[2023] SC (Bda) 71 Civ. (21 September 2023)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 89

BETWEEN:

JOHN ZUILL

Plaintiff

- and -

REBECCA BRADY

Defendant

JUDGMENT

Doctrine of lost modern grant, Easements,
nec vi nec clam nec precario (not be by violence, not be secret, not be permissive)
Change of use

Date of Hearing: **24 July 2023**
Date of Judgment: **21 September 2023**

Appearances: **Adam Richards, Marshall, Diel Myers Limited, for Plaintiff**

Jeffrey Elkinson, Conyers, Dill & Pearman Limited, for Defendant

JUDGMENT of Mussenden J

Introduction

1. The Plaintiff ("**Mr. Zuill**") is the owner of the property known as Lot C, Peak Road, Smith's Parish ("**Lot C**").

2. The Defendant ("**Mrs. Brady**") is the owner of the property known as Somersall, 12 Peak Farm Road, Smith's Parish ("**Somersall**").

Background and Pleadings

3. The background is that Lot C, Somersall and a property "**Westlands**" are adjacent to each other on a vast tract of lands in Smith's Parish. There is a road ("**Peak Rd.**") which runs from Middle Rd. through Westlands and then to other properties historically owned by members of the Zuill family. At one point, Peak Rd. makes an elbow turn (the "**Elbow Area**") where several roads and tracks converge. The driveway to Somersall starts in the Elbow Area. Also, there is a dirt track with scrub vegetation on each side (the "**Track**") which starts in the area of the Elbow and goes onto Westlands and continues to Lot C. Part of the Elbow Area is on Somersall.

4. Mr. Zuill and Mrs. Brady are cousins. The case concerns a dispute between them over a small triangle of land measuring no more than 121 square feet (the "**Disputed Land**") in the Elbow Area on Somersall. Thus, Mr. Zuill has a right of way over Westlands in two parts: (i) by way of Peak Rd. from Middle Rd. to one side of the Disputed Land; and (ii) from another side of the Disputed Land to Lot C by way of the Track. What is in dispute is whether he has a right of way over the Disputed Land, which connects the two parts.

The Writ and Statement of Claim

5. By a Specially Indorsed Writ of Summons issued on 1 April 2022 and the Statement of Claim ("**SOC**"), Mr. Zuill seeks confirmation of a right of way over the Disputed Land.

6. The SOC set out that Lot C has been in the ownership of Mr. Zuill and his family since at least 1930. Mr. Zuill has been the owner of Lot C since it was conveyed to him by Vesting Deed dated 2 October 2002. It is claimed that there is a long-established right of way leading from Lot C through Westlands (along the Track) and thereafter onto Peak Rd. which leads to Middle Rd., a portion of which runs across the western boundary of Somersall (the "**ROW**"). Peak Rd. provides access for multiple properties owned by family members of Mr. Zuill and Mrs. Brady and is used by such properties to access Middle Rd., including Somersall.

7. Lot C consists of an undeveloped lot of land in excess of four (4) acres which is zoned predominantly open space with areas designated as woodland and arable. The SOC set out that it is evident from the historical use of Lot C and long-established access thereto that a legal easement over Peak Rd. has arisen in favour of Mr. Zuill as the owner of Lot C. It stated that neither Mr. Zuill nor the tenants, grantees, family members, visitors, guests, or licensees of Lot C have ever paid any fees for access to the ROW with all persons having exercised free and unencumbered passage over the ROW as a means of access to and from Lot C. Further, the nature and extent of the ROW has never been altered.

8. On 19 July 2021, extended family members of both Mr. Zuill and Mrs. Brady, in their capacity as owners of a small portion of the Peak Road, entered into a Deed of Declaration and Confirmation of Easement (the "**2021 Deed**") confirming the ROW.

9. Mr. Zuill has entered into a sale and purchase agreement for the sale of Lot C. On 14 March 2022, the proposed purchaser attempted to access Lot C with their realtor but was blocked by Mrs. Brady who had blocked the ROW where it crosses Somersall with a chain and metal rod. Counsel for Mr. Zuill issued letters to Mrs. Brady requesting her acknowledgment of the existence of the ROW and that she remove any barriers on it. She

was also notified that if the current sale was lost due to her actions, Mr. Zuill would seek damages from her as a result. At the time of the issuance of the Writ, Mrs. Brady had failed to respond in any substantive manner to Mr. Zuill's requests.

Relief Sought

10. Mr. Zuill seeks a declaration that the Plaintiff his successors in title and assigns as owners of Lot C together with their tenants, servants and others authorized by him or them benefit from full and free right and liberty of way and passage to go return pass and repass with or without animals and vehicles of all descriptions over and along the entire ROW including where it crosses Somersall. Damages and costs are also claimed.

The Defence

11. The Defence denied the allegation that there is a right of way in the favour of Mr. Zuill over any portion of Somersall. It set out that at all material times, in respect of the relief sought, access over Somersall has been with Mrs. Brady's permission and that at all material times there was no free and unencumbered passage over her property not least evidenced by visible obstructions placed on the ROW. Mrs. Brady denies that she was a party to the 2021 Deed and denies that anyone had or would have had authorization to execute such a Deed. In any event, the Defence sets out that the Deed does not grant a right of way over Somersall. In her evidence, Mrs. Brady states that the Deed does not impact or involve Somersall. Thus, Mr. Zuill is not entitled to the relief sought.

The Trial - Evidence

12. The trial took place with evidence given by witnesses for the Plaintiff and Defendant.

13. For the Plaintiff's case, Mr. Zuill and Carlos Amaral gave evidence.

14. For the Defendant's case, Mrs. Brady and her husband Lawrence Brady gave evidence.

Evidence not in dispute

15. There was evidence that generally was not in dispute.

16. As far back as the 1920s or thereabouts, Lot C and much of the surrounding land was owned by Alan James Zuill. ("**Alan**"). By a conveyance dated 28 June 1933 made between Alan and Lilla Zuill on the one part and Mr. Zuill's grandfather William Edward Sears Zuill ("**Grandfather Zuill**") on the other part, Alan conveyed Lot C to Grandfather Zuill.
17. Grandfather Zuill died in 1989 when Lot C was vested in Mr. Zuill's father James Zuill ("**Father Zuill**'). Father Zuill died in 2000 when Mr. Zuill and his brothers inherited Lot C and Westlands. An agreement was reached between them wherein Mr. Zuill would retain Lot C and his brother David Zuill ("**David**") would retain Westlands. I should note here that Mr. Zuill states that this was subject to him being granted full, free, and unrestricted access through Westlands, over the ROW, and thereafter over Peak Rd. to get to and from Middle Rd. That agreement was framed within a Vesting Deed dated 21 October 2022 (the "**2022 Vesting Deed**") made between Mr. Zuill and several other parties.

18. There is a plan prepared by B&L Limited (Ref. SY400 dated 1996) showing the location of the various Zuill properties (the "**1996 B&L Plan**").

19. There is a plan prepared by Bermuda Land Surveys (drawing No. LS6929Z dated July 2016 (the "**2016 Original BLS Plan**"). It shows Lot C and Westlands (Lot B). It shows the ROW (in yellow) from Lot C leading to the Elbow Area and Disputed Land. It shows Peak Rd. (in yellow) coming from Middle Rd. to the Elbow Area and Disputed Land. It shows the start of the driveway to Somersall.

20. There is an amended plan to the 2016 Original BLS Plan prepared by Bermuda Land Surveys (drawing No. LS6929Z1 dated July 2016 (amended January 2023)) (the "**2023 Amended BLS Plan**"). The amendments are additional markings. It shows the Disputed Land marked in pink with a description that the access to Lot C is over Somersall. It shows Peak Rd. passing along the Disputed Land and continuing onto Somersall in the direction

which it is agreed is to other properties. It shows the start of the driveway to the residence on Somersall. It has comments/descriptions added about boundary lines and walls and right of ways.

21. Mr. Amaral, a local farmer, farmed various lots of land on Peak Rd., including some lots on Lot C and some on Somersall for well over twenty (20) years. He continues farming some of the plots to the present day. Lot C had previously been farmed for many years by Manual Pereira, now deceased. Mr. Amaral knew Manuel very well and as a young man helped him with farming work from time to time. When Manuel retired, Mr. Amaral agreed with Father Zuill to lease Lot C and he has been farming it since. When Father Zuill died in 2000, Mr. Amaral agreed with Mr. Zuill to continue his tenancy arrangement. For the purpose of farming on Lot C, Mr. Amaral moved his vehicles and equipment over Peak Rd., the Track and over the Disputed Land. His evidence is that Manuel used the same routes for access to Lot C and that they both had free, unrestricted and unencumbered passage from Middle Rd to Lot C. I should note here that Mrs. Brady disputes that access over the Disputed Land was free and unrestricted, a point that I shall return to later.

22. It is not in dispute that members of the public would sometimes access Peak Rd. for various purposes. Sometimes Mrs. Brady would give permission to various groups to access Somersall, such groups including equestrians, boy scouts, painting groups and mountain bikers. However, some people accessed the lands on the Peak Road without permission from any property owner for other purposes such as walk-abouts, exploring and sometimes nefarious purposes including stealing cedar from the properties and engaging in "night-farming", an interesting word used locally to mean stealing farm produce. Consequently signage was erected informing people that the property was private property, trespassing was not allowed and access was with permission only. At one point, a chain and later rebar was placed across the Track. I should note here that it is disputed as to who erected the chain, Mr. Amaral or the Bradys, and to whom the signs were directed, points to which I shall return to later.

<u>Evidence in Dispute</u>

23. There were various main areas of evidence that were in dispute as set out below and which I will deal with them in turn.

The purpose of the Signs
Who erected the chain and for what purpose
Was the rental fee paid to Mrs. Brady supplemented by produce and was it for the purpose of accessing Lot C by use of the Disputed Land.

24. Mrs. Brady and Mr. Brady's evidence was that in an effort to prevent trespassers, over 20 years ago, they erected two signs (together, the "**Signs**") along Peak Rd. One sign is located on Peak Rd. at the junction with Orange Grove (the "**Orange Grove Sign**", for convenience only, defined using the property name immediately above the sign in the exhibited picture), and the other is at the junction in the Elbow Area where the Disputed Land is located (the "**Malplaquet Sign**", for convenience only, defined using the property name immediately above the sign in the exhibited picture). The Signs are still present and the wording is "*Notice, Access with permission only, Private property no trespassing, Area patrolled by dogs, Failure to comply with notice will result in legal action.*" Mrs. Brady asserts that the Signs were put there with the knowledge and consent of her father, her brother and her cousin David. She also asserts that, more than twenty years ago, David had placed a chain across the Track, between two trees which cuts off access to the Disputed Land from Lot C and anyone who wished to access it would have to remove the chain. Her concern was that people would use Peak Rd. to access her property without her permission.

25. On cross-examination about the Signs, Mrs. Brady stated that the Signs were put in place to stop the public going onto her property as well as on to other properties including Westlands, Sandbox, Orange Grove and Peak Farm. When challenged that the Signs were never intended for Mr. Zuill, because twenty years ago when the Signs were erected she did not know she owned the Disputed Land, she maintained that she wanted to protect her property. She conceded that the Signs were erected to stop people from stealing the cedar

and produce but also to stop people from wandering through the properties. She maintained that the Signs were very clear.

26. Mrs. Brady stated that she knows Mr. Amaral as he is a tenant farmer for her as well as Lot C and other fields in the area. She gave Mr. Amaral access to Somersall to access her fields and the other fields including Lot C. Mr. Amaral had been paying $1,000 a year in rent for her fields. Also, he had been providing her with vegetables from her fields and the other fields which she considered as supplemental payment for renting her fields and for using the Disputed Land to access Lot C. In January 2020, she asked Mr. Amaral to meet with her to discuss the Track, Lot C and boundaries. She states that on 25 February 2020, and confirmed with an email of the same date, she told Mr. Amaral that he could no longer use the Disputed Land to access Lot C. She was motivated by the fact that she wanted to prevent Mr. Amaral access to Lot C because he had given her cousin an affidavit in support of his claim against her elderly cousin. Mrs. Brady states that she has not seen Mr. Amaral or his workers using the Disputed Land since but that he is still farming Lot C. Thereafter, she erected a third sign that read "*Private Property No Trespassing*" (the "**Third Sign**") as she was annoyed with the allegations concerning a right of way over her property and she wanted to make it clear that no trespassing had been or would be allowed. The Third Sign is located on the Disputed Property and is a few feet from the Malplaquet Sign.

27. Mr. Zuill stated on cross-examination that he has a right of way from Middle Rd to Lot C along Peak Rd. which no-one had contested until Mrs. Brady did so. He has lived away from Bermuda for a considerable time. He was last at Peak Rd. around 2010 when he first saw the Signs up. He recalled that the Signs went up because people were stealing the cedar and riding their bikes onto the properties. He also saw the chain up across the Track. He recalled that prior to 2010, sometimes he saw the chain up and other times he did not see it up. In any event, he never considered that the chain applied to him or to Mr. Amaral. In 2010, no-one told him he could not go to Lot C which he owned. He confirmed that Mr. Amaral is still his tenant, pays him each year and he still farms three fields on Lot C. Mr. Amaral sells his own produce.

28. Mr. Amaral stated that he put the chain in place across the Track because people were night-farming and stealing his produce. He rejected the suggestion that David erected the chain. Instead he did it himself, loping the chain around the trees and hitching it to itself unlocked. This was to prevent people night-farming. He would unloop the chain to have continued and unfettered access to Lot C over the Track. He stated that he had maintained the Track between Lot C and Peak Rd. without objection from anyone. Also, he agreed with the evidence of Mr. Zuill that people were stealing cedar from the properties and that the chain was put there to deter people from doing so.

29. Mr. Amaral stated that he had a lease with Father Zuill and it was renewed without being placed in writing. When Mrs. Brady told him to use another route to access Lot C, he took the position that he had a lease to use Peak Rd. and he needed to use the Track also. Thus he maintained that he continued to use the Track, pointing out in one of the pictures the tyre marks of his tractor on the asphalt aligning with the start of the Track on the grass area. In any event, he maintained that he was relying on his lease which gave him a right to use the Track. He declined to cut another route over someone else's property.

Findings

30. In my view, having considered the evidence, I find as a fact that the Signs were posted to deter unauthorized people from coming onto the properties to steal cedar or to steal produce or do any other unauthorised activity. It is clear to me that they were posted in the two locations so that they would have maximum effect to ward off unauthorized people from accessing the various properties. Thus, people would see the Orange Grove Sign first at an early stage as it was co-located with house signs for Sandbox, Somersall, Peak Farm, Westlands and Orange Grove. If they continued, they would see the Malplaquet Sign and hopefully heed that warning also.

    In respect of the erection of the chain, I prefer the evidence of Mr. Amaral that he installed the chain in the way that he did to prevent people from accessing his fields to steal his produce. I am not satisfied with the evidence of Mrs. Brady that David had put the chain up. To my mind, Mr. Amaral had taken some care and interest in the properties to that

extent that he had 15 lots of land that he was farming in the area, as split between five property owners. It follows that he would take some care of the farmland such as doing maintenance on the Track and the areas he used, for example clearing paths after a hurricane. Further, Mr. Amaral had 'skin in the game' in that in the land beyond the chain, he had a financial investment in fields that he farmed. Thus, he had reason to put the chain up to deter people from stealing, especially night-farmers who probably would not have realised that the chain was not locked but instead looped around the tree. Thus, I find as a fact that Mr. Amaral installed the chain.

In respect of whether the rent paid to Mrs. Brady by Mr. Amaral was supplemented by produce from the farmlands, I reject Mrs. Brady's position that it was so, as it is vague and unsupported in any form. Thus, I prefer Mr. Amaral's evidence which had a solid ring of truth to it that there had never been any express agreement or even implied understanding that providing Mrs. Brady with vegetables had any bearing on his access or was in exchange for any continued use of the Peak Road, the Track and the Disputed Land.

Is the position of the Track and Disputed Land settled

31. The Defendant submitted that it remains unclear what is the exact location of the Track. He highlighted that the Track and the Disputed Land are variously shown and described in several surveys, plans and reports: (i) the 1996 B&L Plan; (ii) the 2016 Original BLS Plan; (iii) the 2023 Amended BLS Plan; (iv) the Bermuda Realty Company Survey Report dated 28 October 2021; and (v) the Bermuda Realty Company Survey Report dated 25 January 2023 which places the Disputed Land part of the Track wholly on Somersall and described as a longstanding situation.

32. On cross-examination, Mr. Amaral maintained that the Track at the Elbow remained the same over the years and that the cut and contours of the land do not allow for the location of the Track to change. He had not seen all of the surveys but he confirmed that although in his witness statement he used the term "approximate location" of the Track on the 2023 Amended BLS Plan, he maintained that the Track was shown accurately on that plan. When

asked to compare the location of the Track on the 2016 Original BLS Plan with the 2023 Amended BLS Plan, he stated that *"... there were slight differences in them, but the run of the Track is pretty well the same on both of them, across the property, the run of the Track off the main road.*"

33. In my view, based on the evidence, the location of the Track in the Elbow Area, and thus the Disputed Land, are in the same position as they have always been for the duration of time that Mr. Amaral has been farming or assisting in farming in the Peak Road area, that is, more than twenty years. I accept Mr. Amaral's evidence, although he is not an expert or land surveyor, that the Track has not changed position as on the evidence, it appears to me that he has used the Track on a very regular basis and more likely more than anyone else. Thus, I find as a fact, that the location of the Disputed Land is settled, as set out in pink on the 2023 Amended BLS Plan.

The Issues

34. There is one main issue in the case, namely whether Mr. Zuill has acquired a right of way over the Disputed Land on Somersall with several sub-issues as follows:
    a. Whether there has been uninterrupted access of the right for more than 20 years;
    b. If so, whether such access has been with the permission of Mrs. Brady; and
    c. If a right of way is granted over the Disputed Land, is it a change in use.

The Law

Doctrine of Lost Modern Grant

35. The leading authority on the doctrine of lost modern grant is the Bermuda Court of Appeal decision in *Gleeson and Gleeson v Bell and King* Civil Appeal 1994: No 2, Judgment dated 12 May 1994. It highlighted the principle that an enjoyment of right must be *nec vi nec clam nec precario*, that is, it must not be by violence, it must not be secret, and it must not be permissive. The Court stated as follows:

    "On the issue of lost modern grant the learned judge was bound by authority to conclude that there was no statutory provision in Bermuda for the acquisition of

easements by prescription or we're the applicability of the common law doctrine relating to prescription (see Lathan v. Darrell and Hill Civil Appeal. No. 13 of 1985, at P-8). Accordingly the appellants had to persuade the learned judge that this was a case for the application of the doctrine of lost modern grant. The learned judge implicitly rejected that contention holding that the user relied upon was not user as of right.

When Lord Davey asserted in Gardner v. Hodgsons' Kingston Brewery Company (1903 A.C. 229, 238) that an enjoyment as of right must be nec vi nec clam nec precario he was in fact merely accepting what was law from the time of Bracton as cited by Coke; in short, the enjoyment must not be by violence it must not be secret, and it must not be permissive.

The prerequisite for the acquisition of an easement under the doctrine of lost modern grant is that the user must have been as of right. Any acknowledgement that the user is permissive will be fatal to the claim. AS Cheshire observed 'to ask permission is to acknowledge that no right exists'(Cheshire and Burn's Modern Law of Real Property, 14th Ed. p. 550) Accordingly what a party must show is that he claims the privilege, not as a thing permitted to him from time to time by the servient owner, but as a thing he has a right to do (see Patel v. W.H. Smith (Esiot) Ltd. WLR 1987 (1) W.L.R. 853)."

36. In the later case of *Bean and Smith v Frost* [2006] Bda LR 87 Kawaley J. as he then was, provided a helpful summary of the law on Lost Modern Grant, having analysed the two Court of Appeal cases of *Lathan v Darrell and Hill* [1986] Bda LR 30 and *Gleeson and Gleeson*, stating:

"The Court of Appeal for Bermuda decision in Gleeson BDLR [1994] Bda LR 8 is undoubtedly binding on this Court because (a) it was handed down after the entry into force of the 1984 Act, (b) defines the scope of the doctrine of lost grant, confirming the Lathan case, and (c) explains how as a matter of evidence a license will defeat a plaintiff's claim. In this case, da Costa (Acting President) again gave the judgment of the Court, here confirming that Wade J (as she then was) had correctly applied the law of lost modern grant in rejecting the plaintiff's easements claim …

"So an easement such as a right of way over land may be acquired on proof of the following circumstances: (a) uninterrupted exercise of the right for more than 20 years, (b) exercise of the right of way as of right, which implies the absence of any evidence of either (i) it being impossible for the grantor to have expressly conferred a right of way, or (ii) an admission by the claimant that the grantor was entitled to grant a license during the period in question. Once these matters are proved, the law will presume that a right of way was granted expressly in a deed that has been lost."

Law on Signs

37. In the English Court of Appeal case of *Winterburn and Bennett* [2017] 1 WLR 646, Richards LJ addressed the issue of whether signs were sufficient to prevent the appellants acquiring a right to use the disputed land. He stated as follows:

> *"13. The phrase "without force" carries rather more than its literal meaning. It is not enough for the person asserting the right to show that he has not used violence. He must show that his user was not contentious or allowed only under protest. This appeal is concerned with what constitutes protest on the part of the owner of the land for these purposes.*
> *14. Mr Gaunt QC for the appellants rightly emphasised that the basis of the law of prescription is acquiescence on the part of the owner of the land. In Dalton v Angus (1881) 6 App Cas 740, in which the doctrine of lost modern grant was authoritatively established, Fry J, one of the judges asked to give his opinion to the House of Lords said at p.773 in a passage cited with approval by Lord Hoffmann in Sunningwell:*
>
> > *"But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest."*
> >
> > *...*
>
> *21. In the light of the development of the authorities, it cannot now be said, even if it ever could, that to avoid acquiescence, the owner of the relevant property must take steps through physical means or legal proceedings actually to prevent the wrongful user.*
> *22. The issue in the present case is whether the continuous presence of legible signs stating that the car park was private property and for use by the Club's patrons only was sufficient to render the use of the car park by the appellants and their suppliers and customers contentious.*
> *23. The decision of this court in Taylor v Betterment Properties (Weymouth) Ltd [2012] EWCA Civ 250, [2012] 2 P&CR 3 (Betterment) establishes that the continuous presence of legible signs may be sufficient to render user contentious.*
> *...*
> *41. The situation which has arisen in the present case is commonplace. Many millions of people in this country own property. Most people do not seek confrontation, whether orally or in writing, and in many cases they may be concerned or even frightened of doing so. Most people do not have the means to bring legal proceedings. There is a social cost to confrontation and, unless absolutely necessary, the law of property should not require confrontation in order for people to retain and defend what is theirs. The erection and maintenance of an appropriate sign is a peaceful and inexpensive means of making clear that property is private and not to be used by others. I do not see why those who choose to ignore such signs should thereby be entitled to obtain legal rights over the land."*

Law on change of use

38. In *McAdams Homes Ltd v Robinson and another* [2004] ALL ER (D) 467 (Feb) Neuberger LJ had considered when an easement could cease because of a change of circumstances. He concluded that

> *"50. The authorities discussed above appear to me to indicate that that issue should have been determined by answering two questions. Those questions are:*
>
> *i) whether the development of the dominant land, i.e. the site, represented a "radical change in the character" or a "change in the identity" of the site (as in Wimbledon, and indeed as in Milner's and RPC Holdings) as opposed to a mere change or intensification in the use of the site (as in Glass and Cargill, and indeed in Giles);*
>
> *ii) whether the use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land, i.e. the cottage (this test being that laid down in Harvey and in Wimbledon and applied in Milner's and RPC Holdings)".*
>
> *51. In my opinion, the effect of the authorities in relation to the present case is that it would only be if the redevelopment of the site represented a radical change in its character and it would lead to a substantial increase in the burden, that the dominant owner's right to enjoy the easement of passage of water through the Pipe would be suspended or lost.*
>
> *52. In reaching this conclusion, I am relying on cases relating to rights of way. It appears to me that none of the decisions concerned with the passage of water are inconsistent with such reliance, and there are two such decisions, namely Wood at 585 and Atwood at 388H, where such cases were expressly relied on. The satisfaction of only one of two requirements will not, at least on its own, be sufficient to deprive the dominant owner of the right to enjoy the easement, in light of the first and third principles which I have suggested can be extracted from the cases. However, where both requirements are satisfied, the dominant owner's right to enjoy the easement will be ended, or at least suspended so long as the radical change of character and substantial increase in burden are maintained."*

39. In the extract from *Gale on Easements, Twenty-First Edition*, Jonathan Gaunt QC, Morgan J it stated as follows:

> *"(1) The Relevant Principle*
> *9-03 Where a right of way is acquired by user, since user is not continuous and may vary, there may be difficulty in determining the scope of the right acquired. The general rule is that, where a right of way is acquired by user, the extent of the right must be measured by the extent of the user.*

9-04 … In his judgment, Lord Abinger CB, in Cowling v Higginson (1838) 4 M & W 245 at 255, said "I do not give any opinion upon the effect of the evidence, but I should certainly say that it is not a necessary inference of law, that a way for agricultural purposes is a way for all purposes, but that is a question for the jury in each particular case … If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shews a user for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed.

(2) Purpose of User

9-06 In Wimbledon and Putney Commons Conservators v Dixon (1875) 1 Ch. D. 362, where the user proved was a user for farming purposes only – except for two or three slight circumstances, the enlargement of a farmhouse, the replacing of a mud cottage by a brick cottage, and apparently the taking away of gravel – the court declined to presume a grant of a way for all purposes, and restrained the Defendant from carting building materials for a new house. The Lords Justices, affirming Sir George Jessel MR, held that the property could not be so changed as substantially to increase or alter the burden upon the servient tenement.

…

Mellish LJ expressed the opinion that the true rule was laid down by Bovill CJ and Willes J in Williams v James (1867) L.R. 2 C.P. 577 at 580, that is to say,

> *'that when a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant.'*

Where however, a right of way to a dwelling house has been acquired by user, there was no excuse of user by opening a small shop.

9-07 The question came again before the Court in RPC Holdings Ltd v Rogers [1953] 1 AER 1029. There the plaintiff sought to restrain the defendant from trespassing on a track passing over the plaintiff's golf course to the defendant's field. The defendant had recently established on this field, and was about to enlarge, a camping site for caravans. The defendant proved that from about 1880 down to a few years before the commencement of the action the track had been used for the ordinary agricultural purposes of the field, and on this ground he established a right of way by prescription at common law. The question then arose whether this right was a right to use the track for agricultural purposes only, or a right to use it for all purposes, including the purposes of the camping site. Harman J, after considering Cowling v Higginson, Williams v James and Wimbledon v Putney Commons Conservatory v Dixon decided against the defendant. He said:

> *"It seems to me as a result of these three authorities that he question of the extent of the right is one which I as a juryman have got to determine, but that I am not to conclude from the mere fact that while the property was in one state the way was for all purposes for which it was wanted, therefore, that is a general right exercisable for totally different purposes which only came into existence at a later*

date. Sitting as a juryman I can feel no doubt that the way here was a way limited to agricultural purposes, and that to extend it to the use proposed would be an unjustifiable increase of the burden of the easement."

Plaintiff's Submissions

40. Mr. Richards made a number of submissions in support of the Plaintiff's case as follows:
    a. Mr. Zuill's evidence is that he has shown uninterrupted use for well in excess of 20 years.
    b. The land has been farmed for more than 20 years by Carlos Amaral.
    c. Permission was not needed by Mr. Zuill, his tenants and guests to cross the Disputed Land to access Lot C. They crossed the Disputed Land because they has unrestricted access to Lot C.

Defendant's Submissions

41. Mr. Elkinson made a number of submissions in support of the Defendant's case as follows:
    a. Mrs. Brady had placed, or caused to be placed, Signs restricting access to the Disputed Land.
    b. There has not been unrestricted access to and from Lot C over the Disputed Land on Somersall.
    c. That Mr. Amaral used Peak Rd. and the Disputed Land with Mrs. Brady's permission.

Analysis

42. In my view, I am satisfied that I should grant the declaratory relief prayed for by the Plaintiff for several reasons.

Issue 1 - Whether there has been 20 years or more of usage of the Disputed Land

43. First, in my view, there is no real issue that there has been more than twenty years of usage of the Disputed Land by Mr. Zuill and Father Zuill who roamed over the Disputed Land and other properties in the area for decades. Also, there is no real issue that Mr. Amaral has had more than twenty years of access over the Disputed Land. I am satisfied that the evidence shows that Mr. Zuill, and before him Father Zuill, had rented the farmlands to Mr. Amaral and before him to Manuel to farm the lands of Lot C. During that time, the farmers used Peak Rd. for access from Middle Rd. and then continued onto the Track. In doing so, they also used the Disputed Land where Peak Rd. and the Track meet in the Elbow area.

44. I note here that the Defendant takes no issue with this position.

Issue 2 – Has the access over the Disputed Land been with the permission of Mrs. Brady

45. Second, I refer to Mr. Amaral's evidence that he had a lease to use the lands and the Disputed Land. The Defence rely on this evidence to say that it supports the argument that he had permission to use the Disputed Land thus it negates the continued use by Mr. Zuill. In my view, I reject that argument. Mr. Amaral was renting farmland from five landlords in the Peak Rd. area. To be specific, he was renting farmland from Mrs. Brady. That poses no real issue in this case. Also, he was renting farmland from Mr. Zuill. Mr. Amaral states that he had a lease with Mr. Zuill and Father Zuill, renewed verbally. Thus, it is clear that by his lease with Mr. Zuill, as his tenant, Mr. Amaral exercised the same rights and privileges as Mr. Zuill, including in respect to the Disputed Land. Thus, the lease between Mr. Amaral and Mr. Zuill had no negative impact in respect of the element of permission.

46. Third, I refer to my findings of fact as set out above in respect of the Signs. In my view, it follows that the Signs were not for the purpose of informing Mr. Zuill and Mr. Amaral that they could not access the Disputed Land. Further, twenty years ago, Mrs. Brady did not know she owned the Disputed Land and thus, when the Signs were posted, she was hardly informing anyone to stay off the Disputed Land in particular. I also refer to my finding of fact that Mr. Amaral erected the chain to prevent the same conduct. It is clear to me that

Mr. Amaral was using the Track and Disputed Land as a tenant of Mr. Zuill and Father Zuill before the Signs were erected by Mr. and Mrs. Brady. I accept that the evidence shows that once the Signs were erected, Mr. Amaral as a tenant of Mr. Zuill, continued to use the Track and Disputed Land. Up to the period of around 2020, he had done so without objection from Mrs. Brady or anyone else. I highlight her evidence that she would give permission to various groups to use the Track and she would address unauthorised people who had come onto the properties. However, in my view, the Signs were not posted to restrict Mr. Zuill or Mr. Amaral from using the Disputed Land.

47. Fourth, in my view, the location of the Signs were not placed to prevent Mr. Zuill or Mr. Amaral from using the Disputed Land. The Orange Grove Sign clearly was on behalf of the various properties owners hopefully warding off unauthorized people at an early point on Peak Rd. As Mrs. Brady intimated, the property owners were protecting each other. However, both Mr. Zuill and Mr. Amaral had permission to use Peak Road beyond that sign. Clearly that sign was not intended to prevent them from accessing the properties. In respect of the Malplaquet Sign, it was erected for the same reason and at the same time as the other sign. To my mind, whilst it was located closer to the Track and Disputed Land, it was also located near to Somersall and its driveway. Thus, I am inclined to give that sign its widest scope but in doing so, I still conclude that the purpose of that sign was, as for the other sign, and that it was not intended to prevent Mr. Zuill or Mr. Amaral from accessing the Track or the Disputed Land.

48. Fifth, I have considered the case of *Winterburn and Bennett* and the various authorities referred to therein. In my view, the Plaintiff has proved that Mrs. Brady has acquiesced to the use of the Disputed Land before she met with Mr. Amaral in 2020 to tell him to stop using the Disputed Land. Additionally, to my mind, the continuous presence of the Signs was for the unauthorized persons coming to steal, to night-farm or to do other activities not approved by Mrs. Brady. Further, the wording of the Signs are far too vague to drive attention to Mr. Zuill and Mr. Amaral that they were barred from using the Disputed Property, already having had the right to use Peak Road and the main part of the Track

across Westlands. Thus, in my view, the Signs were not sufficient to render usage of the Disputed Property by Mr. Zuill and Mr. Amaral contentious.

49. Sixth, I again refer to my finding of fact that Mr. Amaral erected the chain across the Track to prevent theft of cedar and night-farming. Based on my finding, I reject Mrs. Brady's argument that the chain was erected by her cousin to prevent use of the Disputed Land by unauthorized people as well as Mr. Zuill or Mr. Amaral.

50. Seventh, I have considered that in 2020 Mrs. Brady instructed Mr. Amaral not to use the Disputed Property. Thereafter she erected the Third Sign. In my view, by the time that Mrs. Brady had the conversation with Mr. Amaral and later when she erected the Third Sign, Mr. Zuill had already obtained the right to use the Disputed Property as set out above. Thus, her actions in 2020 could not remove or other wise extinguish that right.

51. Eighth, I refer to my finding of fact that Mr. Amaral's supply of produce to Mrs. Brady was not a part of his rent to Mrs. Brady and was not for permission to use the Disputed Land. I rely on this finding to reject Mrs. Brady's contention that Mr. Amaral was using the Disputed Property with her permission because he had paid for such use. As stated above, Mr. Amaral was using the Disputed Land as a result of being the tenant of Mr. Zuill and before him Father Zuill.

52. In light of the reasons set out above, I am satisfied that Mr. Zuill has established a right of way over the Disputed Land on Somersall on the basis that it was *nec vi nec clam nec precario*, that is, not by violence, not by secret, and not by permission and that he is entitled to benefit from the doctrine of the lost modern grant.

Issue 3 - Is there a change of use

53. I now consider the argument advanced by the Defence that any grant of the declaration sought is restricted by the proposed change of use. Counsel for the Plaintiff submitted that this point was not pleaded, it had arisen late and the evidence did not touch on this issue.

54. The Defence argued that if the court granted a right of way under the doctrine of lost modern grant then it should be restricted to the current use, namely access by farmers and their vehicles and equipment. Reliance was placed on the extract from *Gale on Easements*, in particular paragraph 9-04 which stated in essence that where there was only one use, then the right granted should be restricted to that use. Counsel relied on *Wimbledon and Putney Commons Conservatory v Dixon* to show that a like for like grant was acceptable in some cases but restrained the defendant from carting building materials for a new house. Counsel also relied on *RPC Holdings Ltd v Rogers* where agricultural purposes limited an extension to camping purposes.

55. Counsel for the Plaintiff submitted that motor cars using the Disputed Property to access Lot C would not be a substantial increase in the burden. Further, Mrs. Brady's evidence was that she cannot hear tractors or farm equipment going over the Track or Disputed Property from her house on Somersall and further she would not be able to see where any proposed development would be on Lot C. Thus, as both requirements in *McAdams Homes Ltd v Robinson and another* had to be satisfied, the Defendant's arguments on this point should fail.

56. The evidence of Mr. Zuill is that he has been granted planning permission to build a dwelling on Lot C. He did not believe that there would be a material change in the use of the Disputed Land as a large part of the arable land would remain as arable land. Thus farm vehicles and trucks will continue to use Peak Road and the Track as they always did. One dwelling house, once built, would likely mean some personal vehicles having access to it infrequently. Any construction vehicles would not likely be bigger than the farm vehicles. Mrs. Brady maintained that building a dwelling house would change the use of the Disputed Land. Further she did not want cars driving over her property as farm equipment she could hear but some cars, like electric cars, she would not be able to hear them. She added that she may also want to improve her driveway.

Analysis

57. In my view, I am satisfied that the grant of easement should not be restricted to agricultural use only for several reasons. First, I am satisfied that part of Lot C would be changed to a dwelling house but part would still remain for agricultural use also. Accordingly, I am not satisfied that the use of the Disputed Land, that is cars visiting a residential home, would be a radical change in the character or a change in the identity in the current use of trucks and farm equipment being on the Disputed Land. They may be an addition, but they would not represent a radical change in character. In my view this case is different from that of *McAdams Homes Ltd v Robinson and another* where the drainage easement was being changed from a bakery to two dwelling houses. Thus, to my mind, there would not be a radical change in use as there would still be farm related vehicles using the Disputed Land.

58. Second, in my view, the use of the Disputed Land would not result in a substantial increase or alteration in the burden on it. My view extends to vehicles used in the construction of a residential dwelling as much as to the goings and comings in respect of a residential dwelling once the building is complete. To my mind, cars visiting a residential dwelling on an infrequent basis would not represent an increase or alteration in the burden, let alone substantially increase it for the Disputed Land. Substantial in this context of an active farm seems to suggest that there would be as much activity or more than the present usage of the Disputed Land. However, I prefer the evidence of Mr. Zuill which suggested that there would be minimal car usage on the Disputed Land.

59. Third, I am attracted to the reasoning in the case of *Williams and James* as set out above in *Gale*, '*that when a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant.'* In my view, the evidence in this case showed that the Zuill properties historically have been used for agricultural purposes but that there have been residential premises built there also. Thus, to my mind, the building of a residential dwelling on a part of Lot C would be an ordinary and reasonable use to the land of Lot C and by extension to the use of the Disputed Land. The contrary would be that Lot C was always used for agricultural purposes.

However, as accepted, Lot C would still have agricultural use. Consequently, as set out above in Gale re *RPC Holdings Ltd v Rogers*, I do not view the use of the Disputed Land for the purposes of accessing a residential dwelling as an unjustifiable increase of it.

60. In light of the reasons stated above, I decline to restrict the use of the Disputed Property to agriculture use.

61. Having decided this point in the preceding paragraphs, to my mind, it seems commonsensical that a point such as change of use should also be analysed in the context of a small island like Bermuda where land is a limited resource. Thus, there should be some room in the analysis to consider elements such as the nature of the surrounding area, for example is it arable, residential or industrial and the reason for the change. For clarity, I have not included such elements in my analysis.

Conclusion

62. In summary:
    a. I am satisfied that I should grant the declaration as sought by the Plaintiff in respect of the Disputed Land; and
    b. I am satisfied that the Plaintiff's use of the Disputed Land should not be restricted to the present use of vehicle and equipment used for farming purposes.

63. I will hear the parties on damages if necessary.

64. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis to be taxed by the Registrar if not agreed.

Dated 21 September 2023

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT