Hilary Term
[2024] UKPC 4
Privy Council Appeal No 0060 of 2021

JUDGMENT

Joseph W Horsford (as Administrator of the Estate of William Horsford, deceased) (Respondent) *v* Geoffrey Croft (Appellant) (Antigua and Barbuda)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda)

before

Lord Lloyd-Jones
Lord Kitchin
Lord Sales
Lord Burrows
Lord Richards

JUDGMENT GIVEN ON
5 March 2024

Heard on 2 May 2023

Appellant
Sylvester Carrott
(Instructed by Harold Lovell & Co (Antigua)

Respondent
Justin L Simon KC
(Instructed by Charles Russell Speechlys LLP (London))

LORD RICHARDS:

Introduction

1. The principal issue on this appeal is whether two parcels of land owned by the Appellant have the benefit of a right of way over an adjacent private road owned by the Respondent. There is no express right of way, but the Appellant contends that a right of way exists as an easement of necessity. At first instance, Cottle J held in favour of the Appellant, but his decision was reversed by the Court of Appeal.

The facts

2. The parcels owned by the Appellant ("the Appellant's land") and the private road are at Monk's Hill in the parish of Saint Paul on Antigua. They once formed part of an estate extending to some 30 acres owned by William Horsford.

3. William Horsford died intestate in 1934. On 1 December 1969 letters of administration were granted to his widow, Hilda Horsford, and to his son, Joseph W Horsford, the Respondent.

4. On 17 May 1979, at first registration under the Registered Land Act 1975, the estate was registered as Registration Section Falmouth and Bethesda, Block 34 2482B, Parcel 26 ("parcel 26") with absolute title in the name of the "Personal Representative of the Estate of William Horsford (deceased)" ("the Personal Representative"). The Respondent has been the sole personal representative since his mother died on 12 December 1983.

5. Over the years following its first registration, parcel 26 has been divided into a substantial number of registered parcels, many of which were sold and transferred. In 1992, parcel 171, comprising about two-thirds of an acre, was created and registered in the name of the Personal Representative. On 22 October 1992, parcel 171 was conveyed to the Respondent in his personal capacity and in 1993 it was registered in his name with absolute title.

6. Parcel 171 was bounded by two roads, an upper road to the east and a lower road to the west. Both roads are, and have at all material times since 1979 formed, part of land registered in the name of the Personal Representative.

7. The upper eastern road, known locally as Monks Hill Road, was registered in 2012 as parcel 281 in the name of the Personal Representative. The right of way for which the Appellant contends is over this road. It runs for a length of approximately 320 metres in a southerly direction from the Appellant's land to the point at which it connects with a public road.

8. The lower western road is bordered by some eleven or twelve properties on both sides. It runs from a point to the north of the Appellant's land to a point to the south where it meets a property registered as parcel 302, which is owned by an unconnected third party. The official title map prepared by the Survey & Mapping Division of the Ministry of Agriculture, Lands and Marine Resources ("the title map") shows a track continuing south for approximately 150 metres, bordered by parcels 302 and 303 to the west and parcels 260 and 219 to the east, all owned by unconnected third parties. The title map shows no continuation of the track beyond parcel 219, but in fact the track runs south for a further 400 metres or so until it connects with the public road. There exists therefore in fact a track running for a distance of approximately 550 metres which connects the southern end of the lower western road with the public road.

9. There is little or no evidence in the record as to the ownership of this track. It does not itself comprise a separate registered parcel but appears to run over land comprised in registered parcels owned by unconnected parties.

10. By a contract dated 31 January 2002, the Respondent in his personal capacity agreed to sell parcel 171 to Ms Joanna Tobitt. Clause 7 of the contract provided:

> "The Vendor shall, prior to the completion date, clear and make useable by vehicles the lower road that provides access to the Property and further clearly mark out and identify for the benefit of the Purchaser all of the boundary stakes relevant to the Property."

11. Legal title to parcel 171 was never transferred to Ms Tobitt. In 2005, it was divided into two separate parcels of approximately equal size, numbered 217 and 218, and legal title to both parcels was transferred to Paul van Beek, Ms Tobitt's partner. Each parcel was bordered by the upper eastern and lower western roads, but most of the border with the upper eastern road formed part of parcel 217 and most of the border with the lower western road formed part of parcel 218.

12. Mr van Beek sold parcel 217 to the Appellant, who was registered as the legal owner on 1 December 2006. Parcel 217, like parcel 218, sloped at a steep gradient from the east to the west. The Appellant built his home at the upper end of parcel 217, close to the upper eastern road. He subsequently built a cottage, also close to the upper eastern

road. He sub-divided parcel 217 into two new parcels – a smaller parcel, numbered 291, on which the cottage stands, with the rest of the property comprising parcel 292. The right of way along the upper eastern road is claimed for the benefit of both parcels.

13. On 15 November 2007, the Respondent delivered to the Appellant a letter dated 19 June 2006, which he had previously delivered to the six other property owners residing along the upper eastern road at that time. It stated in part:

> "The Monks Hill Road is a Private Road owned solely and exclusively by myself, and any interference by you or any other person is a trespass. Your rights as it relates to the Monks Hill Road is limited only to your access to your property that forms part of the Monks Hill Estate and is subject to the road conditions based upon normal wear and tear."

14. Although the letter in terms acknowledged a right of access along the upper eastern road, the Respondent subsequently asserted in a letter dated 30 January 2008 that the Appellant was allowed only pedestrian access over the road and, by a letter dated 15 August 2008, demanded payment of $750 per month for vehicular access. The Appellant refused to pay, and the Respondent has since demanded $1,000 per month.

15. The Appellant responded by issuing proceedings against the Respondent, contending that the upper eastern road was a public road. His claim succeeded at first instance, but the decision was reversed on appeal. The road was held by the Court of Appeal to be a private road owned by the Personal Representative.

The present proceedings

16. In 2012, the Respondent issued the present proceedings, seeking a declaration that the Appellant had no right to use the upper eastern road, an injunction to prohibit further use of the road and damages for trespass. By way of defence and counterclaim, the Appellant asserted the existence of an easement of necessity over the road, on the basis that the Appellant's land had no other usable access to the public road. While the Respondent did not plead the existence of any alternative access to the Appellant's land from the public road in his Reply and Defence to Counterclaim, it was the Respondent's case at trial and on appeal that the lower western road, taken with the track that connected it with the public road, (together "the western route"), provided such access and that he had in the past used it for that purpose.

The judgment of Cottle J

17. In his judgment, Cottle J observed at para 9 that it appeared from the survey maps that the Appellant could access his land by means of the lower western road, but at para 10 he said:

> "This court visited the locus in quo. It was at once patent that the access via the western road was only apparent but far from real. The topography rendered it extremely difficult to build a driveway from this road onto the First Defendant's property. But more crucially, the claimant, at the locus in quo, explained that the western road is also his private property and the First Defendant would require his permission to use it. At the entrance to this road the claimant has constructed a gate which he can lock at any time effectively preventing access along this road to the First Defendant's property. The effect of all this is that the First Defendant is landlocked. He cannot access his home unless he passes along one of the roads which [run] from his western and eastern boundaries. Both of those roads are owned by the claimant. This is the epitome of an easement by necessity."

The judgment of the Court of Appeal

18. In the Court of Appeal, Pereira CJ and Webster JA [Ag] agreed with the judgment given by Henry JA [Ag], who at para 19 said:

> "The evidence is that in 1993 when Parcel 171 was transferred and registered to Joseph W. Horsford, he used as access to the public road a path west of the glebe land (the western road). So that Parcel 171 enjoyed a right of way over the lower or western road. An express easement was granted over this road to Ms Tobitt on the transfer of Parcel 171 to her. There is no evidence in the record of Parcel 171 ever enjoying an easement or right of way over the upper or eastern road."

19. Henry JA gave a further reason for allowing the appeal at para 22:

> "Further, there was no finding by the learned trial judge that the lower road did not in fact lead to the public road or that the lower road would take the user over lands of a stranger to the

> grant as submitted by Mr Croft. A right of way across the appellant's land could not be granted on the basis that it was a more convenient way and there was no other basis from which a way of necessity in favour of the upper or eastern road could be implied. Mr Croft therefore has failed to meet the essentials for implication of such an easement."

An express right of way over the western route?

20. In para 19 of his judgment quoted above, Henry JA held that parcel 171 enjoyed an express right of way over the western route. Henry JA first states that, by virtue of the Respondent's evidence that he had used the western route as access to the public road, parcel 171 enjoyed a right of way over that route. However, the Respondent's evidence was an insufficient basis for the existence of a right of way and his case was not put on that basis before the Board.

21. The principal point made in para 19 of Henry JA's judgment, on which the Respondent relies, is that clause 7 of the contract dated 31 January 2002 expressly conferred a right of way over the western route. The Board is unable to accept this. First, it pre-supposes that the Respondent was in a position to grant a right of way over the entire route, because he owned the entire western route. The Board considers the question of ownership of the western route later in this judgment. Second, clause 7 does not in terms grant a right of way. It imposes an obligation to clear and make usable by vehicles "the lower road that provides access to the Property". Performance of that obligation did not require the Respondent to be the owner of "the lower road" but, even if it did, it was no more than an assumption that he was the owner. It may also be noted that, as Cottle J recorded at para 10 of his judgment, the Respondent told the judge that the lower western road was his private property and that the Appellant would require his permission to use it. While this could not alter the true legal effect of clause 7, it is certainly inconsistent with the Respondent's case that clause 7 conferred a right of way.

22. The Board therefore concludes that parcel 171, and the parcels into which it was later divided, enjoyed no express right of way giving it access to the public road. The issue is whether it enjoyed a right of way of necessity and, if so, over which of the two roads.

Easement of necessity: the law

23. There is no dispute as to the legal principles applicable when considering whether there exists an easement of necessity. They were set out by Lord Oliver of Aylmerton, giving the judgment of the Board in *Manjang v Drammeh* [1991] 61 P & CR 194, 196-197:

> “It seems hardly necessary to state the essentials for the implication of such an easement. There has to be found, first, a common owner of a legal estate in two plots of land. It has, secondly, to be established that access between one of those plots and the public highway can be obtained only over the other plot. Thirdly, there has to be found a disposition of one of the plots without any specific grant or reservation of a right of access. Given these conditions, it may be possible as a matter of construction of the relevant grant (see *Nickerson v Barraclough*) to imply the reservation of an easement of necessity.”

24. In *Nickerson v Barraclough* [1981] Ch 426, the Court of Appeal of England and Wales held that an easement of necessity is based on implication from the circumstances, not public policy. Buckley LJ said at p 447:

> “…in my judgment the law relating to ways of necessity rests not upon a basis of public policy but upon the implication to be drawn from the fact that unless some way is implied, a parcel of land will be inaccessible. From that fact the implication arises that the parties must have intended that some way giving access to the land should have been granted.”

The application of the law to the facts of this case

25. Having regard to the legal conditions necessary for the implication of an easement of necessity, the critical time was the transfer of parcel 171 from the Personal Representative to Mr Horsford personally in 1992. This was the last time when parcel 171 and either of the roads were in common ownership. Without a right of way to the public road along one of those roads, parcel 171 was landlocked once transferred to the Respondent personally. Assuming that one of those roads, from parcel 171 to the public road, was owned by the Personal Representative, an easement of necessity in favour of parcel 171 would exist along that road. If both roads, from parcel 171 to the public road, were owned by the Personal Representative, an easement of necessity would exist along one of them. Given that there was no express grant of an easement, the choice of road would depend on all the relevant evidence, including the evidence of use.

26. Essentially, the Appellant’s case is and has always been that the upper eastern road was the only road running from parcel 171 to the public road owned by the Personal Representative in 1992 and that therefore a right of way over that road was, by necessity, created in favour of parcel 171 on its transfer to the Respondent personally.

Likewise, the Respondent's case is and has always been that the Personal Representative also owned the lower western road which also provided access to the public road, and that the easement of necessity runs along that road.

27. In order for a right of way to exist over either road, it would need to satisfy a factual and a legal condition. The factual condition is that in 1992 there was in fact access along that road from parcel 171 to the public road. Both roads satisfied this condition. This is clear in the case of the upper eastern road. As regards the lower western road, although no physical road or track appears on the survey map for the full distance required, it is clear from the evidence that such access did in fact exist in 1992 and, indeed, that it continues to exist.

28. The legal condition is that the Personal Representative owned the full length of the road from parcel 171 to the point at which it joins the public road. The upper eastern road satisfied this condition, because it is not in dispute that the Personal Representative owned the full length of that road.

29. It is clear that the Personal Representative owned the lower western road from parcel 171 to the point at which it met parcel 302, but there was no evidence before the court that the Personal Representative owned the further 550 metres of track which connected the lower western road to the public road. Cottle J recorded at para 10 of his judgment that the Respondent had constructed a gate which he could lock at the entrance of the road, which it was agreed was where it met parcel 302. Although not decisive, it suggests that the Respondent did not consider he, whether personally or as Personal Representative, owned the track running beyond the gate to the public road.

30. Cottle J held that the Appellant is entitled to a right of way as a matter of necessity over the upper eastern road "as there is in fact no other access to the property of the [Appellant]". As legal support for this conclusion, Cottle J relied on the decision of the High Court of Australia in *Dabbs v Seaman* (1925) 36 CLR 538. However, that case concerned an estoppel arising from the description of the property in the transfer and is not applicable to the facts of the present case.

31. The Court of Appeal reversed Cottle J's decision on the basis that he had made no finding that the western route to the public road, starting with the lower western road, would take the user over the land of other persons. The Court of Appeal was in effect saying that the burden of proof as regards ownership of the track connecting the lower western road to the public road lay with the Appellant.

32. It is the view of the Board that the Court of Appeal in this respect adopted the wrong approach. The Appellant asserted an easement of necessity over the upper eastern road. It is not in dispute that both the factual and legal conditions described above were

satisfied in the case of that road. The Respondent sought to meet the Appellant's case by asserting that both conditions were satisfied as regards the western route, including the lower western road, and that an easement of necessity existed over the full length of that route. In those circumstances, it was for the Respondent to lead evidence to satisfy the factual and legal conditions. As regards the legal condition, it does not appear that there was any evidence before the court as to the ownership of the track between parcel 302 and the public road, or as to any other legal basis on which the Personal Representative could grant a right of way over that land. Other than the gate installed by the Respondent, there was a complete absence of evidence on this central issue on which the Respondent had to succeed to defeat the Appellant's claim to a right of way over the upper eastern road. The result is that the Respondent is unable to establish that the Appellant could enjoy a right of way to the public road by means of the western route.

33. It necessarily follows that the Appellant was entitled to the declaration that he sought in his counterclaim that he had a vehicular and pedestrian easement of necessity over parcel 281, the upper eastern road.

Encroachment

34. A secondary issue concerns the Respondent's claim that the Appellant had constructed a wall and a building that encroached on to parcel 281. The Respondent adduced an unchallenged report of a surveyor that showed a total encroachment of approximately 420 square feet. The Respondent sought damages for trespass and an order that the Appellant remove the building from parcel 281.

35. The Appellant resisted this claim on the basis that the boundary between parcel 217 and parcel 281 had not been fixed pursuant to section 17 of the Registered Land Act and that therefore, by virtue of section 17(4), the Respondent's claim could not be entertained until the boundary had been fixed.

36. Cottle J accepted the Appellant's defence, but the Court of Appeal held that there was no dispute as to the boundary such as to engage section 17(4). It held that the claim for damages for trespass succeeded but it refused, in the circumstances of the case, to grant any mandatory or prohibitory injunctive relief. It made an order for damages to be assessed.

37. The Board considers that the Court of Appeal was correct. Section 17(4) provides that no court shall entertain any action or other proceedings "relating to a dispute as to the boundaries of registered land" unless the boundaries have been determined by the Registrar. However, as the Court of Appeal correctly found, no dispute existed as to the boundary. The Appellant has not advanced any case to indicate that the boundary was

different from that asserted by the Respondent. Nor has the Appellant adduced any evidence to contradict the surveyor's evidence as to the extent of the encroachment.

38. The Board therefore considers that the appeal as regards the encroachment should be dismissed.

Conclusion

39. For these reasons, the Board will humbly advise His Majesty to allow the appeal as regards the right of way over the upper eastern road and to make a declaration that the Appellant is entitled to a pedestrian and vehicular right of way over parcel 281, but to dismiss the appeal against the order for the assessment of damages as regards the encroachment.