REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2014-04043

BETWEEN

RAFFICK BAKS

Claimant

AND

ROBBIE NAIDOO

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. R. Boodoosingh for the Claimant

Mr. A. Manwah instructed by R. Ramsaran for the Defendant

Judgment

1. By amended claim filed on the 13th March, 2015, the claimant claims that he has a right of way over an unpaved road reserve leading from a public road, Arnold Bates Trace, St. Augustine to his home situate at lot 5 Jordon Trace, Santa Margarita, St. Augustine ("lot 5"). According to the claimant, the road reserve measures approximately twelve feet wide and runs from south to north between lots number 6 and 7 Jordon Trace. It is the case of the claimant that the defendant has built his house in the middle of the unpaved road reserve thereby preventing his use of same. Consequently, he seeks a declaration that the said unpaved road reserve exists and an order for the removal of the structure.

2. By amended defence filed on the 17th April, 2015, the defendant denies that there exists an unpaved road reserve measuring twelve feet wide running between lots 6 and 7 and that the claimant has a right of way. The defendant alleges that there exists a footpath between the lots which has never been used as a road way. He denies that he built a structure on the said footpath, but admits that a structure which abuts onto the footpath was built by his uncle, David Mark Naidoo ("David") and has been in existence since 1988.

Issues

3. During the trial, it became apparent that a visit ought to be made to the locus in quo by the parties and their lawyers together. As a consequence, the court adjourned to give the parties the opportunity to explore a compromise, if not of the entire claim, certainly of some issues. In the result, the parties have agreed that a road reserve is in fact delineated and shown on the cadastral sheet of Hugo Somarsingh *(See "A" annexed to the amended Statement of Case filed on the 13th March, 2015).* The parties further agree that the defendant's house in fact abuts onto the purported road reserve. What is in contention is the usage of the purported road reserve, the size of same and whether the structure abutting onto same was recently constructed. As such, those issues of facts must first be determined.

The Evidence

The evidence for the claimant

4. The claimant called one witness in addition to his testimony, namely Nadira Bickram ("Bickram"). At the time of his Witness Statement filed on the 31st July, 2015, the claimant was sixty-three years of age. It means that he was born around 1952. According to the evidence of the claimant, he has been residing at lot 5 since 1972. The claimant testified that he has been using the road reserve since he was ten years of age, which in the courts estimation would be in or around 1962. That his neighbours also used the road to get to and from their houses on Jordon Trace. The claimant further testified that he used the road reserve until the defendant built his house on at least half of the road. That the defendant has threatened the claimant with violence if he passed on the said road. As such, the claimant had to find an alternative way to his house on lot 5. The claimant currently passes through lot 12 (which belongs to his neighbour) to access his house. The claimant testified that when rain falls, it is almost impossible to get to and from his home over lot 12. During cross-examination, the claimant testified that he also accesses his road way through Jordon Trace by climbing up some eighty something steps. According to the claimant's viva voce evidence, after ascending the flight of steps, one will meet the flat piece of road, which was cut by the former owner of the land to provide a path way to enter Arnold Bates Trace. The general public has access to this pathway.

5. During cross-examination, the claimant testified that he purchased lot 5 approximately three years ago. However, the claimant has not produced a deed for lot 5.

6. According to the evidence of the claimant, in the year 1972, the said road was a track about seven or eight feet wide. Over time the road was widened to about ten feet by a tractor. During cross examination, the claimant testified that the ten foot road has now reverted to a track which is much less than ten feet wide. In cross-examination, it was the claimant's viva voce evidence that there never was a road. That the former owner of the land, cut a

roadway and about twenty-five years ago, his neighbours on lot 7 blocked it up by depositing boulders on it. That some of the boulders have since been removed. Due to the fact that his neighbours blocked up the road, no cars have passed on it for the last twenty-five years. The claimant further testified that if the defendant moves his house, he would still be unable to pass along the road with a car, as the road would have to be cut properly in order to pass on same. The court understands and finds that the claimant is not being inconsistent in his testimony when he says that there was never a road. The court interprets this to mean that the claimant is saying that there never was a paved road or an official road, but that a roadway was originally cut.

7. On or about the 13th April, 2013, he received a letter from Hugo Somarsingh and Associates stating that Susan Naidoo (the Defendant's mother) had contracted their services to conduct a survey which abuts his property. The survey was undertaken and the cadastral sheet of Hugo Somarsingh was produced.

8. On or about the 17th October, 2013, the claimant caused his attorney to write to the defendant in relation to the blockage of the said road however there was no response by the defendant. On or about the 17th October, 2013 the claimant caused his attorney to write to the Town and Country Planning Division concerning the defendant's blockage of the road. While the Town and Country Division did not respond to the letter, its officials visited the area.

9. During cross-examination, the claimant denied that the subject house has been there for the past twenty years. He testified that David was living in a ten feet by ten feet wooden shack on the side of the road reserve. That the wooden shack was not in fact situated on the road. The claimant further testified that when the first survey of the land was done in 1987 *(See Cadastral Sheet dated the 25th January, 1987 annexed to the amended Statement of Case filed on the 13 March, 2015 and marked "A")* David was living there.

10. There is one further item of cross examination with which the court must treat before moving on to other evidence. During cross-examination, the Claimant testified that there are two houses on lot 5. He denied that part of one of the houses lies on the road. The

evidence is unclear as to the road and the house of which the claimant spoke at the time. As a consequence the court finds that there is no inconsistency in his testimony in that regard. Taken in the context of the entire case, it is apparent that the claimant was speaking of another house other than the one that is a feature of this claim.

11. **Bickram** has been residing at lot 5 for the past nine years. She is the claimant's daughter-in-law. During cross-examination, she testified that she came to live on lot 5 in 2006. She testified that over the last six or seven years, she has been using the road reserve from Arnold Bates Trace to go to and from her home on lot 5. She further testified that when the defendant built his home on half of the road, he threatened her with violence if she passed on the said road. Consequently, Bickram had to find an alternative way to her home.

12. During cross-examination, Bickram also testified that when she came to live on lot 5, David was still living in his little shack. That the house which was built by the defendant was not built in the same location as the little shack in which David lived. The inference being that the new house was built with part of it encroaching upon the road reserve.

13. The witness also testified that the road reserve is about 13 feet wide. That a car could have passed through the road reserve but that since the defendant built his house on half of the road this has become impossible. She further testified that should the defendant remove his house from the road reserve, she will be able to drive along it to access her home. It was Bickram's clear viva voce evidence that a steep slope does not lie to the southern side of the road reserve. This evidence is in conflict with the evidence of the claimant himself who has had a long history with the area and the pathway or road reserve. The evidence of Bickram is unreliable in this regard on this issue and her measurements are unsupported. Bickram did however write to the Town and Country Planning Division on the 17th October 2012, stating that the defendant built a house which protruded unto the road. This evidence is crucial evidence which shall be referred to later.

The evidence for the defendant

14. The defendant gave evidence for himself. The defendant was born on the 9th June, 1979. His mother, Susan Naidoo ("Susan") is the legal title holder of lot 6. According to the evidence of the defendant, in or about 1988, when he was about nine years old, he started living with his uncle David at his home. David's home consisted of one room and was made out of ply boards, wood and galvanized roofing ("the wooden house").

15. David lived on the lands where the wooden house was located since the 1950's until 1990 when the defendant was about to get married. It follows on his evidence that he would have married at the age of eleven years old. At that time, David vacated the house and moved to Jordon Trace, St Augustine, leaving the wooden house as a wedding present for the defendant. Subsequently, the defendant renovated the wooden house by changing the boards into sturdier material and extended by adding two rooms to the west of the house. During cross-examination, the defendant testified that he never touched the wooden house. That the wooden house which is now his home is in the same location as it has been since its initial construction. That since it was constructed, it has been in the same spot. He is therefore saying that the house has been in the spot shown on the Somarsingh cadastral sheet since he moved in.

16. It was the evidence of the defendant that the lands that are shown on the cadastral sheets *(See "A" annexed to the amended Statement of Case filed on the 13th March, 2015)*, slope downwards in a westerly direction from Arnold Bates circular. As far as he was aware, the claimant and his family always accessed their home by either walking up the pedestrian pathway from Jordon Trace at the bottom of the hill or by using a footpath between his house and lot 7. That the claimant and his family also utilized a pathway to the north of the defendant's house though lot 12 to access their house.

17. According to the evidence of the defendant, no state agency has ever created or maintained an actual roadway or portion designated as a road reserve as shown on the cadastral sheets, the alleged road reserve has never been used as a public roadway and the residents have never used same with vehicles. He admitted that it is not possible to use the roadway as a vehicular access way, as it has not been graded or paved.

18. It was the evidence of the defendant that he has been residing between lots 12 and 7 on that portion stipulated as a road reserve for almost twenty-six years and he has even fenced the lands where he resides. He utilizes that part of the road reserve (delineated on the cadastral sheets) which is east of his house to access Arnold Bates Trace. That his mother also uses that part of the road reserve to access Arnold Bates Trace. The defendant further testified that other people utilize that portion of the road reserve.

The photographs

19. The parties herein visited the site and admitted into evidence photographs depicting the purported road reserve, the Defendant's house and the surrounding areas. The defendant's submissions referred to two photographs which showed what he called the "public road" and the gate of the defendant's house. No explanation or description in relation to the other photographs whatsoever was provided to the court. In those circumstances the photographs were useless as their relevance was not demonstrated on the evidence. The photographs have not assisted the court in determining where the house is situated or where the road reserve is situated. The exercise was therefore one in futility from the court's perspective.

Findings

The size of the road reserve

20. It is abundantly clear on the evidence on both cases that what exists on the lands which has been demarcated as road reserve on the cadastral sheet is in fact a pathway and not the road reserve shown thereon. The claimant has admitted this and so has the defendant. The witness for the claimant has also admitted that there exists a pathway now and says that if the pathway is cleared, one can pass with a vehicle as there is not a steep drop along the edge and south of the road reserve. This evidence is clearly inconsistent with the evidence of the claimant on this issue. The claimant's evidence seems in the court's view to be frankly honest in that regard and is consistent with the evidence of the defendant.

21. It follows as night follows day, the road reserve has certainly not been used by vehicles since the house was constructed in its way. A finding as to when the house was constructed will therefore be instructive. In this regard, the evidence of the claimant and the defendant are not far apart. The evidence of the claimant is that since he was ten years old, in 1962 he has lived at number 5. In those days there was a track or footpath. That track was present even in 1972 but was subsequently widened to a ten-foot road. The neighbours blocked the road reserve with boulders causing it to become unusable for vehicles to pass. According to the claimant, the defendant then built his house thereon also hampering the passage of vehicles. The defendant says that he has lived on the same spot for some twenty-six years and the claimant says that no one has been able to use vehicles on the road for some twenty five years. However, the reason that the claimant gave for not being able to use the road for twenty-five years is the fact of boulders being placed on the road and not the existence of the house.

22. It is therefore the finding of the court that the original passage was a footpath of some seven to eight feet, which was widened by a contractor to ten feet sometime between 1973 and 1988. However, it is not plausible that the defendant was married at age eleven as he says so that the court finds that the defendant could not have occupied in his own right from 1988 as he was an unmarried minor at the time. So that the defendant is either not telling the truth or is mistaken when he says that he was married in 1988. It means that his evidence that he did not rebuild or in renovating did not extend into the road reserve is highly suspicious and unreliable in the court's view.

23. The evidence of both the claimant and the defendant does not assist the court in relation to the date upon which the defendant extended the house into the road reserve. The evidence that's assists the court in that regard comes from the witness, Bickram who testified that the defendant extended the house after she, Bickram moved onto lot 5 in the year 2006. In fact, it is her evidence that the defendant threatened her when she complained to him resulting in her letter to the Town and Country Planning Division. Her evidence on this issue remains strong and incontrovertible. The court finds that the Defendant in fact extended the size of the board house that was gifted to him thereby encroaching on the road

reserve in or around the year 2006 to 2007. It follows that the road reserve was ten feet wide until the encroachment in the year 2006 or 2007 and the court so finds.

The right of way/ easement

Law

24. The court notes that the issue of an easement in strict sense is not before this court as the claim form and statement of case seeks orders that the road reserve exists and that the defendant be ordered to remove the encroachment thereon. The law as regards easements is relevant in so far as the parties have raised the issue of user of the road reserve.

25. An easement is a right in alien solo (in the soil of another): ***See Megarry & Wade, The Law of Real Property, 8th Edition, page 1249, paragrapgh 27-011.*** It is a right annexed to land to utilise other land of different ownership to do something on that land (not involving the taking of any part of the natural produce of that land or of any part of its soil) or to prevent the owner of the other land from utilising his land in one of a limited number of ways: ***See Halsbury's Laws of England, Volume 87 (2012), 5th Edition, paragraph 802***.

26. Before an easement can be established, the following four requirements must be satisfied;

    i. there must be a dominant and servient tenement;
    ii. the easement must confer a benefit on (or "accommodate the dominant tenement;
    iii. the dominant and servient tenement must be owned by different persons; and
    iv. the easement must be a right capable of forming the subject-matter of a grant: ***See Megarry & Wade supra, page 1246, paragraph 27-004.***

27. Easements can be created by inter alia statute, express grant, implied grant or by prescription: ***See Commonwealth Caribbean Land Law, Chapter 10, page 388.*** In the

instant case, based on the evidence there was no express grant of an easement by deed or by statue. Further, the Claimant cannot claim an easement by prescription because it is his case that the predecessors in title of the land gave him permission to use the road reserve. As such, in order for the Claimant to succeed on his claim for a right of way, he must show that there was an implied grant of an easement. In the circumstances of this case, the most appropriate implied easement would be a right of way of necessity.

28. At paragraph 956 of the ***Halsbury's Laws of England, Volume 87 (2012), 5th Edition,*** a right of way of necessity is defined as follows;

"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…The doctrine is not founded on public policy but on the implication into the document granting the land that the grant of some way was intended because otherwise the land would be inaccessible.

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. A way of necessity may arise upon a grant of a lease as well as upon a grant in fee, and also upon the disposition of the property by will.

A way of necessity can arise in favour either of the grantee on a disposition of the dominant tenement or of the grantor on a disposition of the servient tenement."

The defendant's Submissions

29. The defendant submitted that the claimant cannot claim a right of way over the road reserve as a right of way attaches to and is appurtenant to land, which the claimant does not own. The defendant further submitted that the claimant has not pleaded any facts which gave him any kind of permission or licence to pass on the road reserve.

The claimant's Submissions

30. The claimant submitted that the predecessor in title of the subject parcel of land provided a right of way on the road reserve for him to get to his home. That the evidence depicts that there is a right of way leading from the public road to the claimant's home. The claimant contended that the defendant has deliberately built a house on the road reserve blocking the Claimant's right of way on same.

31. The Claimant relied on the cases of ***Nickerson v Barraclough (1981) Ch. 426 and Manjang v Drammeh (1990) 61 P & CR 194.***

32. In Nickerson supra, Lord Buckley at page 447 stated as follows;

"…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…"

33. In Manjang supra, Lord Oliver at 196–7 stated as follows;

"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."

34. It was the submission of the claimant that once a person has an interest in the said land, that person can acquire a right of way to and from his premises. According to the claimant, although he does not have a deed for the lot 5, he has an interest in same since he has a receipt evidencing payment for lot 5 and is in actual possession of lot 5.

35. The Claimant submitted that the cadastral sheet of Mr. Somarsingh, a Land Surveyor hired by the Defendant's mother plotted a right of way giving access to the various lots shown on the cadastral sheet. The Claimant further submitted that from the cadastral sheet, requirements iii and iv listed above (paragraph 25) may be satisfied.

36. Moreover, the Claimant submitted that being denied the use of the right away, fetters his comfortable occupation of lot 5.

Findings

37. As stated in Manjang supra, the essentials for the implication of an easement of necessity are 1) a common owner of a legal estate in two plots of land, 2) to be established that access between one of those plots and the public highway can be obtained only over the other plot and 3) there has to be found a disposition of one of the plots without any specific grant or reservation of a right of access.

38. As such, the first hurdle in determining whether the claimant has an easement of necessity is to determine whether the lots of land had a common owner. During cross-examination, the claimant testified that lot 5 was a part of a larger parcel of land. He further testified that those lots demarcated on the cadastral sheet were previously owned by one Dhanpaul Singh. According to the viva voce evidence of the claimant, he purchased lot 5 from the owner's daughter, Ms. Singh. During cross-examination, the defendant testified that his grandmother also purchased lot 6 from Ms. Singh. The court therefore finds that the lots had a common owner.

39. The third element is undisputed since there was no reservation of a right of way in any Deed. In determining whether the second element was satisfied, the Court took into consideration the various ways in which the claimant can access his land. The main issue of fact is whether the only access from the claimant's land to the public road was over the alleged right of way. According to the evidence of the claimant, he currently passes through lot 12 (which belongs to his neighbour) to access the public road, Arnold Bates Trace. The evidence of the defendant demonstrates however that there is in fact another alternative public access route used by the claimant which is that of walking up the pedestrian pathway from Jordan Trace. This appears to be an area of steps referred to in both the evidence in chief of the defendant and cross examination of the claimant. The claimant's evidence is however highly unintelligible in that regard. What is clear to the court however, is that there is another route for the claimant to access his house through public steps from another street. In those circumstances, the claimant cannot succeed on the issue of a right of way by necessity.

Disposition

40. Even though the parties agreed that a road reserve was demarcated on paper and the court found that the defendant encroached on the road reserve sometime during the years 2006 or 2007, the court will not order that the defendant remove that part of the structure that encroaches on the road reserve since the evidence clearly demonstrates that the road reserve was never used as a vehicular access way. On the claimant's evidence, even before the defendant built that part of his house which encroaches on the road reserve, the road which was widened by a tractor many years ago was in any event unpassable with a vehicle for some twenty-five years because boulders were deposited thereon by residents. The claimant further testified that even if the defendant moved his house, he would still be unable to drive a car along the road as same would need to be cut properly to accommodate vehicles. As such, the claimant has failed to prove his case that the road reserve was used as a vehicular access way and since it is clear on the evidence that the road reserve was always used as a pedestrian walkway. It means that what has been demarcated as road

reserve on the cadastral sheet, (in respect of which the evidence of proper registration is unclear), has never been used for vehicular traffic and has therefore not been the same as that which has been demarcated.

41. In closing the court notes that the defendant pleaded adverse possession but has not pursued that argument, quite properly so in the court's view.

42. The order of the court will therefore be as follows;

    i. The claim is dismissed;
    ii. The claimant shall pay to the defendant, the prescribed costs of the claim in the sum of $14,000.00.

Dated this 11th day of May, 2017

Ricky Rahim
Judge