[2012] UKPC 7
Privy Council Appeal No 0113 of 2010

JUDGMENT

J & O Operations Limited and another; Eloise Mulligan and Grace Wong (Appellants) *v* The Kingston and Saint Andrew Corporation (Respondent)

From the Court of Appeal of Jamaica

before

Lord Hope
Lord Mance
Lord Clarke
Lord Sumption
Lord Reed

JUDGMENT DELIVERED BY LORD REED ON

7 March 2012

Heard on 7 February 2012

Appellant
Allan S Wood QC
Teri-Ann Gibbs

(Instructed by MA Law (Solicitors) LLP)

Respondent
Rose M Bennett-Cooper
Crislyn Beecher-Bravo

(Instructed by Charles Russell LLP)

LORD REED:

1. This appeal is concerned with issues relating to the law of easements which have arisen in connection with the creation of New Kingston, a large commercial development in Jamaica.

The background

2. During the 1950s a scheme was devised for the development of Knutsford Park, an area of land which was owned by Horace Clinton Nunes and had previously been used for horse racing. It was proposed that the land should be developed as a commercial centre. On 28 August 1958 details of the proposed development were submitted to the respondent, which was the local authority with responsibility for such matters, in accordance with section 5 of the Local Improvements Act:

> "5.-(1) Every person shall, before laying out or sub-dividing land for the purpose of building thereon or for sale, deposit with the Council a map of such land; such map shall be drawn to such scale and shall set forth all such particulars as the Council may by regulations prescribe and especially shall exhibit, distinctly delineated, all streets and ways to be formed and laid out and also all lots into which the said land may be divided, marked with distinct numbers …
>
> (2) Every such person shall also deposit with the Council as respects each street and way as shown on the said map –
>
> (a) a specification showing how such street or way is to be constructed … Such specification shall, if the Council by regulations so prescribe, be accompanied by plans and sections …
>
> (b) an estimate of the probable expenses of the street works being done."

3. On 2 October 1958 the respondent sanctioned the sub-division of the land and approved the proposed development, subject to certain conditions, in accordance with section 8(1) of the Local Improvements Act:

> " … the Council shall on such deposit as prescribed in section 5 consider the said map, specifications, plans and sections and estimates and shall, by resolution … refuse to sanction or sanction subject to such conditions as they may by such resolution prescribe, the sub-division of the said land and the formation and laying out of the said streets and ways, and may approve of the map, specifications and estimates of the said street works or may alter or amend the same as to them may seem fit and may prescribe the time within which the said street works shall be completed."

The map, which the Board will refer to as the approved plan, showed the development as comprising 360 lots, set out in a grid divided by the principal streets. Many of the lots were arranged back to back in such a way that some had frontages on to those streets and others, lying to the rear, had frontages on to secondary streets, which were designated on the map as car parks and piazzas. Each secondary street could be entered at either end from one of the principal streets, the entrance at one end being suitable for vehicular traffic and the entrance at the other end being a narrower passage suitable only for pedestrians. All the streets, including those designated as car parks and piazzas, were shown as being bounded by sidewalks. The dimensions of the lots, streets and sidewalks were shown on the map. The secondary streets were shown as being wider than the principal streets, consistently with their proposed use for car parking.

4. The relevant resolution of the respondent's building committee recorded:

> "That this Committee hereby approves of the plans, specifications and estimates … for construction of roads, drains, culverts, kerbs and paved sidewalks … and of the application … on behalf of the owners for permission to subdivide the said premises into 360 lots on the following conditions …"

The conditions included several relating to the proposed roadways, the respondent being the statutory roads authority. They included the following:

> "(c) That no building be erected on any of the lots fronting on the proposed roadways until they have been constructed to the satisfaction of the City Engineer and taken over by [the respondent].

(d) That the title for the roadway to be handed over to [the respondent] be prepared from the deposited plan in the Titles Office.

…

(g) No transfer of any lot adjoining any proposed roadway shown on the Map shall be registered until there has been lodged with the Registrar of Titles, a certificate by the Town Clerk that the proposed road has been completed."

There were also conditions in the following terms:

"(h) That the titles for the car parks and piazzas shall be prepared in the name of [the respondent] from the deposited plan and handed over on completion.

…

(m) All sidewalks shall for their entire widths be paved with 4 inches of 1:3:6 cement concrete and 3 inches of stone ballast and wood floated to the satisfaction of the City Engineer."

5. On 13 January 1960 a further plan, which the Board will refer to as the deposited plan, was deposited with the Registrar of Titles in accordance with section 126 of the Registration of Titles Act:

"126. Any proprietor subdividing any land under the operation of this Act for the purpose of selling the same in allotments shall deposit with the Registrar a map or diagram of such land exhibiting distinctly delineated all roads, streets, passages, thoroughfares, squares or reserves, appropriated or set apart for the use of purchasers and also all allotments into which the said land may be divided …

Provided always that when any such land is situated within any portion of a parish to which the provisions of the Local Improvements Act and any enactment amending the same shall apply the proprietor shall deposit with the Registrar copies ... of the map deposited with [the respondent] and the resolution of [the respondent] sanctioning the subdivision, and no transfer or other

instrument effecting a subdivision of any such land otherwise than in accordance with the sanction of the Board shall be registered."

As required by the proviso to section 126, copies of the approved plan and of the resolution of 2 October 1958 were also deposited with the Registrar of Titles. It was explained in evidence that the purpose of the deposited plan was to provide precise information as to the location and dimensions of the individual lots, based upon a survey of the development as constructed, to which reference could be made in the certificates of title. The deposited plan differed from the approved plan in that the former did not show the sidewalks and piazzas shown on the latter. Notwithstanding that difference, it is apparent that sidewalks were in fact constructed.

6. From 18 January 1960 onwards, transfers of title by Mr Nunes to the purchasers of lots in the development were registered. In particular, on 4 September 1969 the transfer was registered of title to Lots 42 and 43, of which the third and fourth appellants are respectively the current owners. Other transfers related to lots of which the first and second appellants are the current proprietors, but those appellants did not take part in the proceedings before the Board, and a cross-appeal by the respondent which related to their lots was withdrawn. It is therefore unnecessary to consider further the position in relation to their lots.

7. Lots 42 and 43 lie adjacent to one another, and front on to a secondary street which was designated on the plans as Car Park C and has been known since 1968 as St Lucia Way. It lies between two of the principal streets of the development, namely St Lucia Avenue and Knutsford Boulevard. There is vehicular and pedestrian access between St Lucia Way and St Lucia Avenue, and pedestrian access between St Lucia Way and Knutsford Boulevard. There is a sidewalk along the southern side of St Lucia Way, separating Lots 42 and 43 from the roadway. Cars can park along the sidewalk, and also in the centre of St Lucia Way and along its northern side.

8. During 1981 the fourth appellant acquired title to Lot 43. During 1983 the respondent acquired title to the car parks and piazzas in the development, including St Lucia Way, in accordance with condition (h) of the subdivision approval. The transfer of title, granted by Mr Nunes' successor in title, recorded that the transferor was desirous of transferring the land in question to the respondent "as parochial authority for parochial purposes". During 1994 the third appellant acquired title to Lot 42. Lots 42 and 43 remained unbuilt on. Since 1994 they have been let to a private car park operator and have been used, in combination with other adjacent lots, as a private car park. That car park is separated from the sidewalk along St Lucia Way by a fence. Vehicular access to

the car park is obtained from a street known as Grenada Crescent, via one of the other lots.

9. From 1998 onwards the respondent undertook steps, as roads authority, to regulate parking within their area. The measures taken included the introduction in 1999 of parking charges in St Lucia Way, with a barrier being installed at the junction with St Lucia Avenue, and payment for parking in St Lucia Way being required upon leaving. Access from St Lucia Avenue was not however prevented, and no fee was charged merely for access. The appellants responded by bringing the present proceedings, in which they asserted their right to have access to St Lucia Way, and to park there free of charge, on the basis of an easement.

10. On 20 May 2005 Anderson J granted declarations in favour of the third and fourth appellants to the effect that they were entitled, as proprietors of Lots 42 and 43, to access St Lucia Way from St Lucia Avenue by foot and by motor vehicle, to access St Lucia Way from Knutsford Boulevard, and to park on St Lucia Way free of charge for the purpose of transacting business with the first and second appellants, who owned a supermarket on the north side of St Lucia Way. Those declarations were granted on the basis that a right of way over St Lucia Way had been impliedly granted as an easement in 1969, at the time of the transfer by Mr Nunes to the appellants' predecessors in title, either as a matter of common intention or by reason of necessity, or had in any event been constituted subsequently by prescription. In relation to parking for the purpose of transacting business at the supermarket, an easement was held to have been constituted by prescription. Anderson J also concluded that it must have been intended that St Lucia Way was to be a public way in relation to the lots abutting it, and that the purpose of condition (h) in the subdivision approval, requiring that title to St Lucia Way be transferred to the respondent, had been to give the local authority control over it.

11. On 25 September 2009 the orders made in favour of the third and fourth appellants were set aside by the Court of Appeal. In the judgment of Panton P, with which the other members of the court concurred, it was observed that there was no foundation in the evidence for a claim to an easement of way by implication on the basis of the intention of the parties: it had not been established that the parties to the 1969 grant had had a common intention that the lots would be used in some definite and particular manner and that the easement claimed was necessary to give effect to that intention. Nor was there any basis in the evidence for an easement of way by virtue of necessity, since the evidence demonstrated that the appellants had access to the public highway over other lots. Nor was there any evidence that the third and fourth appellants or any agent of theirs had ever driven a vehicle on to St Lucia Way or done anything there which might give rise to an easement to park. They therefore possessed no greater right than any member of the public. The present appeal has been brought against that decision.

The issues in the appeal

12. The principal issue raised in the appeal is whether a right of way for pedestrians and vehicles between the lots in question and St Lucia Avenue, over St Lucia Way, was impliedly granted as an easement when separate titles to those lots were granted in 1969. Counsel for the appellants submitted that a common intention to create such an easement could be inferred, and that in any event such an easement, with an accessory right to park on St Lucia Way, should be implied on the ground of necessity, since it was necessary for the convenient and comfortable enjoyment of the lots. Reference was made to the case of *Moncrieff v Jamieson* [2007] 1 WLR 2620, 2008 SC (HL) 1, and to the authorities discussed there. Counsel submitted that the easement was also such as to entitle the appellants to take vehicles across the sidewalk between their lots and the roadway of St Lucia Way in order to park on the lots, and was incompatible with the current use of the roadway ex adverso the lots for parking. Counsel for the respondent on the other hand submitted that the appellants were entitled to use St Lucia Way as a means of access between their lots and St Lucia Avenue and Knutsford Boulevard in the exercise of a public right of passage. Given the existence of that public right, there was no basis for the implication of an easement, either on the basis of any common intention or on the basis of necessity. As the proprietors of land adjoining a highway, the appellants were entitled to form an access to the highway, subject to compliance with any relevant statutory requirements. In response, counsel for the appellants noted that a highway, unlike an easement, might be stopped up under statutory powers without the payment of compensation. That consideration does not however appear to us to have any bearing on the question whether the circumstances under which the grant was made in 1969 were such that an easement was created.

Discussion

13. The development with which the Board is concerned was designed in such a way that only certain of the lots intended for commercial use had frontages on to the principal streets which were to be formed. The remaining lots had frontages on to secondary streets, such as St Lucia Way, which constituted culs-de-sac for motor vehicles. Although described in the plans as car parks, those secondary streets were also the only means by which access to the lots could be obtained, not only by their owners and occupiers but also by customers, tradesmen, delivery vehicles and members of the public generally. In such a situation, as Kelly CB observed in *Espley v Wilkes* (1872) LR 7 Ex 298, 302, it must have been intended by the parties that there should be either a public way or a private way, or there must be a way of necessity.

14. Given the layout of the development, with the principal streets being linked by secondary streets such as St Lucia Way, and given also the intended use of the lots fronting those streets for commercial purposes, and the intended use of the streets themselves for car parking, the natural inference is that it must have been intended that there would be a public right of passage, both for pedestrians and for motor vehicles, over those streets. As Lord Kinnear remarked in the Scottish case of *Magistrates of Edinburgh v North British Railway Co* (1904) 6 F 620, 639, it is familiar that landowners may lay out ground for streets in such a way as to create an indefeasible right in the public. The inference that the land in question had been dedicated to the public gains support from the terms of the conditions on which approval was granted for the subdivision. As the Board has explained, those conditions stipulated that the roadways were to be constructed to the satisfaction of the City Engineer and taken over by the respondent. Title to St Lucia Way, and to the other streets, was also to be transferred to the respondent, as in fact occurred. As the local roads authority, the respondent would then be responsible for the maintenance and management of the streets at public expense, in accordance with its statutory functions. The inference gains further support from the evidence that St Lucia Way has been used by the general public since about 1968.

15. The circumstances which the Board has described do not on the other hand support any inference that there was a common intention to create an easement. No evidence was given by the parties to the dispositions in 1969 by which separate titles to Lots 42 and 43 were first created. Mr Nunes can however be taken to have been aware of the approved and deposited plans for the development of his land, and of the conditions attached to the approval: conditions which required him to transfer title to St Lucia Way to the respondent. It is also reasonable to infer that the grantees of the transfer were aware of the deposited plan, which was referred to in the transfer of title. They could also be expected to have been aware of the approved plan and the conditions attached to the approval, since those documents had also been deposited with the Registrar of Titles and, under section 126 of the Registration of Titles Act, the transfer could only be registered if it was in accordance with the approval. As the Board has explained, it could be inferred from all those documents that a public right of passage over the area then described as Car Park C had been created. Nothing in the evidence supports the attribution to the parties of an intention to create an easement of way rather than, or in addition to, the public right of passage.

16. Counsel for the appellants suggested however that the sidewalk might not have been created by 1969, since it was not shown on the deposited plan. On that basis, it was submitted that it could be taken to have been intended that proprietors such as the third and fourth appellants should be able to access their lots via St Lucia Way by motor vehicle, and to park on the lots, without their being impeded by the kerb of the sidewalk. This submission lacks any foundation in the evidence: the question whether the sidewalk had been constructed by 1969 does not appear to have been raised at any earlier stage in the proceedings, and was not the subject

of any findings of fact. The evidence does on the other hand indicate that transfers of the individual lots would not have been registered unless the roadworks, including the formation of the sidewalks, had been completed in accordance with the approved plan and the relevant conditions. That is also the implication of the proviso to section 126 of the Registration of Titles Act. Furthermore, an intention that proprietors should be able to access their lots by motor vehicle would not in any event entail a common intention to create an easement over St Lucia Way rather than, or in addition to, the public right of passage.

17. It remains to consider the argument based on necessity. If, as the Board has explained, the effect of the development was the dedication of St Lucia Way to the public, it follows that there was no necessity for the acquisition of an easement by the proprietors of the lots in order for them to be entitled to access and egress between their lots and the principal streets of the development. They have a right of passage between their lots and the principal streets of the development, via St Lucia Way, in the same way as any member of the public. The only specialty in the appellants' position is that, as was accepted on behalf of the respondent, they have a right at common law to form an access from their property to the public way, subject to any relevant statutory provisions.

18. In the absence of an easement, the argument that there was a right, ancillary to the easement, to park on St Lucia Way fails to get off the ground. Nor in any event could a right to park in St Lucia Way be said to be necessary for the comfortable enjoyment of an easement of way: commercial premises are commonly operated without the benefit of adjacent private parking. In so far however as members of the public are permitted to park in St Lucia Way on payment of a fee, the appellants can do so on the same basis.

Conclusion

19. For these reasons the Board will humbly advise her Majesty that the appeal should be dismissed. The third and fourth appellants must pay the costs of the appeal.