

**EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE**

CLAIM NO. SVGHCV2017/0109

BETWEEN:

OLFRED SHARPE

Claimant

and

ANTHONY DASCENT o/c TONY OR RAMPEL

Defendant

Appearances:

Ms. Tonya O. Da Silva for the Claimant

Ms. Maia Eustace for the Defendant

2026: 15th January

11th March

12th March

9th July

JUDGMENT

- [1] **THOM J (Ag):** This is a claim for an injunction restraining the defendant, his servants and or agents from blocking the claimant's right of access to his home and damages for nuisance.

Background

- [2] The claimant and the defendant are first cousins being the offspring of two brothers who were the sons of Ms. Priscilla Pope.

- [3] In 2016 the claimant became a joint owner of a parcel land at Chapmans measuring 66,034 sq. ft., with one Chris Sharpe by virtue of a Crown Grant. There is a dwelling house on the land which is owned by the claimant.
- [4] The defendant is the owner of a parcel of land measuring 12,827 sq.ft. There is a dwelling house on the land. The claimant's land adjoins the defendant's land.

The Claimant's Case

- [5] In his statement of claim the claimant alleged that around 1976 his father Elford Pope-Roberts leased the land on which his house is situate from the Crown for farming and rearing animals and he subsequently built a house and resided there with his family. On the eastern side of the property, there is a track which existed before 1976 and which is the only access to the claimant's property. His family used this path to access the property from 1976, a period in excess of forty (40) years. Around 2016, the defendant claimed to have purchased the adjoining land where the defendant's house is situate, including the track of land which provided the only access to the claimant's land. The defendant subsequently blocked the access path to the claimant's land by erecting a wire fence on the access path and began planting crops in the access path.
- [6] The claimant contends further that an easement of a right of way exists over the defendant's land by way of prescription and or by way of necessity. He alleges that the defendant has sought to prohibit his enjoyment of the easement by building a fence on the right of way and planting trees thereon.
- [7] The defendant in his defence alleged that the claimant, his father and family emigrated to Tortola, British Virgin Islands since the claimant was about

seven (7) years old. The defendant and his father resided on the land now owned by the claimant. The wooden house on the land was owned by his father. He resided on the said land until he was about 13 years old, when his father sold the house and they moved to the neighboring land which was owned by a relative named Omega Vanterpool. While the claimant and his father and siblings resided in the BVI, the claimant's land was unoccupied. No one used the land that is now the defendant's land as an access way. Further, Priscilla Pope who occupied the land now owned by the defendant did not permit anyone to use her land as an access way without her permission.

[8] The defendant further alleged that the footpath over his property is not the only way the claimant can access his property. The claimant has access to his property through a track which runs along its north-eastern boundary as shown on Survey Plan (C24/117).

[9] The defendant contended that there is no easement by prescription since the claimant and his predecessors used the footpath with the consent of the defendant's predecessor.

The Evidence

[10] The claimant testified and called one witness, being his mother, Mrs. Barbara Sharpe.

[11] The defendant testified on his own behalf and called no witnesses.

Olfred Sharpe

[12] In his witness summary, Mr. Sharpe stated that in early 1980 he lived with his family, which consisted of his father, Elford Pope-Roberts (now

deceased), his mother, Barbara Sharpe, and three siblings. They lived in a wooden house which was situated on Crown land. His father had leased two (2) acres of Crown land in 1976 for farming, and his family lived on the land. To get to their home, the family used a footpath over his grandmother's property. They also used the footpath to get access to a track north of his grandmother's land. The footpath is the only entrance to his home. His family maintained the footpath.

[13] In the early 1990s, the family's wooden house was demolished and it was replaced by a concrete house. The claimant lived in both houses before he migrated to the BVI. He migrated to the BVI in 1993. Whenever he returned to St. Vincent, he used the path to gain access to his home.

[14] The rent for the land now belonging to him was being paid to the Ministry of Agriculture in the name of his grandmother Priscilla Pope. In 2010, while visiting the Lands and Surveys Department, he saw a letter which showed that the land was handed over to his father by his grandmother Priscilla Pope.

[15] After his father's death in 2015, he continued to maintain the path. In January 2016, he and his wife made plans to renovate the house. He held discussions with the defendant regarding access to the path for the transportation of building materials since the defendant had purchased the land from Mr. Touhy Job, the husband of the claimant's aunt. In February 2018, he visited his property and found the entrance being the footpath, to be blocked.

[16] In his further witness summary filed on 4th May, 2023, the claimant repeated the statements in his earlier witness summary that in February 2018, when he visited the area he noticed the entrance to his house was blocked with

a wire face and dasheen was planted in the place where the road used to be.

[17] Under cross-examination, he testified that he migrated to the BVI in 1993. Both parents had migrated earlier. His father left first followed by his mother. When his mother left, he went to live with his grandmother. He was about two (2) years old when he went to live with his grandmother. He lived with his grandmother for about 5-6 years. He has lived in the BVI since 1993.

[18] The path that passed over Priscilla Pope's land, is the land now occupied by the defendant. A small vehicle like a Volkswagen could fit in the path. The path was used only by family members. His father returned to St. Vincent from Tortola in 1993, the same year that he moved to the BVI. He subsequently returned on vacation and arranged for someone to build the house and he also returned when the lower portion was completed.

Barbara Sharpe

[19] Mrs. Barbara Sharpe testified that in 1976 she was resident at Lowmans Windward. She met Elford Pope-Roberts who was farming the land. Their relationship produced four (4) children including the claimant.

[20] In 1979 she and her ex-husband purchased a wooden house which they placed on the land where they resided. To access their home, they walked through her husband's mother's property. She and her children cleared the path and planted flowers along the path. No one ever stopped them from walking there because it was the only way to their home. They used that path to get to another road above her husband's mother's property.

- [21] When she migrated to the BVI, her brother Garret lived in the house and farmed the land. Whenever she returned home on vacation, she used the same path to get to her home.
- [22] In the early 1990s, they demolished the wooden house and built a concrete house.
- [23] In January 2017, she received information that the path leading to the house was blocked. She visited her house in 2018 and she saw that the path to her house was blocked and dasheen was planted in its place.
- [24] Under cross-examination, she testified that the wooden house was bought in 1979 and she and Elford Pope-Roberts moved to live in the house in the same year. The claimant was born on the land on 2nd May 1980. She moved to the BVI in 1986. Her husband moved back to St. Vincent in 1993. She cannot recall when the claimant moved to the BVI. He attended primary school in St. Vincent and also in the BVI. When she went to the BVI she left the claimant with her mother who was living in Lowmans Windward.
- [25] The pathway was always kept clean. There are two pathways to the house, one through the defendant's land and one by the mountainside.

Defendant's Evidence

Anthony Dascent

- [26] Mr. Dascent testified he resided at Chapmans Village from childhood. His grandmother Priscilla Pope, his father and other relatives including his uncle the Claimant's father and other relatives resided there. He and his father occupied the land now owned by the claimant until he was about 12 years old when his father migrated to Grenada. He currently occupies a portion of land measuring 12,827 sq.ft which he purchased from a relative.

- [27] His land adjoins the claimant's land. Mr. Dascent further testified that there is no access road from his land to the claimant's land shown on the survey plan for his land. The other portion of land next to his land was owned by his grandmother Priscilla Pope.
- [28] During his childhood when he resided on the land now owned by the claimant, to get to his home, he and his father walked through his grandmother's land but with her permission. However, he and his father frequently used the path along the mountainside to access their home.
- [29] During the 1980s the claimant's father Elford Pope-Roberts migrated to Barbados where he resided for several years. When he returned to St. Vincent he occupied the land now owned by the claimant since the land was left vacant after his father had migrated to Grenada. To access the land, the claimant's father also sought permission from his grandmother Priscilla to walk through her property. Elford Pope-Roberts migrated to the BVI a few years after he returned to St. Vincent. His family including the claimant joined him in the BVI a few years later.
- [30] In 2006 he migrated to Tortola to work. He visited his home at Chapmans every year until 2011 when he returned to St Vincent where he resided until 2015, then he returned to Tortola to continue employment.
- [31] Under cross-examination, Mr. Dascent agreed that the land now owned by himself and Mr. Sharpe was previously occupied by members of their family. He reiterated that his statement in paragraph 10 of his witness summary that there is a shortcut where persons walked and the claimant could access his land the same way is correct. The path across his property is not the only access to the claimant's land. There is also access from the main road. A river is at the back of the land. Across the river is the Lowmans' main road. Mr. Dascent acknowledged that there is a steep embarkment. He also acknowledged that the fence that he built is blocking the footpath.

Issues

- [32] The issue to be determined is whether there is an easement of right of way by prescription and or necessity over the defendant's land.

Easement

- [33] Both parties agree that the legal principles governing easements are the principles outlined in **Re Ellenborough Park** [1956] Ch 131 where Lord Evershed MR outlined the following characteristics of an easement as follows:

- (1) There must be a "dominant" and servient tenement. This means that one plot of land must have the benefit of the right and another plot must have the burden. The right cannot exist independently of the ownership of land. An easement which is appurtenant to the dominant tenement will pass on the transfer of land.
- (2) The right must "accommodate and serve" the dominant tenement. This means that it must be of benefit to the land and not a personal right granted by the owner.
- (3) The dominant and servient tenements must be owned and occupied by different persons.
- (4) The easement must be capable of forming the subject matter of a grant.
- (5) The right must also be within the nature of rights capable of being easements and it must be sufficiently definite.

- [34] It is common ground between the parties that a right of way is an easement. It is also common ground that an easement may be created expressly, by implication or by prescription.

- [35] Counsel for both parties in their submissions addressed whether there was an easement by prescription first. I will do likewise.

Submissions

Easement By Prescription

Claimant's Submissions

[36] Learned Counsel Ms. Da Silva referred to the **Prescription Act** Cap.329 of the Revised Laws of Saint Vincent and the Grenadines ("the Prescription Act") which provides at Section 2 as follows:

"(1) "No claim which may be lawfully made at the common law by or to any watercourse, or the use of any water to be enjoyed or derived upon, over or from any Crown land or water belonging to the Crown, or being the property of an ecclesiastical or lay person or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years: but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated.

(2) Where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

.....

(4) Calculation of Period

Each of the respective periods of years herein before mentioned shall be deemed and taken to be the period next before same suit or action wherein the claim or matter to which such period may relate shall have been, or shall be, brought into question, and no act or matter shall be

deemed to be an interruption within the meaning of the Act unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had, or shall have, notice thereof, and of the person making or authorizing the same to be made.”

[37] Having agreed that the essential elements of an easement are as outlined in **Re Ellenborough Park** [1956] Ch 131, Learned Counsel referred to the following passage in the textbook **Elements of Land Laws** fourth edition by Kevin Gray and Susan Gray at p.694:

“The basis of prescriptive acquisition is not merely long user per se. In order that a claim of prescription should succeed, it is necessary that there be a history of continuous user in fee simple, and that this user be a ‘user as of right in which the servient owner has with the requisite degree of knowledge acquiesced’.¹ This element of acquiescence vitally underpins all claims of prescription.²

...User in fee simple means that the user alleged must be user by or on behalf of a fee simple owner against another fee simple owner.”

[38] Learned Counsel further submitted that continuous user could be established even where there is intermittent use. Learned Counsel referred to the following passage at p.695:

“The mere fact that user is intermittent does not destroy a claim of continuous user, but frequency of user does ultimately affect the validity of the claim. Thus, for instance, a prescriptive claim to a right of way may succeed where there has been user on six to ten occasions each year for 35 years, but not where there have been

¹ Mills v Silver [1991] C 271 at 281G per Dillon LJ.

² Dalton v Angus & Co (1881) 6 App Cas 740 at 773 per Fry J (‘the whole law of prescription rest[s] upon acquiescence’).

merely three occasions of user, each separated by an interval of 12 years.”

[39] In further submissions after the visit to the locus, Learned Counsel submitted that the steep embankment and narrow pathway as seen on the visit to the locus support the claimant's case for a prescriptive easement. It is consistent with the claimant's evidence that he and his family have used the specific pathway across the defendant's land since 1976. The alternative routes being dangerous or impractical explain why the claimant and his predecessors in title consistently used the path over the defendant's land. This route represents the only safe and practical means of accessing the claimant's property.

Defendant's Submission

[40] Learned Counsel referred to section 2 of the Prescription Act and submitted that for a prescriptive easement to exist the claimant was required to establish that the claimant's land, being the dominant parcel, benefitted from a path across the defendant's land, the servient land, for a period of not less than forty (40) years. The claimant was therefore required to prove (a) the existence of a defined path across the defendant's land benefitting the claimant's lands and (b) that such defined path was used for the full period i.e., without interrupted use continuously for not less than forty (40) years.

[41] Applying the above legislative provisions and the principles in **Re Ellenborough Park**, to form the subject matter of an easement there must be certainty of the right granted. Learned Counsel referred to the following passage in **Lawrence Lynford Wyllie v Clair Urban Ottley et al**:

“It being impossible to precisely locate the right of way given the radically altered topography of the land as a result of the cutting as

the road and subsequent erosion of the bank, it is necessary to define an access path which is practical and realistic, which can only follow the path at the foot of the bank to the west of the road, cut and paved with wheel tracks by the defendants.”

[42] Learned Counsel also relied on the case of **Borman v Griffith** [1930] 1Ch 493.

[43] Learned Counsel submitted that neither in his pleadings nor in evidence does the claimant assert the precise location of the purported path. Neither the claimant nor his witness was able to describe the location nor to say whether if taken to the land they could identify the path. No Survey plan was adduced showing a path, nor a deed showing description of the path adduced into evidence. The photographs adduced by the claimant do not assist the claimant as they only capture portions of the defendant’s land and not a pathway on the defendant’s land leading to the claimant’s land.

[44] Learned Counsel further submitted that, the claimant, by his evidence, failed to establish user for a period of forty (40) years. Neither the claimant nor his witness testified, and they were in no position to do so, as to when the occupation of the claimant’s land began. The claimant failed to give evidence of actual use or occupation before emigrating as a child in the 1990s, particularly since he did not reside at the land the entire period of his childhood years in St. Vincent. The claim having been filed in 2017, the 40-year period must have begun in 1977. This was before the birth of the claimant. Further, during the period, there was interruption by the defendant erecting a fence. Neither the defendant nor his witness could speak of consistent use of what would become the defendant’s land for a period of forty (40) years.

- [45] Learned Counsel urged the Court to accept the evidence of the defendant that Mrs. Priscilla Pope was a difficult woman and persons had to get permission from her before crossing her land.
- [46] The Claim should also fail because of a lack of evidence of a defined pathway.
- [47] There is a dearth of evidence of sustained occupation of the purported dominant parcel such as would enable continuous use of a purported path across a servient parcel and finally there is no evidence of use for a period of forty (40) years.
- [48] The evidence of the defendant that he and his father occasionally used the hillside path should be accepted as the visit to the locus showed that the hillside path is a well-worn path. They often did so because Priscilla Pope did not allow persons to cross her land without her permission. Permission defeats the doctrine of a right of way by prescription.

Discussion

- [49] The question for the Court is did the claimant establish an easement of right of way by prescription.
- [50] The claimant based his case on user for a continuous period of forty (40) years.
- [51] Learned Counsel for the claimant in her submissions, in reference to **Kevin Gray and Susan Gray**, emphasized that the user must not merely be long but it must be continuous.
- [52] The requirements for an easement of prescription are:

- (1) There must be user for a period of forty (40) years;
- (2) The user must be a user in fee simple. **Davis v Whitby** [1973] 1 WLR 629 at 630E; **Simmons v Dobson** [1991] 1 WLR 720 at 723;
- (3) The user must be continuous;
- (4) The user must be against another fee simple owner; and
- (5) The servient fee simple owner must have acquiesced.

User for a period of forty (40 years)

[53] The claimant's case is based on his evidence and the evidence of his mother Mrs. Barbara Sharpe. The interruption having occurred in 2017 and the claim having been filed in 2017, for user to be for a period of forty (40) years, the user had to commence in 1977.

[54] Mrs. Sharpe's evidence is that she met Mr. Elford Pope-Roberts in 1976 while she was living at Lowmans Windward. Mrs. Sharpe's evidence of when user of the path commenced is outlined in paragraphs 4 and 9 of her witness statement. In paragraph 4 of her witness statement, she stated:

"There was no proper access road to our home so we walked through my ex-husband mother's property to get to and from, that is the path in dispute which is now blocked."

[55] Further in paragraph 9:

"Sometime in January 2017, I received information from my son Andy that the road leading to our house was blocked. A road I knew from since I knew my ex-husband because he used to work some lands before the house was even there."

[56] Mrs. Sharpe's evidence is not precise when user of the path commenced. While she stated that she knew the path in 1976, she gave no evidence of use of the path in 1976. The house was purchased in 1979, the period of user would be less than the forty (40) year period.

[57] The claimant's testimony is that in the early 1980s, himself and his parents and siblings used the path to access their home on the property. I note under cross-examination Mrs. Sharpe testified that the claimant was born on 2nd May, 1980. The claimant therefore cannot testify to user of the path prior to May 1980.

User in fee simple

[58] The authorities such as **Davis v Whitby** [1973] 1 WLR 629 and **Simmons v Dobson** [1991] 1 WLR 720 show that the person claiming the right of way must show that the user has the fee simple title of the dominant tenement. Similarly, the user must be against a fee simple owner of the servient tenement.

[59] The evidence of the claimant is that the property was originally Crown land. His father who occupied the property before him was not the fee simple owner. In fact, his father occupied the property with the permission of his mother Priscilla Pope who subsequently purported to hand over the use of the property to his father. He exhibited a rent receipt dated 24th September 1990 which showed his father making a payment of \$400.00 to the Agriculture Office for Priscilla Pope for the land. This clearly shows that neither his father nor grandmother was the fee simple owner of the property in 1990. Further the claimant submitted several receipts dated as late as 2016 where \$400.00 was paid for lease of the property.

[60] The claimant also exhibited two letters which he testified were under the hand of his father. But neither of these letters assist the claimant's case. The letters are brief, so I will outline them.

"May 14, 2012

Mr. Adolphus Ollivierre,

Chief Surveyor Land and Surveys Department Kingstown

Dear Mr. Ollivierre,

I, the undersigned Elford Pope-Roberts of the abovementioned village, have been an occupant of a house lot and agricultural lands at Lauders Estate for over a period of thirty (30) years. I hereby state that I no longer able to pay and humbly request transfer of ownership of the same to my son Mr. Olfred Sharpe currently residing in Tortola, BVI.

.....

Elford Pope-Roberts”

In the above letter Elford Pope-Roberts acknowledged that he was in occupation of a house lot and agricultural lands and could no longer pay for same. He never claimed to be the owner of the land as indeed he was not. The second letter reads:

“August 17th 2015

To whom it may concern,

I Elford Pope-Roberts writing to inform you that, I hereby agree to transfer ownership of my house located in Chapmans Village and any responsibility hereafter, to my son Olfred Sharpe.

Thank you for considering my transfer.

Sincerely

Signed.....

Owner: Elford Pope-Roberts.”

[61] The earliest receipt exhibited by the claimant showing Elford Pope-Roberts paying for the land is 24th October, 1988.

[62] Further the claimant stated in his Amended Witness Summary dated 4th May 2023 at paragraph 19 that:

“On or about 1976 his father Elford Pope-Roberts leased 2 acres of Crown land at Chapmans Village for farming and rearing of animals where he lived with his family.”

[63] The claimant was not born until 2nd May 1980 and therefore could not testify of matters prior to that date. He provided no documentary evidence to support his contention. No details of the lease are provided nor was a lease exhibited. In any event at best the claimant’s father was a lessee of the Crown. He was not the owner in fee simple of the property.

Fee Simple Ownership of the Servient tenement

[64] The claimant has not adduced any evidence to show that Priscilla Pope was the fee simple owner of land on which the footpath is situate. The evidence is confined to the period of ownership of the defendant who obtained fee simple ownership by Deed No. 142 of 2017. Prior to that there is no evidence of fee simple ownership of the servient land.

Continuous User

[65] The claimant being born in 1980 could not give evidence of continuous user over a 40-year period. Further he alleged the path was blocked in 2016 and the claim was instituted in August 2017. His witness, Mrs. Sharpe, also could not give evidence of continuous user for 40 years, since her evidence is that she migrated to the British Virgin Islands in 1986. While she testified that she visited on vacation and used the path when she did so, she gave no details of the frequency or length of her vacations. The claimant has failed to adduce evidence of continual user over a 40-year period.

Servient owner Acquiesced

- [66] The evidence of Mrs. Sharpe is herself and husband and family used the path to access the home without any permission from anyone.
- [67] I prefer the evidence of the defendant on this issue. The servient land was originally occupied by the grandmother of the claimant and the defendant. I believe the defendant's evidence that Priscilla required persons to seek her permission to pass through the land, this led himself and his father on occasions to use the access along the mountain. Seeking permission passing through neighboring land is in keeping with village norm.
- [68] For the claim of a right of way by prescription to succeed, the claimant had to meet all of the requirements. This he failed to do. I will now turn to the second part of his claim.

Easement by Necessity

- [69] Learned Counsel for the claimant submitted that an easement of necessity exists where a claimant can establish that without the provision of the desired easement, it becomes impossible to make use of his own tenement and referred to the following passage in **Leslie Emmanuel et al v Ace Engineering Limited et al** DOM HCV AP 2013/0014:

“An easement of necessity is one without which the property retained cannot be used at all and not one merely necessary to the reasonable enjoyment of that property. Such easement will be implied if the remaining land is effectively landlocked. The right of way arises out of necessity, not convenience. It would be most dangerous to hold that where a deed is silent as to any reservation of a way, because it is more convenient to use that way than another, it must exist as a way of necessity. Further, once alternative access is available, even if it is by water rather than

land, no matter how inconvenient, a right of necessity cannot arise, unless that other way is merely precarious.”

Also, in **Elements of Land Law** at Paragraph 8.132:

“It is vital however, that the necessity pleaded be by the transfer of the land and not be merely a form of necessity which arose after that date.”

[70] Learned Counsel submitted that the site visit undermined the defendant’s assertion that the claimant has alternative access to his property. Rather it supports the claimant’s evidence that the disputed path over the defendant’s land represents the primary and functional means of entry to the claimant’s land. The site visit highlighted the significant topographical challenges present on the surrounding land. The hillside pathway has a steep embarkment. It is narrow and unsuitable for regular entry or exit.

[71] Similarly, the site visit revealed that access from the main road is impractical. It is steep and mountainous in nature. It presents severe physical limitations which would make construction of a roadway extremely difficult and impractical.

[72] There is no viable alternative access to the claimant’s land. The claimant’s property is effectively landlocked without access across the defendant’s land.

Defendant’s Submissions

[73] Learned Counsel Ms. Maia Eustace submitted that, to sustain a claim that a purported right of way exists by necessity, the claimant must establish that there is no alternative access from the claimant’s land to the main road. Learned Counsel referred to the case of **Manjang v Drammeh** (1990) 61 P & CR 194 and submitted that an easement by necessity will not be implied

if there is any other existing means of access to the property, even if that alternative access is highly inconvenient, impractical, or only accessible by non-standard means such as by boat.

[74] Learned Counsel submitted that the Survey Plan (C24/117) shows that the claimant's land benefits from generous alternative access from the main road on its southeastern boundary. The Court should therefore not imply a right of way by necessity.

[75] In further submissions filed after the visit to the locus, Learned Counsel submitted that two access points were shown from the claimant's land, being a well-worn path along the hillside and access from the main road at the claimant's southern boundary. The hillside path is unobstructed and neither hindered by the embankment.

[76] The main road access is also available to the claimant. While the claimant contends that it has severe physical limitations which would make construction of a pathway extremely difficult or impractical, the defendant contends that an easement of necessity of right of way is access to the property, not roadway access but a pedestrian path. The visit to the locus shows that the hilly nature of the main road access is typical of the topography of mainland St. Vincent where residential construction at steep gradient is commonplace. Creating access is neither difficult nor impractical to overcome, but Learned Counsel for the defendant concedes that it may be expensive. However, inconvenience does not give rise to the creation of an easement of necessity.

Discussion

[77] The applicable principles are not in dispute. They are the principles outlined in **Megarry & Wade: The Law of Real Property** where the learned author stated:

“If some other way exists even if it is by water rather than over land, no way of necessity will be implied unless that other way is merely precarious and not as of right, or unless, perhaps it would be a breach of the law to use that other way for the purpose in question. Nor will there be a way of necessity if the other way is merely inconvenient, as where the land abuts on a highway in a cutting 20ft below; for the principle is that an easement of necessity is one without which the property retained cannot be used at all and not one merely, necessary to the reasonable enjoyment of that property.”

[78] Having heard the evidence and read the submissions of the parties, the Court ordered a visit to the locus. The parties and their Counsel along with the Senior Bailiff visited the locus physically while the Court simultaneously viewed the locus via Zoom. At the end of the visit Counsel were given the opportunity to further cross-examine the parties and to file further submissions.

[79] The visit to the locus revealed that there is an alternative path to the claimant’s house. This path is not a motorway but a footpath. The parties, Counsel and the Senior Bailiff all walked the path to the claimant’s property. The visit also showed that the claimant could access his property by making a footpath from the main road. I agree that the terrain is steep. However, the claimant did not adduce any expert evidence to show that the access could not be gained from the main road, or the alternative path was treacherous. Rather, the visit showed that the alternative path was well-worn. I therefore find that the claimant has failed to establishment an

easement of right of way by necessity. The claimant has alternative access to his property albeit it is a longer way, he can also construct a path from the main road.

Implied Reservation/ Easement

[80] Learned Counsel for the claimant submitted that there was an implied easement of a right of way based on the common intention of the parties, being the claimant's father Elford Pope-Roberts and his mother Priscilla Pope.

[81] At the outset I wish to state that easement by common intention did not form part of the claimant's pleaded case. The defendant made no submissions on this issue and in my opinion rightly so.

[82] Learned Counsel for the claimant referred to the following dictum of Lord Parker in **Pwllbach Colliery Co, Ltd v Woodman** [1915] AC 634 (646-647):

"The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

And:

"... it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough

that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use.”

[83] Learned Counsel submitted that an implied easement arose on or about 1976, when the claimant’s father, Elford Pope-Roberts, leased 2 acres of Crown Land at Chapmans Village for farming and rearing of animals where he lived with his family. The said land adjoining the defendant’s land. Receipts that the claimant’s father had paid the claimant’s grandmother for the property were exhibited. The payments implied that Ms. Pope was handing over the land to the claimant’s father and the footpath was also handed over. There was therefore a common intention between the claimant’s father and grandmother with respect to the footpath.

[84] There is no merit in these submissions. It is not disputed that the land which the claimant and his brother owned, (the Crown Grant is in the name of Olfred Sharpe and Chris Sharpe) was Crown land. No lease in favor of Priscilla Pope was exhibited nor was a lease in favor of Elford Pope-Roberts exhibited. Receipts for rent were exhibited of payments made by Elford Pope-Roberts from 1988 and one payment made on behalf of Priscilla Pope.

[85] The onus was on the claimant to show that there was a common intention for his predecessor in title to have a right of way across the defendant’s land. The claimant had no direct evidence of such common intention nor any evidence from which a common intention could be inferred. Payments made by Elford Pope-Roberts to the Ministry of Agriculture from 1988 and a receipt of a payment made on behalf of Priscilla Pope in 1990 was not sufficient to establish an implied grant/ common intention of an easement of right of way over the defendant’s land.

Nuisance and Injunction

[86] The claimant having failed to establish that he has a right of way over the defendant's land, no issue of nuisance arose, and there is no basis for the grant of an injunction against the defendant.

Costs

[87] The parties have agreed that each party shall bear their own costs.

Order

[88] It Is Ordered:

- (1) The Claimant's claim is dismissed.
- (2) Each party shall bear their own costs.

Gertel Thom

High Court Judge (Ag.)

By the Court

Registrar