

Privy Council Appeal No. 8 of 1970

Rosaline Antigua - - - - - *Appellant*
v.
Isaac Boxwill - - - - - *Respondent*

FROM

**THE COURT OF APPEAL OF THE SUPREME COURT OF
JUDICATURE OF GUYANA**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 3RD MAY 1971

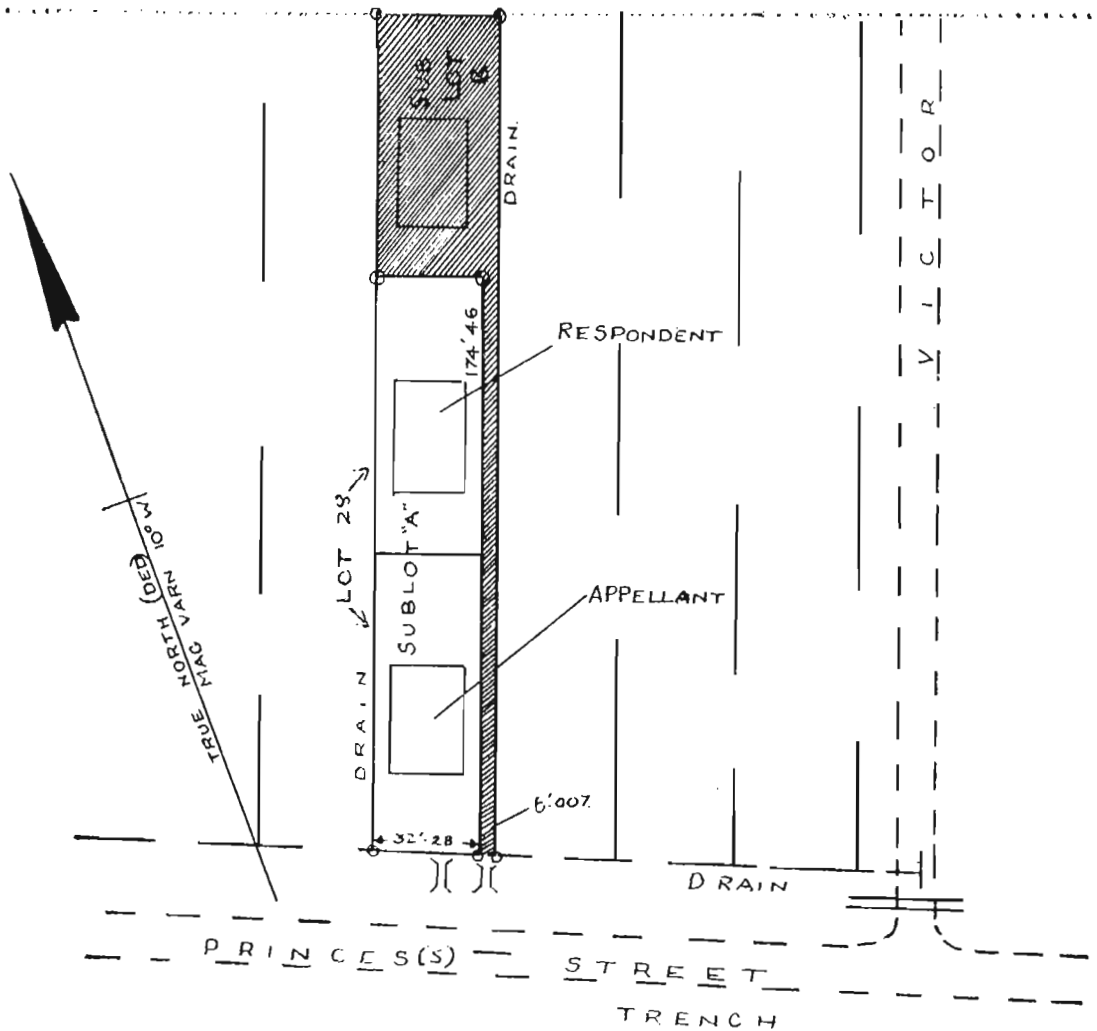
Present at the Hearing:

LORD DONOVAN
LORD WILBERFORCE
LORD DIPLOCK

[*Delivered by LORD WILBERFORCE*]

This is an appeal from the Guyana Court of Appeal, which by a majority (Persaud J. A. and Cummings J. A., Crane J. A. dissenting) dismissed the appellant's appeal from a judgment of George J. in the High Court in favour of the respondent.

The respondent, who was plaintiff in the action, claimed to be entitled to a right of way over the appellant's property in Lodge Village, East Coast Demerara. As shown approximately on the subjoined plan, there is, fronting Princess (or Princes) Street, a long thin strip of land called "Lot 28".



The southermost portion, abutting on Princess Street, is occupied by the appelland who has a house on her plot. Next, to the north, is the respondent's plot, also with a house on it. Next again, to the north is another plot with a house occupied by one Thomas. Along the eastern side of the appelland's and respondent's plots is a strip some 6' wide which at the present time is fenced off from the appelland's land. The legal position as regards this strip will be considered shortly: in fact it appears to be used by the respondent and the occupier of the property to his north as a means of ingress and egress.

The history of the land is as follows. In 1939 all three plots (making up the southern part of Lot 28) were owned by Ellen Joseph. In November 1939 she let the southernmost portion to the appelland who later erected a house on it. The actual lease is not, it appears, in existence, so that it is not known precisely what the dimensions of the demised plot were, or what covenants or reservations it contained. It is agreed however that the appelland fenced her plot on the North, South and East—there was already a fence to the West—leaving a strip of land about four feet wide along the eastern boundary as a means of access to the lands at the back. This strip has remained in existence and has been used as a passageway ever since: indeed in 1957 the appelland moved her eastern fence about $2\frac{1}{2}$ feet further to the west so that the strip is now about 6 feet wide as shown on the plan, and is separated from the appelland's plot by a fence.

In 1943 Ellen Joseph let the plot immediately to the north of the appelland's to one Hodge who erected a house. The respondent married Hodge's daughter and in 1951 took Hodge's place as tenant of this plot.

In 1953 Thomas rented the third and northernmost lot, and built a house there. As already stated, Hodge, Thomas and the respondent used the strip to gain access to Princess Street.

On 28th February 1955, the respondent was granted a lease in writing of his lot by Ellen Joseph. It was for a term of 5 years with a right of renewal for a further 5 years. The demise included expressly "a right of ingress and egress thereto (s.c. the lot) along a strip of land 4 ft. in width extending towards Princess Street, along the eastern boundary of the lot". From this it appears that Ellen Joseph regarded herself as either the owner of the strip, or at least as entitled to grant a right of way over it to the respondent.

Ellen Joseph died in 1956: her executrix was one Margaret Kingston. Lot 28 (Southern part—which included all three plots) was devised in equal shares to Joyce Rodney and Hazel Johnson.

In 1961 a survey was made of Lot 28, southern part, and a plan of subdivision into two sublots was prepared. Sublot A (unshaded on the plan above set out) included the appellant's plot (not including the 6' strip) and the respondent's plot. Sublot B (shaded on the plan) included Thomas' plot and the strip. The strip shown is 174 feet long and 6 feet wide.

On 24th May 1965, transport of subplot A was passed in favour of the respondent by Margaret Kingston, in accordance with the plan of subdivision: the transport did not contain any grant or mention of a right of way over the strip. As regards the southernmost portion of subplot A the appellant continued in occupation, paying rent to the respondent. In February 1966 subplot B was transported by the executrix of the estate of Ellen Joseph to Hazel Johnson.

In March 1966 the present proceedings were started by the respondent against the appellant claiming (inter alia) a declaration that he was entitled to a way of necessity over the plot occupied by the appellant, and an injunction restraining her from interfering with his right of passage. This was resisted by the appellant, but the respondent succeeded in obtaining the declaration or injunction sought both in the High Court and in the Court of Appeal. The appellant appeals against these decisions.

Their Lordships will first consider the position of the appellant as tenant from 1939 to 1965 of Ellen Joseph or her estate, and after 1965 of the respondent. It is clear, in their opinion, that between 1939, when her tenancy commenced, and 1965, when the respondent acquired the reversion to her plot, no basis existed for any claim, by the respondent or any other person, to a right of way, of necessity or otherwise, over the land now enclosed by her fences. However or whenever the strip on the east came into existence; whether it was from the start excluded from the appellant's tenancy or was afterwards abandoned by her, or whether a right of way over it was granted or established it is clear on the evidence that, in 1965, and for a period before then, persons occupying the plots to the North, had, and exercised, by means of the strip access to and egress from their property to Princess Street. There was no need for them to pass over the land occupied by the appellant—there was no basis upon which to imply a reservation, or grant, of any right of way over that land.

This state of affairs lasted until 1965, and it is upon the event which took place in that year—namely the transport by way of sale of subplot A to the respondent—that the respondent relies in support of his claim.

It must be said, in the first place, that the claim appears remarkable and even surprising. The respondent was at the time in enjoyment of a right of way over the strip which formed part of subplot B, regarded, as the plan of subdivision indicates, as the property of the estate of Ellen Joseph: (his lease of February 1955 seems to have expired by then, but there is no doubt that he was holding over under the terms of it). The respondent, as has been shown, had no right over the fenced subplot occupied by the appellant. The appellant was not a party to the transport of 24th May 1965, but the estate of Ellen Joseph was. It would therefore be surprising that the respondent under or by virtue of the transport of 24th May 1965, should have gained a right of way over the appellant's subplot when he was in a position to obtain access over the strip from Ellen Joseph's estate. If he obtained or retained a right of access over the strip, he had no need of any right over the appellant's plot. If he did not actually obtain a right of way over the strip, he was in a position to negotiate for one from the estate: and if, in the absence of a grant, he had to depend upon an implication in law to obtain a right of way, it would seem far more appropriate to imply this right against the estate than against the appellant.

An analogous situation arose and was considered under Roman-Dutch law in the South African case of *Wilhelm v. Norton* (1935) S.A.L.R. (E.D.L.D.) 143. The judgment of Gutsche, J. contains this passage:

"In ordinary circumstances it would be inequitable that the plaintiff should be compelled to seek an outlet elsewhere [by analogy, here, over the appellant's land]—especially when no other outlet is as practicable as the existing one—and it would be inequitable that some neighbour's land should have imposed upon it this new burden, and most inequitable that the defendant [by analogy, here the estate of Ellen Joseph], who partitioned his land and thereby created the present difficulty, should escape from the result of his actions by imposing hardships on the plaintiff and disabilities on strangers. The law is designed to meet a case of this very kind . . ." *l.c.* p. 171.

But the transaction must now be legally analysed.

1. As between the appellant and the respondent.

When the respondent, on 24th May 1965, acquired the reversion to the appellant's subplot, it seems clear that the appellant's contractual tenancy came to an end. This was because it was not registered in the Deeds Registry—Deeds Registry Ordinance §23 (1) (a) (see *Dhanpaul v. Demerara Bauxite Co. Ltd.* (1959) 1 W.I.R. 257). But the appellant was entitled to, (and did) remain in possession as a "statutory tenant" by virtue of the Rent Restrictions Ordinance—C.186. The respondent's claim to a right of way over her land was founded on this circumstance. He contended that the contractual tenancy came to an end on 24th May 1965 and that the respondent must be treated as having granted her a new tenancy in accordance with the terms of the Rent Restrictions Ordinance as from the same date. As (it was said) he was then "land locked", the law will presume that he reserved in his own favour a way of necessity, or a licence of the same effect, over the appellant's land.

Their Lordships would say first, as regards this argument, that they do not accept the premise that the respondent was "land locked": they will give their reasons for this under the next heading. But apart from this, in their opinion, the respondent's argument is not well founded. The matter depends entirely upon the terms of the Rent Restrictions

Ordinance—it was only under this statute that the appellant was entitled to remain on her subplot, and her rights are statutory and not based on the common law or on Roman-Dutch law.

S.21 (1) of the Ordinance reads (in part) as follows:

“21.(1) A tenant who by virtue of the provisions of this Ordinance retains possession of any premises to which this Ordinance applies shall, so long as he does so, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as they are consistent with the provisions of this Ordinance, and shall only be entitled to give up possession of the premises on giving the notice which would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than one month’s notice.”

Their Lordships are unable to appreciate how this section supports, or is consistent with, the respondent’s contention. Under it the appellant retained possession, *i.e.*, she had the exclusive right to occupy her subplot. She was entitled to all the terms and conditions of the original contract of tenancy, so far as consistent with the provisions of the Ordinance. Under her original tenancy, whether expressly or by operation of law, she was entitled to enjoy her land without interference or disturbance by her lessor. There is nothing in the Ordinance which cuts down her right. If, having enjoyed it for 26 years free from any right of the occupier of the adjoining subplot to pass over it, she were, as from 24th May 1965 to enjoy it subject to a right of passage, she would occupy on terms and conditions substantially less favourable than those on which she enjoyed it under her contractual tenancy. The Ordinance, so far from supporting the right claimed, in express terms excludes it. Thus the respondent’s claim cannot succeed.

2. As between the respondent and the estate or heirs of Ellen Joseph. This is relevant to the premise mentioned above—that the respondent was at the date of the transport of 24th May 1965 land locked. In their Lordships’ judgment the respondent cannot succeed in showing that this was the case. As has been stated, the respondent was, up to 24th May 1965, entitled to a right of ingress and egress along the strip by virtue of the lease of 28th February 1955 on which he was holding over. He was in fact (and so far as is known still is) making use of this right. At the date of the transport of 24th May 1965 the strip was shown on the plan, in accordance with which the transport was passed, as forming part of subplot B. There may perhaps be insufficient evidence to prove that the strip was in law the property of the estate of Ellen Joseph, but at any rate since 1955 Ellen Joseph had been treated, as between herself and the respondent, as entitled to grant a right of way over it.

In these circumstances, the respondent is unable to satisfy their Lordships that the respondent was in any sense land locked—*i.e.*, that he was left, after 24th May 1965, in a worse position than he had been in under his lease, and without any right to pass over the strip.

The learned judges in the Court of Appeal who gave the majority decision thought that the right which the respondent had under the lease was extinguished when he acquired the freehold of the plot: but they gave no consideration to the question whether, on the acquisition of the freehold, and having regard to the circumstances then prevailing, a way of necessity, or an analogous licence, could be implied. Crane J. dealt with this point and reached the conclusion that, under the doctrine of *Wheeldon v. Burrows* (1879) 12 Ch.D. 31 a right of way over the strip ought to be implied. Their Lordships agree substantially with the learned

judge's reasoning. He held further that this, being an easement of necessity was not registrable nor required to be annotated or inserted in any transport (See *Jaigopaul v. Clement* (1960) 2 W.I.R. 203).

It may be open to argument whether the respondent acquired a right of way as a "continuous and apparent" easement under the doctrine mentioned, or whether, as the appellant submitted was the case, he acquired a right of way, or a licence of way of necessity, in accordance with the accepted principles of Roman-Dutch law. Since the owner of the strip is not a party to these proceedings, it would not be right for their Lordships to make a formal declaration as to the nature of his right. It is sufficient that the respondent wholly fails to show that at and by reason of the transport of 24th May 1965 he became land locked in the sense that he had no right, other than a permissive or precarious right, to pass over the strip. In these circumstances the premise on which the respondent claims is based also fails.

Their Lordships are therefore of opinion that the appeal succeeds and that the order made in the High Court and in the Court of Appeal must be set aside and the respondent's action dismissed. Their Lordships will humbly advise Her Majesty accordingly. The respondent must pay the appellant's costs of this appeal and in the Courts below.

In the Privy Council

ROSALINE ANTIGUA

v.

ISAAC BOXWILL

DELIVERED BY

LORD WILBERFORCE