IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

DEWEY BEACH LIONS CLUB, INC., a non-profit charitable corporation,	)	
Plaintiff,	)	
v.	)	C.A. No. 162-S
CRAIG A. AND CAROLINE L. LONGANECKER, STANLEY C. UNDERWOOD AND STACEY J. LONGANECKER AS TRUSTEES OF THE LONGANECKER-UNDERWOOD LIVING TRUST DATED MARCH 5, 2001; WALTER AND KATHERINE LEKITES, CHARLES AND LEE GALLAGHER, PEARL GOLDEN, MARY ANN DILL,	)	
Defendants.	)	

MASTER'S REPORT

Date Submitted: May 6, 2005
Draft Report: September 1, 2005
Final Report: February 24, 2006

Daniel F. Wolcott, Jr., Esquire, Potter Anderson & Corroon, Wilmington, Delaware; Attorneys for Plaintiff.

John A. Sergovic, Jr., Esquire, Sergovic & Ellis, Georgetown, Delaware; Attorney for Defendants/Counter-Plaintiffs.

GLASSCOCK, Master

BACKGROUND

This matter involves a petition to quiet title to real property in Dewey Beach owned by the Dewey Beach Lions Club ("the Lions Club"). Opposing the petition are the owners of four lots adjoining the Lions Club property. These property Owners (the "Owners") maintain that they have acquired an easement across the lands of the Lions Club. The Lions Club parcel fronts on Rehoboth Bay on its western boundary, on McKinley Street to the south and abuts the Owners' lots on the east. The Owners' lots are improved by cottages used by their owners as summer retreats, or rented to vacationers. The southernmost of the four lots, owned by Pearl Golden, fronts on McKinley Street. The remaining three lots to the north are landlocked.[1] In creating these four lots, the owner of the larger parcel from which they were created established a 15-foot wide easement by deed (the "easement") running from McKinley Street in the south to the northern most (Longanecker) lot in the north. This 15-foot easement allows ingress and egress to the landlocked lots. It occupies the western-most part of each of the parcels, abutting the property line common to the Owners and the Lions Club. The deed restrictions also establish a 25-foot setback from this property line, meaning that in

[1] The four lots, ordered south to north, are owned by Pearl Golden, Charles and Lee Gallagher, Walter and Katherine Lekites, and members of the Longanecker family, respectively.

addition to the 15-foot width of the easement an additional 10 feet of open space should (by deed) exist between each cottage and the western boundary of each lot.

On the Lions Club property west of this property line, the plaintiff maintains an area, the Waples playground, open for the use of the public. This is located toward the south-eastern portion of their parcel. The playground is surrounded by a fence. A portion of the Lions Club property to the north of the playground, until recently, was occupied by tennis courts. Located between the property line separating the Lions Club lands from those of the owners, on the east, and the fence running along the playground and (formerly) the tennis courts, on the west, is an open area 20 or 25 feet wide. The public at all times pertinent has been permitted to use this area as a right-of-way for access to the playground, by driving along the easternmost portion (the "Strip") abutting the defendants' lots, and parking along the playground fence just to the west. The Owners have used the Strip as a driveway to reach their cottages from the public street. The Lions Club seeks to quiet title to this area; the Owners have counterclaimed, maintaining that they have acquired an easement over the Strip.

Between 1980 and 2000, the property owned by the Lion's Club on McKinley Street (including the area at issue here) was leased to Lisa's Sailboats, Inc. ("Lisa's"). Pursuant to the 1980 lease, the Lions Club leased its Dewey Beach property to Lisa's for a term of 5 years. The lease provided for Lisa's to move the then-existing Lions clubhouse to another location on the property, and to make improvements thereto. Lisa's,

in fact, moved the clubhouse to the beach area of the property, added to it, and operated it as a restaurant. Lisa's was also permitted to operate a sailboat-rental business and to charge for the use of the tennis courts on the property. The lease provided that Lisa's was to maintain the existing Waples playground as a public playground. The parties agreed that Lisa's did not have the right to sublet the property. By the terms of the 1980 lease, the Lisa's also received an option to renew for three successive 5-year terms, which it exercised. The effective term of the lease, therefore, was from 1980 through 2000.

In 1991, the lease was modified to exclude the area of the playground from the leased premises.[2] It is not clear from the face of the lease or the 1991 amendment whether the Strip was included in the area formally excluded from the leased property in the 1991 amendment. It is clear, however, that for at least the period of 1980 to 1991, the entire Lions Club property including the playground and the Strip, was in the legal possession of Lisa's, and that during that period the Lions Club held a reversionary interest which would become possessory only upon termination of the lease.

After the Lisa's lease expired in 2000, the Lions Club removed the tennis courts and explored the possibility of building a new clubhouse for its members in the now-vacant area. It sought a permit for this improvement from the Town of Dewey Beach proposing use of the Strip and playground parking area as a driveway and parking area

[2] Other amendments, not pertinent here, were also made to the lease at that time.

for the clubhouse. At a public hearing on the proposal, some of the Owners appeared and challenged the right of the Lions Club to exclude them from the Strip. This lawsuit resulted. The Lions Club, which holds title of record, seeks a declaratory judgment that it has exclusive dominion over this Strip, and the Owners seek an easement by prescription or of necessity.

DISCUSSION

1. Easement Of Necessity

The Owners maintain that an easement over the Strip has arisen of necessity. An easement of necessity is an easement created by the presumption that where a landowner subdivides his property to create a landlocked parcel, without creating some access to that parcel, the landowner is presumed to have intended an easement to provide access across the non-landlocked (servient) parcel to the landlocked (dominant) parcel. *See* Pencader Associates, Inc. v. Glasgow Trust, Del. Supr., 446 A.2d, 1097, 1099-1100 (1982). In such a case, the explicit grant establishing the landlocked and non-landlocked parcel is presumed to have included an implicit grant of an easement to provide access to the landlocked parcel. Id. at 1099.

Thus, an easement of necessity can arise only to burden lands of a common grantor who created the landlocked parcel by partition. The Owners point out that at the time their lots were created from a single parcel, the common grantor also had some interest in

the parcel that became the Lions Club property (evidenced by the fact that the common grantor signed a quit-claim deed in favor of the Lions Club). Assuming that this showing is sufficient to demonstrate that the Lions Club's and the Owners' lots were once part of a common parcel so that the presumption of an implied easement might apply, a more fundamental problem defeats the application of the easement of necessity doctrine here. The presumption that the common grantor intended to burden the Lions Club property with an easement in favor of the Owners' landlocked parcels[3] cannot arise, because the common grantor explicitly created an easement for ingress and egress. Despite the fact the Owners complain that the easement created is insufficiently commodious for their present purposes, it is clear that the common grantor evidenced her intent in the original deeds that the landlocked parcels would be served by the easement. There is simply no justification for presuming that an implicit easement across the Lions Club property arose at the time the Owners' lots were created. "The burden of proof is on the [proponent] to show 'an absolute necessity' as of the time the parcels were separated. That is, for the presumption [in favor of easement by necessity] to arise, the [proponent] must show that at the time of the partition he had no other right of access to the landlocked parcel. A showing that access across the non-landlocked parcel is more convenient than another access way of right is insufficient to raise the presumption." Frederick Jenson & Sons,

[3] The Golden parcel is situated on McKinley Street, and therefore its owner cannot in any event establish an easement of necessity.

Inc. v. Mustard, Del. Ch., 2196-S, Glasscock, M. (August 7, 2003) (Master's Report) at 1, *citing* Pencader, 446 A.2d at 1100.

2. Easement By Prescription

The Owners maintain that they and their predecessors in title have obtained an easement over the Strip by prescription. In order to prevail on this claim, each Owner must demonstrate that he, or a person in privity with him, used the Strip (1) openly, (2) notoriously, (3) exclusively, and (4) adversely to the rights of others for an uninterrupted period of 20 years. Anolick v. Holy Trinity Greek Orthodox Church, Inc., Del. Ch., 787 A.2d 732, 740 (2001). Because they work a forfeiture of title, prescriptive easements are disfavored and in order to establish such an easement, the proponent must establish each element described above by evidence that is clear and convincing. *See, e.g.*, Anolick, 787 A.2d at 740, Berger v. Colonial Parking, Inc., Del. Ch., No. 1415, Hartnett, V.C. (May 20, 1993) (Mem. Op. at 3).

The following facts were demonstrated at trial and in the evidence. As of the time of the public hearing in 2002, the Lions Club asserted dominion over the Strip. Testimony by Mrs. Longanecker indicated that for some period after this assertion of sovereignty the Owners attempted to use the easement rather than the Strip. I find, therefore, that the time of the public hearing in 2002 the assertion of exclusive possession by the Lion's Club cut any prescriptive use of the Strip. If an easement by prescription

arose, then, it must have arisen between 1982 and 2002. The evidence demonstrated that since the late ‘80s or early ‘90s, when the Golden property was enlarged, residents of that rental house have regularly parked in the easement on weekends, making use of the easement as a passageway for vehicles to reach the Owners’ other parcels impossible. The Owners consistently testified that in the 1990s, they usually drove to the west of the telephone poles on the boundary line of the property (that is, over the Strip) to reach their own properties rather than using the frequently-blocked easement. The record demonstrates that utility vehicles use the Strip to service the properties, although the evidence does not indicate clearly when this practice commenced. Pearl Golden’s deposition testimony that she hired contractors in the 1990s to perform maintenance on the Strip is clear evidence that, in the 1990s at least, the Owners were openly using the Strip for access to their lots.

The evidence in favor of use in the early and mid 1980s is more sparse. Dale Brown, an employee of one of the restaurants owned by Lisa’s, testified that from the time that restaurant opened in 1980 or 1981, people parked “everywhere,” presumably at times blocking the easement in those years as well. By implication, the Owners’ predecessors in title used the Strip to reach their lots. In addition to the testimony of Mr. Brown, several other witnesses, including members of the Lions Club, testified that they were aware that some lot tenants were using the Strip to access there properties in the 1980s. A letter from a lawyer for the Lions Club to lot owner Frank Watt indicates that

as early as 1981, Owners were using the Strip in this fashion. Plaintiff's exhibit M, sub-exhibit 13.

Cutting against this testimony is a photograph, plaintiff's exhibit No.18, taken in the mid-1980s of the easement and Strip. The Owners point out that tire tracks in the Strip show that it was being used by vehicular traffic. Of course, this is not in dispute, as that area was open to the public as a right-of-way to reach the playground, and was also open to business invitees of Lisa's. More importantly, however, the photograph shows that the more-traveled area at that time was down the easement, which appears as a graveled lane as far north as a telephone pole on the boundary between the Longanecker and Lekites properties.

a) *Acquiring Title By Prescription Against The Holder Of A Reversionary Interest*

In the draft version of this report, I opined that, assuming the record as stated above was sufficient to constitute clear and convincing evidence that the Owners, post-1981, were adversely possessing an easement across the strip, they still would fail to have perfected title to the easement *against the Lions Club*. My reasoning was that the possessory interest in the Strip during the years of alleged adverse possession was not in the Lions Club, but instead in their lessee, Lisa's. The Lions Club held a reversionary interest during that time.

Prescriptive easements, as I have noted above, are strongly disfavored because they work a forfeiture of property rights. The purpose of the requirement that prescriptive rights arise only after a long period of open, notorious and hostile use is the maintenance of a balance between two competing interests: Property rights established by long exercise (prescription) should be preserved, but only in those cases where the prescriptive user, by his actions, has put those with a contrary possessory interest on constructive or actual notice: validate your rights, or abandon them. To ripen into title, therefore, prescriptive use must be so "open, visible and apparent that it gives the owner of the servient tenement knowledge and *full opportunity to assert his rights*." Anolick, 787 at 741 (emphasis added). Where adverse use over a period of 20 years has commenced during a time when the property is leased, for the duration of the leasehold that use would run against the entity or individual in possession—the lessee—and not the reversioner—the lessor. *See* Old Time Petroleum Co. v. Tsaganos, Del. Ch., No. 518, Hartnett, V.C. (Nov. 8, 1978) (Mem. Op.). In such a case, the lessor/reversioner would have neither the interest nor the legal right (the "full opportunity") to pursue a remedy for the trespass. *See, id.* In other words, possession by a stranger of a leasehold is not adverse to the rights of the lessor, but only to the lessee.

The Owners took exception to this alternative holding in the draft version of this report. They point out, rightly, that there were two bases for the holding in Old Time Petroleum: that the use there was adverse only to the lessee, and therefore the

lessor/reversioner had neither the interest nor the right to oust the adverse possessor; and that the lessor lacked actual knowledge of the adverse use, and thus lacked the ability to even attempt to protect its rights. As the Owners correctly point out, in this case (and unlike Old Time Petroleum) it is undisputed that the Lions Club was aware that the Owners were traversing the Strip. Moreover, unlike the typical lease under which the lessor surrenders possessory rights to the lessee, here the Lion's Club did retain certain possessory interests, both explicit and *de facto*, in the leased premises.

Before entering the lease with Lisa's, the Lion's Club, consistent with its charitable purposes as a public service organization, had maintained the Waples playground as a public facility, and had invited the public to use the area and to obtain access to it by driving across the Strip. Under the terms of the lease, Lisa's obtained possession of the entire Lion's Club parcel. The lease obligated Lisa's to maintain the Waples Playground as a public playground, however, and necessarily the lease retained to the Lions Club the power to enforce that right. The evidence demonstrates that Lisa's complied with the lease, maintained the playground as a public facility, and did not interfere with the licence extended by the Lion's Club to the public to drive across the Strip, to park and use the playground. Throughout the term of the lease, members of the Lions Club periodically entered the playground and strip area to do maintenance, as volunteers. The Lease was modified in 1991 (during the alleged prescriptive period) to exclude the "playground area," which then reverted to the possession of the Lion's Club.

In other words, the Lion's Club's interest in and access to the leased property, or at least that portion of the leased property encompassing the Waples Playground and the Strip, was greater than the interest/access of a typical lessor, as in Old Time Petroleum.

For those reasons, and because it is unnecessary to address the issue to reach a result in this case, I withdraw my reliance on the leased nature of the property sought adversely, make no decision on the amenability of the reversionary interested in this leased property to adverse possession, and rely here upon the alternative ground stated in the draft report, as set out below.

b) *The Use By The Owners Was Not Sufficiently Adverse To The Rights Granted By The Lions Club To The Public To Constitute Adverse Use*

During the period of claimed adverse use, the Lions Club openly made the Strip available to the public to use as a right-of-way to reach parking area along the playground fence. Because that use was permissive, the public obtained only a license to drive across the Strip. The Owners, as members of the public, had the same license to traverse the Strip: they exceeded the terms of that license (if at all) only when they turned right onto their properties, rather than left into a parking space. It was consistent with the interests of the Lions Club, as a public service organization, to permit the public to traverse the strip, to park and use the Waples playground. The Owners cannot demonstrate by clear and convincing evidence that their use of the Strip was exclusive or hostile to the rights of

the Lions Club given the existing license to members of the public to transit the Strip. *See generally* Lickle v. Frank W. Diver, Inc., Del. Supr., 238 A.2d 326, 330 (1968) (finding plaintiff failed to establish adverse use of land open to the public as a parking area). Use of property is adverse—hostile to the rights of the owner—only where it is undertaken without the permission of the owner. *E.g.* Brown v. Houston Ventures, Del. Ch., No. 2046-S, Noble, V.C. (January 3, 2003)(Mem. Op. at 5 n. 21). Since the Lions Club had given the public permission to traverse the Strip, the use of the Strip by the Owners was insufficiently hostile to establish prescriptive rights.

In their exceptions to the draft version of this report, the Owners argue that the public was not permitted free use of the area in question. They point to the fact that, during a portion of the alleged prescriptive period, the Lions Club maintained signs indicating that parking (adjacent to the Strip) was only for the use of the playground. Thus, according to the Owners, their use of the Strip—which was not for playground parking—was hostile to the license granted the public by the Lions Club, and was therefore adverse use. The Owners analysis, however, is fundamentally flawed. The Owners did not use the Strip for parking in a manner hostile to the license granted the public. In fact, the Owners were instructed by the Lions Club not to park in the area of the Strip, and there is no indication that they ever used this area for parking. Instead, the testimony is clear that the Strip itself was kept clear as an alleyway which was used both to reach the parking area along the playground and tennis courts, and (by the Owners) for

access to their property. There is nothing in the record indicating that the Lions Club (or Lisa's) ever made an attempt to exclude anyone from driving over the Strip. Instead, the public was permitted to transverse this area, a use also made by the Owners.

CONCLUSION

When the lots currently belonging to the Owners were created many years ago, they included the use of a 15' easement along their western boundaries to allow access from the public street. As the years have passed and what were originally simple cottages were transformed into substantial beach homes, the Owners and, particularly, their summertime renters and invitees, found it convenient to park in the easement. Some of the properties were rented to groups for the summer, and these tenants were forced to park their multiple vehicles in areas which included the easement, if they were to park them on the properties at all. At the same time, just to the west of the easement, the Strip was open to the public as a right-of-way for access to the Lions Club playground. It was, therefore, natural for the Owners and their guests and renters to avoid the easement, clogged with parked cars, and instead drive to the properties over the Strip. Because of the public license to use this area, however, the Owners' use was not hostile to the rights of the possessor of the property, and therefor no prescriptive rights in the Owners' favor were established.

For the foregoing reasons, the Owners have failed to establish entitlement to an easement by prescription, and the plaintiff's petition to quiet title should be granted. Once this report becomes final, counsel should supply a form of order consistent with the report.

/s/ *Sam Glasscock*
Master in Chancery

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