

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 210 of 2012

BETWEEN

SHERON VICTORIA CYRUS

CLAIMANT

AND

ROBERT ERIC LEON NICHOLS-BOWEN

DEFENDANT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2014: January 27, 28, 30

May 07

October 21

2018: November 27

Appearances:

Mr. Pearson J. Leacock, Attorney-at-Law for the Claimant.

Ms. Lynette Eastmond, Attorney-at-Law for the Defendant.

DECISION

Introduction

- [1] This matter requires a determination by the Court as to whether the Claimant is entitled to a right of way over the Defendant's land.

Background

- [2] The Claimant lives on land at Sutherland No.1 in the parish of St. Lucy owned by the estate of Gwendolyn DePeiza, deceased. The land has an access to Half Moon Fort that is now impassable. To reach the nearest public road, the Claimant and her neighbours traverse lands owned or occupied by other persons, including the Defendant.
- [3] Prior to Mrs. DePeiza's death, the Claimant's mother paid rent to the deceased. No rent has been paid for the land the Claimant occupies for a number of years. In fact, in December 2012 the Claimant and her mother instituted proceedings to acquire the land by adverse possession.
- [4] The Defendant is the fee simple owner of land to the north west of the land occupied by the Claimant. The Claimant alleges that the Defendant orally agreed to convey a six foot right of way over his land to the Claimant. As a result of this agreement, she contends that her attorney-at-law drafted a deed to grant her the right of way. A surveyor was also engaged to draw a plan of the Defendant's land showing the right of way. The Defendant denies that there was any such agreement.
- [5] The Claim as presented to the Court is:-
- (1) that the Defendant is estopped from denying the Claimant's equitable interest in his land;
 - (2) that a deed, in the same terms as the draft agreement

prepared by the Claimant's attorney-at-law, be executed by the parties;

- (3) for costs; and
- (4) for further or other orders.

Issues

[6] The evidence presented to the Court crystalized into three main issues, namely:-

1. whether there is an enforceable oral agreement between the parties to grant the Claimant a right of way over the Defendant's land;
2. whether there is evidence of a proprietary estoppel that allows the Court to enforce a right of way over the Defendant's land; and
3. whether the Claimant is entitled to a right of way by virtue of an easement by prescription.

Was There an Oral Agreement?

[7] In her Statement of Claim filed on 09 February 2012, the Claimant pleaded as follows:-

- “4. The Defendant requested that Mr. Pearson J. Leacock Attorney-at-Law proceed with a Draft Agreement to grant the Claimant a six foot right of way over the said land.
5. The Defendant visited the office of [Mr. Leacock] sometime in about the 7th day of December 2011 and agreed to grant the Claimant a six foot right of way over the said land to be located on the eastern side of the said land.

6. The Defendant further agreed to have the said land surveyed and a plan produced showing the said six foot right of way over the said land. He also instructed the Bank of Butterfield at Lower Broad Street in the parish of Saint Michael to provide the Claimant's said Attorney-at-Law with a copy of the Title deeds to the said land, which they did.
7. [Mr. Leacock] duly prepared the Draft Deed giving the Claimant the said right of way over the said land and forwarded the same to Mr. Frank Belgrave Attorney-at-Law for the Defendant for his perusal.
8. [Mr. Belgrave] sent an email to [Mr. Leacock] essentially stating that the Defendant does not acknowledge any right of way to the Claimant or anyone else".

[8] The Claimant's lawyer also filed an affidavit on 09 February 2012, which spoke to his discussions with the Defendant about granting the Claimant the right of way. However, the Court was unable to consider this document because Mr. Leacock gave no oral evidence, and did not tender himself for cross-examination. The Claimant did not specifically plead that Mr. Leacock was her authorised agent at the relevant time. However, the Court accepts that Mr. Leacock acted in that capacity.

[9] In her Affidavit in Support filed on 09 February 2012, the Claimant deposed to her knowledge of a conversation between the Defendant and Mr. Leacock.

“(5) I am informed by my Attorney-at-Law [Mr. Leacock] and I verily believe the same to be true that the said [Defendant] came to his office in or about the 7th day of December

2011 and agreed to grant me a six foot right of way on the eastern side of his land. He further instructed Mr. Leacock to draw up a Deed providing the same and forward it to [Mr. Belgrave] for his perusal and approval before he signed it. Further [the Defendant] also gave his permission for a Land Surveyor to survey the said land and produce a plan with the said right of way”.

[10] The Defence was filed on 08 March 2012. The Defendant’s narrative with respect to any discussions about the grant of a right of way is as follows:-

- “9. On or about November 16, 2011 I was contacted by the Claimant’s lawyer [Mr. Leacock] who said that he was acting on behalf of the Claimant and that she wanted to purchase the land. I told him the price and he advised that his client would not be able to buy it at that price.
10. On or about November 18, 2011 I was contacted again by [Mr. Leacock] about the grant of a right of way to his client. I told him that I would have to be advised by my lawyer before I could agree to anything.
11. On or about November 25, 2011 I visited [Mr. Leacock’s office] at his request. He told me that he was drafting a document and that he would get a surveyor to survey the land. I told him that I could not agree to the grant of a right of way without advice from my lawyer.
12. The Claimant’s lawyer then started to call me almost every day on my mobile phone to the degree that when I recognised his number I did not answer the mobile.

13. When he could no longer reach me on my mobile phone he started to call me on my land line at home. Sometimes it appeared as though he was alternating between my land line and mobile phone in quick succession.
14. I felt as though I was being harassed so I gave him the information that he requested such as the name of my Bank, my Account Manager and my lawyer so that he would stop calling me.
15. [DD] is my Account Manager at the Bank of Butterfield. I had been in discussions with the Bank about selling the land and he expected to get a call from my lawyer.
16. On or about January 3, 2012 [DD] informed me, by telephone, that he was going to email my lawyer information regarding the land in St. Lucy and forward the information to me as well. I told him that he should go ahead.
17. Subsequently he asked me about the identity of [Mr. Leacock] because he had never known him to be my lawyer. I then informed him that he was not my lawyer and that he was the lawyer of the lady trying to acquire six feet of my land for a right of way. [DD] then informed me that he had already sent off the email because [Mr. Leacock] had presented himself as my lawyer.
18. I reiterated to [Mr. Leacock] that I could not agree to anything without my lawyer. I therefore did not believe that [Mr. Leacock] or the Claimant would go ahead and incur any expense not knowing what the advice of my lawyer would be.

19. Nigel Marshall, a surveyor, called me on or about January 7, 2012 to inform me that he was instructed by the Claimant's lawyer to survey the land. At that time I instructed him not to proceed as I was waiting on my lawyer to contact the Claimant's lawyer.
20. Approximately five minutes later, Nigel Marshall called me back and said that in his professional opinion I did not have to give the Claimant six feet of my land. I told him that I did not agree to anything with the Claimant's lawyer and that I was not signing any documents and told him that he was not to proceed.....
24. I have never spoken to the Claimant about giving her a right of way or any other matter". (See the Defendant's Affidavit in Answer filed on 08 March 2012).

[11] According to the Claimant, although she was accustomed to passing over the Defendant's land, she did not know him. In fact, the first time she saw him was in the court. She confirmed the Defendant's evidence that she never had any discussion with him about his land. Her evidence is that:-

"I did not enter into an agreement with the Defendant to acquire any portion of his land....My lawyer called the land surveyor. I did not call the land surveyor. The Defendant did not encourage me to get a land surveyor or to do anything".

[12] The Claimant had no direct knowledge of what occurred between her lawyer and the Defendant. She relied on Mr. Leacock's account; an account that

could not be subjected to cross-examination because Mr. Leacock did not give oral evidence. The Court is unable to consider either Mr. Leacock's version, or the Claimant's second hand reports, about what transpired between the Defendant and Mr. Leacock in relation to the right of way.

[13] The Defendant admitted in his pleadings that he did meet with Mr. Leacock to discuss the possibility of granting a right of way over his land to the Claimant. However, he vigorously denied consenting either to the preparation of a deed, or to a survey of his land to produce a plan showing a right of way.

[14] During his examination-in-chief, the Defendant informed the Court that:-

“I have met the Claimant's attorney. He contacted me about purchasing on behalf of the Claimant. I told him the price. He said she was no longer interested and that he was representing her in another matter. He contacted me by phone, several calls, very regular. He called me on my cell phone on numerous occasions. I felt a little intimidated because of the number of times he was calling.

I went to see him at his office because he kept calling and asking for us to speak about the matter. He wanted to discuss me giving his client a right of way over my land. Mr. Frank Belgrave was my lawyer at the time.

I did not agree to give his client a six foot right of way.

I tried to contact my attorney but he was out of the island at the time. I spoke to him after he came back. My attorney wrote a letter to Mr. Leacock.

....This is the letter that was copied to me. [Exhibit RNB4 admitted]....

I am aware that a survey was attempted. I can't recall the gentleman's name. He was a land surveyor. He called me. I told him that I had not instructed any survey and nothing was to be done until I contacted my lawyer".

[15] And in cross examination the Defendant stated further that:-

“[The Claimant's] attorney gave me something to read when I visited his office. I told him that I can't do nothing until I talk to my lawyer....I did not tell the Claimant's attorney that I will give a right of way over the land. I told the Claimant's attorney that if I built a house there I would have no problem with anybody passing. But since I was going to sell the property I cannot sign or agree without talking to my lawyer....I said who my lawyer was and who to send the agreement to. I did not say I was in favour of a survey for a right of way....I did not tell the surveyor to go ahead”.

[16] The Court is persuaded that the Defendant did not agree with Mr. Leacock to grant the Claimant a right of way for a number of reasons. The oral evidence of Mr. Nigel Marshall, the surveyor, is critical. His instructions for a plan showing a six foot right of way came from Mr. Leacock and not from the Claimant. When Mr. Marshall contacted the Defendant to inform him about Marshall's engagement to provide a plan showing the right of way, the Defendant let it be known immediately that he was not in favour of granting a right of way to the Claimant.

[17] The Defendant did admit to Mr. Marshall that there were previous discussions with Mr. Leacock. But there is no evidence from Mr. Marshall that the Defendant also admitted that he had agreed either to grant the Claimant a right of way, or to have a surveyor draw a plan showing the right of way. In speaking to Mr. Marshall, the Defendant was adamant that he had to speak to his lawyer, and that he would be contesting any right of way. This led Mr. Marshall to observe that "...there seemed to be a difference of opinion with respect to what was to be done".

[18] Mr. Marshall detailed his conversation with the Defendant as follows:-

"...I informed him of the task assigned to me....We conversed. My recollection of the conversation was that [the Defendant] was saying that he was not in favour of having a right of way delineated for [the Claimant]. I told him that I had been informed that he would be permitting the delineation of a right of way to allow [the Claimant] to traverse his lot.

I further informed [the Defendant] that Mr. Leacock had told me that it was already agreed that [the Claimant], who had been traversing the lot for a number of years had been given permission to have a right of way delineated. I told him that there seemed to be a difference of opinion with respect to what has to be done.

I informed [the Defendant] that a land surveyor does not give title or ownership to land, and I would therefore still mark or delineate the right of way as per the instructions of Mr. Leacock. [The Defendant] said to me that's okay but that he would be contesting the legality of the right of way.

I do not recall [the Defendant] denying me the right to carry out a survey on his land. If I am instructed by the landowner not to conduct a survey I will take up my tools and leave. If [the Defendant] had told me don't do a survey on my land I would take up my tools and leave.

I look at it that I had permission to do the survey. But I do note that he did say that he would contest the legality of the right of way”.

[19] Mr. Marshall added additional details about the conversation with the Defendant during his cross examination.

“During my conversation with [the Defendant] he did not make it clear that he was against the survey being done. I understood him to mean that he understood that I could not confer title or ownership to anyone....I told [the Defendant] that I understood that the parties had already agreed. [The Defendant] said that he would have to speak to his attorney as well....My thoughts were that even if he contested the legality of the right of way it had to be shown on a plan, hence why I continued to execute the instructions.....

I never said he gave me permission to go ahead. [The Defendant] did not tell me to carry out the survey, but he never denied me carrying out the survey either”.

[20] This conversation between Mr. Maxwell and the Defendant occurred in early January 2012. It confirms that two things were uppermost in the Defendant's mind. First, the Defendant intended to contest any assertion by the Claimant that she was entitled to a right of way over his land. Secondly, the Defendant

thought it best to get the advice of his lawyer before agreeing to execute a deed in favour of the Claimant. In these circumstances the reasonable inference is that the Defendant never agreed with Mr. Leacock to grant the Claimant a right of way over his land.

- [21] The tenor of the correspondence from the Defendant's lawyer to Mr. Leacock supports the Court's finding of fact and the inference drawn therefrom. Mr. Belgrave wrote to Mr. Leacock by letter dated January 30, 2012, and reiterated the Defendant's position as follows:-

“Dear Sir

Re: Land and Property situate at Sutherland No.1,
St. Lucy

I act on behalf of [the Defendant] and refer to your letter dated November 09, 2011.

Please be advised that my client does not acknowledge any right of way upon or over his property and accordingly is not in a position to execute any document transferring a right of way to your client or indeed to any person. Consequently, he will vigorously prosecute in the Courts any attempt to whittle away his interest in the said property”.

Mr. Leacock's November 2011 letter was not made available to the Court.

- [22] Mr. Marshall's evidence also revealed that when he surveyed the Defendant's land in early January 2012, there was “no amount” of topsoil and no grass.

Outcrops of rock were showing, and the limestone was visible. The Claimant also testified to finding the walkway over the Defendant's land "blocked and impassable". In her words:-

"Mould, top soil was removed. Dug up areas and rock remained which made it impassable....The Defendant's land was inaccessible for two years now and my family and I found another access".

[23] The Claimant's witness Lorna Broome also told the Court that she could no longer walk across the Defendants land because:-

"I came home one evening and found [the Defendant's] land dug out.....It is not safe now....".

[24] Jerry Skeete, another of the Claimant's witnesses, agreed that on the Defendant's land:-

"The topsoil was removed....The Defendant's property is now treacherous to pass over. I prefer not to go there because of the unevenness and the up and down".

[25] This evidence from the Claimant, her two witnesses and the surveyor, gives credence to the Defendant's narrative that he had cleared his land in preparation for the construction of a house, after receipt of town planning permission. Having cleared the land he discovered that there was a sink hole on the adjoining land. The Defendant then considered selling the land because an engineer was unable to confirm whether the sink hole affected the Defendant's land.

[26] This version of the factual matrix is consistent with the Defendant's statements that Mr. Leacock had first approached him about the possible sale of the land to the Claimant. (See para. [10] supra at subpara.9). The Defendant also discussed the sale of the land with his bankers. (See para. [10] supra at subpara. 15).

[27] The Defendant expressed a concern that if he granted the Claimant a six foot right of way on one side of his land, "I would not be able to build a house on the land". And, inferentially, a right of way over the land could affect the prospects for a sale of the land and the sale price. The Court is of the view that, with this in mind, the Defendant would have resisted any notion that the Claimant had a right of way over his land. And he would not have agreed to grant her a right of way by deed. This is encapsulated in the Defendant's oral evidence that:-

"I did not tell the Claimant's attorney that I will give the Claimant a right of way over my land. I told the Claimant's attorney that if I built a house there I would have no problem with anybody passing. But once I was going to sell the property I cannot sign or agree without talking to my lawyer".

[28] Section 47(1) of the Property Act, Cap. 236 provides that:-

"No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to

be charged or by some other person thereunder by him lawfully authorised”.

[29] The claim before the Court is predicated on a non-existent oral contract. Part of the Claimant’s case is that she incurred legal and surveying fees because of an oral agreement by the Defendant to grant her a right of way. Even if the Court had found that an oral contract existed between the parties, section 47(1) of the Property Act would not have applied to the Claimant because of these acts of part-performance by her.

[30] The doctrine of part-performance is an exception to the statutory bar against the enforcement of oral contracts pertaining to land. G. Kodilinye and M. Kodilinye explain that:-

“In equity, an oral contract for the sale of land may be specifically enforced despite the absence of a written memorandum, if the claimant...has done *a sufficient act of part-performance of the contract*. The principle underlying the doctrine of part-performance is that: ‘if one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable...’ ”. (See **Steadman v. Steadman [1976] AC 536**, at 540 per Lord Reid, referred to in “Commonwealth Caribbean Contract Law”, 2nd ed, at p.31-32).

[31] The question may well be asked whether the payment of the various fees by the Claimant establishes that an oral contract existed between the parties. As

far as the draft deed is concerned, the Defendant made it clear to the Claimant's lawyer that he could not agree to the draft deed without the advice of his own lawyer. That advice, when communicated to the Claimant's lawyer, was emphatic that there would be no agreement with the Claimant, or concession of rights to the Claimant by the Defendant. Another observation is that a six foot right of way may be much wider than the track or path that the Claimant alleges she walked over for many years.

[32] In relation to the surveyor's fees, the Defendant cannot be held responsible for the surveyor's decision to execute Mr. Leacock's instructions although he realised that there was "a difference of opinion with respect to what was to be done". It must also be borne in mind that another aspect of the Claimant's case is that she is entitled to the right of way either by proprietary estoppel or prescription or both. According to the surveyor:-

"My thoughts were that if [the Defendant] contested the right of way it had to be shown on a plan, hence why I continued to execute the instructions".

In his expert opinion, a plan was required, in any event, to bolster the Claimant's case in full.

Proprietary Estoppel

[33] It was argued on behalf of the Claimant that the evidence established a

proprietary estoppel in her favour. Counsel for the parties were guided by the statement of the law by Oliver J in **Taylor's Fashions Ltd v. Liverpool Victoria Trustees Co. Ltd** [1982] QB 133. The learned Judge stated that:-

“if under an expectation created or encouraged by B that A should have certain interests in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment with such land, a Court of Equity will compel B to give effect to such expectation”. ([1982] QB 133 at 144).

[34] The Caribbean Court of Justice has more recently endorsed the distillation of the elements of proprietary estoppel by the House of Lords. In **Walsh et al v. Ward et al** 87 WIR 101, Sir Dennis Byron PCCJ said that:-

“[37].... it has been judicially accepted that there is no definition of proprietary estoppel that is both comprehensive and uncontroversial. Nonetheless, Lord Walker explained in the House of Lords decision of **Thorner v. Major and others** [[2009] UKHL 18] that most scholars agree that the doctrine is based on three main elements: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance”.

[35] In this case the Claimant alleges that the Defendant represented to and assured her lawyer that he would grant her a right of way over his land by deed. In reliance on that representation and assurance, she expended money on legal fees and for a surveyor's plan delineating the right of way. It is the Claimant's

contention that the Defendant's refusal to honour his representation and assurance has caused her financial detriment. This Court is called upon to declare her equitable interest in a right of way over the Defendant's land.

[36] The Court has already determined that there was no agreement between the parties for the Defendant to grant a right of way over his land. The Defendant did tell the Claimant's lawyer that if he built a house on the land he had no objection to the Claimant walking over his land. If this can be construed as a representation or assurance, it was conditional on the Defendant building a house on the land. It cannot be construed as a representation or assurance that the Claimant would be granted a right of way by deed, either for a wider area than a track or pathway, or for any area at all.

[37] The financial expenses incurred by the Claimant were not as a result of representations or assurances made by the Defendant. Therefore, no estoppel against the Defendant arises in her favour. The Court is unable to enforce a right of way over the Defendant's land on the basis of a proprietary estoppel.

Easement by Prescription

(1) The Statutory Foundation

[38] The archaic language of section 35 of the Limitation and Prescription Act, Cap.232, provides that:-

“(1) No claim which may be lawfully made
at common law, by....prescription....to any way or

other easement..., to be enjoyed or derived upon, over or from any land..., being the property of any person or body corporate, when such way...has been actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years, shall be defeated or destroyed by showing only that such way...was first enjoyed at any time prior to such period of 20 years, but nevertheless such claim may be defeated in any other way by which it is now liable to be defeated.

(2) Where such way...has been so enjoyed for the full period of 40 years, the right thereto shall be deemed absolute and indefeasible, unless it appears that it was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing”.

[39] Sampson Owusu opines that these and similar sections mean that:-

“An easement which has been actually enjoyed without interruption for the prescribed periods confers a right of easement, which, by virtue of the statute, cannot be defeated by proof that the enjoyment of the right claimed started later than the date adopted by the courts...for establishing easements under the common law. The 40 year period of uninterrupted enjoyment vests an “absolute and indefeasible” title to an easement. A prescriptive claim based on any of these periods can, however, be defeated by any other defense available at common law, such as the fact that the right claimed lacks any of the essential characteristics of an easement...”. (See Commonwealth Caribbean Land Law, 2007, at p.435-436).

[40] The Court’s consideration of whether a statutory easement by prescription exists in favour of the Claimant, will begin by determining the period of time

during which the Claimant walked over the Defendant's land. Barbara Yearwood was a witness for the Defendant. The Court accepts her evidence that she lived in the same area as the Claimant for 34 years, and that she went there and found people passing over the Defendant's land. This evidence was elicited during cross examination by the Claimant's attorney-at-law.

[41] Ms. Yearwood also testified that:-

“I have seen a track going from the Claimant's land over the Defendant's land. It was there for the 34 years I was there. I have seen the Claimant and her mother use the track to get to the main road”.

This evidence proves that a track was in use over the Defendant's land for at least 34 years. But it does not prove that the Claimant was using the track for 40 years. Not even the Claimant's witnesses spoke of anyone using the path for 40 years or more. Therefore, the Claimant can take no benefit from section 35(2) of Cap.232. (See para. [38] supra).

[42] The Defendant's cousin gave evidence that she had never seen the Claimant cross the Defendant's land. And his father testified that “During the time I owned the land I never saw a track”. The Court is persuaded by the evidence of Ms. Yearwood. As a witness for the Defendant it was never suggested to her that she was mistaken.

[43] Ms. Yearwood was never asked by the Defendant's counsel to give an

estimate of the time during which the Claimant was passing over the Defendant's land. The Claimant herself deposed to passing over the land for 15 years. In an affidavit filed on 09 February 2012, in support of an urgent application for injunctive relief, she swore that she had resided on the land for the past 30 years. More importantly, the Claimant also swore in that affidavit that she and her relatives were passing over the Defendant's land for 15 years (para. (2) of Affidavit).

[44] The Claimant's affidavit evidence conflicts with her oral evidence that the Defendant owned the land that she "was walking on for over 30 something years". When shown her affidavit by counsel for the Defendant, the Claimant responded:-

"I am familiar with this document. It says that I was passing over [the Defendant's] land for 15 years. I was passing over Ms. Howell's land prior to this (the fenced in area). I was living at the current house spot all my life. But I was not traversing the Defendant's land all my life".

[45] Ms. Howell's land, or the fenced in area, refers to another piece of land to the north east of the Defendant's land that shares a common boundary with the Defendant's land. This other land is owned by Deborah Howell, but the uncontroverted evidence is that it was fenced in some 15-16 years ago. Prior to the erection of the fence, the Claimant and other persons traversed Ms. Howell's land.

[46] After the fence was built, there was no foot access across the enclosed area.

Indeed, the Defendant's father stated in his affidavit and oral evidence that he was aware of a well-established foot path on Howell's land, and that he had seen other person's using that path. (See para.7 Affidavit filed on 13 November 2013, and oral testimony of 30 January 2014).

[47] The Claimant's response to counsel for the Defendant is that she was walking over Howell's land before she began to traverse the Defendant's land. Her evidence of 15 years of personal pedestrian traffic over the Defendant's land, dovetails with her evidence, given in re-examination, that she stopped crossing Howell's land 15 years ago. A reasonable inference to be drawn from her February 2012 affidavit, and her oral evidence in chief, is that when passage over Ms. Howell's land was curtailed by a fence, the Claimant began to use an alternative route over the Defendant's land.

[48] Recognising that the Claimant's evidence as to her length of user of the Defendant's land was contradictory, her counsel sought to resolve the conflict through re-examination. This is what she said when re-examined:-

“There was an open field and I traversed both pieces at the same time. I was traversing both pieces at the same time from about when I was 5 to 6 years old. I moved there from a baby. I was traversing both pieces from approximately 5 to 7 years of age. I did not stop traversing both pieces before the area was fenced. I stopped after the area was fenced over 15 years ago”.

- [49] The evidence elicited in re-examination was obviously an attempt to reconcile the Claimant's changing evidence about her period of passage over the Defendant's land. The evidence of the witnesses does not prove 40 years of access over the Defendant's land. And 15 years of access by the Claimant falls outside the 20 year statutory period required by section 35(1) of Cap.232.
- [50] The Claimant had to establish another 5 years of unhindered passage before she could claim a statutory prescriptive right of way over the Defendant's land under section 35(1). This she attempted to do by claiming user of the Defendant's land for 5 to 7 years prior to the fencing in of the adjoining property. But noticeably, the Claimant never asked the Court to accept that she was mistaken in her affidavit evidence that she had unhindered passage over the Defendant's land for 15 years.
- [51] The evidence of the various witnesses ranges from those who never saw the Claimant walk over the Defendant's land, to those who say that she used an access over the Defendant's land for more than 30 years. The Defendant's cousin, Aileen Allman, said that she had seen the Claimant's mother cross the Defendant's land, but she never saw the Claimant do so. The Defendant's father, who was the previous owner of the Defendant's land, deposed that he was unaware that the Claimant or anyone else was crossing over the land.

[52] Jerry Skeete lived in the area for 34 years. He recalled seeing the Claimant and her mother crossing the Defendant's land for all of those 34 years. Skeete was 45 years of age when he swore his affidavit on 26 September 2013. Therefore, he began living at Sutherland No.1 when he was about 11 years old.

[53] Lorna Broome's affidavit was filed on 27 September 2013. She was 56 years old at the time, and up to then she had lived in the area for 29 years. She too recalled seeing the Claimant make her way over the Defendant's land for all of those 29 years.

[54] The Court has relied on the evidence of Barbara Yearwood. However, her affidavit gave no estimate of the length of time during which the Claimant accessed the Defendant's land. Ms. Yearwood's oral evidence revealed that she had lived in the area for 34 years. She confirmed that she moved there and found people passing over the Defendant's land, and that a track was on the Defendant's land for all those years. But no evidence was elicited from Ms. Yearwood as to how long she knew the Claimant to be living at Sutherland, or, more significantly, how long she observed the Claimant walking over the track on the Defendant's land.

[55] In this regard, the Court refers to another case filed by the Claimant on 19 December 2012, the foreclosure suit LTP 77 of 2012 (Exhibit SC 1). In that

document, which was signed by the Claimant and her mother, they deposed as follows:-

“4. We claim ownership of the property by virtue of the following facts:

- (1) That we have been living at Sutherland Number 1 in the parish of St. Lucy for over ten years.
- (2) That we have been renting a house spot from the late Gwen Depeiza of Sutherland Hill... for the past fifteen years although we have not been paying rent for approximately ten years and no demands for the same has been made to us by anyone during that period”.

[56] Approximately 10 months after filing her Statement of Claim in this matter, on 09 February 2012, the Claimant filed a foreclosure suit in which she stated that she was living on Ms. DePeiza’s land for 15 years. This aligns with the statement, in her February 2012 affidavit, that she and her family members were passing over the Defendant’s land for 15 years.

[57] There is no evidence in the present matter to suggest that the Claimant was living elsewhere in Sutherland before moving on to Ms. DePeiza’s land. Yet her February 2012 affidavit asserts that she lived at Sutherland Number 1 for 30 years. Her oral evidence in chief also alleges that she was passing over the Defendant’s land for 30 years.

- [58] There is likewise no evidence that the Claimant accessed the Defendant's land from another part of Sutherland Number 1, prior to moving on to the house spot where she lived for 15 years. The Court is of the view that the Claimant's oral evidence was not of a quality or kind to adequately explain the discrepancies raised between her affidavit and oral evidence.
- [59] The Court has stated its preference for the evidence of Barbara Yearwood, over that of the witnesses for the Claimant. Unfortunately, Yearwood's evidence does not assist in placing the Claimant at Sutherland for more than 15 years, or passing over the Defendant's land for 20 or 40 years. There is, therefore, no cogent evidence that the Court is inclined to accept, that establishes on a balance of probabilities that the Claimant had free unimpeded access over the Defendant's land for 20 years. The Claimant does not satisfy the requirements of section 35 (1) of Cap. 232.
- [60] The Court also noted that the Claimant's mother who paid the land rent, offered no witness statement and oral evidence in this case. Also, the Court found no evidence of the Claimant's age to use as a benchmark to determine how long she was traversing the Defendant's land. Her oral evidence was that she started crossing his land when she was approximately 5 to 7 years of age. But nowhere in any of the affidavit or oral evidence is the Claimant's date of birth or age revealed.

[61] Owusu proffered that a claim for a prescriptive right of way under the statute could be defeated if the right claimed lacked “any of the essential characteristics of an easement...”. (See para.[39] supra). Although the Court determined that the Claimant does not satisfy the statutory time periods, the Court will for completeness consider whether her claim would otherwise satisfy the essential characteristics of an easement.

(2) The Essential Characteristics of Easements

[62] An easement is a right over land that runs with the land, and, once established, it attaches to and forms part of the land. It is not a personal right. (See Smith J in **Baboolal et al v. Ali, HCA TT No. S1303 of 2003** at para. 18). A person laying claim to an easement must prove:

- (1) the existence of a dominant and servient tenement;
- (2) user of the servient tenement as of right;
- (3) fee simple ownership by the occupiers of both the dominant and servient tenements; and
- (4) continuous enjoyment of the easement claimed.

(See Megarry & Wade, “The Law of Real Property”, 8th ed, 2012 at paras. 28-043 to 28-058; Gilbert Kodilinye, “Commonwealth Caribbean Property Law”, 4th ed, at pages 176-179)

(i) Dominant and Servient Tenements

[63] The parcel of land acquiring the benefit of an easement is the dominant tenement, and the parcel of land providing the easement is the servient tenement. In this case the two properties are opposite each other. The Claimant occupies the dominant tenement, and the Defendant is the owner of the servient tenement over which a right of way is claimed.

(ii) User of Servient Tenement as of Right

[64] The Claimant alleges that she has used a defined pathway over the Defendant's land for a number of years *nec vi, nec clam, nec precario*, that is, without force, openly and without permission. Based on the evidence before the Court, there is no doubt that the Claimant crossed over the Defendant's land freely and without force. But whether her use of the property was open depends on the actual or constructive knowledge of the Defendant.

[65] It is the Defendant's case that he never knew that the Claimant and other persons were walking over his land. The unchallenged evidence is that the Defendant purchased the land from his father in January 2006. At the time of purchase he did not live in the same parish as the land, and he did not often visit his St. Lucy relatives who live near the land. Through his cousin Aileen Allman, who lives near the land, permission has been given to allow trucks to drive over or park on the Defendant's land to facilitate deliveries to tenants on

the DePeiza land. However, this relative never told him that individuals were walking across the land.

[66] It is a fact that prior to the trial of this matter, the parties did not know each other. The Defendant's oral evidence is that he did not know the Claimant; he never spoke to her; and he had no interaction with her. The Claimant's evidence was that she only knew the Defendant by seeing him in court. She did not know his father, the previous owner of the land. She did not recall ever seeing the Defendant or his father before coming to court. And she knew nothing about the history of the Defendant's land, or who owned it before the Defendant.

[67] Neither Lorna Broome nor Jerry Skeete knew either the Defendant or his father; or who owns the land over which the Claimant is asserting a right of way. In these circumstances it would not be difficult for the Court to find that the Defendant was unaware in 2006, when he purchased the land from his father, that the Claimant and other DePeiza tenants had an access route over his land to the highway.

[68] By his own admission, the Defendant was aware that individuals crossed over his land by the time he began excavation with a view to building a dwelling house. In his Affidavit filed on 08 March 2012, the Defendant stated that:

“8. After I started to excavate the land the neighbours that I saw and spoke to said that they

would take an alternative route to get to their homes.”

Inherent in this statement is that the Defendant came to realise that the DePeiza tenants were walking over his land.

[69] Although the Court accepts that the Defendant was not always aware of the user of his land by the Claimant, a plea of *clam* will fail if, as the servient owner, the Defendant had sufficient opportunity to discover the user. Megarry and Wade posit that:

“...the servient owner cannot make the user secret by shutting his own eyes; it must be:

“of such character that an ordinary owner of land, diligent in the protection of his interests would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment.”

(Supra para. [62] at para. 28-051, quoting Romer LJ in **Union Lighterage Co. v. London Graving Dock Co. [1902] 2 Ch. 557**, at 571)

[70] In **Lloyds Bank Limited v. Dalton [1942] Ch 466**, Bennett J commented that:

“It is notorious that the owners of land and buildings are interested in their boundaries, and, in my judgment, the facts proved at the trial of this case lead irresistibly to the conclusion that the successive owners of [the servient tenement], assuming them to have been reasonable persons, diligent in the protection of their interests, either must have known or must be taken to have had reasonable opportunity of becoming aware of the fact that [the servient

tenement was] supporting the north-east part of the plaintiffs' yard and of the outbuilding standing thereon. For these reasons, the plea of *clam*, in my judgment, fails." (p. 471)

[71] The Court is of the view that the public user of a demarcated footpath over the Defendant's land, by persons living in the area, would have fixed the Defendant with constructive knowledge of the user of his land. This conclusion is supported by the **Baboolal** case. (Supra at para. [62]).

[72] In **Baboolal**, the plaintiffs proved long public user of a road over the defendant's property for more than 35 years. Smith J referred to a presumption of knowledge that arises in cases of long user. Smith J cited Cross LJ in **Pugh v Savage [1970] 2 All ER 353**, where the learned law lord stated that:

"When long user of a way has been shown, I think that the law should support it if it can, and that we ought to presume, in the absence of any evidence to the contrary, that the owners of (the servient tenement) knew of the user and that (the predecessor of the owner of the servient tenement) knew of it". (**Baboolal** at para. 26).

[73] Smith J concluded that in the case before him:

"The evidence ... is that no one ever saw the former owners of the land in the area, so that they cannot be fixed with actual knowledge of the user of Lagoon Road. However, the evidence of the nature of the use of the Lagoon Road shows that, had the owners of the servient tenement ever visited their land, they would have been readily aware of this easement which was enjoyed by [the First Plaintiff] and her predecessors in title. They had the means of

knowledge or the constructive knowledge of this easement, and the Plaintiff's claim cannot be defeated on this ground." (**Baboolal** at para. 25)

[74] Had the Defendant visited his land regularly, he would have been aware that it was used by individuals as an access route to the highway. It appears that when he did visit the land during the excavation process, he became aware that his neighbours crossed over the land on foot. He also told the Court that it was the Claimant's lawyer who informed him that the Claimant was crossing his land. The Defendant had "the means of knowledge or constructive knowledge" of this user of his land. (See **Baboolal** supra at para. [73]). The same can be said for the Defendant's father when he was the owner of the land.

[75] In an affidavit filed on 13 November 2013, the Defendant's father deposed that the land was conveyed to him by his mother around 1988. (Para. 10 of affidavit). He owned the land for approximately 12 years before it was conveyed to the Defendant. Neither this conveyance, nor the conveyance to the Defendant, were produced to the Court. The affidavit also states that:

"During the time that I owned the land I was unaware of anyone crossing the land and neither did I give permission for anyone to cross the land... I never gave the Claimant or anyone else permission to cross over the land and I am unaware that the Claimant or anyone else might be crossing over the land". (Paras. 12 and 16 of Affidavit).

[76] The Defendant's father denied seeing anyone walking across the land when he visited as the owner. However, this Court has accepted the evidence of his son's witness, Barbara Yearwood, that people were exercising a right of way over the land for about 32 years. When Yearwood gave her evidence in 2014, she had lived in the area for 34 years. The Defendant excavated the land in early 2012, making it impassable by foot. Therefore, Yearwood had personal knowledge of the long user of the land by neighbours for 32 years.

[77] The Court also recalls the evidence of the Defendant's cousin Aileen Allman. Ms. Allman admitted that she has seen people crossing over the Defendant's land to and from the area where the Claimant lives, although the Claimant was not one of those persons. Ms. Allman did not know of "any particular track being developed over any of the land in No. 1 Sutherland except the area which Deborah Howell left to the East of her land to allow the residents to pass." (Para. 12 of affidavit filed on 13 November 2013). Again, the Defendant's witness Barbara Yearwood said otherwise. And there was no challenge to this aspect of Yearwood's evidence on the basis that she was either mistaken or deliberately misleading the Court.

[78] The Claimant easily establishes that she walked across the Defendant's land without his permission, *nec precario*. His father denied giving anyone

permission to cross the land when he owned it. The Defendant's evidence was that he was prepared to permit persons to pass if he built a house on the land.

[79] The evidence before this Court established user by the Claimant of the Defendant's land *nec vi, nec clam, nec precario*. But realistically, credible evidence of a right of way over the Defendant's land, by other individuals for 32 years, does not assist the Claimant. The Court made a finding that Ms. Cyrus used the pathway for only 15 year. Similarly, imputing knowledge of long user to the Defendant and/or his father would only assist the Claimant if she satisfied the minimum statutory period of 20 years of passage over the Defendant's land. As the person claiming a right of way, the Claimant had not enjoyed that right for 20 years or more.

(iii) Fee Simple Ownership of Dominant and Servient Tenements

[80] Owusu explains that:

“The acts on which a prescriptive claim is based should have been performed by or on behalf of a fee simple owner ... Prescriptive right under the common law can arise only where it has been exercised since time immemorial. It is therefore not possible for a tenant who has an estate which is less than a fee simple to acquire an easement by prescription, except where, as it normally happens, the exercise of the right is on behalf of a fee simple owner.” (Owusu *supra* at para. [39] pages 430-431; see also Megarry & Wade, *supra* at para. [62], para 28-054, and Kodilinye *supra* at para. [62] pages 178-179).

[81] In **Hobbs v. Laurie (1992) 27 Barb. L.R. 349**, the plaintiff acquire two portions of land from a plantation under the Tenancies Freehold Purchase Act, Cap.239 B. She claimed to be entitled to a right of way over adjoining land occupied by the defendant. Williams CJ noted that the claim was brought against the occupier and not the fee simple owner of the servient tenement.

The learned Chief Justice observed that:

“The existence of a right of way being a matter that affects the proprietary rights over the servient tenement, I would have thought that the owner of the tenement would have been the proper defendant”. (Page 351).

[82] Despite this deficiency in the pleadings, Williams CJ considered the case on its merits. The surveyor who prepared the plan for the plantation gave evidence that no right of way was shown on the plan. The case was dismissed because any right of way over the dominant tenement, which the plantation had when the plaintiff and her predecessors were tenants on the land she purchased from the plantation, was either not acknowledged by the plantation owner or had been abandoned by the plantation owner.

[83] Williams CJ reasoned that:

“The owners of [the plantation] did not convey to the plaintiff any right of way over the adjoining land. The surveyor who was acting for the owner told the plaintiff that she had no right of way over the land and showed her where her entrance to her lot was....This is the basis on which

the land was sold to her. On the evidence I find that the owner of the plantation either did not accept that it had any right over the adjoining land or made a deliberate decision to abandon what right it had....

[The plaintiff] is unable to rely on any period during which the way over the adjoining land was used before she bought because the owner of the tenement on whose behalf she and those before her would have prescribed either did not acknowledge that it had rights in the matter or abandoned what rights it had". (Page 355).

[84] Here, the Claimant began her user of the Defendant's land while she was a tenant on the dominant tenement. But she cannot be said to be making a claim on behalf of the DePeiza estate. There is no evidence that the personal representatives of that estate have agreed to or advanced such a claim. And this is unlikely given the fact that the Defendant's land was previously owned by that estate, and that the Defendant is a DePeiza descendant.

[85] Another relevant factor is that in 2012 the Claimant joined her mother in a foreclosure suit against the DePeiza estate. The Claimant does not acknowledge the DePeiza estate as her landlord. She is in a peculiar position of having no legal estate in the dominant tenement from which to launch her prescriptive claim against the Defendant's land. Her oral evidence left no doubt as to her status on the DePeiza land:

“The land I live on does not belong to me. I do not pay rent. My mother paid rent before. She stopped paying rent approximately over 10 years.

My mother and I started proceedings to acquire the land as an adverse possessor....That matter has not yet been determined”.

- [86] The Claimant is unable to satisfy the element of an easement that requires her to be the fee simple owner of the tenement, or to be claiming a prescriptive right over the servient tenement on behalf of her landlord.

(iv) Continuous Enjoyment of the Easement

- [87] Speaking to this characteristic of an easement, Megarry and Wade state that:

“The Claimant must show continuity of enjoyment. This is interpreted reasonably. In the case of rights of way it is clearly not necessary to show ceaseless user by day and night. User whenever circumstances require it is normally sufficient, provided the intervals are not excessive. However, merely casual or occasional user does not suffice”. (Supra at para. [62] para.28-058, and the cases mentioned there).

- [88] Kodilinye adds that:

“Whether the user of the way is sufficiently continuous is thus a matter of degree...the user need not have been by the same person throughout the whole period. It is sufficient that the user is by successive owners or occupiers of the dominant tenement – which would be the most usual case – nor need the user be by the owner or occupier personally. It is sufficient if members of his family or regular employees enjoy the user”. (See para.[62] supra at page 178).

- [89] The Claimant testified to always using a track over the Defendant’s land. It was also used by persons in her home, persons visiting her home, and

neighbours who lived “above and below” her house. Ms. Yearwood’s evidence was that she has seen the Claimant and her mother used the track to get to the main road. Lorna Broome asserted that the Claimant always used the access over the Defendant’s land. According to Broome, she hardly knew the Claimant and her family to use any other route before the pathway over the Defendant’s land became difficult to traverse.

[90] The Court accepts the evidence of continuous user of the path by the Defendant and her family. However, that user has not been proved satisfactorily to this Court to have been for 20 years or more. The Claimant cannot rely on long user by persons who are not her family members. Neither can she rely on user by successive owners or occupiers of the lot where she lives. There is no evidence of any person residing on the lot before it was rented by the Claimant’s mother.

[91] Had the Claimant established user of a path over the Defendant’s property for at least 20 years, she still would not have been entitled to a right of way, having not demonstrated to this Court that her user satisfied all the characteristic elements of an easement.

Disposal

[92] Given the findings of fact made by this Court, the Claimant is also unable to claim a right of way on any of the grounds advanced. There was no

enforceable oral agreement between the parties, and the Court found no evidence to support a proprietary estoppel. The Claimant is not entitled to an easement by prescription either by statute, at common law or through the fiction of a lost modern grant.

[93] The claim is dismissed with costs to the Defendant to be agreed or determined by the Court.

Sonia L. Richards
Judge of the High Court