

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2014-04577

BETWEEN

NICHOLAS ST ROSE

Claimant

AND

RATTAN RAMKISSOON

Defendant

Before the Honourable Madam Justice Margaret Y Mohammed

Dated the 25th May, 2017

APPEARANCES

Mr. Selwyn Mohamed instructed by Mr. Akhail Khan Attorneys at law for the Claimant.

Mr. Vashist Maharaj at law for the Defendant.

JUDGMENT

1. The Claimant instituted the instant action seeking damages for the blocking of a right of way on Basilon Lane, Tunapuna (“the right of way”); an injunction ordering the Defendant to remove all steel and concrete structures constructed in the right of way which have prevented the Claimants, his servants and/or agents from having ingress or egress to and from his premises situated at No 5 Basilon Lane Tunapuna (“the Claimant’s premises”); an injunction restraining the Defendant his workers and agents from continuing further construction works which has blocked and prevented the Claimant his servants and/or agents from entering or leaving the Claimant’s premises; interest and costs.

2. The Claimant's case is by deed dated the 29th August 2008 and registered as DE200802519724 ("the 2008 deed") he became the owner and occupier of the Claimant's premises. Part of the western boundary of the Claimant's premises is bounded by Bason Lane but in error the 2008 deed stated that it was Bason Street. However, by 2015, the error was corrected by a Deed of Rectification registered as DE201501423189 ("the 2015 deed") where the words "Bason Street" were replaced with "Bason Lane". The Claimant asserted that he is entitled to a right of way over Bason Lane since his predecessors in title have enjoyed such a right for over 80 years before this action without interruption. In his own right he averred that he has been using the right of way for the past 7 years.

3. The Claimant also pleaded that on or around 26th November, 2014 the Defendant obstructed Bason Lane by placing a concrete platform in it. On Monday 4th May, 2015, the Defendant completely blocked the Claimant's access to the Claimant's premises preventing him from entering or leaving it via Bason Lane. By a letter dated 13th February, 2014, a letter was delivered by hand to the Defendant with respect to the construction works. The Defendant did not respond to the letter. As a result of the Defendant's actions, the Claimant asserted that he has been prevented from the enjoyment of the right of way over and has suffered loss and damage.

4. The Defendant averred that he purchased his property ("the Defendant's property") in 2014 and that the Defendant's property is contiguous to the Claimant's premises. He admitted that on the 26th November 2014 he placed a concrete platform on the Defendant's property. According to the Defendant, he is constructing a building on the Defendant's property which is contiguous to the Claimant's premises. He denied that the Claimant is entitled to a right of way over Bason Lane. The Defendant averred that Bason Street passes in front of the Claimant's premises on the eastern boundary line. He denied that there is any private or public right of way from Bason Lane to Bason Street and vice versa. He also asserted that there is a right of way on Bason Lane but it does not reach up to the Claimant's premises and that the Claimant has direct access to the Claimant's premises on the eastern side from Bason Street. He denied that he has disturbed the Claimant's enjoyment of the right of way on Bason Lane

on the basis that the Claimant never had a right of way over Basilon Lane and therefore the Claimant is not entitled to the relief sought.

5. The issues to be determined at the trial are:
 - (a) Is Basilon Lane a public right of way?
 - (b) If not, is Basilon Lane a private right of way and if so, is the Claimant entitled to its enjoyment?
 - (c) Who is liable in damages?

6. At the trial, the Claimant gave evidence in support of his claim. He also called Mrs Rosaline Wills-Mohammed and Dr. Raid Al-Tahir. The Defendant gave evidence and he called one witness Mr Ramkissoon Rajaram.

Is Basilon Lane a public right of way?

7. It was argued on behalf of the Claimant that he has proven that Basilon Lane is a public road since Basilon Lane is labelled as an existing road on a survey plan dated 20th November 2015 (“the 2015 plan”) and it was unchallenged by the Defendant. It was also submitted that the report of Dr Raid Al-Tahir (“the expert report”), the Court appointed expert on photogrammetry also proved that Basilon Lane is a public road. In any event the Claimant submitted that it was not in issue that Basilon Lane was a public road since the Defendant never so pleaded.

8. The Defendant submitted that the onus was on the Claimant to prove that Basilon Lane was public road and that the Claimant has failed to provide any proof that Basilon Lane is a local road maintained by the Regional Corporation and therefore he failed to establish that Basilon Lane in the 2015 deed is a public road.

9. Lord Cairns in **Rangeley v Midland Railway Company**¹ described the distinction between a public road and a private right of way as:

¹ (1868 1r 3 Ch App 306)

“There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected to a dominant tenement. In truth, a public road or highway is not an easement it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities of otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement.”²

10. Therefore the most important element of public roads is that they are maintained by public funds.

11. **Section 2(1) of the Highway Act**³ (“the Highways Act”) defines a Highway as follows:

“Highway” means the whole or part of any road thoroughfare, street, trail, trace, or way maintainable at the public expense and dedicated to the public use whether by way of express or implied grant, or by proclamation of the President or by a declaration made by a local authority or by the Minister in accordance with the provision in that behalf in Part IX and includes bridges, culverts, footways, sidewalks, and the adjoining reserves necessary to a highway.

12. **Section 3(1) of the Highways Act** classifies the applicable roads as:

“3 (1) On the coming into operation of this Act, the Minister shall, classify the highways in Trinidad and Tobago in accordance with the classification set out as follows:

- (a) main roads;
- (b) special roads;
- (c) secondary roads;
- (d) local roads;

² At page 311

³ Chapter 48:01

- (e) streets;
- (f) development roads;

and the Minister may be Order add to or remove s highway from a class.

13. The Local Authority is statutorily obliged under **Section 17 (4) of the Highways Act** to keep a listing of all local Roads.

“17 (4) Every local authority shall cause to be made, and shall keep corrected up to date, a list of the local roads, street and development roads within the area of the authority which are highways maintainable at the public expenses; and every list made under this subsection shall be kept deposited at the offices of the authority by whom it was made and may be inspected by any person free of charges at all reasonable hours.”

14. I do not agree with the Claimant’s submission that the Defendant failed to plead that Babilon Street was not a public road since paragraph 3 of the Defence specifically denies that Babilon Lane is a public road. Therefore it is an issue for the Court to determine.

15. In my opinion, the naming of the Babilon Lane on the 2015 plan and the expert report does not mean that Babilon Lane is a public road. Private lanes and roads can be so named on survey plans but this mere act does not make them a public road since one of the key distinguishing factors of a public road is that it is maintained at the public expense. There was no evidence adduced by the Claimant to demonstrate that Babilon Lane is maintained in any manner at the public expense and in the absence of such evidence the Court cannot find that Babilon Lane is a public road.

If not, is Babilon Lane a private right of way and if so is the Claimant entitled to its enjoyment?

16. The Claimant contended that he is entitled to a right of way through Babilon Lane by reason of his predecessors in title having enjoyed it for over 80 years before the institution of the instant action without interruption and in his own right for the past 7 years. He asserted that the

Claimant's premises is bounded on the west partly by the lands of Ramlogan and partly by Basilon Lane since 1942.

17. The Defendant's position was that the Claimant did not specify the nature of the right of way which he is claiming. He did not specifically plead a private right to the right of way or alternatively a public right of way. He has not set out how the right of way was acquired. He has also not stated that the right of way is across any servient tenement owned by the Defendant and the Statement of Case failed to indicate that the right of way was created by a grant as such the Claimant's claim is not based on an easement.
18. An easement is a right over the land of another. There must be a dominant tenement and a servient tenement. The portion of land which acquires the benefit of an easement is called the dominant tenement while the portion of land which serves the dominant tenement is the servient tenement.⁴The right of an easement, once established, is enforceable over all successors in title to the dominant tenement and against all successors in title to the servient tenement. The tenements need not be adjacent but must be sufficiently close so that the dominant tenement actually receives a benefit from the easement. Generally, to be valid in law, an easement must be created by Deed or other "writing," or by Statute.
19. A person asserting an easement must state in his pleadings the nature of the title under which he claims, that is to say, whether by statute or by grant, expressed or implied or by prescription and if he alleges by prescription how he alleges the prescription arose. If the easement is being claimed by grant, the words of the grant must be referred to and it must be shown how title is derived under it⁵.
20. There was no expressed grant pleaded by the Claimant. The schedule to the 2015 deed describes the boundaries of the Claimant's premises as:

⁴ Re Ellenboroug Park [1956] Ch. 131

⁵ Atkins Court Forms 2nd ed 17(1) Issue Para [19]-[20]

“ALL AND SINGULAR that certain piece or parcel of land situate in the Ward of Tacarigua in the Island of Trinidad, comprising of FIVE THOUSAND AND NINE (5009 S.F.) SUPERFICIAL FEET (being portion of a larger parcel of land measuring 26 feet in front along the Eastern Main Road 275 feet along the Eastern Boundary Line and 53 feet along the Western Boundary Line) and abutting on the North upon lands of Alfred Antoine on the South upon the remaining portion of lands belonging to Christina Bourgeois, on the East upon the lands of the heirs of Parker Greaves and on the West partly by lands of Ramlogan, partly upon a lane formerly known as North Lane now Basilon Lane with all rights easements and liberties and all privileges exercisable and enjoyed therewith which said parcel of land is delineated and coloured pink on the Plan to Deed No. 6685 of 1942 together with the buildings thereon and the appurtenances thereto belonging.”

21. In my opinion, the Schedule to the 2015 deed only describes the land being conveyed and there are no words in the 2008 deed or the 2015 deed that show an easement was created or that there was any intention to create an easement. Therefore there is no expressed grant of any easement or private right of way over Basilon Lane created by the 2008 deed or 2015 deed.
22. There was also no evidence that there is any easement created by statute.
23. Therefore for the Claimant to succeed in the instant case the onus was on the Claimant to show that there was an implied grant of an easement. There are three ways by which an easement may be implied: (i) under the rule in **Wheeldon v Burrows**¹⁶ (ii) as an easement of common intention; (iii) as an easement of necessity.
24. The rule in **Wheeldon v Burrows** was explained by Lord Thesiger¹⁷ as “*on the grant by the owner of a tenement of part or that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which of course I mean quasi easements) or in other words all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted ...*”

25. To prove that an easement has been created under the rule in **Wheeldon v Burrows** it is therefore necessary for the Claimant to show that:

- (1) the dominant and servient tenements have at some time been in common ownership;
- (2) the common owner disposed of one tenement, retaining the other, or disposed of both simultaneously;
- (3) the right claimed is such that it could form the subject matter of an express grant;
- (4) it was continuous and apparent;
- (5) it was necessary for the reasonable and convenient enjoyment of the property conveyed;
- (6) at the time of the grant it had been used by the grantor for the benefit of the part conveyed.

26. An easement cannot be acquired under the rule **Wheeldon v Burrows** unless there is evidence of actual use by the common owner prior to and at the time of the grant. There was no evidence that the Claimant's premises and Basilon Lane were at some time in common ownership and that the common owner disposed of either the Claimant's premises and retained Basilon Lane or disposed of both simultaneously. I have already found that there was no express grant in the 2008 deed or 2015 deed. The Claimant having failed to prove these elements the Court cannot imply an easement under the rule in **Wheeldon v Burrow**. Therefore he cannot rely on this doctrine to establish his claim for a right of way on Basilon Lane.

27. The requirements for establishing an easement of common intention were set out in the judgment of Nourse LJ in **Stafford v Lee**⁶ as:

“The law will readily imply the grant or reservation of such easements as maybe 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 is to be used. See *Jones v Pritchard and Lyttleton Times Co. v Warners*. But 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

⁶ (1992) 65 P&CR 172 at page 175

definite and particular use ... There are ... two hurdles which the grantee must surmount. He must establish a common intention as to some definite and particular user. Then he must show that the easements he claims are necessary to give to it”.

28. Again, there was no evidence that there was any common intention at the time the Claimant acquired the Claimant’s premises for him to have use of Basilon Lane in order for him to enjoy it. Therefore the Claimant cannot rely on this doctrine to establish a claim of a right of way over Basilon Lane.

29. Section 2 of the **Prescription Ordinance**⁷ provides:

“Where any claim shall be made to any right of common or pasture, or other pasture, or other profit or benefit, except rent and services or to any way or other easement, or to any watercourse or the use of water, to be taken or enjoyed or derived upon, over or from any land or water of the State or anybody corporate or person and such right of common or matter as hereinbefore mentioned shall have been actually enjoyed by any person, claiming right thereto without interruption for the full period of sixteen 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.

30. To establish an easement based on prescription the Claimant must prove (i) that the user was of right, that is to say, that the enjoyment was not by force, in secret or by permission; (ii) that it was continuous for an uninterrupted period of 16 years; and (iii) it was in fee simple.

31. The Claimant’s evidence was that he has enjoyed the uninterrupted use of the right of way since he purchased his property in 2008. Mrs Rosalie Wills-Mohammed was the previous owner of the Claimant’s premises. Her unchallenged evidence was that she purchased the Claimant’s premises in 2005 and that Basilon Lane was used to access it. The Defendant’s evidence was that when he acquired the Defendant’s premises in 2014 the Claimant was using Basilon Lane to access the Claimant’s premises. His witness Ramkissoo Rajaram also stated

⁷ Chapter 5 No. 8

in cross examination that he was aware that the Claimant used Basilon Lane to access the Claimant's premises. There was no evidence that the Claimant obtained the permission to use Basilon Lane from anyone and there was no evidence that his use was by force or in secret. Indeed the evidence of the Defendant and his witness Mr Rajaram was that they were both aware that Claimant used Basilon Lane to access his property. Therefore, based on the evidence the Claimant was able to establish that at best since 2005 his predecessors in title enjoyed without interruption the use of Basilon Lane to access the Claimant's premises. However the Claimant has fallen short in establishing that he acquired a right of way over Basilon Lane by prescription since to do so he had to establish that either he or his predecessors in title had enjoyed such a right from at least 2002.

32. A right of way of necessity is defined by **Halsbury's Laws of England**⁸ at paragraph 956 as:

“A way of necessity is a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted to him, or over the land of the grantee where the land retained by the grantor is land-locked.”

33. A right of way of necessity arises where there is no other way by which the grantee can get to the land that has been granted to him. It would not be implied merely on the ground that it would be necessary to the reasonable enjoyment of the property¹⁸. In the words of Hamel-Smith J (as he then was) in **Boisson v Letrean**¹⁹:

“If other means of access exist, no matter how inconvenient, an easement of necessity cannot arise, for the mere inconvenience of an alternative way will not itself give rise to a way of necessity”.

34. A right of way of necessity can only be implied where the grantee has no alternative means of getting to the dominant tenement. The fact that the grantee's land is not fully surrounded by the grantor's land does not affect the power of the Court to give effect to a way of necessity over the grantor's land.

⁸ Volume 87 (2012) 5th Edition

35. **Halsbury's Laws of England** states that:

“A way of necessity can only exist where the implied grantee of the easement has no other means of reaching his land. If there is any other means of access to the land so granted, no matter how inconvenient, no way of necessity can arise, for the mere inconvenience of an alternative way will not of itself give rise to a way of necessity.

Accordingly a way of necessity will not be implied where access can be obtained on foot, though not by car, or by water. It is not necessary in order that a way of necessity may arise that the land granted should be completely surrounded by land of the grantor if the land is partly surrounded by land of strangers and abuts upon land of the grantor. In those circumstances the implication is not rebutted by the fact that at the date of the grant of the land there existed a permissive or precarious approach to it over land of a stranger.”(Emphasis mine)

36. It was the Claimant's case that there is no other means of accessing the Claimant's premises. However the Defendant argued that the Claimant can access the Claimant's premises from the eastern boundary which is Bason Street.

37. In my opinion the Claimant is entitled to a right of way of necessity over Bason Lane since the weight of the evidence supports the Claimant's contention that the only way he can access the property is by using Bason Lane.

38. The Claimant's evidence was that in 2008 he purchased the Claimant's premises and that the only access was by using Bason Lane. He acknowledged that the property he rented from Greaves is separate from the Claimant's premises which is on the western side of the Greaves property. The access to the Greaves property is from Bason Street and not Bason Lane. When the Claimant purchased the Claimant's premises nobody was living on it and he started construction on it one and half years after he purchased. He also constructed a wall and a gate on the western boundary of the Claimant's premises and there was pre-existing fence and gate which he replaced with a wall and a gate. The wall and fence he constructed was in line with the fence of the two properties which was north of the Claimant's premises. He acknowledged

that while there were two properties north of the Claimant's premises, only he used Bason Lane to access the Claimant's premises and he has been doing so for 5-6 years. He said he knew that the Claimant's premises was bounded with Ruiz but he did not know Ruiz and where Ruiz lived. He said he knew Azard Ali but not Antonio and Asgar Ali. He did not know where a road called North Lane was and he did not know about the Defendant's title. In my opinion the Claimant's evidence that the only way he could access the Claimant's premises using Bason Lane was not challenged.

39. Mrs Rosalie Wills- Mohammed stated that she purchased the Claimant's premises in 2005 from Laurel Lynch. When she purchased it there was an old house on the property which was abandoned and the only access to the Claimant's premises is from Bason Lane. In cross examination she stated that she jointly owns the property north of the Claimant's premises, and that none of the houses have an entrance to Bason Lane. After she purchased the Claimant's premises in 2005 she allowed Azard Ali to park on it for a short while and he used Bason Lane to get from Bason Street. Her evidence corroborated the Claimant's evidence that his only means of accessing the Claimant's premises was by using Bason Lane.
40. The Defendant's evidence in his witness statement was he is a businessman who purchased the land in June 2014 ("the Defendant's land"). When he purchased the Defendant's land there was a right of way or footpath on the eastern boundary of the Claimant's premises. According to the Defendant, Bason Lane is a short lane which is north of the Defendant's land but it does not extend to the Claimant's premises and in order for the Claimant to access the Claimant's premises he has to pass over the Defendant's land.
41. In cross examination, the Defendant stated that when he purchased the Defendant's land , the entrance to the Claimant's premises was at the beginning of it and that at the end of Bason Lane there was a concrete wall which was beyond both the entrance to the Claimant's premises and the entrance to the Defendant's land. He estimated that the concrete wall was about 20 feet beyond the beginning of the entrance to the Defendant's land. He also acknowledged that when he purchased the Defendant's land, the Claimant was already in occupation and use of the

Claimant's premises and that the wall was at the end of the Defendant's land which was beyond the entrance to the Claimant's premises.

42. The Defendant also admitted in cross examination that the Claimant used Basilon Lane to enter the Claimant's premises. When he purchased the Defendant's land, Basilon Lane was dirt and he paved part since he believed it to be the Defendant's land and he was building on it, yet he admitted that he did not read the schedule to his deed and he could not indicate to the Court the width of the entrance to Basilon Lane. He also admitted that when he purchased the Defendant's land there were two other persons on the western side of Basilon Lane who were using it.
43. The Defendant evidence in cross examination contradicted his evidence in his witness statement and it did not support his Defence. There was no evidence from the Defendant to prove that the Claimant had access to the Claimant's premises from Basilon Street. In my view, the contradictions by the Defendant in cross examination demonstrated that his evidence in his witness statement was neither credible nor true. In particular, while the Defendant stated in his witness statement that Basilon Lane did not extend to the Claimant's premises, in cross examination he admitted that it extended beyond it and that the Claimant used Basilon Lane to access the Claimant's premises.
44. The Defendant's witness Ramkisson Rajaram was one of the joint co-owners who sold the land to the Defendant. According to Mr Rajaram's witness statement, he has known the area where Basilon Lane is situated for at least 70 years and there has never been a right of way or footpath from Basilon Lane to the Claimant's premises. According to Mr Rajaram, he contacted Mr Hugo Somarsingh in January 2014 ("the 2014 plan") to prepare a survey plan for him. According to him the 2014 plan shows the eastern boundary of the Defendant's lands as that of lands of Audrey Lynch and not Basilon Lane.
45. However, Mr Rajaram's evidence in cross-examination contradicted his evidence in his witness statement. He stated that he was familiar with the area Basilon Lane is situated for 39 years and not 70 years. He admitted that cars used Basilon Lane since they would come in and turn.

There was first a hedge at the end of Basilon Street, later it was replaced with a wire fence and now there is a wall and for 39 years people walked from the Main Road through the hedge unto Basilon Lane. He visited the area 2-3 times each year. He did not know who was on the Claimant's premises before the Claimant. He knew where the Claimant's premises was situated and he was aware that its entrance was before the wall situated at the end of Basilon Lane and that the Claimant used Basilon Lane to access the Claimant's premises. In my opinion the evidence of Mr Rajaram supported the Claimant's case that Basilon Lane extended beyond the entrance to the Claimant's premises and the Claimant used it to access the Claimant's premises.

46. There were four survey plans which were referred to in the pleadings and in the trial. However there was no qualified land surveyor who was called as a witness to assist the Court on these plans.
47. The Claimant annexed two survey plans to his witness statement. He annexed a survey plan dated 3rd December 1942⁹ ("the 1942 plan"). His evidence was that the Claimant's premises was labelled Antonia Ali & Asgar Ali on the 1942 plan. While the Court is no expert on survey plans, an examination of the 1942 survey plan shows that there is a lane on part of the western boundary of the lands of Antonio Ali & Asgar Ali; it extended beyond the northern boundary of the lands of Antonio Ali & Asgar Ali i.e. the Claimant's premises and the end of the land there is a notation of a hedge. Notably on the 1942 plan the only means to access the Claimant's premises was via the lane.
48. The Claimant also annexed the 2015 plan. According to his witness statement Basilon Lane was coloured in orange and it was labelled "existing road". On the 2015 plan there is an "existing road" on part of the western boundary of the Claimant's premises; it extended beyond the northern boundary of the Claimant's premises and the end there is a notation of a brick wall. Like the 1942 plan, in the 2015 plan, the only means to access the Claimant's premises was via the lane. Notably on the 2015 plan, part of Basilon Lane which is part of the western boundary of the Claimant's premises, there are two notations namely "Contilever of Building" on the Defendant's land which overlaps onto Basilon Lane and a brick wall and gate on the

⁹ Exhibit NSR 2 to the Claimant's witness statement

Claimant's premises which is aligned to the western boundary of the property owned by Rosaline Wills-Mohammed and which appears to be in part of the "Existing road".

49. The Defendant annexed a survey plan dated the 10th February 2014 ("the 2014 plan") which was prepared by Hugo Somarsingh on the instruction of the previous owner Mr Rajaram. The 2014 plan was also annexed to Mr Rajaram's witness statement. According to the Defendant's evidence the 2014 plan did not show a right of way or footpath on the eastern boundary line of the Defendant's land. An examination of the 2014 plan shows a notation that the "Existing Road" ended at the northern boundary of the Defendant's land and that it did not extend beyond the eastern boundary. The 2014 plan also shows that the Existing Road did not extend along any part of the lands of "Audrey Lynch" which is the Claimant's premises.
50. Therefore there were three survey plans in evidence. In cross examination Counsel for the Defendant showed Mrs Rosaline Wills-Mohammed a plan dated the 1st November 1965 ("the 1965 plan"). The 1965 plan showed an existing road on part of the western boundary of the lands of Audrey Lynch (the property) with a wire fence at the end of the said road. There was also a marked area along part of the road and on the western boundary of the lands north of the property. Mrs Rosaline Wills-Mohammed stated that she was familiar with the 1965 plan and that the property was labelled "Audrey Lynch". Counsel for the Defendant asked Mrs Wills-Mohammed if the marked area on the 1965 plan meant that Alfred Antoine reclaimed land that was part of the "existing road" to which she responded that she understood that the marked area was always Alfred Antoine's property. Notably the 1965 plan was not tendered into evidence.
51. Dr. Raid Al-Tahir, the Court appointed expert in photogrammetry examined the 1942 plan, the 1965 plan, the 2014 plan, and the 2015 plan in preparation of the expert report. He did not annex any copies of the plans.
52. Dr Al-Tahir stated that he examined aerial photographs dated 1994, 1998, 2003 and 2014 of the area in dispute and he included copies of the said photographs in the expert report. According to the expert report the 1994 photograph was of high resolution and adequate

brightness. Based on his examination of the 1994 photograph he found that Basilon Lane extended beyond the northern boundary of the Defendant's land and it curled towards the structure of the Claimant. He concluded that there was no evidence that there was any fence or gate blocking Basilon Lane.

53. The expert report stated that the 1998 photograph was "*blurry and clear on details*". However despite this shortcoming, he found that Basilon Lane extended beyond the northern boundary of the Claimant's premises. The expert reports stated that the 2003 photographs were high resolution and perfect brightness. The expert concluded that Basilon Lane extended beyond the northern boundary of the Defendant's land; it continued into the southern hedge/ fence and there was no evidence of any fence or gate blocking it. The 2014 photograph was of very high resolution and with colours. After the examination of this photograph the expert concluded that the Defendant's land had been cleared and the structure on the Claimant's premises had been replaced; Basilon Lane extended south beyond the northern boundary of the Defendant's land; there was no fence or gate which blocked Basilon Lane.
54. Based on the aforesaid findings, Dr. Al-Tahir concluded that: (a) Basilon Lane clearly continued south beyond the northern boundary of the Defendant's land; (b) the Claimant had access to the Claimant's premises through Basilon Lane between 1994 to 2014; (c) there was no photographic evidence for the existence of any wall/ fence or gate on Basilon Lane at the northern boundary of the Defendant's land since 1994; and (d) the conclusions are consistent with the 1942 plan, 1965 plan and 2015 plan and dispute the 2014 plan.
55. Dr. Al Tahir was questioned extensively in cross examination. He admitted in cross examination that he was not a land surveyor and he did not have any expertise in the field of land surveying. He admitted that he did not state the width of Basilon Lane in the report. He was shown the 1942 plan and the 1965 plan and he admitted that the lane in the 1965 plan appeared to be narrower than that in the 1942 plan. He admitted that the first time a wall is shown on the western boundary of the Claimant's premises was in the 2014 plan.

56. In my opinion, the expert report and the unshaken evidence of Dr. Al-Tahir in cross examination was that since 1942 to 2015 Basilon Lane extended beyond the northern boundary of the Defendant's land and there was no wall / gate or fence at the northern boundary. This position was consistent with the evidence of all the other witnesses namely the Claimant, Mrs Rosaline Wills- Mohammed, the Defendant and his witness Mr Rajaram. While the Defendant relied on the 2014 plan to demonstrate that Basilon Lane ended at the northern boundary of the Defendant's land, there was no evidence from the surveyor who prepared the 2014 plan to explain the inconsistencies between the 2014 plan and the 1942 plan and the 2015 plan.

Who is liable in damages?

57. Having found that the Claimant has established that he has a right of way of necessity over Basilon Lane to access the Claimant's premises, he is entitled to the relief sought in the Claim.

58. The Claimant pleaded a claim for damages but there was no evidence adduced to show a quantifiable loss.

59. The Defendant admitted in his evidence that he had paved part of Basilon Lane and started construction of a building since he thought that it was part of the Defendant's land. In light of the Defendant's admission I am minded to award nominal damages in the sum of \$7,000.00.

Order

60. The Court finds that the Defendant has obstructed the Claimant's use and enjoyment of Basilon Lane as a right of way to access the Claimant's premises.

61. The Defendant to pay the Claimant nominal damages in the sum of \$7,000.00.

62. The Defendant is to remove all steel and concrete structures constructed on the right of way which prevents the Claimant, his servants and /or agents from having ingress or egress to and from the Claimant's premises.

63. The Defendant is restrained by himself or by his workers or agents from continuing further construction works on the right of way which prevents the Claimant, his servants and /or agents from having ingress or egress to and from the Claimant's premises.

64. Pursuant to Rule 67.5 (2) (c) CPR the Defendant to pay the Claimant costs in the sum of \$14,000.00.

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Margaret Y Mohammed
Judge