

CAYMAN ISLANDS

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL No. 1/72

BEFORE: The Hon. President
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A.

BETWEEN - BENTLEY ROSS - PLAINTIFF/APPELLANT
AND CABLE & WIRELESS (W.I.) LTD. - DEFENDANT/RESPONDENT

Lancelot Cowan for plaintiff/appellant
instructed by O.L. Panton & Co.

Ramon Alberga, Q.C., for defendant/respondent
instructed by W.S. Walker & Co.

June 23, 24, 25; December 3, 1976

ROBINSON, P.:

On the 25th June, 1976, we allowed the appeal in this matter and intimated that we would, at a later stage, give our reasons in writing. This we now do.

The appeal was from a judgment of the Grand Court delivered on the 30th day of July, 1971, wherein the plaintiff's claim that the defendant had obstructed a right of way leading from the public road to the plaintiff's land by erecting buildings thereon, and seeking damages and other relief therefor, was dismissed with costs to the defendant.

It was quite clear from the evidence given by the plaintiff and his witnesses that a right of way leading from Fort Street to the plaintiff's lands known as Red Spot had been acquired by the owners of Red Spot from as far back as 1931 or early 1932, that that right of way ran along the southern

boundary of lands formerly owned by Captain Lawrence Bodden and now belonging to Cayman Commercial Company Ltd. and had been enjoyed and used without interruption as occasion warranted right up to the commencement of building operations by the defendant company in 1966. The failure of the trial judge so to find was inexplicable.

Almost as inexplicable was his failure to find that the defendant company had encroached on that right of way and had obstructed same by erecting a building and a steel tower thereon. The evidence of the plaintiff and his witnesses apart, a proper evaluation of the evidence of the defendant company's own witnesses could lead to no other reasonable conclusion.

Mr. Peter Forrestall, who was the defendant company's Resident Manager in the Cayman Islands at the relevant time, i.e. from October, 1965 to July 1967, testified that when he arrived in the Cayman Islands in late October, 1965, there was a site plan which the defendant company had prepared and which showed the "land we got from Government". That plan showed on the eastern boundary (he could have called it the northern boundary - north-eastern would be more accurate) "a footpath outside boundary we got from Government". Mr. Forrestall, in addition to admitting that "there was a footpath adjoining our lands" also averred that "I saw that Fort Street entrance to the way. It was a clearly defined though there was rubble, sand and building materials there". And he confirmed that "It was obvious that people had walked along it".

That site plan, dated March 1965, was admitted in evidence as Exhibit 14 and it showed not only the footpath to which Mr. Forrestall referred in his evidence but also a fence which was no longer there when Mr. Forrestall arrived in the Cayman Islands as he testified that "there was no fence on the site until much later stage of completion There was no fence showing our boundary....." The site plan, however,

showed that a fence was there when the plan was prepared (presumably in March, 1965), and that the footpath was outside that fence.

It was clear from Mr. Forrestall's evidence that he saw only one footpath along which people had obviously walked, that that footpath was not included in the land which the defendant company had acquired from Government and that it had a Fort Street entrance which he saw.

Mr. Forrestall had also testified that "From 1963 I knew Government had sold the land to Cable and Wireless". It appears, therefore, that the Conveyance of 23rd October, 1965 (Exhibit 13) was merely a legal formality to give legal effect to the sale and that the plan prepared in March, 1965 by Mr. Clarence Vernon Thompson, the Collector of Customs who also did survey work, was intended to reflect the actual land on earth which the defendant company had in fact acquired from 1963 and about which Mr. Forrestall had testified with particular reference to what he knew to be its true eastern boundary on earth.

Mr. Clarence Thompson's evidence should therefore have been examined in the light of the above. He testified that when he made his survey in March, 1965, of a portion of the Town Hall lands for purpose of sale of part to Cable and Wireless, he recalled seeing no track "on Cayman Commercial side of fence". Indeed he claimed to know no passage from Fort Street to plaintiff's lands. He did testify, however, that "Captain Lawrence had a concrete fence along Fort Street ending with a big concrete pillar. It was not against Town Hall fence. It was about 6' from Town Hall fence. There was a space and then the Town Hall fence. I believe a lot of people entered there to get to Town Hall water cystem My measurements stopped at concrete pillar. My measurements of Town Hall land stopped at fence." The statements in these last two sentences seem contradictory.

Be that as it may, what follows is far more important.

Mr. Thompson testified as follows: "There was a gap between Government fence and the pillar. I regarded gap as entrance to Town Hall lands."

The conclusion seems inescapable. The gap that Mr. Thompson regarded as "entrance to Town Hall lands" was the "Fort Street entrance" to the footpath which Mr. Forrestall had testified was "adjoining our lands", and which is the right of way that the plaintiff had claimed. And in respect of this right of way, Mr. Thompson had this to say "Building of Cable and Wireless are in that gap." He also admitted that "Gap could lead to anywhere behind Town Hall, including lands of Ross", and that "I measured gap at 8 feet between post and wall".

It seems clear, therefore, and should have so appeared to the learned trial judge had he properly evaluated the evidence, that Mr. Thompson had erroneously assumed that that the 8 foot gap was the entrance to the Town Hall lands and not, as it in fact was, the entrance to the plaintiff's right of way. Mr. Thompson had therefore wrongly included that right of way in the plan he prepared in relation to Exhibit 13. (And so as to get his 104 ft. as being the width of the land along Fort Street, he measured in a straight line inside the land instead of measuring along the actual curved boundary with the road.

Another piece of evidence that should have led the learned trial judge to the conclusion indicated above is Mr. Thompson's further evidence as follows:

" I saw a wire fence leading down from posts as it was in 1962. It was standing intact with barbed wire. It was Capt. Lawrence's boundary post, "

This Court also visited the locus, as did the learned trial judge in the course of the trial, with the parties and their Counsel, on Wednesday 23rd June, 1976. An old wire fence was still to be seen which divided the western boundary

of Cayman Commercial Property from the plaintiff's lands. Significantly enough, at the south-western corner of the Cayman Commercial Property, that old wire fence continues in an easterly (or south-easterly) direction towards Fort Street and somewhere along that easterly route becomes merged with the new chain link fence of the defendant company which new fence continues to Fort Street. Here again, this view of the locality supports the conclusion that the old wire fence was the fence of Cayman Commercial Property and not the fence of the Government Town Hall lands. It stopped at the south-western corner of the Cayman Commercial Property and then continued without any break or gap in an easterly (or south-easterly) direction forming the northern boundary of the right of way claimed by the plaintiff. Were it not so, one would have expected to find a gap (of about 8 feet) between the southern end of Cayman Commercial Property fence which runs from north to south dividing the Cayman Commercial Property land from the plaintiff's land and the fence which runs from west to east. Instead the fence running from west to east was merely a continuation of the fence that came from the north to south along the western boundary of the Cayman Commercial Property land. And that fence running from west to east appeared at the western end to be just about 8 feet north of what appeared to us to be the northern boundary on earth of the Government Town Hall lands. That that old wire fence should have ended in a straight line with the new chain link fence erected by Cable and Wireless should have suggested to the learned trial judge, as it has to us, that the chain link fence has been placed about 8 feet north of where it should have been and has in fact engulfed the 8 foot pathway that the plaintiff claimed as his right of way.

It is for these reasons that we had no difficulty in concluding that Mr. Thompson had erroneously included the plaintiff's 8 ft. wide right of way in the plan which he had prepared for purposes of the Conveyance of 23rd October, 1965 between the Cayman Islands Government and the defendant company and which now appears as the sketch map annexed to Exhibit 13. The sketch map itself clearly shows the incorporation of this 8 foot gap.

We therefore allowed the plaintiff's appeal, set aside the judgment of the court below and entered judgment in favour of the plaintiff/appellant with damages to be assessed by the Judge of the Grand Court upon enquiry. We also ordered that the plaintiff/appellant should have the costs of this appeal and the costs in the court below, to be agreed or taxed.

At the time of delivery of that judgment, we stated that the court had been informed that the offer of the Cayman Islands Government contained in Exhibit 6, the letter of 15th February, 1971 from the Attorney General to the then Attorneys of plaintiff, was still open, that the Government was still prepared to grant to the plaintiff, his heirs and assigns, an alternative right of way to his land through the adjoining Town Hall premises, it to be understood, however, that it could not be an exclusive right of way and that the parties might wish to have this fact considered in relation to the inquiry for an assessment of the damages.

Having regard to the decision of this court on the main issue it follows that the order of the court below dismissing the third party proceedings from which, however, no appeal had understandably been brought, ought not to stand but it remains for the parties concerned to take such steps in connection therewith as they consider fit.