IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO. 156 of 2012

GLEN BRAND	**CLAIMANT**
AND	
DORIS CREASEY	**DEFENDANT**

Hearings
2013
5th March
8th March
17th April

Mr. Estevan Perera for the claimant.
Mrs. Melissa Balderamos-Mahler for the defendant.

LEGALL J.

JUDGMENT

1. The main issue in this case is whether the claimant is entitled to have access by way of an easement of necessity to land owned by the defendant, and also access to a six feet wide right of way also owned by the defendant that starts from the south eastern edge of the defendants land and continues to the beach adjoining the Caribbean

Sea. Both the land and the right of way are included in the Deed of Conveyance of the defendant. The defendant's land adjoins and is immediately west of the claimant's land. The right of way extends from the south eastern corner of the defendant's land to the beach of the Caribbean Sea. From the Caribbean Sea, running generally west, is firstly a piece of land owned by Paolo Kind, which I call Lot 132, and adjoining Lot 132 going further west is the defendant's land, Lot 133, and adjoining the defendant's land going further west is Lot 134, the claimant's land. The right of way runs from the Caribbean Sea along to southern edge of Lot 132 up to the south eastern edge of the defendant's land Lot 133. The right of way, and land that is between two gates, are shown on a map given at Appendix A to this judgment.

2. It is alleged that an easement of necessity continues through the two gates on defendant's land to the claimant's property. The problem for the claimant is that the defendant installed first, the gates, and later a fence, where the gates were, thus preventing access to her land and the right of way, and preventing access of the claimant to the right of way which leads to the beach. The claimant's access problems are compounded further because he is surrounded by private property on the west, north and south, and on the immediate east by the defendant's land. The claimant in order to go to and from his land would have to traverse either on the defendant's land by jumping over the fence, or walking through the land of his neighbours to go to the beach or the nearby road. The claimant has testified that for access purposes he uses his neighbours' land, which they have not up to now objected to, but if they construct fences, as the defendant did, he said

he would be landlocked. He testified that in that scenario, he would, to get access, "have to jump over the fence."

3. The claimant bought his land from one Charles Young on 28th December, 2010 for US$116,000. The property the claimant bought is described in the Deed of Conveyance as follows:

> "ALL THAT PIECE OR PARCEL OF LAND, situate at Caye Caulker and being the Western portion of that piece or parcel of land formerly the property of Dominga Novelo as described in an Indenture dated the 11th day of February 1964, recorded at the General Registry of Belize in Deeds Book Volume 1 of 1964 at Folios 1356-1363 and bounded to the North by property of A. Canto and there measuring 45 feet or thereabouts on the east by property formerly of the Vendors but now of Mike Smith and there measuring 90 feet or thereabouts on the South by property now formerly of D. Rodriguez and there measuring 45 feet of thereabouts and on the West by property of S. Young and there measuring 90 feet or thereabouts, TOGETHER with all buildings and erections standing and being thereon."

4. There is no mention in the description above, nor in the Deed of Conveyance of the right of way, or conferring on the claimant ownership or access to the right of way or access over the defendant land enclosed by the gates. The claimant had seen the property prior to purchasing it. He had seen the right of way and the locked gates on the defendant's land, but did not ask the defendant about access

through the locked gates, or access through the right of way prior to purchasing the property. He testified that he did not, prior to purchasing the property, consulted an attorney-at-law, nor conducted a title search. He testified that he did not know whether a title search was conducted prior to purchasing the property. He purchased the property through a real estate agency, and he testified that he expected the real estate agent to conduct the search. There is no evidence that a title search was conducted with respect to the property, before it was bought by the claimant. It may well have been that had such a title search been done, the claimant would have realized the ownership of the right of way, and the access problem, and may not have purchased the property.

5. Sometime after the claimant bought the property, he requested the defendant to open the gates that blocked off his access to the right of way, so that he could have access to and from his property, through the defendant land to the right of way, but the defendant, who had given access for specific purposes, as we shall see below, to the claimant's predecessor in title Charles Young, the person from whom the claimant bought the property, refused the claimant's request. The basis of the refusal is the defendant's Deed of Conveyance, which gives her ownership of her land and the right of way; and that such access over her land would affect her livelihood. The defendant's husband Terrence Creasey had bought the defendant's land from the previous owners Mike and Margaret Smith in 1987. In October 2006 Terrence Creasey transferred the said land and right of way to the defendant. The defendant's Deed of Conveyance states:

> ALL THAT piece or parcel of land situate at Caye Caulker and being the central portion of that piece or parcel of land now or formerly the property of Dominga Novelo as described in an Indenture dated the 11th day of February, 1964 recorded at the General Registry in Deeds Book Volume 1 of 1964 at folios 1356 to 1363 and bounded on the North by property of A. Canto and there measuring 45 feet or thereabouts on the East by property formerly of Dominga Novelo but now of Paolo Kind et al and there measuring 90 feet or thereabouts on the South by property now or formerly of D. Rodriguez and there measuring 45 feet or thereabouts and on the West by property of C. Young and there measuring 90 feet or thereabouts TOGETHER with all buildings and erections standing and being therein and ALSO a 6(six) feet right of way extending from the South-eastern corner of the piece or parcel of land now being conveyed to the Sea and which said piece or parcel of land and right of way are shown more particularly on the attached plan drawn by G.V. Baustista, Licensed Surveyor and dated March 25, 1986.

The Bautista plan also shows the right of way from the south eastern corner of the defendant's land to the Caribbean Sea. Mike Smith's Deed of Conveyance from whom the defendant bought, describes the right of way in identical terms as the defendant's Deed of Conveyance.

6. The claimant's and the defendant's land were originally part of a larger piece of land owned by Dominga Novelo by an Indenture dated 11th February 1964 which was granted to her due to "natural love and affection" by Peter Alexander. This Indenture did not mention any six feet right of way. On 30th August 1984 Novelo sold by Deed of Conveyance the said land to Paolo Kind, Elena Dell'Ultri Vizzini and Elizabeth Dell'Uultri Vizzini (the Vizzinis). The Deed did not mention a six feet right of way. The Vizzinis subdivided the larger property into three parcels. They kept a parcel closest to the Caribbean Sea which I called Lot 132. They sold a parcel to Mike Smith adjoining to the Vizinis parcel, Lot 133 and they sold the other parcel to Charles Young, Lot 134 which adjoined the Smith's parcel. There is another property which adjoined Charles Young property to the west in the name of Sixta Young.

7. The Vizzinis sold the parcel to Mike Smith by Deed of Conveyance dated 24th July, 1986, and for the first time appearing in the Deed is the six feet right of way in favour of Mike Smith who sold to the defendant, as we saw above. The parcel sold by Deed to Charles Young who sold to the claimant, did not mention a six foot right of way, as we saw above. The subdivision of the parcels gave for the first time the right of way to Mike Smith and subsequently to the defendant.

8. There is no evidence that an application for subdivision of the larger piece of land with a plan into the three parcels was made to the Land Subdivision and Utilization Authority, as required by section 4 and 5

Land Utilization Act Chapter 188. There is no evidence that any application for subdivision was considered by the Authority or that the Authority recommended to the Minister that the subdivision be approved as required by the Act. Mr. Hertular, a licensed or sworn land surveyor with 52 years experience, testified that the Authority would not have recommended approval of a subdivision that conveyed a right of way to the owner of one of the parcels and not to the other owners who would be landlocked. He testified that at the time of the subdivision, the Authority was not as vigilant as it is today, and the subdivision was perhaps done "under the table."

9. The defendant's parcel of land was registered under the Registered Land Act Chapter 194 and was issued with a land certificate dated 1st November, 2012 which describes her land as Parcel 1506 Block 12 Caye Caulker Registration section. The certificate of title to land is indefeasible: but the court can rectify a title on the basis of fraud or misrepresentation. In this case before me, fraud is not pleaded and there is no pleading requiring rectification or cancellation of the defendant's title or Deed of Conveyance. Instead, the claimant pleads that, on the facts of this case, an easement of necessity exists on his behalf entitling him to access his property through the defendant land and the 6 feet right of way. The amended claim form states the reliefs as follows:

> "1. A Declaration that a six (6) feet easement of necessity exists which runs along the south end of the property of the defendant's property to the

claimant's property. The said easement is therefore to extend from the south-eastern corner of the claimant's land to the sea.

Or in the Alternative

A Declaration that the six (6) feet easement has been acquired by the claimant through prescription pursuant to section 141(1) of the Registered Land Act.

2. A mandatory order requiring the defendants to remove any gate/fence or structure erected on her property which presents the claimant from accessing his property by way of the six (6) feet easement of necessity.
3. An order restraining the defendants whether by himself, his agents, or servants from erecting a fence or placing and/or maintaining any item or things on the 6 feet right of way, which tends to obstruct or deny access to the claimant's property and business, including but not limited to branches, leaves, bushes, wood planks, etc.
4. An order that the Registrar of Lands take notice of the easement (whether as an easement by necessity or by prescription) and make the necessary notation on the respective tiles of the claimant and the defendant.
5. General damages.
6. Interest pursuant to section 166 of the Supreme Court of Judicature Act.
7. Costs.
8. Such further or other relief as the court see fits.

Amount claimed:	$	BZ
Court Fees:	$	BZ 132.50

Legal Practitioner's fixed costs on issue: $ BZ
Interest to be assessed: $_____
TOTAL CLAIM **$ BZE**

10. In ***Gale on Easements 14th Edition at p. 117*** a definition of easements of necessity is given as follows:

> "A way of necessity arises where, on a disposition by a common owner of part of his land, either the part disposed of or the part retained is left without any legally enforceable means of access. In such a case the part so left inaccessible is entitled, as of necessity, to a way over the other part. The principle no doubt applies where both parts are disposed of simultaneously, either by grant inter vivos, or by will."

11. In ***Barry v. Hasseldine 1952 Ch 835*** the plaintiff predecessor in title, Mr. WJ Farmeny, bought from the defendant a parcel of land which was enclosed on all sides by land retained by the defendant, and by land belonging to strangers. Mr. Farmery about two years later, conveyed his said land to the plaintiff who claimed a right of way of necessity over the defendant land so as to go to and from his land. The court held that a way of necessity over the defendant's land in favour of the grantee and his successor was implied by law as incidental to the grant, notwithstanding that the land granted was not entirely enclosed by the land of the grantor or defendant; and that the implication was not rebutted by the fact that at the date of the grant

there existed a permissive way to the plaintiff's land over the land of a stranger. DanckWerts J made the point that:

> "If the grantee has no access to the property which is sold and conveyed to him except over the grantor's land or over the land of some other person or persons whom he cannot compel to give him any legal right of way, common sense demands that a way of necessity should be implied, so as to confer on the grantee a right of way, for the purposes for which the land is conveyed, over the land of the grantor; and it is no answer to say that a permissive method of approach was in fact enjoyed, at the time of the grant, over the land of some person other than the grantor because that permissive method of approach may be determined on the following day, thereby leaving the grantee with no lawful method of approaching the land which he has purchased."

It may be mentioned that in ***Barry v. Hasseldine*** the defendant had sold the land to the plaintiff's predecessor in title, knowing that the land was enclosed. It seems that a right of way of necessity arises against the land of a seller or grantor which land he knows is land locked, on the basis that in those circumstances the law will imply in that sale a right of way in favour of the purchaser over the land of the seller or grantor.

12. In ***Corporation of London v. Riggs 1879 13 ch 798*** the defendant owner of land had granted to the plaintiff 141 acres of land which completely surrounded a smaller piece of land that was retained by the defendant. The defendant, their servants and agents, in order to go to and from their smaller piece of land traversed the plaintiff land by foot and carriage for a myriad of purposes, causing injury upon the soil and herbage of the plaintiff's land. The plaintiff agreed that the defendant was entitled by way of necessity "for agricultural purposes only." The court held that, on the facts, there was an implied right of way of necessity to and from the smaller piece of land over the larger plaintiff's land, but it was not a way of necessity for all purposes. Jessel MR says that "it appears to me that the right of way must be limited to that which is necessary at the time of the grant." In ***Riggs*** the land over which the way of necessity was granted was sold by the defendant to the plaintiff.

13. In cases of easement of necessity there is a rule that if the owner intends to reserve any right over the land granted, it is his duty to reserve it expressly in the grant. This rule is subject to the well known exception to an easement of necessity, that is to say where the enjoyment of the alleged right over the adjoining land is necessary to the property which is not conveyed, in which case the court will consider the easement as impliedly reserved, though it has not been reserved by expressed words: see ***Wheeldon v. Burrows 12 chd page 31 at p 19***.

14. It ought also to be noted, as the authorities show, that an easement of necessity means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property: see ***Union Lighterrage v. London Graving Dock Company 1902 2 chd 557, at p 573*** per Sterling J; and ***Ray v. Hazeldine above at p 20***. The evidence in this case before me is that the claimant who works and lives in Canada spends two, two weeks periods a year at his property. There is access from the claimant's property to the road and also to the sea, without using the right of way or the defendant's land. The access, seen by the court during a visit to the locus, is through neighbours land which is open and not fenced around, and which seems to the court by the beaten tracks to be a usual way of access not only by the claimant but by members of the public. The claimant has testified that his neighbours have made, to date, no objection to the access route to the sea and the nearby road through their land. I respectfully agree with the view expressed by Sterling J in ***Union Lighterrage*** above and Kekewich J in ***Ray v.*** **Hazeldine** above where the court held that an easement of necessity means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property. In Halsbury Laws of England, 4th Edition, Volume 14 at paragraph 29, it is said that an easement of necessity is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement; but one without which that tenement cannot be used at all. On the evidence, the claimant has failed to prove that he falls within the requirement that his property cannot be used at all, or that he has an easement of necessity as

described in ***Ray v. Hazeldine***; ***Union Lighterrage*** and ***Halsbury*** above.

15. Moreover, in this case before me, the defendant did not sell the land owned by the claimant. The claimant bought the land from a third party – Charles Young. The question is whether an easement of necessity arises in a case where the defendant, as in this case, had at no time sold the land to the claimant or the claimant's predecessors in title. We have seen above in both ***Barry*** and ***London*** that the defendants in these cases had sold the land in question. Learned counsel Mr. Perera for the claimant referred the court to ***Commonwealth Caribbean Land Law*** by Sampson Owusu who wrote that unity of ownership or title is required for the establishment of easement of necessity. Mr. Perera relies on the below mention view of the author to prove that his client is entitled to access to the land and right of way:

> "It is therefore necessary for the claimant to show that the disputed dominant and servient tenements were or had once been in common ownership. The unity of title need not be immediate, provided it can be shown that such common ownership existed at any point in time in the chain of title to the properties. The failure or delay of the grantee to exercise or assert his claim of a right way of necessity would not preclude or debar him or a remote grantee from subsequently maintaining such right of way. If the title to the two properties can be traced, however distant that may be, to a

> common owner who effected the severance which gave rise to the necessity of easement, the right of way may be dormant through several conveyances, yet it can be exercised at any time."

16. The decision that is referred to in support of the submission of tracing the title for the exercise of the necessity of the easement is ***Crolly v. Coal Company 1913 72 W Va 68, 78SE 233***. I have not been able to access this decision. It ought to be noted that the Deed of Conveyance of the original owners of the land namely Novelo and the Vizzinis, as we saw above, did not mention the six feet right of way. Mike Smith to whom the six feet right of way was conveyed for the first time was not in common ownership of lands of the defendant and the claimant. Moreover, I gather from reading of the decisions of ***Barry*** and ***London*** above that the basis for the implication of an easement of necessity is some agreement between contracting parties in which the court, considering the circumstances of the case before it, implies a right of way by necessity. I find it difficult to accept that implication of necessity between the claimant and the defendant in circumstances where the defendant at no stage was involved in granting or selling the land owned by the claimant. The cases of ***Barry*** and ***Riggs*** seem to suggest that the implication of a way of necessity is established where the defendant sold the land in question. The law seems to imply in that sale or grant a way of necessity. In this case before me, neither the Vizzinis nor any representative are defendants in this case, and the defendant who owns her land and the right of way, did not sell or had nothing to do with selling the land owned by the claimant. Gale

above quotes two examples which seem to show that the defendant in the case must have sold or granted the land in question: The examples are:

> "If I have a field enclosed by my land on all sides, and I alien this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit from the grant. And the grantor shall assign the way where he can best spare it."
> "Where a man having a close surrounded with his own land, grants the close to another in fee, for life or for years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, without it he cannot derive any benefit from the grant. So it is where he grants the land, and reserves the close to himself."

17. But if I am wrong on the above, we return to the point already discussed: whether, on the facts, the claimant's property cannot be used at all. The court visited the scene on 20th March, 2013 and saw that the claimant property was not landlocked. There was adequate access from the claimant's property to the beach on the Caribbean Sea, and similar access also to the road, through Tom Young's property and Sixta Young's property both of which are not enclosed, but open. The court also saw the tourists of the claimant on her property which was enclosed and on which there were facilities for

sitting and there were also large plants. From what the court has seen during the visit to the scene, the claimant has more than adequate access to and from his property; and there is evidence from the claimant that that access is not objected to by his neighbours. The claimant has testified that there is no objection at this point to his using neighbours property to go to the road. The evidence at the date of the trial is that the claimant has access necessary for the reasonable enjoyment of his property, and it is not the case at this time that his property cannot be used at all due to it being landlocked.

18. The defendant swore that providing access through her land would affect her livelihood. Having visited the scene the court has no reason to doubt the defendant. The court saw persons, tourists, sitting on structures on the defendant land, accompanied by growing trees.

19. The claimant also alleges that he is entitled, by virtue of prescription to an easement over the land in question. The defendant land is registered under the Registered Land Act Cap. 194. As learned counsel for the defendant pointed out, under section 141 of that Act easement by prescription is acquired by peaceful, open and uninterrupted enjoyment of the land in question for a period of twenty years. On the evidence there has been no such enjoyment by the claimant for that period. Moreover, for the easement by prescription to be granted the court must be satisfied that the easement was not by permission of the owner of the adjoining land. There is evidence that the defendant gave permission to the claimant's predecessor in title Charles Young to use her land to gain access to land of Paolo Kind for

purposes of carrying out caretaking and other duties. For the above reasons I am not satisfied that the claimant has established his right to an easement by prescription over the defendant's land.

Counterclaim

20. The defendant made counterclaims that no easement of necessity exists, and that the defendant is entitled to the benefit of an easement along the property of Paolo King to the eastern end of the defendant property. I have held above that no easement of necessity exists in favour of the claimant, and the defendant's deed of conveyance confers on her the six feet right of way. Moreover, neither Paolo Kind nor his beneficiary or representatives are parties to the claim.

21. The defendant also claims damages for trespass, but evidence of the details of the alleged trespass is lacking, as well as evidence of consequential damage suffered as a result of the alleged trespass. At paragraph 3 of the counterclaim, the defendant claims an order that the claimant be prevented from using the defendant's property to gain access to the claimant's property. Since there is no easement of necessity in favour of the claimant, and since the defendant owns the property by her certificate of title, the defendant is entitled to the said order. Paragraphs 2, 4, and 5 of the counterclaim are refused. Paragraph 1 and 3 are granted.

22. Costs follow the event. Both the claimant and the defendant were partly successful. The parties to bear their own costs.

Conclusion

23. For all the above reasons, I make the following orders:

(1) The claims in the Amended Fixed Date Claim Form are dismissed.

(2) A declaration is granted that no easement of necessity exists in favour of the claimant over land described in Deed of Conveyance dated 29th June, 1987 and in Certificate of Title dated 1st November, 2012 No. LRS 201213088 owned by the defendant.

(3) An order is granted that the claimant whether by himself or through the use of agents is prevented from using the defendant's property to gain access to his property.

(4) Paragraphs 2, 4, and 5 of the counterclaim are refused.

(5) The parties to bear their own costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
17th April, 2013

APPENDIX

Map Paragraph 1

P.T.O.