[2023] JMCC Comm 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022 CD00331

(Formerly Claim No. 2017 HCV 00928)

BETWEEN	**ERROL BENNETT**	**CLAIMANT**
AND	**LHCC PERFECT HOMES LIMITED**	**1ST DEFENDANT**
AND	**IAN K. LEVY**	**2ND DEFENDANT**

IN OPEN COURT

Canute Brown instructed by Brown Godfrey & Morgan, Attorneys-at-Law for the Claimant

Dr. Lloyd Barnett, Weiden Daley and Shaydia Sirjue instructed by Hart Muirhead Fatta for the Defendants

HEARD: 6th, 7th and 8th March 2023 and 26th May 2023

Civil Procedure - Whether issues arising on the claim are *res judicata* based on the dismissal only of an application for summary judgment.

Easement - Right of Way - Methods for acquiring - Easement by express grant – Easement by implication - Easement by prescription - Whether claimant has an interest in land to enable acquisition of easement over lands adjoining registered strata.

C. BARNABY J

INTRODUCTION

[1] The Claimant is a businessman who claims to be the owner of a parcel of land in Negril, Westmoreland which he has occupied for more than thirty (30) years. He

also alleges that the buildings on the land owned by him are occupied by tenants, licensees, and other persons with his permission. He has identified the "lands" as lots 26 and 28 of Strata Plan no. 380 in what is known as Plaza, Negril (hereinafter "the Strata"). The lots are registered at Volume 1213 Folio 663 and Volume 1213 Folio 665 of the Register Book of Titles in the names of Apanage Limited and Buccaneer Restaurant Limited respectively.

[2] The 1st Defendant is the registered proprietor and developer of lands registered at Volume 1122 Folio 493 (hereinafter called "the Disputed Land"), Volume 1095 Folio 794 and Volume 1117 Folio 991 of the Register Book of Titles, which lands are cumulatively called the **"**the Developer's Lands" and are the construction site of what has been described as an upscale multiple-unit residential development. The Disputed Land is contiguous to the Strata and has upon it an access way (hereinafter called "the Disputed Road") to the Negril main road. The 2nd Defendant is a director of the 1st Defendant company.

[3] It is the Claimant's claim that the land which comprises the Strata and the Disputed Land were previously comprised in a single certificate of title being that registered at Volume 1122 Folio 493 of the Register Book of Titles, before subdivision and distribution to their respective registered proprietors. It is his claim that as the owner of the Strata he has an easement in the form of a right of way over the Disputed Road as it is the only means of access to the main road and is used by pedestrians, motorists and other members of the public who move to and from the Strata as visitors or licensees; and that he is entitled to the right of way because he has enjoyed it as of right and without interruption in excess of thirty (30) years before the filing of his claim in March 2017.

[4] It is further alleged that the Defendants wrongfully interfered and obstructed the said right of way by drilling holes across the Disputed Road, rendering it impassable on diverse days on or about 27th February 2017. It is the Claimant's contention that the acts of the Defendants have disturbed the enjoyment of his right of way, in consequence of which he has suffered loss and damage, which he

particularised as loss of income suffered by tenants of the shops and the withdrawal of tenants from long term leases. He, therefore, prays for the following relief.

1. *A Declaration that [he] is entitled to a right of way from his property, known as Plaza, Negril in the Parish of Westmoreland, been the Strata Plan number 380 to the main road in Negril over the property comprised in Certificate of title and registered at Volume 1122 and Folio 493 in the Book of Titles, of which the First Defendant is the registered proprietor, a right of way or easement enjoyed by the Claimant without interruption for a period of upwards of twenty years, and back over the same way for himself, his servants, tenants and licensees, on foot, with carriages, motor vehicles or other conveyances at all times and for all purposes. (sic)*

2. *A Declaration that [he] and his predecessors in title have used the said right of Way as a legal right by virtue of and in accordance with Section 1 of the Prescription Act and that the right of way is absolute and indefeasible and/or in the alternative there exist an easement of necessity, there being no other access to the Claimant's land or by an easement implied granted, expressly or impliedly granted at the time the land was transferred to the Claimant's predecessors in title that has been continuously enjoyed without interruption for upwards of thirty years. (sic)*

3. *An injunction ordering the Defendants to remove plastic materials placed on the road, refill the holes dug with suitable building material and restraining the Defendants, by themselves, their servants or agents, from the repetition or continuance of the acts complained of or of similar acts obstructing the Claimants right of Way.*

4. *Damages.*

5. *Cost.*

[5] The Defendants deny the allegations of the Claimant and his claim to any of the reliefs sought or at all. In so doing they contend that the Claimant is not and has never been the registered proprietor of any of the lots in the Strata; has never been registered as having any estate or interest in any of the lands comprised in the certificates of title for any of the said lots; and has not acquired or enjoyed any right of way over the Disputed Road or any part of the Developer's Lands as alleged or at all. The Defendants also deny that they have done anything wrongful on the Developer's Lands, rendered the Disputed Road impassable, or maintained any obstruction of the said road. That the 2nd Defendant is a servant or agent of the

2nd Defendant is also denied and it is contended that he does not and has never carried on any activity on the site or in its vicinity. Further, the Defendants contend that the activities of which the Claimant complains relate to a private road upon parts of the Developer's Lands.

[6] It is also contended by the Claimant that disputed issues of law and fact, particularly those enjoined between with the 1st Defendant are *res judicata,* consequent on the dismissal of a summary judgment application made by the latter. While there is no dispute that an application for summary judgment was in fact made and dismissed, the Defendants deny that the dismissal of it caused any of the issues enjoined on the claim to become *res judicata.*

[7] Following the close of evidence and arguments on 8th March 2023 on the trial of the claim, the Claimant was permitted to file and serve authorities referenced during submissions by 10th March 2023; leave was given to the Defendants to file written responses to the Submissions of the Claimant filed and served 8th March 2023 on or before 13th March 2023; and a decision reserved on the claim.

ISSUES AND SUMMARY CONCLUSION

[8] The following two main issues arise on the claim and are dipositive of it.

i. Whether the issues of law and fact which arise on the claim were previously adjudicated on the 2nd Defendant's application for summary judgment and therefore *res judicata*.

ii. Whether the Claimant has acquired an easement comprised in a right of way over the Disputed Road to and from the main road?

[9] Several authorities were cited by the parties in the form of judicial decisions and authoritative works, I did not find it necessary to refer to them all in disposing of the claim. I thank counsel for the indulgence in this regard and for the assistance given by their production of the authorities.

[10] For reasons set out below, I find that these issues are to be determined in favour of the Defendants and dismiss the claim accordingly.

REASONS

Res Judicata

[11] The Claimant sought to raise for the first time at trial, the issue of *res judicata.* It was called in aid by Counsel Mr. Brown in requesting an adjournment of the trial, and in pursuing a line of questioning during the cross-examination of the 2nd Defendant. As stated in the *Submissions of the Claimant* filed 8th March 2023, the argument was met with the disapproval of the court on both occasions.

[12] It was and is the contention of Counsel Mr. Brown that issues of fact and law were already determined in proceedings for summary judgment and that the trial was an attempt by the Defendants, the 2nd Defendant in particular, to relitigate those issues. I found the contention to be without merit on the occasions they were twice raised orally, and I am not moved to depart from that finding on account that it now appears in the Claimant's written submissions for a third time.

[13] The record of the court shows that a Notice of Application for Summary Judgment was filed on 21st September 2018 by the 2nd Defendant. The application was made pursuant rule 15.2 (a) of the CPR, that the Claimant had no real prospect of succeeding on the claim. The factual basis for the application was that the 2nd Defendant was not a proper party to the claim as he is one of several directors of the 1st Defendant body corporate with separate legal personality and that he is neither its servant, contractor or agent; that the activities complained of relate to a private road on the 1st Defendant's land; and that 2nd Defendant does not and has never carried on any activity on or in the vicinity of the site of the 1st Defendant's development.

[14] The below three orders were sought by the 2nd Defendant on his application.

1. *The 2nd Defendant be granted summary judgment on the claim against the Claimant.*
2. *The costs of these proceedings be awarded to the 2nd Defendant against the Claimant.*
3. *There be such further or other relief as this Honourable Court deems fit.*

[15] The application was heard on 23rd September 2019 by a court otherwise constituted and the following orders made:

1. *Notice of Application for Summary Judgment filed on 21st September 2018 dismissed.*
2. *Costs of this Application are awarded to the Claimant. Such costs to be borne by the 2nd Defendant, to be taxed if not agreed.*

[16] The Claimant cites the decision of McDonald-Bishop J (as she then was) in **Fletcher & Company Limited v Billy Craig Investments Limited and Anor** [2012] JMSC Civil 128 in aid of his submission. Although the cases are factually dissimilar and do no warrant repetition, the statement of principles on *res judicata* and summary judgment which are distilled in the case are instructive.

[17] The following extract from the decision of the Court of Appeal in **Gordon Stewart v Independent Radio Company Limited and Wilmot Perkins** [2012] JMCA Civ 2 appears at paragraph 29 of the judgment.

> *"The doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between the parties…"*

As observed by McDonald- Bishop J, whether a claim is *res judicata* is primarily a question of law.

[18] Of the power reserved to the court to grant summary judgment under rule 15.2(a) of the CPR, the learned judge stated thus.

> *[19] … pursuant to the CPR, rule 15.2 (a), the court has the power to grant summary judgment on a claim on the basis that the claim has no real prospect of succeeding. The exercise of the court's power under this rule is, of course, subject to the overriding objective contained in part 1 to deal with the case justly which would be the same as doing justice between the parties.*
>
> *[20] ... I will venture to say for present purposes that the principles of law governing the area are, by now, so well-established so much so that they can be said to be, practically, trite…*
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> *[22] In considering whether summary judgment ought to be granted on the claim, the court has to bear in mind that there must be a "real", as opposed to, a "fanciful", prospect of success of the claimant's case for the claim to stand. The test is not one of certainty and so the court is not required to form a view that the claim is bound to be dismissed at trial.* ***The test requires that the court's attention is directed to the need to do an assessment of the claimant's case to determine its probable ultimate success or failure****.*
>
> *[23] In assessing whether the claim has a real prospect of success, it is, therefore, legitimate for me to form a provisional view of the outcome of the claim. However, I am not required, nor am I expected, to conduct a mini-trial on disputed facts which have not been tested and investigated on the merits. I am mindful that* ***the object of the rule is not to permit a mini-trial of the issues but to enable cases which have no real prospect of success to be disposed of summarily. I have to look down the road, so to speak, to see what will happen at the trial and if the case is so weak that it has no real prospect of success, it should be stopped. It saves time and cost and would, in the end, prevent the court's resources being used up unnecessarily in the trial of weak cases that have no real prospect of success****…*

[Emphasis added]

[19] While there are no published reasons for the decision to dismiss the 2nd Defendant's application for summary judgment, having regard to the nature of applications for summary judgment generally and the orders made by the court on the application, issues of disputed facts and/or law which arise on the substantive claim were not determined. In dismissing the application, the court did no more than adjudge that it was inappropriate to dispose of the claim against the 2nd Defendant summarily. The issues between the Claimant and the Defendants on the claim therefore remained enjoined after the determination of the summary judgment application. Consequently, I find that there is no merit to the Claimant's submission that issues of law and fact which arise on the claim were previously adjudicated on that application and are therefore *res judicata*.

Acquisition of easement comprised in right of way

[20] The claim concerns an "easement", the essential characteristics of which were long accepted in **Re Ellenborough Park, Re Davies, Powell v Maddison** [1956] Ch 131, 163.

> (1) There must be a dominant and a servient tenement;
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> (2) an easement must "accommodate" the dominant tenement:
>
> (3) dominant and servient owners must be different persons; and
>
> (4) the right over land must be capable of forming the subject-matter of a grant.

[21] The existence of a dominant and servient tenement is therefore critical to the establishment of an easement. As to the distinction between the two tenements, assistance may be found in the dictum of Lord Coleridge C.J. in **Hawkins v Rutter** [1892] 1 Q.B. 668, 671 when he stated that "… *"easement" does imply a dominant*

tenement in respect of which the easement is claimed, and a servient tenement upon which the right claimed is exercised."

[22] A right of way, which is the easement claimed here, is but one of several easements over land. Broadly, it is the right to use the servient tenement as a means of access to or egress from the dominant tenement for a purpose which is connected to the enjoyment of the dominant tenement, having regard to the nature of the latter.[1]

[23] It is the Claimant's claim that he is the "owner and occupier" of lots 26 and 28 of the Strata - to which I will return later in the judgment - which he describes as the "dominant tenement", and that he has a right of way over the Disputed Road upon the Disputed Lands which he describes as the "servient tenement", from the main road to the Strata. When his statement of case is carefully examined, particularly the declaratory reliefs sought, he appears to contend that the right of way arises in one or other of the following ways.

i. Prescription - on the basis that a right of way has been enjoyed by him over the Disputed Road without interruption for a period upward of twenty (20) years at all times and for all purposes.

ii. Continuous and uninterrupted use and enjoyment of a right of way over the Disputed Road by himself and his predecessor's upwards of thirty (30) years, in accordance with section 1 of the **Prescription Act**;

iii. Necessity, there being no other access to the lots said to be owned by him;

iv. Implied grant at the time the land upon which his lots are located was transferred to his predecessors in title, with continuous enjoyment of a

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[1] **Halsbury's Laws of England**, Volume 87 (2022), para. 870

right of way over the Disputed Road without interruption for upwards of thirty (30) years; and/or

v. Express grant at the time the land upon which his lots are located was transferred to his predecessors in title, with continuous enjoyment of a right of way over the Disputed Road without interruption for upwards of thirty (30) years.

Easement by Express Grant

[24] The most direct method of creating an easement is the making of an express grant. This is generally accomplished where the owner of the servient tenement gives an easement to the owner of the dominant tenement. I believe it goes without saying that where it is contended that an easement has been so created, the dominant and servient tenements must be defined with sufficient clarity in the instrument pursuant to which the grant is made.

[25] As advised by the Claimant's Answers to Request for Information by the Defendants, it is the Claimant's claim that the lands comprising the Strata and the Disputed Land were once comprised in a single certificate of title registered at Volume 1122 Folio 493 of the Register Book of Titles (hereinafter called the "Parent Title") before being subdivided; and that the owner of the lands, one transferred from that holding the lands which comprise the Strata registered at Volume 1211 Folio 103 of the Register Book of Titles, while retaining the remainder which comprises the Disputed Land registered at Volume 1122 Folio 493 of the Register Book of Titles. This is not challenged and is in fact supported by the documentary evidence.

[26] A copy of the Certificate of Title for the Disputed Land was admitted into evidence. It shows that of the Disputed Lands was registered to LHCC Perfect Homes Limited the 1st Defendant herein on 12th December 2014, for consideration.

[27] The following entry dated 18th March 1976 is the first entry on the certificate:

> *… the Villas-Negril Limited … is now the registered proprietor of an estate in fee simple subject to the incumbrances notified hereunder in ALL THAT parcel of land situate at NEGRIL in the Parish of WESTMORELAND containing by survey Seven Acres Two Roods Twenty-two Perches and One-tenth of a Perch of the shape and dimensions and butting as appears by the Plan thereof hereunto annexed and* ***being the land comprised in Certificate of Title formerly registered at Volume 579 Folio 29 SAVE and EXCEPT the portion transferred by Transfer numbered 301896 (1A. 1R. 15, 34P.).***
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> [Emphasis added]

[28] The plan annexed, which is the result of a survey on 13th August 1949, shows the boundaries of the land comprised in the certificate, to include the boundaries of lands which were comprised in certificate of title registered at Volume 1099 Folio 811 of the Register Book of Titles.

[29] No copy or otherwise of the certificate of title registered at Volume 1099 Folio 811 of the Register Book of Titles was supplied. A document which is identified as the plan referred to in the said certificate was nevertheless produced and admitted in evidence without objection. It is the result of a survey on 23rd March 1973. Among other things it shows the Main Road from Negril to Southfield, the land comprised in that title, and "*Remaining Portion of Vol. 579 Fol. 29"* retained by a Buxton Cooke.

[30] A copy of the Certificate of Title registered at Volume 1211 Folio 103 of the Register Book of Titles in respect of the lands which comprise the Strata (less annexure) was also admitted in evidence. It shows that on 20th May 1988 H & R Developers Company Limited

> *… is the registered proprietor of an estate in fee simple subject to the incumbrances notified hereunder in ALL THAT parcel of land part of NEGRIL in the parish of WESTMORELAND containing by survey Sixty Thousand and Ninety-four Square Feet and Eighteen Hundredths of a*

Square Foot of the shape and dimensions and butting as appear by the plan hereunto annexed and being part of the land comprised in Certificate of Title registered at Volume 1122 Folio 811 and the land comprised in Certificate of Title registered at Volume 1099 Folio 811. (sic)

[31] As earlier indicated, no copy or otherwise of the certificate of title registered at Volume 1099 Folio 811 was produced. The same is to be said for the certificate of title said to be registered at Volume 1122 Folio 811 which is also referenced in the preceding extract from the certificate of title registered at Volume 1211 Folio 103. These absences notwithstanding, it is apparent on the documentary evidence that was produced that the Strata lands comprised in Volume 1211 Folio 103 were once a part of the lands which were comprised in the certificate of title registered at Volume 1122 Folio 493, which the Claimant says is the root of common title for the Strata and the Disputed Land upon which the Disputed Road is located. All those lands are derived from those comprised in the Certificate of Title registered at Volume 579 Folio 29 which includes land registered at Volume 1099 Folio 811.

[32] Returning to the Parent Title, the only incumbrances to the lands comprised in it, to which the Villas Negril as the first registered proprietor of an estate in fee simple together with its successors in title are subject, are mortgages now reflected as discharged.

[33] However, on the subdivision of the lands and the acquisition by H & R Developers Company Limited of an estate in fee simple of the portion which comprises the Strata and is registered at Volume 1211 Folio 103 of the Register Book of Titles - the alleged dominant tenement on the Claimant's claim - the incumbrance numbered 6 which appears on the certificate of title provides that *"[e]ntrance to the said land* ***and*** *the remaining lands registered at Volume 579 Folio 29* ***shall be grouped at their common corner with the main road.****"* [Emphasis added] The Claimant stated in cross examination that he was unaware of this incumbrance.

[34] The meaning of the express incumbrance appears to me to be quite clear whether or not the Claimant made himself aware of it. It is that there is common entrance

to the Strata and to the remaining lands registered at Volume 579 Folio 29 - which includes the Disputed Land upon which the Disputed Road is located - which entrance is located at their *"common corner with the main road"*. On the face of the certificate of title there is no access reserved to the owner of the Strata over the Disputed Road that is contiguous to it.

[35] Also in evidence are two survey diagrams numbered PE 180163 and PE 190468 which were considered by Andrew Bromfield, Commissioned Land Surveyor, and expert witness called by the Claimant.

[36] The diagram numbered PE 180163 is the result of a survey made on 30th August 1983 of parts of land at Volume 1099 Folio 811 and Volume 1122 Folio 493 which totalled 60094.18 square feet. Among other things, it shows the boundaries of the lands which comprise what is the Strata and the *"Remaining Portion of Vol. 1122 Fol. 493 Villas Negril Ltd. Negril P.O."*, including the Disputed Road which is there designated *"Rt. of Way"*. The survey was made at the instance of H&R Developers. The diagram numbered PE 190468 is the result of a survey of the lands conducted on 12th to 13th August 1985 at the instance of Buxton Cooke and is referable to *"SUBDIVISION PLAN PART OF NEGRIL VOL. 1122 FOL. 493 WESTMORELAND"*, wherein the Disputed Road is designated *"Reserved Road"*.

[37] On cross-examination, Mr. Bromfield indicated that he had no explanation for the change in designation from a "right of way" to "reserved road" and that to the best of his knowledge such changes are indicated by land surveyors. Mr. Bromfield also accepted during cross-examination that there was nothing physical which would show why one description would be used instead of the other. He also admitted that he did not find anything on the documents relating to the Strata, the certificate of title registered at Volume 1122 Folio 493 of the Register Book of Titles, or the deposited plan for the development being done by the 1st Defendant which gave a "right of way" to the Strata over the Disputed Road. He also did not find any instrument granting a right of way over the said road to the Strata.

[38] The Defendants' expert witness Mr. Llewelyn Allen, also a Commissioned Land Surveyor, doubted the designation of the Disputed Road as a "right of way" as appears on the diagram numbered PE 180163. On being asked how he is able to make the determination that the designation is based in "wrong information", he advised that he would not characterise the designations in that way but would say that designations are made by way of a best judgment assessment by a surveyor employing a process of elimination, having regard to information received from various sources including locals, the Parish Council, and existing survey plans and diagrams. Where the designation is eventually shown to be something other than that which is represented, an amendment is required to be made to the survey diagram.

[39] Although both experts appear to disagree on the status of the Disputed Road, the cross-examination of both demonstrates that the designation of an access way as a "right of way" or "reserved road" on a survey diagram is not always conclusive evidence of the nature of the access way.

[40] On a final analysis, no evidence has been produced which permits a finding that there was an express grant of a right of way over the Disputed Road which is contiguous to the boundary of the Strata as the Claimant claims. In fact, the objective evidence which is provided by the incumbrance numbered 6 on the certificate of title for the Strata - which would be the dominant tenement on the Claimant's case - is that on the subdivision of the Strata from the other lands which were comprised in the Parent Title and the transfer of the fee simple in it to H & R Developers Company Limited, access to both the Strata and the remaining lands which include the Disputed Road, is expressly stated to be grouped at their common entrance to the main road.

Easement by Implication

[41] It is trite that a person cannot have an easement over his own land. It is possible however that an easement may arise and be the subject of a grant by implication where two contiguous pieces of land which shall be called "X" and "Y" are owned

by the same person, and the owner habitually traverses "Y" to get to land which is on the other side of "Y". This can occur upon the disposition of "X" to another and the retention of "Y" by the owner, or the disposition of both "X" and "Y" to different persons. Upon disposition, "X" assumes the position of a quasi-dominant tenement and "Y" the position of a quasi-servient tenement.[2] The owner of the quasi-dominant tenement having habitually traversed the quasi-servient tenement to get to lands which are on the other side of it, on the disposition of "X" the new owner may be able to claim an easement over "Y" based on an implied grant. In this regard the new owner of "X", the quasi-dominant tenement, benefits from two principles of construction - that a person shall not derogate from his grant and that a grant is to be construed in favour of the grantee.[3]

[42] The subdivided lands which comprise the Strata and the Disputed Land upon which the Disputed Road is located were owned by the same person who transferred the former and retained the latter before also transferring it. If there is evidence that the common owner habitually traversed the Disputed Road to get to and from the main road, from the lands which comprise the Strata, the owner of the Strata and his successors in title may claim an entitlement to a right of way on the basis of an implied grant, notwithstanding that an express grant cannot be established. This may be of necessity, that there was an intended easement or an easement under the rule in **Wheeldon v Burrows** (1879) 12 Ch D 31, CA.[4]

[43] The Claimant claims that an easement of necessity exists over the Disputed Road.

[44] In **Adealon International Corpn Pty Ltd v Merton London Borough Council** [2007] 1 WLR 1898 which was cited by the Defendants, Carnwath LJ with whom the rest of the Board agreed considered the following statement of Lord Oliver in

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[2] Kodilinye, G. **Commonwealth Caribbean Property Law**, 2nd Ed., Cavendish Publishing Limited, 2005, page 194.
[3] Supra n.1, para. 791
[4] Ibid

Manjang v Drammeh (1990) 61 P & CR 194, 196-197 to be a good starting point for a discussion on the easement of necessity. I adopt the approach.

> *"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 [1981] Ch 426*) to imply the reservation of an easement of necessity."*

[45] While it has been established on the evidence that there was a common owner of the fee simple of the lands which now comprise the Strata and the Disputed Land, and that there was no grant or indeed reservation of access over the Disputed Road to the owner of the lands which comprise the Strata, the Claimant has not established that access to and from the main road from the Strata could only be obtained over the Disputed Road. As earlier found, the entrance or access if you will to both the Strata and the Disputed Land upon which the Disputed Road is found is to be *"grouped at their common corner with the main road",* pursuant to the incumbrance numbered 6 on the certificate of title registered at Volume 1211 Folio 103 of the Register Book of Titles. This demonstrates that access can be had to the main road from the Strata other than over the Disputed Road. A critical element for implying an easement of necessity is therefore absent.

[46] Outside of an easement of necessity, the law will also imply the grant of an easement if it is required to give effect to the common intention of the parties, having regard to the manner or purpose for which the land is granted to be used.[5] No evidence has been produced of any such common intention and it is my view

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[5] Supra n.1, para. 793

that no such intention could be implied in light of the express terms of the incumbrance numbered 6 on the certificate of title for the Strata lands, at the time of their subdivision from the remaining lands and transfer to H&R Developers.

[47] Under the rule in **Wheeldon v Burrows**, where the common owner disposes of a quasi-dominant tenement, all continuous and apparent easements then used and enjoyed, and/or easements which are necessary for the reasonable enjoyment of the property granted passes to the grantee.[6] There is no evidence of any continuous and apparent easement used and enjoyed by the common owner over the Disputed Lands to and from the main road at the time of disposition of the lands which comprise the Strata to H&R Developers or of any easements then existing which was necessary for the reasonable enjoyment of the Strata lands which would have passed to the grantee of those lands. In the result, no easement can be implied under the rule in **Wheeldon v Burrows**.

[48] In the foregoing premises, I am unable to find that there could be an implied grant of right of way over the Disputed Road which is contiguous to the western boundary of the Strata as asserted by the Claimant.

Easement by Prescription

[49] Prescriptive easements may be acquired at common law, under the doctrine of lost modern grant and pursuant to the **Prescription Act**. As observed in **Simmons v Dobson** [1991] 1 WLR 720 which is cited by the Claimant, a right which is claimed by prescription must be claimed as appendant or appurtenant to land. The case is also authority for the proposition that a prescriptive easement which is comprised in a right of way can only be acquired by an owner in fee simple against the owner

[6] Supra n.1, para. 794

in fee simple of the servient tenement. The following statement by Fox LJ at page 723, with whom the rest of the court agreed, is particularly instructive in this regard.

> *Now in relation to common law prescription generally, user had to be by or on behalf of a fee simple owner against a fee simple owner. An easement can be granted expressly by a tenant for life or tenant for years so as to bind their respective limited interests, but such rights cannot be acquired by prescription: see* Wheaton v. Maple & Co. *[1893] 3 Ch. 48 and* Kilgour v. Gaddes *[1904] 1 K.B. 457. Thus Lindley L.J. in the former case said [1893] 3 Ch. 48, 63:*
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> > *"The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with any one except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years."*
>
> *In* Kilgour v. Gaddes *[1904] 1 K.B. 457 that was cited with approval by Collins M.R., at p. 465. Mathew L.J. said, at p. 467:*
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> > *"… an easement like a right of way … can only be acquired by prescription at common law where the dominant and servient tenements respectively belong to different owners in fee, the essential nature of such an easement being that* ***it is a right acquired by the owner in fee of the dominant tenement against the owner in fee of the servient tenement****. If authorities were necessary for that proposition, the case of* Wheaton v. Maple & Co. *[1893] 3 Ch. 48 and 2 Wms.' Saunders, 175 (*f*), (*i*), would suffice."*
>
> *[Emphasis added]*

[50] Among the reliefs sought by the Claimant is a declaration that he and his predecessor's in title have used the Disputed Road as a right of way by virtue of section 1 of the **Prescription Act** (hereinafter called "the Act"). When one reads the statute it is at once discovered that section 1 only contains a short title. From the statements of fact which have been pleaded however, it was apparent that the

reference to section 1 was erroneous and that the Claimant in fact intended to rely on section 2 of the Act. Arguments proceeded accordingly.

[51] Section 2 of the Act states:

> *When any profit or benefit, or* ***any way or easement****, or any water course, or the use of any water,* ***a claim to which may be lawfully made at the common law, by custom, prescription or grant****,* ***shall have been actually enjoyed or derived upon****, over or from any land or water of Her Majesty the Queen, or of any person, or of anybody corporate, by any person claiming right thereto,* ***without interruption for the full period of twenty-years****, the right thereto shall, subject to the provisos hereinafter contained [which are not immediately relevant to the facts of this case] be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.*
>
> *[Emphasis added]*

[52] Among other rights over or from the land of another, the provision enables a claimant to acquire an absolute and indefeasible prescriptive right to an easement where he is able prove that the same has been enjoyed unmolested for a period of twenty (20) years, without the consent or agreement of that person. As demonstrated by the authorities however, an easement comprised in a right of way can only be acquired by way of prescription *"by the owner in fee of the dominant tenement against the owner in fee of the servient tenement."* This is not disputed by the Claimant and is in essence the defence to the claim for acquisition of an easement comprised in a right of way by prescription.

[53] It is part of the Claimant's pleaded case that he is the "*owner and occupier*" of lots 26 and 28 in the Strata but as disclosed by his answers to request for information, Apanage Limited and Buccaneer Restaurant Limited are the respective registered proprietors of those lots. Accordingly, I am unable to find that he is the legal owner in fee simple of the lots.

[54] In the Submissions of the Claimant filed on 8th March 2023, the following is submitted under the sub-head "OWNERSHIP OF THE DOMINANT TENEMENT".

> *The Claimant maintains he is the owner of the two shops in the Plaza. He means that he paid for them, the registered proprietor is Apanage Limited and Buccaneer Restaurant, two companies he promoted and in which he serves as a Director. The evidence is that he pays the property tax, has tenants in them and has been in undisturbed possession for over 30 years.*
>
> *In the case of Apanage Limited, public records filed by the Defendant, show the Company as having been removed from the Register of Companies for over 20 years. During those 20 years and beyond, the Claimant has had exclusive possession of the property of which the company is the registered proprietor. By virtue of Section 12 of the Limitation of Actions Act, the title of the Company would have been extinguished after 12 years and hem being the person in possession, exercising without interruption all acts of ownership would have gained possessory title to the land.*
>
> *It is submitted, with respect that his claim to be the owner of the land in firmly rooted. (sic)*

[55] I am unable to agree with the Claimant's submission that his claim to ownership of lots 26 and 28 of the Strata is established or to use his own words, *"firmly rooted"*.

[56] In the first instance, I find it difficult to reconcile the Claimant's contention that he owns the lots on the bases that he paid for them and was a promoter of their registered proprietors with the simultaneous contention that he has also acquired a possessory title for the lots. He appears to suggest on one hand that as the alleged purchaser of the lots they are held by the companies on his behalf; and on the other, that the lots are in fact owned by the companies whom he has dispossessed thereby acquiring a possessory title to the lots.

[57] Difficulties of reconciliation aside, the facts on which the Claimant submit in support of his contention of ownership vis-à-vis purchase, and acquisition of a possessory title pursuant to the **Limitation of Actions Act**, were never included in his claim form or particulars of claim.

[58] Rule 8.9(1) of the CPR requires the Claimant to include a statement of all the facts on which he relies in his claim form or particulars of claim. The CPR also goes on to require him, pursuant to rule 8.9(3) to identify or annex a copy of any document which he considers is necessary to his case. Where there is failure to perform the duty to set out his case as prescribed, the Claimant may not rely on any allegation or factual argument which could have been made but which were not, unless the court permits.

[59] The court's permission for the Claimant to rely on the statements which were raised for the first time in submissions was never sought, and to permit reliance at this stage would deprive the Defendants of the benefit of the very cogent argument which they have in fact made, that the Claimant should not be permitted to rely on statements of fact or allegations not included in his claim form or particulars of claim.

[60] The claim commenced by claim form and particulars of claim filed on 22nd March 2017. It was expressly averred by the Claimant that he is *"the owner of a parcel of land … and has been in possession and occupying the said land upwards of thirty years."* After identifying the Disputed Land, he went on to say *"[b]oth parcels of land were comprised in one certificate of title before been subdivided by the owner with the registered proprietor retaining the land in the parent title and transferring all the lands in the Strata Plan number 380 to the Claimant in the predecessor in title."* (sic) There was no mention of acquisition of a prescriptive title to the lots or that the Claimant had a beneficial interest in them, legal interest being registered to corporate entities. The Defendants would justly be forgiven for concluding that the Claimant was claiming legal ownership of the lands comprised in the Strata.

[61] That notwithstanding and no doubt informed by prudence, the 1st Defendant filed a request for information on 31st August 2018 in these regards, after filing a defence to that which the Claimant had pleaded. In answer to the request filed 28th September 2018, the Claimant disclosed that lots 26 and 28 in the Strata were *"occupied"* by him and registered in the names of Apanage Limited and Buccaneer's Restaurant Limited respectively. After the provision of these answers, the Claimant filed an Amended Particulars of Claim dated 13th May 2019 on 16th May 2019. The statements of fact to which the Claimant refers in his written submissions could and should then have been included in his pleadings, but they were not.

[62] Further, the matters were only raised by Counsel for the Claimant after the close of the parties' respective cases and closing submissions by Counsel for the Defendants on the last day scheduled for trial, although submissions were ordered to be filed well ahead of the event. The Claimant's submissions were only filed and served on Counsel for the Defendants while closing submissions were being made on their behalves, which then made it necessary in the interest of fairness for the court to accede to the request of Counsel for the Defendants to reply to those submissions in writing later.

[63] The absence of the factual allegations in the Claimant's pleadings and on which he submits in seeking to establish ownership of lots 26 and 28 of the Strata is also unexplained and I can see no good reason for the failure to include the allegations of fact for the approximately six (6) years which have passed between the initiation of the claim and the trial. In the circumstances there is nothing which could or should move the court to permit reliance on them at the stage that they were raised for the first time.

[64] In any event, the allegations which have been raised by the Claimant in submissions concern the rights of registered companies, whose legal personalities are separate from any of their promoters or officers.

[65] Further still, lots 26 and 28 which are upon the land which the Claimant contends is the dominant tenement are part of registered Strata Plan no. 380. On the registration of the strata plan, the proprietors of all strata lots in the said plan become a body corporate, capable of suing and being sued in its own name, as prescribed by section 4 of the **Strata Act**.

[66] Pursuant to section 3 (3) of the said Act, a proprietor of each lot in a strata holds his lot and share in the common property subject to interests notified or shown on the registered strata plan as affecting that lot or share. Additionally, proprietors may by unanimous resolution direct that the strata corporation accept a grant of easement or restrictive covenant benefiting the land comprised in the registered strata plan on their behalf in accordance with section 12 (1) (b) of the Act. As submitted by the Defendants there is no evidence of an easement over the Disputed Road being notified or shown on Strata Plan no. 380, or of any unanimous resolution by its proprietors directing the corporation to accept a grant of easement over the said road.

[67] There is also no evidence of the corporate proprietors of lots 26 and 28 or of the Strata corporation having concurred with the Claimant in bringing his claim, and they are not parties to the proceedings. Accordingly, to proceed to determine the claim as suggested by the Claimant's submissions in these circumstances is to engage in a breach of the undoubted and fundamental right of each of these corporations to due process, which includes the right to be heard.

[68] In all these premises the Claimant has failed to establish on a balance of probabilities that he is the owner in fee of lots 26 and 28 or any dominant tenement to which the Disputed Road may be said to be servient to enable him to claim an easement in the form of a right of way over the said road.

[69] While the claim in its entirety is determined on the conclusions reached thus far, having regard to the breadth of the relief sought by the Claimant, I briefly remark on the acquisition of easements by prescription at common law and under the doctrine of lost modern grant.

[70] For a claimant to acquire a right of way by prescription at common law, he must show that the user has been enjoyed from time immemorial or 1189, the time fixed by the Statute of Westminster 1275 as the beginning of legal memory. Recognizing that this burden may be impossible to discharge, the courts will presume that enjoyment has persisted from 1189 where there is proof of enjoyment of twenty (20) years. This presumption is rebuttable however by proof that the easement could not have existed since 1189.[7]

[71] It is the Claimant's own case, which is supported by the evidence, that the lands which comprise the Strata and the Disputed Land upon which the Disputed Road is located were owned by a single person before the subdivision and transfer of the fee simple in the lands comprising the Strata to H&R Developer's Company Limited on 20th May 1988. Considering the inability of a person to have an easement over his own land if there was ever an easement from time immemorial it would certainly have been extinguished when ownership of the lands comprising the Strata and the Disputed Land resided in the common owner. No easement could have been acquired by prescription at common law in the circumstances.

[72] The fiction reflected in the doctrine of lost modern grant is in fact a form of common law prescription as observed in **Simmons v Dobson**. It developed to ameliorate the hardship associated with establishing prescription at common law where a claimant can show actual enjoyment of an easement for at least twenty (20) years. By the doctrine the court is permitted to presume that an actual grant was made at the time enjoyment began but that the deed which granted the easement has been lost, notwithstanding that it is extremely unlikely that such a grant was ever made.[8] Where a claimant wishes to avail himself of the doctrine however, he must plead a lost grant.[9]

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[7] Supra n.2, page 211
[8] Ibid
[9] See **Smith v Baxter** [1900] 2 Ch 138.

[73] As earlier stated, it is the duty of every claimant to set out his case by including a statement of all statements and allegations of fact on which he relies in his claim form or particulars of claim, pursuant to rule 8.9(1) of the CPR. Where that could have been done and was not done, the claimant may not rely on the allegation or factual argument unless permitted by the court as prescribed by rule 8.9A. No permission was sought by the Claimant to place reliance on the doctrine and for reasons which have already been expressed in refusing to permit the Claimant to rely on matters not pleaded, the court is not now moved to allow it.

[74] In any event, as observed in **Simmons v Dobson**, the doctrine of lost modern grant is rooted in common law prescription and can only be claimed by or on behalf of an owner in fee simple. The Claimant has not proved that he owns any land or that he claims on behalf of any owner in fee simple of the lands which are alleged to constitute the dominant tenement.

[75] The Claimant has therefore failed to establish that he has acquired an easement comprised in a right of way over the Disputed Road as claimed or at all. The claim being premised on the existence of such an easement, it must fail in its entirety.

ORDER

1. The Claimant's claim is dismissed.
2. Costs of the claim to the Defendants to be agreed or taxed.
3. The Attorneys-at-Law for the Defendants are to prepare, file and serve this order.

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Carole Barnaby

Puisne Judge