaration of R. Theodore L. V. Browne dated 27th June, 2002 and exhibited to Lenore Cox's witness statement filed on 27/5/2014, (para.9) and marked "C".

[7] At the date of the gift, the claimant was residing in the United States of America and from the evidence lived there for many years. It seems she has now returned to live at Pembroke in Saint Vincent and the Grenadines where she has constructed a dwelling house. The claimant avers that she contracted Vernon and Noreen Scott in 2002 to construct her house on the said land at Pembroke. The claimant further attests that after the Scotts were engaged to construct her house, they approached her about access from the public road to her property. She states that she contacted the defendant who gave her written consent by letters dated 5th November, 2002 and 4th August, 2004, to access her property through his land¹² via an access road ("the disputed road") that he gave her permission to construct and which he assured her would become her permanent access to and from her home.

[8] Paragraphs [6] through [9] of the Claimant's statement of case state:

"[6] The **First Named Defendant** at the time of purchased (sic) was entitled to a road which would have around (sic) the side of his land. This road was not developed at the time the **Claimant** received her said deed of gift or at all.

[7] In **2002** the **Claimant** and the **First Named Defendant** agreed that the Claimant would construct a road through the First named Defendant's land at the Claimant's own expense and this road would become the Claimant (sic) permanent access to and from her home. This position was reduced to writing on the 4th August 2004. *Letters of the 5th November, 2002 and 4th August, 2002 are annexed and marked "D"*.

[8] Since **2002** the **Claimant** has utilized this road unimpeded whether by the **Defendants** or anyone else.

¹² See Lenore Cox's witness statement filed on 27/5/2014 (para.17) and marked "G".

[9] The road leads directly to the claimant's home and is the **Claimant's** only useable means of access to her home at the time of the drafting of this claim."

[9] It is important for the purposes of this case to set out the text of both letters. They state respectively:

"November 5, 2002

I, Hermus Patrick of Layou,
give permission to Vernon and Noreen Scott
to open road leading to the construction Building
of my sister house Lenore Cox
In Pembroke ST. Vincent.

(signed Hermus Patrick)
Hermus Patrick."

" August 4th, 2004

I Hermus Patrick give permission to Vernon and Noreen Scott
to open Road for my Sister Lenore Cox leading to her house in
Pembroke St Vincent.
All work paid for by Lenore Cox.
This road is her permanent access to and from her residence.

(signed Hermus Patrick)
Hermus Patrick."

[10] The claimant avers that she utilized the disputed access road without interference until July 2013 when the defendant erected and placed a gate at the commencement of the disputed road. She states further that he placed a lock and chain on the gate on September 23rd 2013 which she removed after reporting the matter to the police at Vermont Police Station. She claims that the defendant locked the gate again on September 28th 2013. She reported the matter to the Vermont Police Station and once again removed the lock. The claimant testified that the defendant arranged for a third party to dig a gaping

hole in the disputed road at the entrance to her property making it impossible for her to access the road to her home.

[11] The claimant contends that the defendant did the aforementioned acts maliciously, out of spite for her and with the intention of humiliating her, injuring her feelings and causing her to be ridiculed by some of her neighbours and friends. As a consequence, she claims¹³ that she has been subjected to anguish and mental distress and suffered loss and damage. She claims also that she has had to construct another road at a cost of \$30,210.00 which will not run through the defendant's land and she has incurred expenses amounting to \$15,966.00 to repair the damaged road. The claimant has not provided satisfactory proof of the alleged anguish, mental distress or defendant's motive by way of written or oral testimony.

[12] The defendant's case essentially is that the claimant is not being truthful. He insists that the claimant did not purchase land from him but rather that he gave her the land in consideration of his natural love and affection for her. He denied receiving monies from the claimant to purchase property and insisted that the receipts exhibited to the claimant's witness statement purportedly evidencing this, were not signed by him. In addition, he testified that he never granted the claimant permanent access through his property, but only permission to her workmen to transport building materials through his property for the temporary purpose of construction of the claimant's house. The defendant maintains that he never gave written permission to the claimant by letters dated November 5, 2002 and August 4, 2004 to construct the disputed access road. He denies also that he had an agreement with the claimant that she could use the disputed road as her permanent access to her house. He insists that the letters produced by the claimant are fabrications. He said in evidence under cross-examination that he became aware that the road was constructed about a week after it was constructed in 2003, but he took no steps to stop the claimant and her agents' use of that road because they were having difficulty using the other road. He states that after he discovered the road had been built he asked Noreen Scott who gave them permission to build it and she told him "It's your sister you know" and he replied "alright, ok" meaning that they could use the road to carry up the materials. He admits that he took no steps to prevent the claimant from using the road after her house was constructed and admits that he has used the disputed road himself on more than one occasion. He maintains that the claimant has access to her house through another road (a 20

¹³ Paragraph (15) of her Statement of Claim

foot road) which is motorable and which is used by the claimant's neighbours. In his witness statement, he explained that in 2002 when the claimant started to construct her home, the 20 foot road "was undeveloped due to neglect but was still accessible." He states also that it was the claimant's workmen who built the disputed road on his property using a sling of cement belonging to him and he agreed with the claimant to allow them to continue to have a temporary access to her land via his until the construction of her house was complete "as we had a close relationship."

- [13] The defendant admits that he placed a gate on the access road where the claimant would start her access to her home, and that he subsequently placed a lock on that gate. He denied presenting a letter to the claimant at a family gathering in 2004 granting her use of the disputed access road as her permanent access. He contends that the temporary permission he granted the claimant to use the disputed access road extended "until her house was finished.". Under cross-examination he appears to have recanted his assertion that the claimant used his rabacca from his land and in answer to a question from learned counsel Ms Sylvester he answered, "I am now saying that the claimant did not instruct Mr Punnett to fill the hole with rabacca from my land.". He however maintained that the claimant removed a load of rabacca and sand from his property. He states that when the hole was filled and the picture taken, he saw rabacca in the hole and rabacca trees right next to the hole on his land. Interestingly, the defendant provided no evidence supporting removal of rabacca or sand from his property by the claimant.

SUBMISSIONS

- [14] Learned Counsel for the Claimant, Nicole Sylvester submitted that the Claimant for many years entrusted her affairs in St. Vincent to the defendant. She contends that the claimant now realizes that this trust was misplaced. She submits also that although the claimant obtained land by deed of gift from the defendant in June 2002, it was never her intention to acquire land from him but from one Alfred Mascoll. On behalf of the claimant, Ms Sylvester submits further that the defendant had utilized US\$10,000.00 which the claimant gave him to pay Mr Mascoll for the lands, consequently the claimant agreed to accept a deed of gift of land from the defendant at a price of US\$20,000.00 inclusive of the US\$10,000.00 she had given to him previously to pay to Mr Mascoll. The additional US\$10,000.00 was paid to the defendant by the claimant in September 2002.
- [15] Ms Sylvester argues that the evidence provided by the claimant and her witnesses

was cogent, compelling, consistent and credible. In contrast, she states that the defendant's evidence was inherently contradictory, riddled with inconsistencies and at times incredible. She also remarked that the defendant's sole witness was of no assistance in resolving the issues in the instant case. She submitted further that the disputed access road was constructed on the defendant's land for over a decade before he sought to complain about its presence and use, despite admitting to having used it himself on multiple occasions. In addition, Ms Sylvester pointed out that the defendant's allegations of the claimant's house encroaching on his land have only recently been made and that the defendant never raised such objections before or after the construction of the claimant's house before. With respect to the "written consents" provided by the defendant who claims that they are fabrications, Ms Sylvester submits that the defendant has failed to provide any proof of or plausible motive for the claimant to fabricate them.

[16] Ms Sylvester submits that the characteristics necessary for the existence of an easement have been satisfied as there are two separate pieces of land, one belonging to the claimant (the dominant tenement) and the other to the defendant (the servient tenement), the disputed access road being the easement. In support of this submission, Ms Sylvester relies on the case of **Abraham v. Vincent TT**¹⁴, the definition of "easement" in **Halsbury's Laws of England**¹⁵ and the dicta of Danckwerts J in **Re Ellenborough Park** where he outlined the essential characteristics of an easement and defined an easement as:¹⁶

"a right to land to utilize other land of different ownership in a particular manner ... or to prevent the owner of the other land from utilizing his land in a particular manner."

Danckwerts J. listed the features of an easement as follows¹⁷:

*"(a) there must be a dominant and servient tenement;
(b) the easement must accommodate the dominant tenement;*

¹⁴ 1991 HC 173, a case involving the use of an undeveloped roadway on the defendant's land, used by the claimant to get to and from his lands and which he used to transport his produce.

¹⁵ 4th Edition, London 1975, Vol. 14 pg. 4

¹⁶ [1956] Ch 131 at p. 140.

¹⁷ See **Re Ellenborough Park**, supra.

(c) the dominant and servient owners must be different persons; and
(d) the right claimed must be capable of forming the subject matter of a grant.”

[17] Ms Sylvester submitted that an easement may be acquired by express grant where the common law requirement of a deed or seal is satisfied – **Hewlins v Shippam**¹⁸. Learned counsel further submitted that the Statute of Frauds¹⁹ as applied by the **Application of English Law Act**,²⁰ introduces the additional requirement that a contract affecting interests in land ought to be evidenced in writing. She reasoned that at common law, a grant of an easement made orally or by an unsealed writing creates only a license, but this may create an equitable easement whereby equity acts on the principle that ‘equity regards as done that which ought to be done’, as established by **Walsh v Lonsdale**²¹ where Jessell M.R. describing the position of an individual who is granted an agreement for a lease in the following terms:

“He holds therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted.”

[18] Relying on the decision in **Walsh v Lonsdale** supra, Ms Sylvester submitted that the effect of that ruling was to convert a formally defective lease or mere contract for a lease into a perfectly valid equitable lease on exactly the same terms. This doctrine she submits has come to apply to a wide range of legal transactions which are vitiated by non-compliance with some legal formality as in the instant case. In further support she cited the case of **May v. Belleville**²², specifically the dicta of Buckley J. as authority for the principle that “if a grant is made by an unsealed writing and is for value, equity will treat this as a contract to grant a legal interest in land, and if the agreement is specifically enforceable, it will then treat the situation

¹⁸ (1826) 5 B. & C. 221 at p. 229

¹⁹ 1677 Ch. 2 c.3 (England)

²⁰ S. 5 (a), Chapter 12 of the Revised Laws of St. Vincent and the Grenadines 2009

²¹ (1882) 21 Ch. D. 9, 14-15 per Jessell M.R.

²² [1905] 2 Ch. 605 at p. 605

as if the grant by deed had already been made". In that case, she quoted Buckley J as stating:

*"...in equity it is not essential that a deed which merely effectuates a previous agreement should be executed by both parties in order to be binding on both of them: **Walsh v Lonsdale.**"*

- [19] On this issue, learned counsel Ms Sylvester submits that the signed letter dated August 4, 2004 purporting to grant the claimant permission to use the disputed access road as a permanent access road to her house although not being "an express grant by deed, is sufficient to create an equitable easement under the **Walsh v Lonsdale** doctrine." She submitted further that the letters amount to "an express grant of an equitable easement" and is an agreement which is not only capable of specific performance, but was also for value as the claimant and her agents (Noreen and Vernon Scott) were instructed "to construct the road from their own expenses, and there was uncontroverted evidence that the defendant also commented on the usefulness of the road to him, as he has surrounding lands which would also benefit from its construction."
- [20] Additionally, Ms Sylvester submitted that due to his conduct over the last decade, the defendant is estopped from denying that there was a grant of an easement. In this regard, she argues that the defendant not only failed to object to the use of the disputed access road as a permanent access road by the claimant, but also on occasion used it himself to take the claimant home from the airport. Learned counsel further submitted that the defendant's denial that he ever signed the agreement and his assertions that his signature on the documents are fabrications amount to an allegation of fraud. In this regard, she submits that a claim for fraud cannot be raised inferentially, must be specifically pleaded and proved and the burden of proof is high. In the circumstances, unless the defendant expressly brings an action for and proves fraud he cannot allege that the signatures affixed to the document are not his own.
- [21] Learned counsel Ms Sylvester contends that the defendant has failed to provide proof of trespass to his land by the claimant in the form of a surveyor's report and that the alleged trespass has not been otherwise substantiated. Further, she submits that the defendant although present throughout the period that the claimant's house was under construction and at no point thereafter until the present

claim, made it known to the claimant or her servants or agents that her house was encroaching on his land.

[22] Learned counsel Ms Nicole Sylvester submitted that the defendant has offered no substantive proof of a cogent or compelling nature to found his allegations that the claimant and/or her agents used his rabacca and sand and felled his trees. The claimant she submits "has provided affidavit evidence in support of her assertion that the materials used to fill the hole dug by the claimant were sourced from Mr Rock Punnett" and also she was not present at her home at the time of the alleged felling of the defendant's trees.

[23] For her part, learned counsel, Ms Ryan submitted that due to the inconsistencies in the testimony of the claimant and her witnesses, she should not be believed and the version of this incident supplied by the defendant should be accepted. She concluded and asked to court to find that the claimant trespassed on the defendant's land and cut down and used his rabacca trees, as well as the sand which was stored on his land.

[24] Learned counsel for the defendant, Ms Elizabeth Ryan submits that no such agreement for the claimant's use of the disputed access road existed between the parties and that the First Defendant did not sign the two documents. This, she submits is the factual and legal position between the parties, notwithstanding the claimant's evidence at paragraphs 16 and 17 of her witness statement that the defendant gave her:

- a) permission to construct a road through his land which will serve as a permanent access to her property; and,
- b) a letter thereafter signed by himself evidencing same dated November 5th 2002.

Learned counsel Ms Ryan points to "the inconsistent evidence of the claimant and her witnesses in relation to the two letters" purportedly giving a right of way through the defendant's land. She contends that the claimant and her witnesses' testimony differ drastically, while the defendant's evidence remained consistent. She accordingly urged the court to accept the defendant's evidence and to reject the

claimant's allegation that the defendant gave her permanent access through his land and that he issued her with two signed letters evidencing this.

[25] Learned counsel Ms Ryan submitted further that the defendant's version of the events is more compelling than the Claimant's and her witness Noreen Scott and should be accepted as proof of the alleged trespass. She reasoned that "there is no dispute that the claimant has fenced her property two times since the construction of her home," the first time being in or about 2004 and again in 2013. She highlighted the testimony of the defendant at paragraph 15 of his witness statement that the Claimant in or about 2004 encroached on a portion of his land by erecting a wall fence with balusters and a gate and in or around June 2013 and erecting a concrete wall structure as being probative of the alleged trespass by the claimant, notwithstanding the claimant's denial. She considered it to be noteworthy and probative of this issue that the claimant's property was completely fenced in or about 2004, however in 2013 the claimant re-fences a portion of her property.

Issues

[26] There are several issues which arise for consideration on the facts of the instant case:

1. Whether the defendant's allegations of deceit have been made out and if so what effect if any that would have on the claimant's case.
2. Whether the defendant by letter dated November 5, 2002 granted the claimant permanent access through his property via the disputed access road? If so, whether this created an easement in favour of the claimant by which she is now entitled to the declarations sought?
3. If not, whether the defendant by letter dated August 4, 2004 granted the claimant permanent access through his property via the disputed access road? If so, whether this created an easement in favour of the claimant, which the defendant interfered with as a result of which the claimant is now entitled to the declarations sought?

4. Whether the claimant trespassed onto the defendant's property, cut and removed and used his rabacca tree portions as alleged?
5. Whether the claimant trespassed onto the defendant's property, removed and used his sand as alleged?
6. Whether the claimant trespassed onto the defendant's property, constructed a wall which she later demolished and stored the debris arising from the demolition on the defendant's property as alleged?
7. Whether the claimant is entitled to damages or the injunction sought?
8. Whether the defendant is entitled to or should be granted general, special damages, declaration, injunction or other relief claimed?

For the sake of convenience, efficiency and good order, the issues will be consolidated and addressed under four broad headings: Fraud, Easement, Trespass, Remedies.

LAW, ANALYSIS AND FINDINGS

[27] The standard of proof in this case, as in all civil matters is on a balance of probabilities. The court's findings of fact turn largely on whose version it accepts. I have reviewed the evidence in its totality and given careful consideration to the helpful submissions of learned counsel for both parties. The claimant struck me as a credible, forthright, and honest witness as did her witnesses. The defendant in some instances was not forthcoming in his responses and his sole witness added nothing useful to the case. I accordingly accept the testimony of the claimant and her witnesses where there is conflict between the two versions. It is regrettable that siblings were pitted against each other in this case and it is hoped that eventually they will be able to mend their differences, put this incident behind them and rebuild their close relationship.

Fraud

[28] The first issue to be considered and determined by the court is whether the defendant's allegations of deceit have been made out and if so what effect that would have on the claimant's case. The defendant maintained throughout the case (both on the pleadings and during the trial) that he did not execute the letters which purportedly grant permission to the Scotts and the claimant to construct and use the disputed access road, nor did he execute and give to the claimant receipts in respect

of the purchase of a portion of lot 1 on Plan A423 at Pembroke, amounting to 9,998 sq. ft. In this regard, he is alleging that the claimant or her agent is responsible for fabricating those documents, that they are misrepresentations of the true factual position and should not be relied on. The defendant stops short of making a claim against the claimant grounded in fraud with associated prayer for remedies.

[29] **Bullen and Leake and Jacob's Precedents of Pleadings**²³ states:

"The essence of the action of deceit is dishonesty; the action will lie where the defendant, in order to induce the plaintiff to act upon his representation, fraudulently or recklessly, i.e. without caring whether his representation is true or false represents as true a matter of which he knows nothing and which is in reality untrue, if the plaintiff is thereby induced to act upon such representation to his loss."²⁴

The defendant is not making a claim against the claimant for fraud, deceit or misrepresentation. He is merely raising a defence akin to "*non est factum*". He is not saying that he executed or signed the documents without knowledge of their character. Rather, he is saying that he did not create them nor sign them, someone else did. I have grave difficulty accepting the defendant's evidence on this score. The evidence of the claimant, her witnesses Noreen Scott and Syl Piard was overwhelmingly convincing of the fact of execution by the defendant of the letter dated August 4, 2004 and also of his grant of permission to the Scotts to construct the road in 2002. The claimant, Noreen Scott and Syl Piard said in cross-examination respectively:

"The first defendant gave me a first letter in 2002 when the Scotts started to build the road through his land to my house. The Scotts wanted to be sure they could build the road. The letter was written to me and I gave it to them to build the road through his land. The Scotts wanted to be sure that the first defendant gave permission for them to open the road on his land. The second letter was given to me in 2004 in the presence of my sister, my brother deceased.... I wanted to have something in writing to show proof and confirmation of the conversation we had that that road would be my permanent access because the other

²³ Twelfth Edition at page 450

²⁴ **Derry v Peek (1889) 14 App. Cas.337**

road was all bush and stone. And what he says to me was, "whenever the government or whoever was responsible to fix the other road, I would then have 2 permanent access to and from my home".

"He (the first defendant) came and showed us exactly where we could make a concrete track for the truck to come in. We never used the 20 foot road which was assigned to the claimant on the deed.... The first defendant gave us permission to put the strips of concrete on his land. There was nowhere the trucks could come in without the strips. The first defendant said to me, "as long as he doesn't have to put the money out, we could go ahead and it would be an asset to him as he "has lands on both sides of the strips so if in the future he has to sell, he would have the road already there."

"The family reunion was in August 2004.... The first defendant brought the letter to the claimant. I peeked at the letter as the claimant read.... The contents was that the road was to be her permanent access.... The first defendant gave the claimant a letter in my presence giving the claimant permanent access through his land. "

[30] Syl Piard identified the letter at page 163 of the trial bundle marked "H" as the letter she referred to in her testimony. At paragraph 5 of her witness summary, she stated: "I recall that the letter was not signed and Lenore indicated this to Hermus. Hermus responded 'what's the matter? You don't trust me?' Our brother Norbert took the letter from Lenore and read it. He said to Hermus, 'No, no; it's not that she doesn't trust you, it's about protecting her from the next generation.' It is after this was said that Hermus signed the letter he brought. Syl Piard was not cross-examined on this portion of her witness summary so it remains unchallenged. I accept her testimony and that of the claimant and Noreen Scott regarding execution of the letter dated August 4, 2004. I accordingly find that the defendant is the author of the said letter and that he presented it to the claimant at the family reunion in August 2004 in the presence of Syl Piard and their now deceased brother Norbert. I reject the defendant's contention that this letter and the one of November 5, 2002 are fabrications. It goes against reason and against the overwhelming evidence in this case to the contrary. I find as a fact that the defendant wrote both letters and gave them to the claimant. Their impact on the claimant's case is considered later.

Easement

Letter dated November 5, 2002

[31] I now turn to consider whether the defendant by letter dated November 5, 2002 granted the claimant permanent access through his property via the disputed access road? If so, whether this created an easement in favour of the claimant by which she is now entitled to the declarations sought? [27] The learned authors of **Halsbury's Laws of England**²⁵ describe an easement as follows:

“An easement confers a right over and above the ordinary general rights enjoyed by the owner of land which are annexed *jure naturae* to the ownership of real corporeal property;”

It is settled law that easements may be created by express reservation or grant, implied reservation or grant, or by prescription. In respect of an express reservation or grant, the grantor must have the power to make the grant²⁶ and it must be created by deed. It remains in force until there is an express release of it, it has been abandoned or extinguished or overridden by statute. An easement which arises by implied reservation or grant comes into existence where the right is essential for the use of the land (i.e. where the land is “absolutely inaccessible or useless” without the easement).²⁷ An easement may also be implied to give effect to the common intention of the parties.²⁸ It is also settled law that a person entitled to the possession of the dominant tenement to which an easement is attached, may bring an action for disturbance of an easement (either in nuisance or in trespass), which if not prevented would result in denial of the right of way.²⁹ A successful claimant may recover damages for his loss.³⁰ I also accept as correct, the submissions by learned counsel Ms Sylvester regarding the essential features of an easement as outlined in the authorities **Abraham v. Vincent TT, Halsbury's Laws of England and Re Ellenborough Park.**

²⁵ 4th Edition, Vol. 14. At paragraph 19

²⁶ *Paine & Co Ltd. v. St Neots Gas and Coke Co.* [1939] 3 ALL ER 812, CA

²⁷ See *Gale on Easements*, paras. 3-119, citing *Union Lighterage Co. v. London Graving Dock Co.* [1902] 2 Ch 557.

²⁸ *Liverpool City Council v Irwin* [1977] AC 239 HL

²⁹ *Kidgill v Moor* (1850) 9 CB 364

³⁰ *Bower v Hill* (1835) 1 Bing NC 549 at 555

[32] The nature and extent of an express grant depends on the proper construction of the language used in the instrument creating it. The court determines the true construction of the words used in the express grant and in this regard examines and considers the circumstances surrounding the grant to assist.³¹ In construing an agreement, the court's duty is to give effect to the common intention of the parties.³² Sir Vincent Floissac, CJ in delivering the decision in the **Halstead v Attorney General of Antigua and Barbuda**³³ case stated:

“... the basic principle that the interpretation of a contract or the appropriate meaning of an ambiguous word or phrase of a contract is derived from the common intention of the parties to the contract. That objective common intention is an inference drawn from the word or phrase interpreted objectively in the light of its contractual context. That contractual context comprises the whole or every part of the contract and all relevant contractual surrounding circumstances which are known to or should be presumed to have been within the contemplation of the parties at the time of the execution of the contract.”

As with contracts, the court employs the several rules of statutory interpretation to interpretation of legal instruments including easements. The “golden rule” is the usual starting point which requires the court to give words their plain and natural meaning. This was enunciated in the case of **Pinner v Everett**³⁴ where Lord Reid expressed that notion as follows:

“In determining the meaning of any word or phrase in a statute the first question is what is the natural or ordinary meaning of that word or phrase in the context in the statute.”

This rule was further amplified by Lord Watson in the case of **Chamber Colliery Ltd v Twyerould**³⁵ where he said:

³¹ **Halsbury's Laws of England 4th Ed. Vol 13. Para. 149** citing with approval Jessell MR in **Cannon v. Villars (1878) 8 Ch D 415**

³² **Halstead (Donald) v Attorney General of Antigua and Barbuda** pg 102

³³ Unreported Antigua and Barbuda decision

³⁴ Cited with approval in the Halstead case

³⁵ Cited with approval in the Halstead case

"I find nothing in this case to oust the application of the well-known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible."

[33] The intention of the parties as captured in their contract, memorandum or other writing is to be arrived at by the court applying an objective approach to interpretation. It is not the subjective understanding of either party or their witnesses which is to be captured but the meaning which a reasonable person (having access to the background knowledge surrounding the matter) would gather from the document. The court will also have regard to "the nature and description of the land and buildings which comprise the dominant tenement and the nature of the place over which the right is granted as it existed at the date of the grant."³⁶ Likewise, "a grant of a right of way to a dwelling house prima facie amounts to a grant of a right of way for all reasonable purposes required for the dwelling house, and would include the right of the user of cars by the occupant."³⁷

[34] In deciding this issue, the court is guided by the legal principles applicable to the construction of legal instruments as enunciated in the cases referenced above. An examination of the content of the letter dated November 5, 2002 when read in light of the evidence of Noreen Scott, the claimant and the defendant clearly points to the grant of a temporary access to the disputed road for the purpose of construction of the claimant's dwelling house. The words of the letter are clear and unambiguous. It reads simply: "I, Hermus Patrick of Layou, give permission to Vernon and Noreen Scott to open road leading to the construction Building of my sister house Lenore Cox, in Pembroke, St. Vincent." To any reasonable person reading this letter, all this letter does is grant to Mr and Mrs Vernon Scott, (not to the claimant), permission to construct a road for the purposes of the construction of Lenore Cox' dwelling house. I am fortified in this view by the claimant's and Noreen Scott's testimony respectively in cross-examination where they stated in answer to questions by learned counsel Ms Ryan:

"The first defendant gave me a first letter in 2002 when the Scotts

³⁶ Cannon v. Villars Supra.

³⁷ Supra.

started to build the road through his land to my house. The Scotts wanted to be sure they could build the road. The letter was written to me and I gave it to them to build the road through his land. The Scotts wanted to be sure that the first defendant gave permission for them to open the road on his land."

"He (the first defendant) came and showed us exactly where we could make a concrete track for the truck to come in."

[35] I find accordingly that the defendant did not by letter of November 5, 2002 grant the claimant permanent access or easement through his property via the disputed access road and that it did not create an easement in favour of the claimant. There is therefore no legal basis by which the claimant is entitled to the declarations sought as it relates to that letter dated November 5, 2002.

Letter dated August 4, 2004

[36] The next issue which exercised the court's attention is whether the letter dated August 4, 2004 granted the claimant permanent access through the defendant's property via the disputed access road? If so, did it create an easement in favour of the claimant, by which she is now entitled to the declarations sought? The authorities referenced immediately above are also applicable regarding the construction of this letter. It is also important to note that an interest created by deed is registrable under section 3 of the **Registration of Documents Act** ("the Act").³⁸ Any deed relating to land which is so registered operates "both in law and in equity according to the priority of time of registration and the right, title and interest of the person so conveying, incumbering or otherwise dealing with such real estate against every document subsequently registered with respect to such real estate. Unless it is registered, such deed "shall be deemed to be fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without notice whose document shall be first registered or against any person who may have, subsequently... obtained a judgment operating as a charge against any such real estate."³⁹ It is also noteworthy that section 22 of the Act provides that no document required to be registered under its provisions, unless registered, shall be admitted into evidence in any legal proceedings as proof of its contents but may be

³⁸ Chapter 132 of the Revised Laws of Saint Vincent and the Grenadines, 2009

³⁹ Section 5 of the Registration of Documents Act, Chapter 132 of the Revised Laws of Saint Vincent and the Grenadines, 2009

admitted as evidence of its existence. The claimant readily concedes that the letter dated August 4, 2004 is not a deed. There is no evidence that it was registered. The claimant nonetheless prays in her aid estoppel and the doctrine she refers to loosely as emanating from **Walsh v Lonsdale**.

[37] Having reviewed the decision in **Walsh and Lonsdale** and the provisions of the **Application of English Law Act**,⁴⁰ I do not identify any legal principle in that case and the statute which would convert the letter of August 4, 2004 into an easement by implied grant. The Application of English Law Act and the Statute of Frauds are however applicable in the instant case when applied in concert with the learning from the case of **Maddison v. Alderson**.⁴¹ The decision in that case and a long line of similar cases have established that a note or memorandum in writing which is referable to a specific agreement between parties will be given effect to by the court if the note sufficiently identifies the parties, describes the subject matter, the nature of the consideration and any other term the parties consider to be material. The court will recognize such an agreement if it is signed by the party to be charged and if there has been part performance of the agreement by the party relying on it, consisting of acts which are necessarily referable to the agreement. The decision was based on section 2 of the Statute of Frauds 1677 which is imported into the law of Saint Vincent and the Grenadines by section 5 of the Application of English Law Act. In more recent times the House of Lords in the case of **Steadman v. Steadman**⁴² has re-affirmed the principles in **Maddison v. Alderson**, indicating it is sufficient if the claimant can establish that it is more probable than not that on the "whole circumstances, leaving aside evidence about the oral contract, ... whether it is proved that the acts relied on were done in reliance on a contract."

[38] In the instant case, having evaluated the testimony of the witnesses, it is my considered opinion that the circumstances taken as a whole point to the existence of an agreement between the claimant and the defendant, whereby the defendant granted the claimant permission to construct a road on his property to facilitate permanent access to her home. The letter of August 4, 2004 together with the claimant's reliance on it to her detriment, effectively converted a temporary licence into an equitable permanent private right of way. In arriving at this determination, I find that the letter identifies the claimant and the defendant as the parties to the

⁴⁰ *ibid*

⁴¹ [1883] 3 App. Cas 467

⁴² [1976] A.C. 536

agreement. It describes the subject matter as being the access road at Pembroke and it clearly provides that the claimant be responsible for all related expenses. I find that in reliance on this written note, the claimant expended considerable amounts of money in constructing the access road of which both she and the defendant had use. I am fortified in my position based on the defendant's conduct after the claimant had finished constructing her house. Under cross-examination he stated that he has driven on that road, having picked up his sister from the airport in January 2013 and taking her to her home on that road and on other occasions before then. He also accepted that that road has been in existence for over 10 years, although it was intended for use by the claimant **only** until her house was completed. This is not credible and I reject this testimony entirely. Even more compelling is the fact that although the defendant has brought action against the claimant for trespass on several scores, he does not claim that her repeated use of the disputed access road (even after he installed the gate) amount to acts of trespass. I agree with the legal submission of learned counsel Ms Sylvester that by his conduct, the defendant is estopped from denying that he granted an easement to the claimant. The law as enunciated in **Pickard v. Sears**⁴³ and a long line of cases, is that a person who by his conduct induces another individual to act to his detriment by causing him to believe that a certain state of affairs exists, he would not be able to renege from his earlier position or representation. That principle is applicable in the instant case as the claimant clearly acted to her detriment and constructed a road based on the defendant's assurances that it would be her permanent road. He is therefore estopped from denying the true factual and legal position of the parties. In addition, a literal interpretation of the letter leads to one conclusion only. This is that the defendant author grants to the claimant a permanent right of way through his property at Pembroke. I find that he has granted the claimant a permanent right of way through his property as evidenced by the letter dated August 4, 2004, his conduct towards the claimant since then and the claimant's reliance on it.

[39] The defendant has maintained throughout,⁴⁴ that in July 2013, he installed a gate at the entrance to the disputed access road and subsequently on September 23, 2013 placed a lock on the gate which effectively prevented the claimant from using the access road until she broke them off. The defendant also admitted that he placed another lock on the gate subsequently. In the circumstances, I find that the defendant interfered with the claimant's enjoyment of the access road and his stated intention that she not continue to use the road as expressed again under cross-

⁴³ (1837) 6 Ad. & E 469

⁴⁴ In his statement of case, paragraphs 7 and 8 of his witness statement and his oral testimony

examination at the trial evinces an intention that she be prevented from using the road. Despite his denials that he was party to the further disruption of the claimant's use of the access road when it was dug up by a tractor trailer, I have no difficulty in drawing the logical inference that the defendant either arranged for the road to be dug up or was in collusion with the person who did. This would explain why he expressed neither surprise nor consternation at that turn of events. I make this finding mindful also that the claimant states that she did not see the defendant at the property when the hole was being dug and note learned counsel Ms Ryan's submissions to this effect. I grant the claimant the declaration sought at paragraph (a) of her prayer, and accordingly it is hereby declared that the claimant is entitled to continue to enjoy access to and use of the disputed road as demarcated in 2002 by the two concrete strips installed at Pembroke on Lot 1 on plan A423. The parties are to arrange for a survey plan to be created outlining the said disputed road as a right of way to be filed at the Deeds Registry within 90 days of today's date.

Trespass

[40] It is settled law that trespass to land consists of interference with possession and gives rise to a continuing action for damages for as long as the trespass persists. A claimant must however discharge the onus and burden of proof that the defendant has unlawfully entered his property. In the case at bar, the defendant alleges that the claimant has trespassed onto his property by constructing her fence and part of her house on his land, storing debris on his land, cutting his rabacca trees and removing his sand. He has not produced any witnesses to substantiate any of these claims. He has also not provided the court with any survey plan or testimony from a licensed land surveyor regarding these matters although he undertook to do so during case management. He has therefore failed to discharge the burden of proof which rests on him. In the circumstances, his claim in trespass against the claimant must fail on all points. The defendant is therefore not entitled to general or special damages, declaration or injunction as prayed. Accordingly, issues numbers 4, 5, 6 and 8 must be resolved in the negative.

Remedies

Injunction and damages - claimant

[41] The court has a wide discretion whether to grant an injunction and will do so when

on the facts of the case it is just and equitable to do so⁴⁵. The guiding principles which govern the grant of an injunction can be summarized as follows:

- (a) The claimant must first establish that he is entitled to the right which he seeks to have the court protect through the grant of injunctive relief.
- (b) The claimant must satisfactorily demonstrate to the court that damages are an inadequate remedy and that there is a strong probability that he will suffer grave damage in the future..
- (c) The claimant must establish that he has acted promptly in seeking relief and has not delayed.

[42] It is trite law that in order to recover special damages, the claimant must not only expressly plead the facts on which he relies but must also prove his loss or damage specifically. While the claimant has outlined in her statement of claim a number of heads under which she claims special damages, she has failed to provide satisfactory proof of those elements. The claimant refers to the cost to repair the damaged road and to construct a new road and exhibits an unsigned estimate prepared by or for a Winfield "Gairy" Cumberbatch. Mr Cumberbatch did not give evidence in this case. There is therefore no basis on which the court can assess the reasonableness or otherwise of the estimates. Accordingly no award for special damages is made in favour of the claimant.

[43] The claimant also claims aggravated damages for anguish and mental distress. She maintains that the defendant acted maliciously and out of spite and with the intention of humiliating her, injuring her feelings and causing her to be ridiculed by some of her neighbours and friends. There is no evidence of this, apart from the claimant's say so. The evidence points to a disagreement between the defendant and the claimant's son which appears to have transpired sometime after the claimant had constructed her house. It may have coincided with the dispute between the claimant and the defendant over the disputed access road. It seems to me that something other than malice and spite propelled the defendant to take the steps to block the disputed access road. I find that the claimant has failed to discharge the burden of proof in relation to this aspect of her claim and no aggravated damages are awarded to her.

[44] Having established her right to use the disputed road coupled with interference of that use by the defendant, the claimant would be entitled to damages where she establishes that the defendant's obstruction of the right of way amounts to a

⁴⁵ *Aslatt v. Corporation of Southampton* (1881) 16 Ch.D. 143

substantial interference of the easement granted.⁴⁶ A substantial interference which renders the way unfit for the purpose for which it was granted would constitute unlawful interference. There can be no doubt that the defendant's involvement in digging up the disputed access road prevented the claimant from using it as initially intended. She states that she was not able to travel through the road in her vehicle and consequently had to expend monies in repairing it. In those circumstances, the claimant is entitled to recover damages from the defendant for this unlawful interference with her access. I accordingly make an award of \$2500.00 as general damages to the claimant for this interference.

[45] Having regard to the totality of the evidence in this case, the conduct of the defendant throughout and his insistence even at the trial that the claimant "cannot continue using that road as her access", this case appears to be an appropriate one in which it is just and equitable that an injunction be granted. The defendant appears determined to ensure that the claimant does not continue to use the disputed access road and unless he is restrained, the claimant is likely to suffer grave damage in the future through the defendant's interference with her enjoyment of the right of way along the disputed access road.

Orders

[46] In light of the foregoing, judgment is entered for the claimant Lenore Cox against the defendant Hermus Patrick. It is ordered as follows:

- (a) It is hereby declared that the claimant is entitled to continue to enjoy access to and use of the disputed road as demarcated by the two concrete strips installed by the claimant in 2002, at Pembroke on property belonging to the defendant on plan A423. The parties are to arrange for a survey plan to be created outlining the said disputed road as a right of way, to be filed at the Deeds Registry within 90 days of today's date.
- (b) An injunction is granted restraining the defendant whether by himself and/or his servants and/or agents or howsoever otherwise from interfering with, preventing and/or blocking the claimant's and her servants' and agents' access to and use of the access road constructed on the defendant's property and demarcated by two concrete strips on plan A423 at Pembroke in the State of Saint Vincent and the Grenadines.

⁴⁶ Halsbury's Laws of England, 5th Edition Vol. 14, paragraph 165

- (c) The claimant's claims for special damages of \$15,966.00 and \$30,210.00 respectively are refused.
- (d) The claimant's claim for aggravated damages is refused.
- (e) The claimant's claim for general damages is granted in the sum of \$2500.00 with prescribed costs unless otherwise agreed.
- (f) The defendant's claim for a declaration in terms of paragraph (a) of his prayer is refused.
- (g) The defendant's claim for an injunction is refused.
- (h) The defendant's claims for special damages and general damages are refused.

[47] I wish to thank both counsel for their assistance rendered in the form of written submissions. The court also apologizes for the delay in returning the decision in this matter. This was largely attributable to the intervening summer break and associated re-settlement issues in country. The forbearance and understanding of the parties and counsel is appreciated.



.....
Esco L. Henry
HIGH COURT JUDGE (Ag.)