

JAMAICA

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO: 11/77

BEFORE: The Hon. President,
The Hon. Mr. Justice Robotham, J.A.
The Hon. Mr. Justice Carberry, J.A.

BETWEEN BENTLEY ROSS PLAINTIFF/APPELLANT
A N D CABLE & WIRELESS (W.I.) LTD., DEFENDANT/RESPONDENT
A N D THE HON. ATTORNEY GENERAL Third Party/RESPONDENT

Mr. Norman Hill Q.C., and Mr. O.L. Panton instructed by O.L. Panton & Co.} for Appellant.

Mr. D. Ritch for the Respondents.

July 24, 25, 26, and December 20, 1978

ROBOTHAM J.A.

This is an appeal from an assessment of damages made by Graham Perkins J. (Ag.) in the Grand Court for the Cayman Islands, whereby he awarded the Plaintiff/Appellant nominal damages amounting to \$100 for an obstruction of the right of way leading to his land, brought about by the first named defendant/respondent Cable and Wireless (W.I.) Ltd., having erected a steel tower therein.

The main thrust of the appeal was that this award of \$100 was unreasonable and unjust having regard to the evidence. Although the matter was vigorously contested before us in arguments lasting three days, the reasonableness or otherwise of this award is now the sole matter which concerns this Court.

The appellant is the owner of a portion of the land known

as Red Spot situate in George Town Grand Cayman. Immediately in front of, and adjoining this portion (hereinafter referred to as the appellant's land) is the other portion which is owned by the Estate of Bentley Ross (Snr.) who was the appellant's father. The frontage of this latter portion is on Church Street and the evidence discloses that the appellant also had a beneficial interest in this piece of land.

From as far back as 1931 or 1932 a right of way leading from Fort Street to the appellant's land had been acquired and this right of way ran along the southern boundary of land formerly owned by Captain Lawrence and now belonging to the Cayman Commercial Co., Ltd.. Appellant claimed it was an 8 foot right of way, which had been enjoyed and used by him without interruption or restriction right up to the commencement of the building of the tower by Cable and Wireless (W.I.) Ltd., in 1966. The terms of the conveyance from Henry Arch to the appellant which reads in part:

"All that parcel of land the same being one half taken from the back portion of that piece or parcel of land situate on Church Street, District of George Town aforesaid....."

seem to make it clear that the appellant's land was the back portion of Red Spot and the total obstruction of the right of way leading from Fort Street by the construction of the tower, made his holding land-locked. He was claiming as special damages the sum of \$25,000. Graham-Perkins J. found that there was no evidence adduced to support this claim, nor was any special damage proven.

There was no contest that with the obstruction of the right

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of way, the only other way to get to the appellant's land would be from Church Street, over the land owned by the Estate of Bentley Ross (Snr.) The Respondents contention however was that since the appellamt had an interest in this land, and it had a frontage on Church Street, it should not prove difficult to obtain as advantageous a right of way from Church Street passing over the front portion of Red Spot on to the appellant's land. Assuming however that this could not be secured, the respondents through the then Attorney General on February 15, 1971 offered to the appellant's Solicitors "without prejudice and in an effort to settle the matter" an alternate right of way to his land through the adjoining Town Hall premises. It is to be noted that this right of way is really an existing passage way between the Town Hall and the Cable and Wireless fence and is capable of accommodating vehicular traffic. It, however, is the access way to the car park to the rear of the Town Hall, and Cable and Wireless have a junction box beneath the roadway. Access to this box is through an opening in the surface of this roadway, covered with a steel plate. It is liable to obstruction by work being done in the junction box and by improper or indiscriminate parking by persons using the Town Hall. Furthermore no monetary compensation was offered.

The appellant rejected this offer, irrespective of whether it was made in an effort to settle the matter, or by way of mitigation of damages. He adopted a stand that he wanted monetary compensation, and maintained this right down to the hearing of this appeal. The respondents on the other hand say they have never retracted the offer of the alternative right of way.

It should be noted, however, that during the hearing of the appeal, based on a view expressed by Graham-Perkins J. (which this Court holds to be erroneous) that what the appellant had previously enjoyed was no more than a right of way as a foot path, Mr. Ritch for the respondents indicated that Government was only prepared to grant an easement restricted to a footpath. Be that as it may, as the hearing progressed, he reverted to the offer as originally understood i.e. a right of way without limitations as to use. He undertook to let the appellant have, after passing through the existing passage way between the Town Hall and the Cable and Wireless fence a minimum fenced passage way not less than 8 feet wide leading to and on to the appellant's land. This in turn would be endorsed on the Land Register.

Graham-Perkins J. found that the appellant was not justified in rejecting the earlier offer on the basis that the alternative way offered to the appellant by the Government in 1966 was "in no circumstances less advantageous than the right of which he had been previously deprived". Relative to this finding this Court must decide three main questions:- viz

- (1) Was the appellant entitled to compensation for the undoubted infringement of his legal right?
- (2) If yes, was the right of way previously offered by the respondents in every way as advantageous as the one he formerly enjoyed, thereby substantially reducing the amount of compensation to which he would be entitled.
- (3) If it was not as advantageous, what would be a reasonable award for compensation.

As to (1) the answer is in the affirmative. As to (2) we are unable

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to agree that the right of way offered was in every way as advantageous as the one appellant previously enjoyed. In this regard, due consideration must be given to its present user, the possibility of obstruction as mentioned above and the fact that it passes through the car park.

As to (3) in considering what would be reasonable compensation, the actions of the respective parties should be borne in mind. The infringement of the appellant's right commenced in 1966, and he never brought his action until 1970. His stand of wanting money rather than a right of way, a stand which he has maintained to the present time, cannot be fully justified.

On the other hand, it cannot be refuted that the appellant's claim was denied by the respondents all the way until it was finally established by this Court in 1976. There was a clear finding by the Court that this problem arose as a result of the Government's surveyor erroneously including the appellant's right of way in the land conveyed by them to Cable and Wireless (W.I.) Ltd.,

The undoubted right of the appellant has been infringed over a long period of time and we do not consider this to be a case where justice would be met by a mere award of nominal damages. We consider the award of \$100 to be manifestly unreasonable. Taking into consideration the undertaking given by Mr. Ritch we are of the opinion that an award of \$3000 would be more in keeping with reality.

The appeal is allowed and the award of \$100 will be set aside and one of \$3000 substituted therefor. It follows that the order for costs must be varied, and the appellant will have the

costs of the assessment in the Court below and of this appeal, such costs to be taxed or agreed.