

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2022/CLE/gen/1310

IN THE MATTER OF the Estate of Sir Malcolm McAlpine

B E T W E E N

JAMES McALPINE

(For and on behalf of the Estate of Sir Malcolm McAlpine)

Claimant

AND

INDYVAL INVESTMENTS LIMITED

Defendant

Before: Her Ladyship the Honourable Madam Senior Justice Deborah Fraser

Appearances: Mr. Vann Gaitor for the Estate of James McAlpine
Mrs. Sharlyn Smith and Ms. Akeira Martin for Indyval Investments Limited

Hearing Date: April 17, 2024

Easement – Conveyance – Dominant Tenement – Servient Tenement – Right of Way

JUDGEMENT

FRASER, SNR J:

Introduction

1. This is the trial of a claim initiated by Kenneth McAlpine, the father of the Claimant, who alleges that the Defendant unlawfully obstructed a right of way granted in a Conveyance dated November 7, 1985 ("1985 Conveyance"), for the benefit of the Estate of Sir Malcolm McAlpine. The Defendant contends that the acts complained of do not constitute an obstruction of a right of way, and did not prevent the Claimant from freely exercising the easement he claims was granted in the 1985 Conveyance.

Background

2. The Claimant, in the Writ of Summons filed on September 13, 2022, alleges that the Defendant, without authorization, used and obstructed an easement, which was a reserved right of way granted by the Executors and Trustees of the Estate of Sir Malcolm McAlpine and its successors in title in the 1985 Conveyance. The Defendant denies the claim and requests the following relief-
 - a. a Declaration
 - b. an Injunction
 - c. Damages
 - d. Interest
 - e. Costs.

Evidence

Claimant's Evidence

Evidence of Mr. John Wanklyn

3. Mr. Wanklyn filed a Witness Statement on March 22, 2024, in which he states:
 - (1) He worked for the McAlpine family in The Bahamas for many years and was asked to act as their agent in the proposed sale of a parcel of land located in and forming part of the Camperdown area;
 - (2) He is familiar with the Camperdown area;
 - (3) The right of way or easement along the southern side of the Defendant's property, commonly referred to as "Lightbourn Lane," is not mentioned in the Conveyances, but he is aware that it was a term of the property sale agreement between the vendors of the property and Sir Malcolm McAlpine;
 - (4) The easement to which the intended purchaser is entitled is a reservation of a right of way over the land on the southern side of the Defendant's property;
 - (5) He claims that he observed on the land on the southern side of the Defendant's property, two raised vegetable gardens, a well, banana plants, a small chicken coop containing a hen and baby chicks, and a chain-link fence enclosing part of the right of way.

Evidence of James McAlpine

4. Mr. James McAlpine filed his Witness Statement on March 22, 2024, in which he states:
 - (1) This action was initiated by his father, Kenneth McAlpine, in his capacity as the executor of the Estate of Sir Thomas Malcolm McAlpine, his grandfather;
 - (2) He was substituted as the Claimant in place of his late father on October 23, 2023;
 - (3) In 2020, he was informed that several obstructions were created by the Defendant on the property in question that hindered the use of the easement to which the purchasers of the property in Camperdown were entitled;
 - (4) The obstructions included vegetable beds, a well, a chicken coop, banana plants, and a chain-link fence that enclosed the entire right of way; he notes that these obstructions may or may not still be present;
 - (5) The Estate intends to sell a portion of the land, and the prospective buyer has sought assurance regarding the existence of a right of way to access the property for their use and enjoyment.

Defendant's Evidence

Evidence of Dr. Valentine Grimes

5. Dr. Valentine Grimes filed his Witness Statement on April 12, 2024 and it provides:
 - (1) He is an officer and director of the Defendant, Indyval Investments Limited;
 - (2) That prior to the ownership of the land by DAJ Development Co. Ltd., he was advised and believed that the land was owned by Edge Investments Limited;
 - (3) He has read the Conveyance dated November 28, 1997, and understood that the property was conveyed from Edge Investments limited to DAJ Development Co. Ltd. along with the right of way over and along the land to the South of the property conveyed;
 - (4) He and his family resided at the said property and when the Defendant purchased the property in August 2016 from DAJ Development Co. Ltd, the strip of land to the south of the Defendant's property over which the right of way was conveyed, consisted of mature virgin bush, and it was the same when he visited the property in March or April 2016;
 - (5) Seeing the overgrown bush confirmed to him that the right of way had not been used for many years, if ever;
 - (6) That the decision of the Defendant to clear the property over which the right of way existed was for security purposes;
 - (7) That during the Covid-19 pandemic, he and his wife established a chicken coop on the property to produce eggs, along with other produce for sustainability and food security, however, there was still access to the right of way;
 - (8) That his wife and children witnessed the illegal use of the property on two separate occasions;
 - (9) That due to the illegal use of the right of way, he erected a fence, however, the right of way remained available for the benefit of his household and his neighbours;
 - (10) That he erected cameras to monitor the property for security reasons;
 - (11) That he is aware that there are other ways to access the property, and the closure of the strip of land was for safety reasons and was not to obstruct or to prevent access to and from the property south of the said strip of land, and furthermore, the fenced area is wide enough to allow vehicular access;

(12) That he and his family never prevented access to the property south of the Defendant's property.

Evidence of Dr. Indira Grimes

6. Dr. Indira Grimes filed her Witness Statement on April 9, 2024 and it provides:
 - (1) She is the officer and director of the Defendant, Indyval Investments Limited;
 - (2) Prior to the ownership of the said property by DAJ Development Co. Ltd., she -was advised and believe that it was owned by Edge Investments Limited;
 - (3) She read the Conveyance and understands that the property was conveyed to Edge Investments Limited reserving a right of way ;
 - (4) She also read the Conveyance dated November 28, 1997 which conveyed the right of way to DAJ Development Co. Ltd.;
 - (5) She and her husband visited the said strip of land in 2016 and it was not visibly marked;
 - (6) A portion of the said strip of land was cleared and in December 2016 she and her husband maintained the said strip of land;
 - (7) In September 2020 during the Covid-19 pandemic, she and her husband used the land to produce eggs and other produce for the sustainability of their family;
 - (8) Someone frequented the strip of land on several occasions and subsequently this resulted in the death of a few chickens they were raising;
 - (9) This experience led to them erecting a chain fence to close a portion of the said land, and keeping a portion clear for the benefit of the family and their neighbours;
 - (10) Security cameras were also erected by them for security purposes;
 - (11)The portion left clear by them, she said, was wide enough for vehicular passage to occur;
 - (12) She is aware of other ways to access property south of the right of way and further that the fence was not an obstruction of the right of way preventing access to the property to the south.

Issue

7. The issue that arises for consideration and determination is: Whether the Defendant obstructed the right of way granted in the 1985 Conveyance?

Submissions

Claimant's Submission

8. Mr. Vann Gaitor contended that the Claimant does not assert any claim to land owned by the Defendant. Instead, the Claimant seeks the recognition of his right, as well as the rights of successors in title, to whom the Estate of Sir Malcolm McAlpine has provided an assurance to enjoy the use of an easement, free from obstruction by the Defendant or any other party.

9. Mr. Vann Gaitor, asserted that the Claimant is entitled to the right of way as detailed in Clause 3 of the Conveyance dated November 7, 1985 which permits:

“There is reserved to the Vendors in fee simple for the benefit of the whole and every part of the Vendors adjoining land a right of way in common with the Purchaser its successors in title and all other persons who may hereafter have the like right at all times and for all purposes with or without vehicles and animals to go pass and repass over upon and along the strip of land Twenty (20) feet wide shown coloured Blue on the plan hereto attached.”

10. Mr. Gaitor further asserted that Clause 3 of the aforementioned Conveyance demonstrates that the Vendors reserved a right of way in fee simple, for the benefit of the entirety and each portion of their adjoining land, to be shared in common with the Purchaser, its successors in title, and any other individuals who may subsequently acquire a similar right, for all purposes and at all times.

11. Mr. Gaitor reminded the Court that the dispute was due to the Defendant's obstruction of the right of way, which he argued constituted a violation of the right reserved for the Estate of Sir Malcolm McAlpine, as well as for every subsequent owner, purchaser, or successor in title to the Estate. Mr. Gaitor also emphasized that the First Schedule in the 1985 Conveyance provides a more detailed description of Clause 3 of the Conveyance, as outlined below:

“AND ALSO that strip of land 20 feet wide bounded NORTHWARDLY partly by land the property of the vendors hereinbefore described and running 126.24 feet and partly by land the property of the said Sylvia Dianne Fair and running thereon 118 feet EASTWARDLY by a road reservation, the property of the vendors and running thereon 20.08 feet and WESTWARDLY by property of the vendors and running 20.14 feet.”

12. Mr. Gaitor concluded that there is no doubt regarding the existence of the right of way or easement, as evidenced by the documentary records of the conveyances. He further asserted that if the Defendant has obstructed this right at any point, such obstruction was unlawful, thereby entitling the Claimant to the relief sought in these proceedings.

Defendant's Submission

13. Mrs. Sharlyn Smith , denied that the Claimant or any other owner of land in that area, has a right of way over the 20 feet strip of land described in the 1985 Conveyance.
14. Mrs. Smith relied on the common law principle in the case of ***London & Blenheim Estates Ltd. v Ladbroke Retail Parks Ltd. [1994] 1 W.L.R. 31 at 36*** which states the four essential elements to prove that an easement exists:

“There must be a dominant tenement and a servient tenement; the easement must confer a benefit on (or ‘accommodate’) the dominant tenement; the dominant tenement and servient tenements must not be owned and occupied by the same person; and the easement must be capable of forming the subject-matter of a grant.”

15. Regarding the first element, Mrs. Smith contended that the Claimant failed to specify or identify the dominant tenement. Concerning the second element, they argued that, due to the inability to locate the dominant tenement, the Court cannot determine the necessary proximity. With respect to the third element, Mrs. Smith asserted that the Claimant's position—that the Defendant does not hold a fee simple interest in the strip of land (the right of way)—is contradicted by their own claim. If the Defendant's assertion were correct, it would imply common ownership by the Claimant, resulting in the Claimant owning and occupying the strip of land. Finally, with respect to the fourth element, Mrs. Smith maintained that the easement is capable of forming the subject of a grant.
16. Mrs. Smith asserted that the Claimant has failed to satisfy the common law criteria necessary for the Court to determine that there was interference with the right of way, even assuming the Court finds that such a right exists.
17. Mrs. Smith subsequently argued that, even if the Claimant successfully established a right of way, they failed to demonstrate that the Defendant interfered with the use and enjoyment of that right.
18. Mrs. Smith further contended that the injunction sought by the Claimant was an interim injunction, rather than a final injunction, highlighting the distinction between the two. They argued that the Defendant would suffer significant injustice if a mandatory injunction were granted, as it would result in the encumbrance of its land in an unpredictable manner, potentially compromising the Defendant's physical safety. Additionally, Mrs. Smith asserted that the Claimant had failed to meet the necessary criteria for the issuance of a final injunction. Consequently, they requested that the Court issue a mandatory injunction, restraining the Claimant and the public at large from trespassing on the disputed strip of land.
19. Furthermore, Mrs. Smith asserted that the Claimant did not provide sufficient evidence to show that any harm or damages resulted from the Defendant's actions.
20. Mrs. Smith then concluded that the Claimant should not be entitled to the relief sought and the Defendant is counterclaiming by seeking a Declaration that it is the owner in fee simple of the said strip.

Law

21. The **Supreme Court Act, Chapter 53, Part III section 7(1)(a)** provides:

“Subject to this or any other law, the Court shall have unlimited original jurisdiction in civil and criminal causes and matters.”

22. The **Supreme Court Act, Chapter 53, Part IV section 21(1) and 21(2)** provides:

“(1) The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.”

“(2) Any such order may be made either unconditionally or on such terms and conditions as the Court thinks fit.”

23. According to ***Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] UKSC 57 at [2]***:

"[2] The essence of an easement is that it is a species of property right, appurtenant to land, which confers rights over neighbouring land. The two parcels of land are traditionally, and helpfully, called the dominant tenement and the servient tenement. The effect of the rights being proprietary in nature is that they "run with the land" both for the benefit of the successive owners of the dominant tenement, and by way of burden upon the successive owners of the servient tenement.”

24. In the case of ***McAdams Homes Ltd v. Robinson and Another [2004] EWCA Civ 214***, at paragraph 43, Lord Justice Neuberger adopted the principle established in *Ray Fairway Motors*, which states:

“...an easement is extinguished when its mode of user is so altered as to cause prejudice to the dominant tenement.”

25. In the case of ***Michael Edward Huckvale and Another v. Aegean Hotels Ltd. [1989] EWCA Civ J0209-3***, it was held that an easement may be extinguished when the necessity that gave rise to it ceases, or when the purpose for which it was created comes to an end. Lord Justice Nourse referenced *Gale on Easements* (15th ed.) at p.343, which states:

“An easement may be extinguished by operation of law. Thus, it has been said that a way of necessity is limited by the necessity which created it, and when such a necessity ceases the right of way is extinguished...So, again, an easement will be extinguished where the purpose for which it was created has come to an end. Thus, where a statute conferred upon a company the right to take water to supply a canal, the right ceased when the canal was abandoned.”

26. In the case of ***Simper v. Foley (1862) 70 ER 1179***, at pages 1180 and 1181, it was established that an easement may also be extinguished when the dominant and servient tenements are owned by the same person. The court further stated:

“The effect of that indenture was to unite the dominant and servient tenements in the same ownership, and, as a consequence, all easements previously existing were extinguished. Unity of seisin extinguishes an easement.”

27. When determining whether to grant an interim injunction, the court is minded by the guidelines listed by Lord Diplock in the case of ***American Cyanamid v Ethicon [1975] A.C. 396***, which states:

- a. Is there a serious question to be tried?
- b. Would damages be an adequate remedy?
- c. Where does the balance of convenience lie?

28. In **Hooper v Rogers [1974] 3 All ER 417**, the English Court of Appeal held that, in determining whether to grant a mandatory injunction, the Court must consider all relevant factors and ensure that justice is achieved for both parties. As Russell LJ stated:

“In different cases differing phrases have been used in describing circumstances in which mandatory injunction and *quia timet* injunctions will be granted. In truth it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances.”

Discussion and Analysis

29. In the case of **Regency Villas Title Ltd. v. Diamond Resorts (Europe) Ltd. [2018]**, it was held that an easement is a proprietary right appurtenant to land, conferring rights over neighboring land. This right runs with the land, benefiting the successive owners of the dominant tenement, while imposing a burden on the successors of the servient tenement.

30. It is important to note that there are several circumstances in which an easement may be extinguished. These include: (1) a change in the mode of use that imposes a greater burden on the servient tenement, thereby prejudicing the owner; (2) the unity of ownership of both the dominant and servient tenements; or (3) the cessation of necessity of the easement.

31. Regarding a shift in the mode of usage, reference is made to the case of **McAdams Homes Ltd. v. Robinson and Another [2004]**, where it was stated that:

'An easement of support in relation to a building may be extinguished if the building is altered or reconstructed in such a way as to impose a substantially increased burden on the servient tenement, to the prejudice of the owner thereof.'

32. This mode of extinguishment is not applicable to the present matter, as no facts were raised or questioned regarding the alteration or reconstruction of any property that would have resulted in an increased burden on the servient tenement, to the prejudice of the Defendant, the owner in this case. Consequently, this first mode of potential extinguishment of the easement is not relevant and need not be considered.

33. The second mode of extinguishment of an easement is the unity of ownership between the dominant and servient tenements. This occurs because an easement constitutes a right granted to one party over land that is owned by another.

34. This mode of extinguishment is not applicable in the present case, as there are no concerns regarding the ownership of the dominant and servient tenements. It is established that both tenements are owned by separate parties. Therefore, this mode of potential extinguishment of the easement is not relevant to the current matter.

35. The third mode of extinguishment of an easement occurs when the necessity for the easement ceases to exist, and the example of this was previously stated when the case of *Michael Edward Huckvale and Another v. Aegean Hotels Ltd.* [1989] was cited.
36. In the present case, extinguishment by necessity is also inapplicable, and indeed, there is no claim that the easement or right away was extinguished by cessation of necessity.
37. In conclusion, it is my opinion that an easement was established by the 1985 Conveyance and has been appurtenant to the land since that time. As there is no evidence before me on which I can find that the easement was extinguished by any of the recognized modes of extinguishment, I affirm the existence of the easement or right of way. I must now determine whether the Defendant has interfered with the right to the enjoyment of the easement or right of way of the dominant tenements to the south of the 20-foot strip of land burdened by the easement.
38. This issue centers on whether I am satisfied on the evidence that the Defendant has by its actions, obstructed the right of the dominant tenements to use the right of way at any time.

Findings of Fact

39. I earlier referred to the evidence adduced by the Claimant and the Defendant and now refer to the evidence I observed on my visit to the *locus in quo*. There, I observed a chain-link fence and gate with padlocks which enclosed a part of the strip of land, which allowed the Defendant to close and lock the gate at any time, obstructing ingress and egress over the strip of land by owners of the other tenements entitled to use the right of way whenever they chose to do so.
40. I further observed the presence of two raised vegetable gardens, banana plants, and a small chicken coop, which both Dr. Valentine Grimes and his wife, Dr. Indira Grimes, admitted to. In my view, this exacerbates the unlawful interference with the easement or right of way, and together with the padlocked gates, constitutes a significant and unlawful obstruction by the Defendant.
41. While the Defendant provided explanations for the obstructions, those explanations do not alter the fact that the Defendant embarked on a course of action which in my view constitutes a clear contravention of the Claimant's right to enjoy the right of way or easement and are insufficient to justify the obstruction.

Is there a serious question to be tried?

42. Based on the Claimant's claim and the facts, it is clear that a serious issue remains to be tried, and there is no necessity to revisit the claim and facts at this stage.

Would damages be an adequate remedy?

43. According to the Claimant, the Estate of Mr. McAlpine owns a tract of land of which it intends to sell a significant and valuable portion. Prospective buyers are entitled to the assurance of the existence of, and of the right to enjoy the easement and indeed, there is a prospective buyer who seeks assurance by the Estate that an easement exists for their use and enjoyment. The Claimant contends that, without the recognition and preservation of the right of way, the property could not be sold to future purchasers. It is argued that damages would not suffice as an adequate remedy, as the inability to sell the land would jeopardize future transactions, and the potential loss would be impossible to quantify. In light of these considerations, I find that the Claimant has met the requirement for an Interim Injunction.

Where does the balance of convenience lie?

44. In terms of the balance of convenience, it appears to favor the Claimant. Granting access to the easement or right of way would be more advantageous for the Claimant, particularly in facilitating potential transactions involving the Estate of Mr. McAlpine. The Defendant stands to unlawfully benefit from the use of the 20 feet strip, not only as a right of way, but also as a garden and farm. For these reasons, I find the balance of convenience to be in favor of the Claimant.

45. Paragraphs 42 to 44 reference the case of *American Cyanamid v Ethicon* [1957] A.C. 396, which outlines the criteria for granting an interim injunction. At this stage in the proceedings, the need for an interim injunction does not arise. However, it is important to note that the Claimant's pleadings did not include a specific request for an interim injunction, despite relying on case law pertaining to interim injunctions. In its Closing Submissions, the Claimant explicitly sought an injunction under sections 21(1) and 21(2) of the Supreme Court Act, Ch. 53. Given the nature of the Claimant's request and the supporting legislative provisions, it appears that the Claimant is seeking a full injunction, rather than an interim injunction, as the Defendant has indicated.

46. The Defendant also referred to the case of *Hooper v Rogers* [1974], in which Russell LJ emphasized that, when determining whether to grant a mandatory injunction, the aim should be to achieve justice between the parties, considering all relevant circumstances. In the present case, it is possible to grant an injunction that serves the interests of justice for both parties. The Claimant seeks an injunction to prevent the Defendant from obstructing a right of way established by the three Conveyances dated November 7, 1985, November 28, 1997, and April 21, 2016. Such an injunction would not restrict either party's access to the right of way. In my view, this constitutes justice for both parties. Consequently, I grant the Claimant's request for an injunction.

47. Furthermore, while the Claimant sought damages, they failed to provide evidence of loss resulting from a pending sale due to the actions of the Defendant, other circumstances that would justify damages as a necessary remedy in this matter. For these reasons, I dismiss the Claimant's claim for damages.

Conclusion

48. In the circumstances, the Claimant succeeds in this action and the Defendant's counterclaim fails.

49. The Court makes the following Orders:

- a. A Declaration that there is a right of way in favour of the Claimant who brings this action for and on behalf of the Estate of Sir Malcolm McAlpine, and its successors in title and all other persons who have a like right to go pass and repass over the strip of land 20 feet wide as granted in the Conveyances dated November 7, 1985 from the McAlpines to Edge Investments Ltd.; November 28, 1997 from Edge Investments Ltd to Daj Development Co. Ltd; and April 21, 2016 from Daj Development Co. Ltd to Indyval Investments Limited, the Defendant.
- b. An Injunction to have the items (the fence, the gate, the chicken coop, plants and any other items) which the Defendant has put on the land to enclose the land and to further obstruct the right of way to be removed within ninety (90) days of the date of this ruling. This injunction shall restrain both the Claimant and Defendant, their employees, agents, or any other parties under their control, from placing or permitting anything which impedes or prevents passage or obstructs the right of way or otherwise interferes with the reasonable enjoyment of the right of way in question. This injunction does not prohibit the Claimant or the Defendant from exercising its right to access the right of way but specifically restrains the Defendant from impeding, preventing or obstructing access thereto.
- c. The Defendant shall pay the Claimant's costs, to be taxed if not agreed.

Senior Justice Deborah Fraser

Dated this 17th day of April 2025