In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 123

BETWEEN:

MARK SOUSA

Plaintiff

-v-

THE MINISTER OF PUBLIC WORKS

Defendant

JUDGMENT

(in Court)[1]

Trial of preliminary issues-subsidiary legislation-whether valid if not advertised in appointed paper-presumption of validity-whether substantial compliance with publication requirements-Private Roads (Vesting as Highways) Order 1963

Date of hearing: February 9, 2018
Date of Judgment: February 23, 2018

Mr. Cameron Hill, Westwater Hill & Co, for the Plaintiff
Mr. Myron Simmons, Attorney-General's Chambers, for the Defendant (the "Minister")

[1] The present Judgment was circulated without a further hearing in order to save costs.

Introductory

1. The Plaintiff is the proprietor of a garage operated by Cardozas Limited ("Cardozas") on Mission Road in a residential neighbourhood in Paget West. The parking of cars on the roadside in the environs of the garage, combined with emissions from garage operations, has provoked the ire of neighbours for several years. This ire has, in turn, stimulated regulatory action by various Government authorities resulting in satellite Court proceedings. The present action is one such proceeding.

2. The Minister served an Abatement Notice dated March 11, 2015 (the "Abatement Notice") on the Plaintiff personally under section 10 of the Public Lands Act 1984. Non-compliance with this Notice is by way of prosecution in the Magistrates' Court. The present proceedings were commenced to seek the determination of legal questions which would, if resolved in the Plaintiff's favour, (potentially at least) remove at least one legal basis for the Abatement Notice. In short the present action seeks to establish that Cardozas operates on a stretch of road which is private and which the Crown has no right to regulate under the 1984 Act.

3. Further prosecution of the Abatement Notice having been stayed pending the determination of the present proceedings, it is unsurprising that the present trial was only listed on the application of the Defendant Minister. Having issued an Originating Summons on March 23, 2015, the Plaintiff quickly applied for an injunction to restrain the Minister from enforcing the Abatement Notice pending the determination of the present proceedings. On March 25, 2015, this Court gave directions for the further conduct of that injunction application upon the following undertakings:

    (a) the Defendant undertook not to enforce the Abatement Notice until further Order; and

    (b) the Plaintiff undertook to leave enough room on the disputed roadway for emergency vehicles to pass.

4. The Defendant failed to file his responsive evidence within 14 days of the March 25, 2015 Order, or at all. This was a delinquency which the Plaintiff did not hasten to remedy by way of seeking enforcement orders from this Court. Instead, the action went to sleep until, on September 18, 2017, the Defendant issued its Summons for Directions substantively seeking an expedited hearing of the Plaintiff's Originating Summons. The following day, the Plaintiff in response issued a second Summons seeking interim injunctive relief. At that hearing, I:

- awarded the costs of the Plaintiff's September 19, 2017 interlocutory injunction Summons to the Plaintiff, to be taxed if not agreed; and

- gave directions for the expedited hearing of those portions of the Originating Summons which would not require oral evidence and cross-examination.

5. Unhelpfully no Order was drawn up to reflect these directions and so, on the eve of the present trial, there was minor confusion as to what its parameters were.

The issues for determination

6. The Originating Summons sought the determination of four questions, the last of which related to an adverse possession claim. The latter claim would only have to be determined if the first two questions were resolved in the Defendant's favour, the impact of the third question alone being resolved in the Defendant's favour being less than clear. The issues ordered to be tried at the present trial were the following:

(1) Whether the Private Roads (Vesting as Highways) Order-in-Council 1963 ("the 1963 Order") which purportedly vested the private road known as Mission Road, situated in Paget Parish, for use as a public highway was Gazetted in accordance with the Private Roads (Vesting as Highways) Act 1955 ("the 1955 Act");

(2) If the 1963 Order was not Gazetted in accordance with the 1955 Act, whether that failure prevented Mission Road from vesting as a public highway, with the consequence that it remains a private road;

(3) If the failure to Gazette the 1963 Order was not fatal, and Mission Road did vest as a public highway, whether the entire length of the road so vested, or alternatively whether only that portion of the road up to the north-eastern corner of the Government's property so vested.

Was the 1963 Order gazetted as required by the 1955 Act?

The statutory publication requirement

7. The relevant provisions of the 1955 Act read as follows:

"*1. Subject to the succeeding provisions of this Act, the Governor may by Order-in-Council declare that a private road shall vest in Her Majesty, Her heirs and successors and shall become a highway….*

2. (1)….

(2)…an Order-in-Council made in pursuance of the foregoing section shall be published in the Gazette, and shall have effect as from the date of such publication or as from such later date as may be provided in the order."

8. The term "*Gazette"* as defined by section 6(1) the Interpretation Act 1951 today encompasses both the Official Gazette and appointed newspaper. Mr Simmons very properly conceded that the original definition in force when the 1963 Order was purportedly made provided as follows:

"*6. (1)….*

(h) the expression 'the Gazette' means the newspaper or newspapers appointed for the time being by the Governor to be the newspaper or newspapers in which Government notices are published by authority and any supplement to such newspaper or newspapers as aforesaid in which Government notices are published;…"

The evidence of non-publication

9. Although the Plaintiff filed no evidence documenting his counsel's efforts to find proof of publication in the requisite statutory sense, it was essentially common ground that no evidence could be found by either party that publication in an appointed newspaper had in fact occurred. In these circumstances, with Mr Hill offering to file evidence if this was required, I considered no evidence needed be filed to establish a negative which was not in dispute. I take judicial notice of the fact that it is comparatively easy to review microfilm records of newspapers published in Bermuda, either at the Government Archives or the Bermuda Library.

10. The failure of the Defendant to adduce positive evidence of publication to contradict the bare assertion that no publication occurred would, on the face it, support an inference that it was more likely than not that no publication occurred. The position might be otherwise if it was not possible to search the relevant newspapers because the records had been damaged or lost.

The presumption of regularity with respect to official acts

11. Mr Simmons contended that the Defendant was entitled to rely on the presumption of regularity and that absent more cogent evidence of non-publication the Court should presume that publication occurred. An instinctive initial response to this submission is to query what further proof of a negative could potentially have been adduced? The Defendant was himself unable to contradict the assertion that no publication occurred having apparently carried out similar researches to those carried out by the Plaintiff. Nor was the Defendant able to advance any hypothesis as to how publication might have occurred of which no record could now be found.

12. The facts of the present case are therefore almost the converse of those in a case where a plaintiff was entitled to rely on the presumption of regularity in a circumstances where there was no available evidence that planning permission had been granted in the distant past. In *Calder Gravel Ltd-v-Kirklees Metropolitan Borough Council* [1990] 2 PLR 26 at 40-41, upon which Mr Simmons relied, the factual and legal matrix was described as follows by Sir Nicholas Browne-Wilkinson, Vice-Chancellor (as he then was):

> "*The truth of the matter is, perhaps not surprisingly, that with the passage of time and given the confusion which must exist, given reorganisation as frequently as this, the necessary evidence for me to make a proper affirmative finding either one way or another that there was or was not a written document is simply not available. People have died; documents have been lost. It seems to me impossible on an ordinary judicial basis to make a firm finding in the absence of clearer evidence.*
>
> *Therefore, in my judgment, the outcome of this case does turn on the burden of proof. The plaintiff is seeking a declaration that there is a planning permission… the burden of proof is obviously basically upon it. But in certain cases the law raises a presumption. The presumption is normally referred to by its Latin tag omnia praesumuntur rite esse acta. Since few people now study Latin, it seems to me desirable that we should call it by English words, and I propose to call it 'the presumption of regularity. The presumption is that when there has been a long-term enjoyment of a right which can only have come into existence by virtue of a grant or some other legal act, then the law presumes, in the absence of proof to the contrary, that there was a lawful origin…*
>
> *The same presumption of regularity can arise where the validity of an act done by a public authority depends on the existence of a state of facts which cannot, with the passage of time, be proved*…" [Emphasis added]

13. Mr Hill sought to distinguish the *Calder Gravel Ltd* case on the grounds that it merely illustrated that the presumption of regularity could be relied upon by the citizen against the Crown. Mr Simmons rightly responded that no such limitation could be extracted from the judgment. Whether or not the presumption arises in the context of the present case turns on a proper analysis of the legal function of the presumption and the facts of the present case. Following the judgment in *Calder Gravel Ltd-v-Kirklees Metropolitan Borough Council* [1990] 2 PLR 26 at 40-41, I find that:

(1) the function of the presumption of regularity is assist courts to make factual findings in circumstances where traditional proof is impossible because evidence has, by reason of the effluxion of time or other supervening events, been 'lost'; and

(2) in the present case there is no suggestion that the relevant evidence existed but is no longer available. It is common ground that no evidence of the publication the Plaintiff contends did not take place can be found in the places where one would expect a record to still be found, if it ever existed.

Findings on gazetting issue

14. Accordingly, I reject the Defendant's submission that issue of publication should be decided in his favour through applying the presumption of regularity. I find it is more likely than not that the requisite gazetting did not take place. It is common ground that no publication can be found and there is no evidence or even a mere suggestion that the relevant newspaper records have been damaged, destroyed or lost.

Was there substantial compliance with the gazetting requirement?

15. It was common ground that non-compliance with the publication requirements of the 1955 Act did not automatically invalidate the 1963 Order. In *Corporation of Hamilton-v-Attorney-General and Centre for Justice* [2014] Bda LR 104, this Court held:

"*32. It is impossible to see how it could properly be open to any reasonable tribunal properly directing itself to find that this Notice substantially met the requirements of publication prescribed by section 38(3)(c) of the Act and section 5 of the Statutory Instruments Act in relation to ordinances made by the Corporation under its governing Act. The Corporation's counsel referred the Court to Wade & Forsyth, 'Administrative Law', 10th edition at pages 761-762 in support of the proposition which I have accepted that non-publication by itself does not automatically result in invalidity. The learned authors (at*

page 761 n. 249) also cite the Australian authority of Watson-v-Lee (1979) 26 ALR 461 (High Court of Australia). Barwick CJ commented in that case on the mischief of subsidiary legislation being purportedly made operative before the public could ascertain its contents as follows:

> *'4… To bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny."*

33. The 2007 Ordinance was accordingly invalidly made because it failed to substantially comply with the applicable publication requirements."

16. The Defendant's counsel relied on the following passage from my judgment in that case:

> "*20…When considering whether or not a statutory instrument has been validly made, the courts should only make a finding of invalidity when as a matter of substance the essential requirements for validity have not been met. The failure to strictly comply with the formalities of publication will not necessarily mean that the essential requirements for making the statutory instrument have not been met. And what constitutes substantial compliance with publication requirements may often be a somewhat fluid consideration, depending on the applicable facts.*"

17. The Notice in that case was published in an appointed paper but did not contain the contents of the purported statutory instrument nor even advise the public where a copy of the instrument might be obtained. On that basis, the suggestion in the present case that substantial compliance was achieved by a Royal Gazette article making a brief reference to the Legislative Council approving the Governor's Order-in-Council would not, standing by itself, constitute substantial compliance. However, in the *Corporation of Hamilton* case I also stated:

> "*21… It is possible to conceive of limitless scenarios in which it would lead to absurd results if strict adherence to the publication and related requirements were to be invariably required. For instance:*
>
> *(a) a draft statutory instrument, otherwise validly made, is forwarded by the lawyer for the maker of the instrument to the Attorney-General's Chambers rather than the Cabinet Secretary. The instrument is duly formatted, numbered and published. It would be absurd if the instrument had to be declared invalid simply because the Cabinet Secretary was not actively involved;*
>
> *(b) a draft statutory instrument, otherwise validly made, is forwarded to the Cabinet Secretary, duly formatted and*

published, but due to a printing error, which no one notices until years later, only partially published. It would be absurd if the instrument had to be declared invalid simply because the entire text was not published;

(c) *a statutory instrument, otherwise validly made, is duly formatted and published as part of the Bermuda Laws online but, due to a clerical oversight which is never discovered until years later, never gazetted at all. It would be absurd if the instrument had to be declared invalid simply because publication took an unauthorised form.* "

18. The present case, in my judgment, provides an excellent example of the third scenario set out above. The 1963 Order was published in the Official Gazette, which would after 1976 have been sufficient to establish strict compliance with standard publication requirements. The 1963 Order is published as part of the Bermuda Laws online, contrary to Mr Hill's submission in reply on this point. I also take judicial notice of the fact, discovered after judgment was reserved, that the same Order was published in the Revised Laws of Bermuda 1965 (Title 19: Item 5 (l)), some 50 years before the present proceedings were commenced. This edition of the Revised Laws is available to the public in the Government Archives today and in 1965 would have been available in the Law Library maintained by the Supreme Court.

19. Mr Hill made various broad sweeping references to the importance of private property rights and the rule of law in the common law dating back to Magna Carta (1215). As attractively as these submissions were put, in my judgment such general notions cannot trump the doctrine of Parliamentary sovereignty. And it is that doctrine which underpins the Court's task in deciding whether or not Parliament ought to be deemed to have intended that a publication defect which has gone unchallenged for over 50 years should invalidate a piece of subsidiary legislation which was fully published in two non-prescribed (but still official) forms.

Findings on substantial compliance issue

20. In my judgment it would be an absurd result to hold the 1963 Order is invalid for a failure to publish in an appointed paper first raised over 50 years after the statutory instrument was made otherwise validly, and published as part of Bermuda's laws. I accordingly find that the publication requirements were substantially met and that the 1963 Order was validly made.

Did the entire length of the road vest as a public road?

21. Mr Hill advanced a very creative argument based on a literal reading of the 1963 Order that only a portion of the road was embraced by the language of the Order. The key statutory words are as follows:

> "*That private road in Paget Parish known as the Mission Road leading in a southerly direction from South Road adjacent to Marshall's Food Store to a point adjoining the norther-eastern corner of the Government property on which the Gilbert Institute School is erected, all as delineated and coloured Blue on drawing No. 110/A/14 prepared by the Public Works Department and dated April, 1963, a copy of which accompanied the Governor's Message No.3 of this present session, shall vest in Her Majesty, her heirs and successors and become a highway*"

22. The unchallenged evidence of the Senior Lands Surveyor is credible and I accept it. Mr Sean Patterson deposed at paragraph 17 of his Affidavit as follows:

> *"17 (a)…;*
>
> *(b)In paragraph 12.3 of the Plaintiff's Affidavit the plaintiff makes the following allegation of fact;*
>
> *'the north-eastern corner of that property is marked with an 'X'. It is clear that the area purportedly vested as a public highway does not include the area to the south of the north-eastern corner, which is adjacent to the Cardoza's garage, i.e. the building marked number 25.'*
>
> *(c)What is clear that the description "north-eastern corner of the Government property" must be read with reference to the 1963 Order Plan which was incorporated by reference into the verbal description. In particular, the verbal description describes Mission Road as 'all as delineated and coloured Blue on the drawing'. As can be seen from the 1963 Order Plan the road coloured Blue leads from South Road to a point beyond the 'X' to a position in the north-eastern corner of the Gilbert Institute property, which is adjacent to the Plaintiff's garage. The 'Northern-eastern corner' must be interpreted in a common sense manner to provide access to Gilbert Institute. To accept the proposition that the 'north-eastern corner' means the exact apex of the north-east corner (i.e.*

the position marked 'X' by the Plaintiff) would mean interpreting it in an absurd manner since to do so would not provide access to Gilbert Institute nor allow for the bus lay-by and turnaround which were the intended purposes of the 1963 Order.

(d)Furthermore, such a proposition is inconsistent with the clear verbal description and the 1962 Order Plan. When describing directions in a verbal description surveyors often use bearings which refer to the 4 quadrants of a compass, i.e. Northeast, Southeast, Southwest and Northwest. If it was intended to describe a particular point, apex or spot, as suggested by the Plaintiff, surveyors would use exact coordinates. Therefore the words 'North-eastern area of the property".

Findings on extent of vesting issue

23. I find that the entire length of Mission Road vested as a public highway.

Other issues

24. Mr Simmons invited the Court to consider, in the alternative, two other legal issues which were not directed to be determined in the course of the present proceedings:

    (1) at common law the relevant roadway was already a road over which the public had a right of way;

    (2) did the definition of "highway" in section 9(3) of the Public Lands Act 1984 apply to th relevant roadway.

25. Mr Hill opposed the determination of those issues in the course of the present trial. I agree that that the scope of issues to be determined at any hearing cannot be unilaterally determined by one party without prior notice to the other party or the Court.

Conclusion

26. All issues relating to the validity of the 1963 Order are ultimately resolved in favour of the Defendant. Although the Order was not validly gazetted because it was not published in an appointed paper, the Order was published in the Official Gazette and in Bermuda's laws.

27. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, the Plaintiff shall pay the Defendant's costs of the trial of the present issues, to be taxed if not agreed. For the avoidance of doubt, those costs shall be limited to the issues relating to the validity and scope of the 1963 Order.

Dated this 23rd day of February 2018 _____

IAN RC KAWALEY CJ