

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2018/0616

BETWEEN:

JEAN LUBIN

Claimant

And

**PRISCA PASCAL
RITA HENRY
PAUL HENRY
HERBERT HENRY ROSERIE
OTHILIA ROSERIE
YOLANDE JOLIE
JAMES JOLIE**

Defendants

Appearances:

Mr. Dexter Theodore, KC of Counsel for the Claimant
Mrs. Maureen John-Xavier of Counsel for the Defendants

2022: October 17;
2024: April 23.

JUDGMENT

- [1] **INNOCENT, J.:** The claimant asserts her entitlement as owner or occupier of a parcel of land registered as Block 1828B Parcel 78 ('Parcel 78') by virtue of prescription arising from her continuous, undisturbed and peaceable occupation and enjoyment by herself and her predecessors in title.
- [2] The first defendant is the administrator of the estate of the late Norderick Roserie (deceased). She is joined as a party herein in her own right and as administrator of the abovementioned estate. She is in occupation and possession of the parcel of land registered as Block 1828B Parcel 106 ('Parcel 106').

- [3] The second and third defendants are the registered proprietors of the property registered as Block 1828B Parcel 76 ('Parcel 76'). The fourth and fifth named defendants are the registered proprietors of the registered title to Block 1827C Parcel 864 ('Parcel 864'), and the sixth and seventh named defendants are the registered proprietors of Block 1828B Parcel 77 ('Parcel 77').
- [4] The claimant asserts her entitlement to the use and enjoyment of a servitude in the form of a right of way over the parcels of land owned by the defendants and hereinbefore described in favour of Parcel 78 as appears by virtue of Land Registry Index Map ('Map Sheet') which shows a private vehicular right of way over the parcels of land belonging to the defendants.
- [5] According to the claimant's pleaded case, Parcel 78 is enclosed on all sides by the land belonging to other persons, and that she has no other means of egress and ingress from Parcel 78 to the public road except by way of the existing servitude or private vehicular right of way over the land owned by the defendants.
- [6] The claimant claims to be entitled to the use and enjoyment of the private vehicular right of way on the ground that she and her predecessors in title acquired the right to the use and enjoyment of the same by prescription. Alternatively, the claimant asserted a right to the use and enjoyment of the private vehicular right of way on the grounds of necessity.
- [7] The claimant complains that the defendants have interrupted her use and enjoyment of the private vehicular right of way by the placement and erection of certain obstacles and impediments that are intended to restrict or otherwise prevent her use and enjoyment of the private vehicular right of way over time . She claimed that unless restrained by injunction, the defendants by their actions threaten to continue to restrict and interrupt her access over the right of way to and from Parcel 78. As a result of the defendants' actions, the claimant alleges that she has suffered loss and damage.

8] In consequence of the foregoing, the claimant commenced the present proceedings in which she seeks the following declarations and relief, namely:

- (1) a declaration that she is entitled to an overriding interest pursuant to section 28 of the Land Registration Act ('LRA') in the form of a servitude or right of way along the private vehicular right of way shown on the Land Register over the defendants' land;
- (2) alternatively, a declaration that she is entitled to an overriding interest over the parcels of land belonging to the defendants by virtue of the provisions of Article 486 et seq. of the Civil Code;
- (3) further and in the alternative, that she is entitled to an overriding interest over the parcels of land belonging to the defendants by prescription and by virtue of the provisions of Article 2103A of the Civil Code;
- (4) an injunction restraining the defendants or any of them from interfering or interrupting her access along the said right of way; and,
- (5) damages for the interruption of her use and enjoyment of the right way together with interest and costs.

9] The defendants deny that the claimant is entitled to Parcel 78 as proprietor or by virtue of any beneficial entitlement thereto. According to the defendants, title to Parcel 78 is registered to the Heirs of Gilbert Serieux, Thomasine Poleon, and Jules Serieux. Furthermore, the defendants deny that the claimant acquired entitlement to the use and enjoyment of the right of way by prescription given that any claim based on prescription would have been interrupted by first registration during the Land Registration and Titling Project ('LRTP') by Adjudication whereby the aforementioned persons were adjudicated owners of Parcel 78. The defendants therefore, asserted that the claimant was a trespasser or a tenant at sufferance which prohibited her from claiming title to Parcel 78 and by implication, the right to the use and enjoyment of the private vehicular right of way for the benefit of Parcel 78.

- [10] Contrary to the claimant's assertion regarding the ownership of Parcel 77, the defendants pleaded that title to Parcel 77 was registered to Mark and Monique President.
- [11] The defendants also denied the existence of a private vehicular right of way over their land for the benefit of Parcel 78. To the contrary, the defendants alleged that there is in existence a private pedestrian right of way over Parcel 78 as shown on the Map Sheet; whereas the defendants' Land Register shows a private vehicular right of way.
- [12] The defendants contended further that the Map Sheet shows a private vehicular right of way which traverses Parcel 107 owned by John Mangal; Parcel 76 owned by Paul Henry and Rita Henry; and Parcel 77 owned by Mark President and Monique President. According to the defendants, the aforementioned proprietors are all siblings and acquired title to the respective parcels through Noderick Roserie (deceased). The resulting parcels comprise the subdivision and mutation of the original Block 1827C Parcel 33.
- [13] The defendants also denied that Parcel 78 is landlocked and that the claimant is entitled to a right of way over their land by necessity. They claimed that there is in existence an alternative and convenient access available to the claimant along the pedestrian right of way as shown on the Map Sheet; and additionally, there exists three foot paths or pedestrian rights of way from Parcel 78 to the public road which are not shown on the Map Sheet which are just as convenient as the private vehicular right of way.
- [14] In answer to the claimant's assertions, the defendants claimed that the private vehicular right of way was constructed by the defendants with their own funds without any contribution from the claimant; and, the claimant has neither agreed to pay for its maintenance nor indemnified the defendants with respect to her proportionate share of the damage occasioned by the use of the said right of way.

- [15] In the premises, the defendants deny that they have unlawfully or at all restricted or interrupted the claimant's access along the private vehicular right of way; and that in any event, they are entitled to restrict access to the claimant since she has no right or entitlement to the use and enjoyment of the right of way over the private land belonging to the defendants; and in any event, is incapable of establishing any right to the use and enjoyment of the same.
- [16] In the circumstances, the following issues are to be determined, namely: (1) whether the claimant is entitled to the use and enjoyment of the servitude in the form of the private vehicular right of way over the defendants' land by prescription or necessity; (2) whether the claimant being merely an occupier of Parcel 78 and having no proprietary interest in the same is competent to bring the present claim; and (3) whether the claimant is entitled to damages for the unlawful interference with and interruption by the defendants of her use and enjoyment of the private vehicular right of way.
- [17] Article 449 of the Civil Code provides that a servitude is a charge upon real property, which imposes upon the owner or occupant of the property an obligation towards another, either to prevent its condition from affecting such other, or to use or forbear from using it in a particular manner, or to permit it to be used in a manner definite and circumscribed which is short of occupation. When this obligation exists for the benefit of the owner or occupant of adjoining land, in his quality as such owner or occupant, the charge is called a real servitude.
- [18] The foregoing provision of the Civil Code answers many of the questions raised in the present proceedings; particularly as it relates to the challenge mounted by the defendants in response to the claimant's assertion of the entitlement of a right of way over the property owned by them in which the defendants contend that the claimant is not the registered owner of Parcel 78. This provision shall be discussed in detail later on in this judgment.

Necessity

- [19] A real servitude arises from the natural position of the property, or from the law, or it is established by (a?) private act.¹ A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, may claim a way upon that of his or her neighbours for the use of his or her property, but must pay an indemnity proportionate to the damage he or she may cause.² The way must generally be had on the side where the crossing is shortest from the land so enclosed to the public road.³ It should however be established over the part where it will be least injurious to him upon whose land it is granted.⁴
- [20] Based on the foregoing expression of the law as contained in the Civil Code, the claimant must show that a right of way exists over Parcel 865 in favour of Parcel 78 by virtue of the natural position of the latter; that parcel 78 is enclosed on all sides by the property of others and that there is no communication with the public road.
- [21] Ms. Andra Ann Lubin ('Ms. Lubin') who is the claimant's daughter and who represented the claimant in these proceedings gave evidence that one cannot get to the public road from parcel 78 without having to traverse the beach, in this judgment described as the Queen's Chain, or the private land of other adjoining owners. Her evidence was that the shortest route from her home located on parcel 78 to the public road was over a road that passed through parcel 865 and in front of the house that belonged to Mr. Roserie.
- [22] This witness also identified what she described as two other tracks that were used to gain access to parcel 78. She also identified a third track which was located somewhere between the land belonging to Rita Henry and Henry Roserie which leads to the road in front of Mr. Roserie's house. She appeared to have identified a fourth track which she claimed leads from parcel 78 with passage "near the sea" that leads to the public road.

¹ Civil Code Article 450

² Article 486

³ Article 487

⁴ Article 488

- [23] Mrs. Mangal denied that Parcel 78 was landlocked and had ever been landlocked. In her written evidence Mrs. Mangal insisted that there were alternative accesses which the claimant could use and which she had used for the duration of her occupation of parcel 78.⁵
- [24] In cross-examination, Ms. Mangal agreed that in order to gain access between parcel 78 and the public road, one would have to traverse the area she described as “by the sea” or over the land belonging to other persons. She also agreed that parcel 78 has for its benefit a pedestrian right of way over parcel 865. However, she disagreed that a vehicular right of way existed over parcel 865 for the benefit of parcel 78. In fine, her evidence was that the claimant had alternative access via the other existing pedestrian rights of way.
- [25] By order of the court dated 15th July 2021, Mr. Lucius Egbert Louis (‘Mr. Louis’) was appointed as an expert in the field of Civil Engineering to view parcel 78 and to determine the shortest route from parcel 78 to the nearest public road; to estimate the costs of constructing a vehicular road over the land that offers the shortest crossing and over that part of the land where it would be least injurious to the proprietor over whose land the proposed road would traverse; and to compare the costs of constructing a road extending from the existing vehicular right of way over the defendants’ lands to parcel 78.
- [26] Mr. Louis is a Chartered Engineer and Chartered Surveyor with over 35 years as a civil and structural engineer, building and valuation surveying, and land infrastructure development. Mr. Louis conducted a site visit which involved visiting parcel 78 and the neighbourhood along with Ms. Lubin. He conducted a walkthrough of the neighbourhood to observe the location of possible access points. According to his report, several possible access options were considered. As part of his methodology, he combined the topographical map sheets for Blocks 1827B and 1828B and then superimposed the respective LRTP map sheets on the combined plan. He said that 5 access options that were observed during the site visit were

⁵ At paras 50 – 51

then demarcated on the combined plan; one on the western boundary, two on the northern boundary, and two at the southeastern corner of Parcel 78.

[27] Mr. Louis made the following findings in his report, he said:

“Based on the field and desktop investigations conducted by the expert, there are five options which could be considered for vehicular access to the subject property. However, only one of those options involves an access which currently exists and ends at one of the boundaries of the subject property. Additionally, the investigations suggested that while there are other meandering and constrained pedestrian accesses that are aligned through narrow “alleyways”, Option 1 along the existing access road which is on parcel 865 – is the only existing vehicular access route to the subject property.”

[28] In fulfilling the requirements of his mandate in keeping with the court’s order, Mr. Louis made the following findings and conclusions in his report, he said:

“A costs analysis of the options indicated that option 1, estimated at \$120,000.00 is the least costly; Option 4 is the second least costly (\$138,710.00), and Option 2 (296,380.00) is the most expensive. Among the three least expensive routes, Option 1 is the longest ... but with the lowest costs estimate. This option is also the least steep and most compliant with the GOSL planning regulations insofar as road gradients are concerned.

Option 4 has the shortest length ... but is the second lowest costs estimate. Land will need to be acquired from an adjacent parcel and the junction with the public road is expected to be steep and higher than the planning regulations.

For option three, second in distance and third in costs impact ..., the access is expected to be extremely small in width and considerably steep, particularly at the proposed junction with the public road. The narrowness of the parcel from which land will need to be acquired may render the said parcel unfeasible for house construction.

Finally, while option 4 is the second least expensive, it has a much longer access from the Micoud-Vieux Fort Highway. A significant portion of the access is over an unpaved and extremely steep excavated path which makes option 4 the least feasible.”

[29] Mr. Louis was cross-examined regarding whether his report complied with the mandate of the court’s order and the terms of reference contained in the letter of instruction. Mr. Louis disagreed that he had failed to follow the instructions given. It

was also suggested to Mr. Louis in cross-examination that his findings contained in his report may have somehow been infected by information given to him during the site visit with Ms. Lubin. He testified that he did not think it prudent to have included the information given to him by Ms. Lubin in his report. Additionally, he stated that this was not information upon which he relied in the preparation of his report; and that the basis of his conclusions contained in his report were derived from the five alternative routes that he identified in his report. Mr. Louis agreed that parcel 865 was not the only parcel that provided access to parcel 78.

[30] Now Mr. Louis was referred to the Land Register for parcel 78. He stated that he did not recall having any reason to refer to the Land Register for Parcel 78. From the tenor of the cross-examination on this point, it appeared that the purpose of the question was to establish that the Land Register either did not show Ms. Lubin as one of the proprietors or that the encumbrances section of the Land Register for parcel 78 did not record the existence of a private vehicular right of way. In the court's view, this was entirely irrelevant to the nature of the investigation with which Mr. Louis was concerned. In any event, Parcel 78 was never considered the servient land for the purpose of the present proceedings.

[31] Mr. Louis was cross-examined concerning the alternative access points that he referred to in his report. He said that with respect to the access along option 4 he saw a few people, no more than five, using this access but this was only possible to traverse by foot. With respect to the access located on the western boundary of parcel 78, he attributed difficulty with traversing this area to a high concentration of housing. He admitted that it would have been possible to obtain access over parcel 301.

[32] Mrs. John-Xavier, Counsel for the defendants, sought to impugn the reliability of Mr. Louis' findings contained in his report on the basis that he did not take measurements or relied on an actual physical survey in order to obtain definitive and accurate measurements. Mr. Louis testified to the effect that he was asked to do a feasibility study which did not require a surveyor; and that it was sufficient to

use approximate measurements. He responded that he did not think that the court required that he conducted a detailed assessment which necessitated the use of a surveyor.

[33] According to Mr. Louis, his profession permitted him to use the measurements on maps in order to make an assessment. He took the view that had the court required a detailed assessment, this would have entailed a significant amount of time, expense, and costs; and, that nothing coming from the court indicated that he was required to use a surveyor to establish detailed measurements other than estimates of costs. As far as Mr. Louis was concerned, the methodology employed by him was an established and acceptable practice in his profession. In fine, that his terms of reference did not require him to produce such a detailed report as suggested.

[34] Mr. Louis was questioned regarding to the absence of the various accesses on the topographical map and the map sheet. Mr. Louis said essentially that, with respect to the topographical map, it would not be correct to say that the topographical map showed everything as it existed on the ground and neither is it accurate to say that the topographical map is inaccurate. He stated that the aerial photographs could provide some information that would have assisted in determining the position of the access points. He admitted that the topographical map could be misleading especially when there is vegetation on the ground. However, the gradients or slopes shown on the topographical map are reflective of what exists on the ground.

[35] He was cross-examined in relation to each of the options identified by him in his report. He accepted that option 1 was the longest route to the public road. He said that he factored in the costs of the culvert in his estimate. He had taken the average cost of reconstruction of the culvert into consideration. He testified that in assessing the costs for each option it was not necessary to have a quantity surveyor or engineer. However, there would be a requirement for a Licensed Land Surveyor.

[36] The defendants relied on the evidence of Mr. Paul Boland ('Mr. Boland'), a Licensed Land Surveyor seemingly to counter Mr. Louis' evidence in respect of the various means of access to parcel 78. Mr. Boland emphasised that he was not giving

evidence in his expert capacity but instead purely as a person who has personal knowledge of the lands that formed the subject matter of the dispute. In short, Mr. Boland was not called as an expert witness.

[37] Mr. Boland's evidence was that there is access from parcel 78 onto the public road through what he described as five footpaths or pedestrian accesses. He said that there were two registered footpaths and three unregistered footpaths. These he said are shown on the Map Sheet.

[38] According to Mr. Boland's evidence, the two registered footpaths were registered during the LRTP on the western side of parcel 78 and commence from the public road and proceed via parcel 301 and on the northern side of parcel 78 and traversing parcel 86 respectively.

[39] With respect to the three unregistered footpaths, Mr. Boland described their location as being on the mid-northern side of parcel 78 from the public road and traversing parcels 91 and 92; on the western side from the public road and traversing parcel 339; and on the southern side from the public road traversing parcels 29, 30, 34 and 801.

[40] Mr. Boland took the view that based on his observations on his site visit, all five accesses which he identified were in use by owners and occupiers of adjoining property and all of them provided access from parcel 78 to the public road.

[41] Mr. Boland testified that he is familiar with the area where the land is located both in his professional and personal capacity. He said that he worked on several projects in the general area which he frequented and where he also had friends. He also testified that he had known some of the defendants for some time. He also said that he had known Paul Henry for a long time and that they were friends. He said that he visited parcel 78 specifically for the purpose of examining its terrain. He could not recall the precise dates that he visited but he knew that it was twice.

- [42] It appeared from Mr. Boland's testimony in cross-examination that he only visited the area on two occasions; the first visit was short and lasted for about an hour; and entailed ascertaining what was required of him both in his personal and professional capacity. During his first visit he spoke mostly with Paul Henry but also met with some of the members of the defendants' family. According to Mr. Boland, they discussed the case "in light of what they were facing".
- [43] It appeared from his evidence that on his visit to the area where the relevant properties were located, he took no measurements. He explained that the nature of his assignment did not require the taking of measurements. He claimed that on his second visit it took an entire afternoon to traverse the entire area.
- [44] In respect of the proximity of the pedestrian right of way and whether it coincided with the vehicular right of way on 865, Mr. Boland testified that the Map Sheet did not show any connection between the footpath on parcel 78 and the road on parcel 865. He said that he could not have seen the pedestrian right of way on parcel 78 on the Map Sheet.
- [45] Mr. Boland was referred to and shown a copy of the Map Sheet. He testified that he did not see a pedestrian right of way in respect of parcel 78 on the Map Sheet. He also testified that the pedestrian right of way on parcel 78 is not close to where the road on parcel 865 is located. However, he said that the vehicular access on parcel 865 is closer to parcel 78 than what is portrayed on the Map Sheet. He also said that the vehicular road on parcel 865 is not shown or highlighted on the Map Sheet that was shown to him. Mr. Boland also admitted that he had not consulted the Adjudication Record for parcel 78.
- [46] It appeared from the record that the court had ordered that a report be prepared by the Chief Surveyor, Mr. Ronald Polius ('Mr. Polius'). Mr. Polius prepared a report dated 21st April 2022 which was submitted to the court. Mr. Polius' terms of reference were to determine whether parcel 78 benefited from a right of way on the Map Sheet.

- [47] According to the Chief Surveyor's report, the right of way commences from the public road and traverses parcel 865 extending northward through parcel 865, located west of parcels 1828B 76 and 77 and east of parcels 1827C 13, 15, and 864. This was confirmed by the survey plans for the said parcels. It appeared from the description of the parcels given that parcel 78 is indeed landlocked.
- [48] The Chief Surveyor said in his report that he visited the area on 22nd November 2021 and claimed to have driven on the existing right of way. He also stated that research from the Land Registry and the Survey and Mapping Department showed a private vehicular right of way documented in the Adjudication Record completed on 19th September 1986; and that the private vehicular right of way is registered in the incumbrances section of the Land Register for Parcel 865 and that this private vehicular right of way was registered on 13th January 1987.
- [49] By reference to the Plan of Survey for parcel 865, the Chief Surveyor stated in his report that the survey showed the existing access road from the public road traverses parcel 865 extending northward to parcel 1828B 107. The report also stated that by reference to another survey plan, the existing private vehicular right of way ends at the driveway of parcel 1828B 87.
- [50] Based on the foregoing, the Chief Surveyor concluded:
"As per the various survey plans which are mentioned and the Adjudication Record for Parcel 1827C 865, the existing road is a private vehicular right of way does not benefit Block & Parcel 1828B 78."
- [51] It appeared to the court that Mr. Polius' investigation was confined primarily to the existing private vehicular right of way on parcel 865. To that extent, it did not appear that Mr. Polius conducted any investigation concerning the existence and extent of the preexisting pedestrian right of way and therefore made no findings in relation thereto.
- [52] An examination of the Map Sheets for Block 1827C and Block 1828B when combined clearly showed an access extending from the public road which traverses parcel 865 and continues along the western boundary of parcels 15 and 13 and

branches off onto parcel 13 on its western boundary but however, continues its route along the western boundary of parcel 864 and continuing further along the western boundary of parcels 1828B parcels 76 and 78 and culminating at the southern boundary of parcel 78.

[53] Based on the findings of the foregoing witnesses, the court has formed the following conclusions: (1) that there are several existing pedestrian rights of way leading from parcel 78 to the public road; (2) that all of the alternative existing pedestrian rights of way alluded to at (1) above are narrow, tortuous and traverse the lands of other adjoining land owners who were not joined as parties to the present proceedings; (3) that notwithstanding the nature of the alternative rights of way mentioned herein, the claimant has not satisfied the court that parcel 78 is landlocked; and (4) that based on the court's findings at (1) and (2) above, the court is unable to make a determination as to the suitability and availability of these alternative rights of way simply because the adjoining land owners over whose property these rights of way traverse are not parties to the present proceedings.

[54] Based on the conclusions that the court has arrived at having considered the evidence and submissions of the parties, there is no doubt that parcel 78 occupied by the claimant is not landlocked; however, she has no direct vehicular access to the public road. The question that arises is whether the claimant is entitled to a right of way of necessity by virtue of article 486 over the private vehicular right of way on parcel 865 and the existing footpath. Another question that arises is whether the claimant is entitled to the enlargement and conversion of the remainder of the pedestrian right of way to a vehicular right of way. The court is inclined to answer both questions in the negative.

[55] Now based on the report prepared by Mr. Louis and having considered the evidence of Mr. Boland the court accepts that there are other alternative pedestrian rights of way located on other properties over which the claimant can obtain access to the public road. The question that arises is with respect to the most appropriate land

over which the claimant may gain access having regard to the provisions of articles 487 and 488 of the Civil Code which provide:

“487. The way must generally be had on the side where the crossing is shortest from the land so enclosed to the public road.

488. It should however be established over the part where it will be least injurious to him upon whose land it is granted.”

[56] The application of the foregoing provisions of the Civil Code was considered in the case of **Clarence Michel and another v Lennard Augier and others**⁶ where the facts and the issues arising were strikingly similar to the present case. In **Michel v Augier** the Land Registry map sheet indicated a footpath which led from the appellants' parcel to and over parcel No.103 belonging to one Clovis and then to Adrian Augier's parcel. There the footpath continued over Adrian Augier's parcel to respondent's parcel where it joined a private road which ran through the respondent's parcel and lead to the public highway. The appellants sought a declaration that they were entitled to a right of way of necessity over the footpath and the private road. At the trial, there was no dispute as to whether the appellants were entitled to a pedestrian right of way over the footpath.

[57] The issues in **Michel v Augier** were whether the appellants were entitled to a vehicular right of way of necessity by virtue of article 486 of our Civil Code and consequently or otherwise were entitled to an enlargement of the footpath into a vehicular road and to a conversion of the right of way from a pedestrian right of way to a vehicular right of way. The trial judge dismissed the appellants' claim. The appellants being dissatisfied with the judgment appealed against it. The issues in the appeal were whether the appellants were entitled to a right of way of necessity over the footpath and whether the appellants were entitled to the said enlargement and conversion.

[58] Sir Vincent Floissac CJ, delivering the judgment of the Court of Appeal examined the first issue within the following context. He opined that the choice of the

⁶[1994] ECSCJ No. 38

appropriate lands that should constitute the appropriate servient lands of necessity to landlocked land is therefore required to be based on objective suitability and convenience. The proprietor of landlocked land cannot arbitrarily select the neighbours from whom he will demand a right of way of necessity.⁷

[59] Floissac CJ clarified the provisions of articles 487 and 488 in this way, he said:

“The requisite objectivity of the choice of the appropriate neighbours and the appropriate servient tenements in civil law is clarified in article 700 of the Civil Code of Louisiana which provides that:

“The owner of the estate, which is surrounded by other lands, has no right to exact the right of passage from which of his neighbors he chooses.

The passage shall be generally taken on the side where the distance is the shortest from the enclosed estate to the public road.

Nevertheless, it shall be fixed in the place the least injurious to the person on whose estate the passage is granted.”

[60] In the present case, as in the case of **Michel v Augier**, the pertinent question is whether the appropriate neighbours of the claimant are the defendants or the owners of other servient lands or whether the appropriate servient lands of necessity to the claimant's parcel are the defendant's parcels or the parcels of other neighbouring lands. Adopting the reasoning of Floissac CJ, this obviously invites a comparison of the relative suitability and convenience of the defendants' parcels and the parcels of other adjoining proprietors as appropriate servient lands of necessity to the claimant's parcel.⁸

[61] In deciding the issue as they did, the Court of Appeal in **Michel v Augier** relied on the findings of fact that on the one hand, the parcel of another neighbouring land owner was contiguous to the appellant's parcel and was more than half of the latter's northwestern boundary which faces the highway. That parcel was the intermediate land between the appellant's parcel and the highway and afforded the appellants

⁷ At para 7

⁸ At para 8

direct access to the highway. On the other hand, no part of the respondents' parcels abutted the appellants' parcel.

[62] The Court of Appeal also found as a fact, that Adrian Augier's parcel was some distance away and respondents' parcel was even further away from the appellants' parcel. They also found that the passage over the respondents' parcel from the appellants' parcel to the highway was circuitous and much longer than the passage over the parcel belonging to the other proprietor of neighbouring land and that access to Adrian Augier's parcel from the appellants' parcel was over the parcel belonging to the proprietor of adjoining land and by means of the said footpath.

[63] Having arrived at the foregoing facts, the Court of Appeal reasoned that but for the footpath, there could have been no justifiable reason for selecting the respondents' parcels as the appropriate servient tenements of necessity to the appellants' parcel. Floissac CJ summed it up in this way:

“But a footpath does not ipso facto signify a right of way of necessity. A footpath usually signals a conventional or prescriptive right of way which is enjoyable independently of necessity. But a footpath per se is not evidence of a right of way of necessity.”

[64] Ultimately, the Court of Appeal in **Michel v Augier** found that the proper inference to be drawn from the circumstances they identified was that the respondents were not the appropriate neighbours whose parcels should be held to be the appropriate servient tenements of necessity to the appellants' parcel; and that all the facts pointed to the neighbouring proprietor's land being the appropriate servient tenement of necessity within the spirit and intent of article 486 of our Civil Code.

[65] Having arrived at this decision, the Court of Appeal went on to consider the second question of conversion of the right of way. The court held that since the right of way over the footpath was either conventional or prescriptive, the other question required to be decided is whether the beneficiary of a conventional or prescriptive right of way over a footpath is entitled to an enlargement of the footpath into a vehicular road or to the conversion of the right of way from a pedestrian to a vehicular right of way.

[66] The Court of Appeal took the view that the solution to the problem resided in the provisions of article 504 when read together with article 1(61) and articles 496 and 497 of the Civil Code. Article 504 provides:

“He who has a right of servitude can only make use of it according to his title, without being able to make, either in the land which owes the servitude, or in that to which it is due, any change which renders the servitude more onerous.”

Article 1(61) states:

“The word “title” is used with reference to property to denote either the act or contract upon which the right to such property is founded, or the document which is the principal evidence of such act or contract, the meaning applicable in any particular case being determined by the context.”

Article 496 reads:

“No real servitude can be established without a title; possession, even immemorial, is insufficient for that purpose.”

Article 497 provides:

“The want of a title creating the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto.”

[67] The court reasoned that the principle enshrined in article 504 (read together with article 1(61) and articles 496 and 497 of our Civil Code is that where a servitude (including a right of way) is created by title (contract, document or other human act), the title governs the extent of the servitude. The dominant owner cannot unilaterally exceed the authority of his title by unilaterally aggravating the servitude or unilaterally increasing the burden of the servient tenement. In the case of a conventional servitude, the extent of the servitude is governed by the documentary title or by the servient owner’s act of recognition (if any). In the case of a prescriptive servitude, the extent of the servitude is determined by reference to the extent of the possession which generated the prescriptive title. In either case, the dominant owner has no right unilaterally to enlarge the servitude beyond the limits of his title or to demand such enlargement from the servient owner.⁹

¹² At para 18

[68] Their Lordships then referred to the decision in **Frechette v La Compagnie Manufacturiere De St. Hyacinthe**¹⁰ where Sir Arthur Hobhouse delivering the judgment of the Privy Council in an appeal from Quebec said:

“The substantial difficulty in the way of the plaintiffs is this: that they are seeking to establish a new and different servitude by the act of man without either grant or recognition; ...”

[69] Therefore, the Court of Appeal in **Michel v Augier** found that the appellants were demanding an improved servitude that had not been proved to be within the scope or contemplation of the contract, document, act of recognition, or possession which constituted the appellants' title to their conventional or prescriptive servitude. Such a demand, they held, has no legal foundation under Quebec, Louisiana, or the Saint Lucia Civil Law.

[70] Referring to the case of **Mills v Silver**¹¹ the Court of Appeal found¹² that such a demand could not be entertained at common law. In **Mills v Silver**, the English Court of Appeal held that the defendants' prescriptive right of way over a track did not authorise the defendants to make improvements to the track to the plaintiffs' detriment. Dillon L.J. said at page 461:

“In the second place if the appellants or their predecessors had been expressly granted a right of way for all purposes with or without vehicles over the disputed track that would have entitled them not merely to repair the disputed track but to improve it to make it suitable for the accommodation of the dominant tenement even if the dominant tenement was to be used for some purpose not in contemplation at the time of the grant... This is founded on the presumed intention of the grant. In the simplest case, if a general right of way is granted with or without vehicles, which is to be the principle access to a house, it is permissible for the grantee to improve it by making it up as a carriageway...

In the third place, however, a prescriptive right of way differs from a right of way by express grant in that the extent of a prescriptive right of way is limited by the nature of the user from which it has arisen ... If the dominant owner under a prescriptive grant cannot increase the burden on the servient tenement by building further buildings - e.g. additional houses - on the dominant tenement, I do not see why he should be entitled to increase the

¹⁰ (1883) 9 A.C. 170

¹¹ *Mills v Silver* (1991) 1 All ER 449

¹² At para 18

burden on the servient tenement by building a made road over the servient tenement, so as to make the way usable at times of the year and in weather conditions when it was not passable before."

- [71] The Court of Appeal in **Michel v Augier** found that the principle incorporated in the foregoing decision was the same as the principle embodied in article 504 of our Civil Code. Applying that principle and articles 486 to 488 of our Civil Code, they concluded: (1) that the appellants were not entitled to a right of way of necessity over the footpath or over any part of the respondents' parcels numbers 122 and 102; (2) that the appellants' right of way over the footpath was either a conventional or a prescriptive right of way; (3) that the appellants had not proved that the improved servitude demanded was within the scope or contemplation of their conventional or prescriptive title to the servitude; and (4) that the appellants were not entitled to an enlargement of the footpath into a vehicular road or to the conversion of the right of way from a pedestrian to a vehicular right of way.¹³
- [72] The foundation of the defendants' argument in relation to the claimant's entitlement to a right of way over parcel 865 by necessity was simply that the claimant was not the proprietor of parcel 78. The court understood this submission to mean that a person bereft of outright title to property and who was an occupier of the same was incapable of acquiring title or right to the use of a servitude by necessity.
- [73] Mr. Theodore KC challenged this submission on the basis that the claimant was entitled to the beneficial ownership of parcel 78 and accordingly, she held an overriding interest pursuant to section 28 of the Land Registration Act. Mr. Theodore KC took the position that the Registrar of Lands only has the power to declare the existence of that entitlement to ownership but cannot create it.
- [74] The other argument raised by the defendants concerned the absence of a right of way registered in the encumbrances section of the Adjudication Record and Land Register for parcel 78. The defendants' main contention on this point can be summarized as follows: (1) that there is no right of way over the lands of the

¹² At para 18

defendants by virtue of the adjudication record; (2) the only relevant appurtenances recorded in the Land Register for Parcel 78 is a private pedestrian right of way as indicated on the Registry Map; (3) there is no servitude recorded on the back of the land register for parcel 78 in the encumbrances section; and (4) there is no encumbrance recorded in the Adjudication Record for parcel 78.

[75] This was a rather surprising argument given that parcel 78 is not the servient land in this case. This point raised by the defendants is directly related to the question of the location or even the existence of a right of way over the defendants' lands being the servient lands in favour of Parcel 78 which the claimant says is the dominant land. To that extent, the defendants appeared to have been challenging the existence of a right of way over parcel 865 in favour of parcel 78.

[76] In response, Mr. Theodore KC quite rightly submitted that the absence of an encumbrance in section 12 of the Adjudication Record or in the Land Register for Parcel 78 simply meant that parcel 78 was not encumbered or subject to a servitude or an easement for the benefit of any other land. According to Mr. Theodore KC, in order to establish whether parcel 78 is entitled to the benefit of any servitude, it is necessary to refer to section 7 of the Adjudication Record which in the present case reads: "A pedestrian right of way in favour of parcel 78". Unfortunately, the court has noted that the Adjudication Record does not describe or delineate the pedestrian right of way.

[77] More importantly, Mr. Theodore KC submitted that the Adjudication Record does not describe any prescribed route belonging to a right of way. In asserting the existence of a right of way located on parcel 865 in favour of parcel 78, Mr. Theodore KC relied on the testimony of Mrs. Mangal but sought however to debunk the conclusions made by Mr. Polius in his report. The court concurs with Mr. Theodore's criticisms of Mr. Polius' report.

[78] The defendants had insisted that parcel 78 is not landlocked or enclosed on all sides by the land of others. It appears that this assertion is correct by simple reference to the Map Sheet for the area which clearly shows that parcel 78 is enclosed on all

sides by the land of others. However, having heard the evidence at the trial, both oral and documentary, the court has already concluded that notwithstanding the geographical location of parcel 78, it had the benefit of access to the public road by virtue of other pedestrian rights of way. Therefore, the court will not seek to dwell extensively or at all on this assertion.

[79] In addition, the defendants appeared to have suggested that the LRTP had reserved a pedestrian right of way. However, as the court has already indicated apart from where the right of way on parcel 865 abuts parcel 78 at its southern boundary there is no other pedestrian right of way shown on the Map Sheet which adjoins parcel 78 which provides access to the public road. However, the evidence pointed ineluctably to the fact that access to parcel 78 to the public road could be achieved over the other existing pedestrian footpaths or rights of way identified in the evidence of both the lay witnesses and the expert.

[80] Additionally, the defendants had taken the view that the claimant ought to have joined the other neighbouring landowners over whose lands she could have obtained alternative access to the main road as parties to the present claim. Mr. Theodore KC's position on this point was simply that perhaps it would have been within the contemplation of the claimant to have effected such a joinder in the face of a suggestion that a way over the land of adjoining landowners was more convenient or feasible.

[81] In a separate challenge to the claimant's case with respect to the acquisition of a right of way over parcel 865 by necessity, the defendants relied on the decision of the Privy Council in **Michel and another v Augier and others**¹⁴ where it was held that consideration of costs is a relevant and proper matter to be taken into account in the application of articles 486 to 489 of the Civil Code of St Lucia (right of proprietor of land which is enclosed on all sides to a right of way of necessity); but such consideration is not merely a matter of comparing the relative costs involved simply to ascertain or select a cheaper route. The general rules of the Civil Code as

¹⁴ (1997) 51 WIR 103

to the choice of the shortest and least injurious route should only be departed from where their application involves costs of a disproportionate nature or of a substantially excessive or prohibitive amount. The burden of proving that the circumstances justify the making of an exception to those general rules falls on the party asserting that such an exception should be made.

[82] It was submitted on behalf of the defendants that it would be wholly inappropriate for the court to conduct a costs analysis in the circumstances because the other neighbouring landowners were not joined as parties to the proceedings in circumstances where their land was likely to be affected. In addition, the question of cost analysis was not canvassed as part of the claimant's pleaded case; and therefore, reliance on the evidence of Mr. Louis was an attempt to introduce the issue through the back door outside of the pleadings.

[83] The court understands the concerns expressed by the defendants' counsel; which in the court's view appeared merely procedural. However, the court is inclined to disagree with this submission on the basis of the discussion and analysis of the Privy Council in **Michel v Augier** set out at para 81 above.

[84] The court having already arrived at the conclusion that the claimant is not entitled to a right of way by necessity over the defendants' lands will simply for the purpose of exposition examine the submissions made by counsel relative to the present issue.

[85] The court accepts that the claimant did not specifically plead matters related to the economic considerations relative to the question of a right of way of necessity. However, the court notes that Mr. Louis' evidence as contained in his report was sanctioned by the court by order dated 15th July 2021 and in fact formed part of the agreed bundle of documents filed in these proceedings. At no point did counsel for the defendants object to this evidence. As a matter of fact no such objection was raised either prior to the trial or in the course of the trial. The defendants appear to be registering their objection for the first time in their written closing submissions. The court finds this approach to be somewhat disingenuous.

- [86] Moreover, the defendants' submissions regarding the use of economic considerations in determining the issue of the right of way by necessity premised on the decision of the Judicial Committee in **Michel v Augier** are misguided and show a lack of appreciation of the legal principles considered by the Judicial Committee in that case. This will become apparent shortly from the court's analysis and interpretation of that decision later on in this judgment.
- [87] However, what the court considers critical is whether the evidence, having come to the court in the way in which it did, the court can simply overlook it on the basis of the belated objection raised by the claimant's counsel; or whether the court ought to overlook the perceived procedural misstep highlighted by the defendants and go on to consider these matters in the determination of the issue at hand. The court is of the view that it ought to opt for the latter approach which in the court's view, and in large measure is supported by **Michel v Augier** itself.
- [88] While it is accepted that the way over the defendants' land is not the shortest, it appeared that Mr. Theodore KC took the view that although the general rule is that the way must be generally had on the side where the crossing is shortest this rule is not immutable and is subject to exception as in the present case. This he said was implicit in the provisions of Article 487 itself. The court agrees with that submission on the basis of their Lordships reasoning in **Michel v Augier**.¹⁵
- [89] In the present case, it is beyond dispute that the claimant and or other persons claiming title through her notably Ms. Lubin are desirous of either erecting or improving residential structures on parcel 78. Therefore, it seems that they require a vehicular right of way over parcel 865 to facilitate the said construction. The instant case presents a similar if not almost identical factual matrix as in the case of the appellants in **Michel v Augier**.¹⁶

¹⁵ At p 107 paras a-c

¹⁶ Per Lord Clyde at p 104 paras e-f

- [90] In **Michel v Augier**, the appellants had decided to build a house on their land. But the land was situated some distance to the east of the public highway. The land was served by a footpath which for the most part passed through the lands owned by the respondents. The appellants required vehicular access to their land, initially for the passage of vehicles in connection with the construction of their new house and later for vehicular access to their house. It was with the provision of such vehicular access that the case was concerned.
- [91] The respondents' lands were each burdened by a private right of way which extended from the public highway across neighboring lands including the respondents' lands and into the appellants' land. The line of this right of way had been developed into a vehicular access from the highway up to a point within one of the lots belonging to one of the respondents where it left the line of the right of way to serve a house belonging to another one of the respondents. The appellants asked the respondents whether they would agree to a continuation of vehicular road along the line of the right of way. One of the adjoining landowners appeared to have agreed in principle that such a use could be made of the length of the right of way which crossed his plot. The respondents however refused. One of the respondents in fact blocked off the right of way altogether with a fence at the point where it left his plot and entered a plot adjacent to the appellants' plot.
- [92] Being dissatisfied with the decision of the High Court and the Court of Appeal who affirmed the decision of the court below, the appellants appealed to the Privy Council on the singular question of whether they were entitled to a right of way over the existing right of way. The appellants did not argue before the Judicial Committee the question of whether the right of way could be enlarged in the manner previously suggested.
- [93] It appears that their Lordships' pronouncement on the issue related to economic considerations stemmed from a submission made by counsel for the appellants to the effect that the provisions of the Civil Code require to be given (in the public

interest) a liberal and purposive construction, and in particular that considerations of cost in the provision and the choice of a right of way were relevant considerations.

[94] Their lordships opined that it may be seen as contrary to the public interest that there should be land left barren for want of adequate access to it. Their Lordships then went on to highlight the similarities between articles 486, 487, 488, and 489 of the Civil Code with certain of the provisions of the Quebec Civil Code which they found corresponded almost exactly. The Judicial Committee observed that while the provisions of article 487 and article 541 of the Quebec Code are qualified by the word “generally”, the word does not appear in article 488. Their Lordships opined that this did not mean that a less flexible construction of article 488 was intended.

[95] The court thinks it is important to pay regard to their Lordships pronouncement on the issue after having examined the relevant treatise¹⁷ and case law¹⁸ and wherein they found support for the proposition that economic considerations may properly be taken into account in the application of them. Lord Clyde delivering the judgment of the Board said:

“There may be room for argument whether in relation to these articles, and more particularly to the equivalent articles of the St Lucian Code, the assessment of the excessive extent of the cost of the relevant works falls to be measured by reference to the value of the enclosed property, or by comparison with the cost of alternative routes, or by some other standard. The expressions used in the treatise and in the cases to which their lordships were referred admit of some variation between the different articles.”¹⁹

[96] The Judicial Committee was quite circumspect in stating that it was not necessary in the present case to determine the question and their Lordships expressed no view on it. However, Lord Clyde went on to say:

“What is clear is that consideration of cost is a relevant and proper matter to be taken into account in the application of these articles of the St Lucian Code. But that consideration is not merely a matter of comparing the relative costs involved simply with a view to ascertaining or selecting a cheaper alternative. The general rules of the Civil Code should only be departed

¹⁷ Montpetit and Taillefer (Traite de Droit Civil Quebec)

¹⁸ *Morrisette v Bessette* [1971] CA 356; *Bissonette-Courteau v Gougoux* [1982] CA 565

¹⁹ At p 107 c-e

from where their application involves costs of a disproportionate nature or of a substantially excessive or even prohibitive amount. It is also evident that the burden of proving that the circumstances justify the making of an exception to the rules contained in the Civil Code lies on the person who asserts that an exception should be made.”²⁰

[97] Interestingly, their Lordships referred to a passage in the judgment of Matthew J in the court below where he stated that the question of the route was not one of economics. Their Lordships interpreted that Matthew J meant that the construction of the relevant provisions of the Civil Code excluded economic considerations. In their Lordships’ view, he was mistaken.

[98] Earlier on in this judgment, the court had alluded to what it perceived as counsel for the defendants having misinterpreted their Lordships reasons for having decided the case in the manner in which they did and consequently misapplying the principles set out in that case to the present case.

[99] It is clear from the judgment in **Michel v Augier** that their Lordships were of the view that the argument advanced by the appellant failed for lack of sufficient support on the facts. According to their Lordships, the issue which was raised in the writ of summons and responded to in the defence was simply that of a claim for a vehicular right of access. What their Lordships considered to be of importance was that neither in the evidence nor in the submissions was any serious attempt made to establish that on economic grounds one route was preferred to that of another. Referring to Matthew J findings their lordships said:

“What he did not do was to balance the considerations, including the economic considerations, between the two routes. But it does not seem that it was suggested to him that he should do that and no attempt was made by the appellants to give him the material on which he could have done it. It appears that route B involves overcoming a quagmire and what is described as a ravine. But without further detail it cannot be determined that the cost of the work would be disproportionate. While a preliminary view might be hazarded that the construction of a new and longer stretch of roadway over terrain of some difficulty might well be more expensive than the achieving of some connection with the existing roadway in plots 102 and 122, the extent of the difference is by no means clear, the extent of the

²⁰ At e-g

practical difficulties in the construction of a road along route B remains obscure, and the value of the enclosed land is not available for the purpose of comparison.”²¹

[100] On the foregoing basis it is clear that their Lordships were of the view that there had been no evidence presented either in the court below or in the Court of Appeal on the matter of economic considerations. In fact, it appeared that the appellants in **Michel v Augier** had raised this point for the first time before the Board and again without presenting any evidence to support their contentions.²²

[101] Counsel for the defendants appeared to have drawn support for her contention that there was no efficacy in the court exploring the point in relation to economic considerations as adjoining land owners over whose land alternative routes laid were not joined as parties to the proceedings from the case of **Michel v Augier**. This was unfortunate since the basis of the claimant’s claim did not interrogate the possibility of alternative routes over the land of other adjoining landowners. What was being interrogated was the question of convenience of other alternative routes relative to the route over parcel 865 and whether any such alternative routes existed or were as convenient as the route over parcel 865. This is implicit in their Lordships’ judgment where it is stated:

“In the Court of Appeal Sir Vincent Floissac CJ, with whose judgment Dennis Byron JA concurred, sought to make a comparison of the relative suitabilities and conveniences of the respective plots of land. He concluded that Clovis’s land was the appropriate servient tenement for the appellants’ access, but since he was not a party to the proceedings and had no opportunity to be heard, no decision affecting him could be given. In making the comparison no account was taken of economic considerations for the very good reason that there had been no particular evidence on that matter. Even in their grounds of appeal the appellants, while criticising Matthew J for holding that what he had to decide was not a question of economics, tied that complaint to the issue whether or not the lands were enclosed, and did not even at the stage of appeal argue that as between the alternative routes economic considerations required the adoption of route A.”²³

²¹ At p 108 e-g

²² At p 108 h-i; p 109 a-d

²³ At p 108 h

[102] In the court's view, counsel for the defendants may have misinterpreted the dicta of Lord Clyde when he was considering the question of remitting the matter to the court below. In so doing the JCPC was not seeking to lay down any principles of general application but were dealing with matters peculiar to the case under their consideration. Lord Clyde in delivering the judgment of the Board said:

"It is not suggested that there are any grounds for interfering with the facts in this case and so far as the facts go they support the conclusions which were reached in both of the lower courts. Particular respect has to be paid to the findings of the trial judge which were based not only on the evidence of the witnesses led before him but also on his own investigation during his visit to the site. The appellants have so far failed to establish that under article 486 they are entitled to a vehicular access along route A. Adoption of route B now affects the interests of the owner of plot 345, as well as the Crown as owner of plot 212 and perhaps others, such as the owners of plots 337 to 344. The possibility of remitting the case for a further hearing on the economic issues involved was suggested in the course of the argument, but their lordships have taken the view that such a course would not be appropriate in the circumstances of a case where the issue has not been focused in the pleadings and where the investigation would involve the interests of persons who are not parties to the proceedings."²⁴

[103] In the premises, and though not entirely in agreement with the views expressed by counsel for the defendants and the manner in which her arguments on this issue were advanced, the court is of the view that there is no merit in investigating the question of economic considerations in the present case although this issue was canvassed in the evidence before the court by both parties. Therefore, the evidence led was intended to inform the discussion on whether the claimant is entitled to a vehicular right of way over parcel 865 by reason of necessity. Therefore, consistent with the decision of the Board in **Michel v Augier**, the court sees no reason to interrogate the question of the suitability of adjoining lands relative to economic considerations.

²⁴ At p 109 e-f

Prescription

[104] Having made the above-mentioned findings in relation to the issue of necessity, the court will now go on to consider the question of whether the claimant is entitled to a vehicular right of way by prescription over the servient parcel belonging to the defendants. Article 491 of the Civil Code provides:

“Right of way is established on behalf of an adjoining proprietor or on behalf of the public, by a prescription of 30 years, even in the absence of any necessity for such right.”

Article 511 of the Civil Code also provides:

“If the land in favour of which the servitude is established belong to several persons in undivided shares, the enjoyment by one hinders the prescription with regard to the others.

[105] Article 2103A of the Civil Code makes provision as to how a servitude is established by prescription. Article 2103A reads:

“Title to immovable property, or to any servitude or other right connected therewith, may be acquired by sole and undisturbed possession for 30 years, if that possession is established to the satisfaction of the Supreme Court which may issue a declaration of title in regard to the property or right upon application in the manner prescribed by any statute or rules of court.”

[106] Ms. Lubin referred to the Adjudication Record for parcel 78 dated 9th September 1986 in support of her evidence that parcel 78 was claimed by long possession. She said that since the LRTP the claimant has lived on the land for a period in excess of 30 years. Her evidence was also that the claimant had applied to the Registrar of Lands (‘Registrar’) for a declaration of title to parcel 78 by prescription.

[107] In addition, Ms. Lubin’s evidence was that subsequent to her mother’s application aforesaid, Sylvester Francis executed a Deed of Declaration of Succession on 11th September 2019 in respect of parcel 78 by virtue of which he claimed to be an heir or one of the heirs to the registered proprietors of the said parcel.

[108] During cross-examination, the witness’s attention was drawn to the proprietorship sections of the land registers with respect to parcel 78 where title to parcel 78 was

recorded in the names of Heirs of Gilbert Serieux, Heirs of Thomasine Poleon and Heirs of Jules Serieux.

[109] She was also directed to a Notice to Quit dated 25th January 2019 from the solicitor purportedly acting on behalf of the heirs of the persons named in the preceding paragraph.

[110] Ms. Lubin testified that she was aware that the heirs of the registered proprietors to parcel 78 were regularizing title to the said parcel; however, she was not aware of any other persons claiming title to parcel 78.

[111] The evidence of Mrs. Prisca Mangal ('Mrs. Mangal') was also instructive with regard to the issue of whether the claimant had acquired a right of way over the servient parcel by prescription. This witness testified that when she began living on the land there was what she described as a "shortcut under the bush". The court understood her to mean that there was some sort of track or footpath that traversed parcel 865 and provided access through a wooded or bushy area.

[112] She said that her father constructed the road to his house which she described as a "proper road" over the preexisting path. She claimed to have been living on parcel 865 for 56 years. She also testified that the claimant would pass "by the sea" to get to parcel 78. However, she stated that after the road was constructed, the claimant would only use the road while travelling on foot but only with permission from her father. Essentially, she denied that the claimant had unfettered access over the existing access over what is now parcel 865. She sought to fortify her evidence by saying that they did not want vehicles to pass on the road because it was a private road that provided access to their house.

[113] In support of their case that the claimant had not had peaceable and uninterrupted use of the right of way over what is now parcel 865, Ms. Mangal's evidence was that after the vehicular access road which was constructed in 1968 by herself, together with her late husband, they installed two iron poles which are still in existence at the entrance of the road from the public road with a chain to prevent persons from

entering the private access road. According to Mrs. Mangal, the entire property belonging to her late husband was fenced except the part bounded with the Queen's Chain.²⁵

[114] Mrs. Mangal also described in her written evidence the various steps taken by her deceased husband to restrict access to the right of way by the public. She insisted that the private right of way was only used by the children of the deceased and their invitees and that no other person used the road and that anyone who attempted to use it either on foot or by vehicle was challenged and questioned about the business they had for using the property. She also gave evidence to the effect that between 1968 and his death in 1998, her husband who occupied the part of the property closest to the access to the main road members of the public including the claimant did not use the right of way as they were fearful of her deceased father. She maintained that this position remained until her husband's death in 1998.

[115] Mrs. Mangal also maintained in her written evidence that the claimant had never personally used the private vehicular right of way on Parcel 865 and that she had always used an access along the Queen's Chain or other points of access located north and west of Parcel 78.²⁶ In addition, in her written evidence she denied that the claimant had acquired the right of way by prescription.²⁷

[116] Now it appeared from Ms. Mangal's evidence that she was not denying outright the claimant's use of the pedestrian right of way; however, she seemed to have been making a distinction between the claimant's right to use the pedestrian right of way and the claimant's right to use the right of way as a vehicular right of way. Having made this distinction, she testified that the claimant's need to use the road was not "her business". She admitted that a few persons would use the road but only with permission from her father.

²⁵ paragraphs 33 – 39 witness statement

²⁶ At para 42

²⁷ At para 52

[117] Ms. Mangal insisted that the right of way was a pedestrian right of way and not a vehicular right of way. She admitted however, that the vehicular right of way followed the path of the previous pedestrian right of way. She testified that the vehicular road was not constructed for the public although they have not prevented people using it for walking.

[118] Now the following evidence elicited from Ms. Mangal in cross-examination may properly be regarded as important and relevant to the current issue; she said:

“I had always been friends with the claimant and that they had permitted her to use the road and had no objection to her passing over it on foot. Jean Lubin could have passed on the land without having to seek permission. They could not have prevented her from using the road. People would have to seek permission from her father when he was alive.”

[119] The defendants challenged the claimant's right to a right of way of parcel 865 by prescription in the following respects. Counsel for the defendants submitted that the claimant could only establish title to the right of way by prescription in accordance with the terms of article 2103A and by following the procedure under the Supreme Court Declaration of Title Prescription by Thirty Years Rules. Therefore, the claimant was required to claim title to the right of way by prescription in conformity with sections 94 and 96 of the LRA. It appears from the provisions of the Rules and the LRA relied on by the defendants that there is a distinction to be made between the acquisition of title to land and the acquisition of title to a servitude.

[120] Mr. Theodore KC argued to the contrary, he submitted that in order to establish the right to the use of a servitude in the form of a right of way by prescription it was not necessary to prove ownership of the right of way. According to Mr. Theodore KC, all that is necessary is enjoyment of the use of the way as an owner would or the requisite period and with the requisite quality. Mr. Theodore KC relied on the provisions of Article 360 Civil Code in support of this contention. Mr. Theodore KC also pointed out that by virtue of Article 2064 of the Civil Code descendants can continue the possession of their ascendants.

- [121] In addition to the foregoing argument, the defendants made the point that the claimant in this instance is not the registered proprietor of parcel 78; therefore, could not lawfully lay claim to the acquisition of title to the servitude by prescription.
- [122] Mr. Theodore KC responded to the foregoing assertion by submitting that there is a presumption that possession is as proprietor; and that it was not for the claimant to prove possession as proprietor the burden being on the defendants to disprove that possession was as proprietor. [Ref: Article 2058 Civil Code]
- [123] The next point raised by the defendants in their submissions before the court was that the claimant could not successfully rely on prescription after first registration and subsequent to the adjudication process. By extension, they argued that the only way the claimant could succeed in her claim based on prescription was by being in continued and uninterrupted possession for a period of 30 years from the date of first registration which was 13th February 1987. They argued that in any event, even though time could be reckoned from that date, the claimant has not been in continued and interrupted possession from 13th February 1987, and therefore her claim to the acquisition of the servitude by prescription is unsustainable.
- [124] Mr. Theodore KC's reliance on the principle in **Graham Davis v Strickland Charles** is indeed unfortunate as can clearly be shown by the decisions of the Court of Appeal and the Judicial Committee in **Chitolie v National Housing Corporation** and other decisions of the Court of Appeal in this jurisdiction. Contrary to Mr. Theodore KC's assertion the decision in **Davis v Charles** is not binding on this court.
- [125] However, the court accepts that the claimant has lived on parcel 78 continuously for a period of 30 years from the date of first registration that is from 13th February 1987. Therefore, 30 years would have expired on 12th February 2017, and before the claim was filed.

[126] In further answer to the point raised by the claimant, Mr. Theodore KC submitted that it must be appreciated that an application for declaration of title or registration of title by prescription whether to the court or to the Registrar of Lands is not what creates title; it is the quality and length of possession which establishes title. According to Mr. Theodore KC, until such time as title is declared or the claimant becomes registered as proprietor, the paper owner continues to have the legal title but the claimant holds the beneficial interest which amounts to an overriding interest for the purposes of section 28 of the Land Registration Act. The court agrees with this submission.

Whether prescription interrupted

[127] The defendants had sought to lead evidence that the claimant's continuous use and enjoyment of parcel 78 had been interrupted by various acts of other persons including that of the defendants. They relied on what they considered to be evidence of parcel 78 having been surveyed during the period of the claimant's occupation and that the registered proprietors have been paying outgoings in relation to parcel 78. The defendants also relied on evidence that the registered proprietors of parcel 78 had served notices to quit on the claimant from as far back as 2008. In relation to the right of way on parcel 865, the defendants relied on evidence of their attempts at interrupting the claimant's use of the right of way.

[128] The evidence in relation to the present issue came primarily from the oral testimony of Ms. Lubin, the claimant's daughter, Ms. Mangal, and Mr. Anderson Reynolds ('Mr. Reynolds'). The court will deal first with the evidence of Ms. Lubin. Ms. Lubin was referred to several documents in the course of cross-examination. The first document was a "Letter of Notice" dated 11th August 2008 which on the face of it appeared to have been written by Mr. Reynolds.²⁸ She was also referred to a letter dated 25th January 2019 which was a notice to quit prepared on the instruction of the estate of the late Gilbert Serieux and others and addressed to Jean Lubin.²⁹ Ms.

²⁸ Exhibit AR2

²⁹ Exhibit AR4

Lubin denied that she had ever received any of the correspondence mentioned above.

[129] The evidence upon which the defendants relied came from the testimony of Mr. Anderson Reynolds ('Mr. Reynolds'). In a nutshell, Mr. Reynolds' evidence was that his uncle Mr. Sylvester Francis had taken affirmative steps to acquire title to parcel 78 on behalf of the persons lawfully entitled thereto during the LRTP. He admitted to having seen at least two structures when he visited parcel 78 with his uncle sometime in the year 2008. He gave evidence related to efforts to have the claimant vacate parcel 78 and referred to the notices to quit which were referenced above. He was cross-examined. He denied being present when a survey of parcel 78 commissioned by his uncle was being undertaken. He admitted to never having met the surveyor. He claimed to have personally served the notice to quit (Exhibit AR2) sometime in the year 2008. He claimed that his evidence was sufficient to provide proof that the document had indeed been served. She said that when he served it he was alone. However, he was referred to what was contained in his written evidence where he stated that he knew that a police officer delivered a copy of the letter to the claimant. Mr. Reynolds appeared unable to account for this discrepancy or to provide any reasonable explanation for the same. Mr. Reynolds insisted his witness statement was entirely true and that both what he stated in his written evidence and his oral testimony in court were both true. The court has discerned that much of Mr. Reynolds' evidence was based largely on hearsay and was accordingly of limited probative value in relation to the question at hand. Also, it seemed quite unreliable and in the court's view, was substantially discredited in cross-examination.

[130] Mr. Theodore KC has asked the court to find that Mr. Reynolds' evidence had been totally discredited on cross-examination and accordingly ought to be rejected by the court outright. Mr. Theodore KC also asked the court to reject any allusion to the service of a notice to quit upon the claimant allegedly in 2008. Mr. Theodore KC invited the court to reject the said notice to quit as one belatedly created and never having been served on the claimant. According to Mr. Theodore KC, assuming that

the notice was in fact served on the claimant, it was merely an act of ownership and did not serve to interrupt prescription.

[131] Mr. Theodore KC was fortified in his view by the decision in **Pye's** case on the question of acts of ownership interrupting prescription.

[132] Mr. Theodore KC also relied on the provisions of Articles 2084 and 2085 as they relate to the question of causes that interrupt prescription. According to Mr. Theodore KC, there has been no natural interruption to satisfy the provisions of Article 2084 in the present case. He submitted that the fact Ms. Lubin remained overseas for some time did not avail the defendants as the claimant had always been in occupation of parcel 78.

[133] Additionally, he submitted that in the absence of natural interruption, it is only by way of judicial demand served upon the persons prescribing that has the tendency to interrupt prescription; and to that extent the provisions of Article 2085 must be satisfied. Mr. Theodore KC considered this to be dispositive of the issue concerning the notice to quit. He submitted that by virtue of Article 2085 the notice to quit would not have operated to effectually to interrupt prescription as it was purely an extra-judicial demand. Further, Mr. Theodore KC submitted that in any event, the period required to prescribe from the date of first registration would have expired by the time that the notice was served, if in fact it was served.

[134] Given the court's assessment on the question of the acquisition of the claimant's entitlement to a pedestrian right of way over parcel 865, the court will only examine in this portion of its judgment the question related to interruption of prescription. However, the court intends to say a few words with respect to Mr. Theodore's submissions on the question of the claimant's enjoyment and occupation of parcel 78.

[135] Article 360 of the Civil Code provides that a person may have with respect to property, either a right of ownership, or a simple right of enjoyment, or a servitude to exercise. In the court's view, this article of the Civil Code answers the question

raised by the defendants in their submissions regarding whether the claimant was entitled to claim a servitude by prescription being a mere occupier or trespasser as the case may be.

[136] Additionally, the court has accepted the point made by Mr. Theodore KC where he illustrates the legal position encapsulated in the provisions of the Civil Code by reference to the case of **J A Pye (Oxford) Ltd v Graham**³⁰ which is the legal authority for the proposition that:

“Once it is accepted that in the Limitation Acts, the word 'possession' has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess: if a stranger enters onto land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long-term intention to acquire a title.”

The court has also adopted the reasoning contained at paragraph [38] of the judgment in **Pye v Graham** where it reads in part:

“It is sometimes said that ouster by the squatter is necessary to constitute dispossession (see for example *Rains v Buxton* (1880) 14 Ch D 537 at 539 per Fry J). The word 'ouster' is derived from the old law of adverse possession and has overtones of confrontational, knowing removal of the true owner from possession. Such an approach is quite incorrect. There will be a 'dispossession' of the paper owner in any case where (there being no discontinuance of possession by the paper owner) a squatter assumes possession in the ordinary sense of the word. Except in the case of joint possessors, possession is single and exclusive. Therefore if the squatter is in possession, the paper owner cannot be. If the paper owner was at one stage in possession of the land but the squatter's subsequent occupation of it in law constitutes possession, the squatter must have 'dispossessed' the true owner for the purposes of para 1 of Sch 1 (see *Treloar v Nute* [1977] 1 All ER 230 at 234, [1976] 1 WLR 1295 at 1300; and Professor Dockray 'Adverse Possession and Intention' [1982] Conv 256). Therefore in the present case the relevant question can be narrowed down to asking whether the Grahams were in possession of the disputed land, without the consent of Pye, before 30 April 1986. If they were, they will have 'dispossessed' Pye within the meaning of para 1 of Sch 1 to the 1980 Act.”

³⁰ [2002] 3 All ER 865 at para [42]

[137] Therefore, in the court's view, there was no requirement for the claimant in the present case to establish ownership of parcel 78. In the court's view, the claimant has established by the evidence factual possession for the requisite period as occupier of parcel 78. In the premises, the defendants' submission on this point fails. According to article 2056 of our Civil Code, possession is the detention or enjoyment of a thing or of a right, which a person holds or exercises himself, or which is held or exercised in his name by another. Article 2057 of the Civil Code tells us that for the purposes of prescription, the possession of a person must be continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor. Additionally, article 2058 provides that a person is always presumed to possess for himself and as proprietor, in the absence of proof that his possession was begun for another.

[138] On the question of whether there was an interruption in the use and enjoyment of the pedestrian right of way asserted by the claimant, the court has paid regard to the provisions of article 509 of the Civil Code which states:

“The thirty years commence to run for discontinuous servitudes from the day on which they cease to be used, and for continuous servitudes from the day on which any act is done preventing their exercise.”

According to article 2083 of the Civil Code, prescription may be interrupted either naturally or civilly. Natural interruption takes place when the possessor is deprived, during more than a year, of the enjoyment of the thing, either by the former proprietor or by anyone else.³¹ A judicial demand in proper form, served upon the person whose prescription it is sought to hinder, or filed and served conformably to the Code of Civil Procedure when a personal service is not required, creates a civil interruption.³² No extra-judicial demand, even when made by a notary, and accompanied with the titles, or even signed by the party notified, is an interruption, if there be no acknowledgment of the right demanded. Prescription is not interrupted if the service or the procedure be null from informality.³³ Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment

³¹ Article 2084

³² Article 2085

³³ Article 2087

which the possessor or the debtor makes of the right of the person against whom the prescription runs.³⁴

[139] In the present case, the defendants have not satisfied the court with the evidence led that the service of notices to quit on the claimant was sufficient to amount to an interruption of prescription as described by the preceding articles of the Civil Code to which the court has alluded.

Overriding interest

[140] The claimant also sought declarations to the effect that she is entitled to an overriding interest pursuant to section 28 of the LRA in the form of a servitude or right of way along the private vehicular right of way shown on the Land Register over the defendants' land; alternatively, a declaration that she is entitled to an overriding interest over the parcels of land belonging to the defendants by virtue of the provisions of Article 486 et seq. of the Civil Code; further and in the alternative, that she is entitled to an overriding interest over the parcels of land belonging to the defendants by prescription and by virtue of the provisions of Article 2103A of the Civil Code.

[141] Section 28 of the LRA makes provision for the recognition and registration of overriding interests over land; and provides in part that unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may subsist and affect the same, without their being noted on the register—servitudes subsisting at the time of first registration under this Act; servitudes which arise from the situation of the property or which have been established by law; user or limitation of user conferred by any other law; rights acquired or in process of being acquired by virtue of any law relating to the limitation of actions or by prescription; the rights of a person in actual occupation of land or in receipt of the income thereof save where inquiry is made of such person and the rights are not disclosed. Additionally, section 28 provides that the Registrar may

³⁴ Article 2087

direct registration of any of the liabilities, rights, and interests hereinbefore defined in such manner as he or she thinks fit.

[142] Counsel for the defendants appeared to have placed reliance on the provisions of section 96 of the LRA to support the argument that essentially in order for the claimant to lay claim to an overriding interest in the form of a right of way over parcel 865, or the defendants' lands as the case may be, she would be constrained by the provisions of section 96 of the LRA which would of necessity require an application to be made to the Registrar. Mr. Theodore KC argued that this reasoning is flawed and that registration under section 96 had nothing to do with the acquisition of a right to a servitude as an overriding interest as opposed to the registration thereof. Mr. Theodore KC argued that until such time as title is declared by the court or the Registrar, the person claiming title to the servitude has an overriding interest over the property over which they claim to be so entitled. The court understood Mr. Theodore KC to be making the distinction between the acquisition of an overriding interest and the registration thereof.

[143] The court is not quite sure whether this distinction stands in the face of the submission made by counsel for the defendants regarding the procedure set out in section 96 of the LRA. In addition, the court distilled from Mr. Theodore KC argument on the point that the court was empowered to make the declaration sought; however, the question of registration was a matter for the Registrar. Therefore, following Mr. Theodore's argument to its logical conclusion it means that the court's declaration of the existence of an overriding interest does not automatically translate into the registration of the servitude. Section 96 of the LRA sets out the procedure for registration of servitudes acquired by prescription. In the claimant's closing submissions Mr. Theodore KC advanced the point that the claimant was not seeking a declaration of an overriding interest over the entirety of parcel 865, but rather a declaration that she had acquired a servitude over the vehicular right of way existing over the said parcel of land. The court has already determined that the claimant is only entitled to a pedestrian access over the vehicular right of way. If the court

accepts this contention, then clearly there is no need to consider the question of registration of the servitude over the entirety of parcel 865.

[144] Section 96 of the LRA deals with the registration of servitudes acquired by prescription and provides that where any person claims to have acquired a servitude by prescription he or she may apply to the Registrar for registration thereof, and the Registrar, on being satisfied as to the claim and subject to such notices, advertisement and conditions as the Registrar may direct, shall register the servitude as an encumbrance on the register of the land affected and also in the property register of the land which benefits.

[145] In the court's respectful view, section 96 of the LRA merely sets out an administrative procedure for the registration of servitudes acquired by prescription. It could not have been the intention that the court would abdicate the function of adjudicating on such matters to the Registrar who would then be required to act in a judicial or quasi-judicial manner. Be that as it may, and without rendering any opinion on the question of whether the provisions of section 96 of the LRA would have impliedly repealed the relevant provisions of the Civil Code as it relates to acquisition of title to a servitude by prescription, the court is of the view that it is empowered to declare that the servitude, being a pedestrian access, enjoyed by the claimant over the vehicular right of way on parcel 865 exist as an overriding interest. The reasons for the court's finding will become more pellucid in the section of the judgment which follows.

Injunctive relief

[146] It cannot be disputed that the defendants performed and engaged in various acts with the intention of depriving the claimant of both pedestrian and vehicular access over the vehicular right of way existing on parcel 865. It follows, therefore, that there has been an interruption by the defendants of the claimant's entitlement to pedestrian access over the vehicular right of way established over parcel 865. The court having so found, will order that the claimant is entitled only to injunctive relief as it relates to the claimant's use and enjoyment of the vehicular right of way by pedestrian

traffic. It is unclear from the evidence at the trial whether the defendants' intention was only to deny vehicular access to the claimant and other persons in occupation of parcel 78. However, having heard the evidence of Ms. Mangal it disclosed an inclination on her part towards depriving the claimant and other persons in occupation of parcel 78 access by foot or pedestrian traffic over the existing vehicular right of way on parcel 865.

[147] In her pleaded case, the claimant alleged that she was entitled to a right of way along the way shown on the Land Register over the defendants' land for herself, her agents, and licensees on foot or with motor vehicles and other conveyances at all times for purposes of access to the highway. She also claimed a perpetual injunction restraining the defendants from impeding the claimant's and other persons authorised by her access along the said right of way. In light of the relief sought by the claimant, it appeared that the claim was based on either pedestrian access or vehicular access.

[148] It did not appear to the court that the claimant had confined her pleadings purely towards vehicular access. In making this observation the court is also cognizant of the fact that based on the evidence, the claimant's need for vehicular access arose out of the recent need to construct a dwelling on parcel 78. It did not appear from the evidence that the claimant had prior to this used the servitude in the form of a vehicular access. In the premises, and the court having already decided that the claimant was only entitled to a pedestrian right of way of the private vehicular right of way on parcel 865 by prescription, the court declines to make an order for injunctive relief relative to the use of the private vehicular right of way on parcel 865 by vehicular traffic.

Damages

[149] In light of the court's findings herein the court is of the view that the claimant is entitled at best to nominal damages for any interruption or disruption of the enjoyment of the servitude in the form of a pedestrian right of way over the private vehicular right of way existing on parcel 865 and which leads to parcel 78 which is

in the use and occupation by the claimant and other occupiers thereof. However, the parties have not addressed the issue of damages with any or any sufficient particularity which assist the court in making a determination of what damages to award. In the circumstances, the court is hesitant to make any award of damages in this instance.

[150] Counsel for the defendants submitted to the court that the claimant has not proven the amount of any loss suffered by her strictly; but however, conceded that there is evidence that they have suffered the loss and that therefore, the claimant should be awarded nominal damages. The court agrees with this position.

[151] It is clear from the evidence that there has been interruption by the defendants of the claimant, her licensees, and agents traversing the subject servitude on foot. Therefore, the court will make an award of nominal damages in the sum of \$5,000.00 for the said interruption.

Conclusions

[152] Having considered the evidence and the submissions made on behalf of the parties on the foregoing points raised at the trial, the court has arrived at the following conclusions: (1) that the claimant had acquired a servitude in the form of a pedestrian right of way over the vehicular right of way on parcel 865 by prescription; (2) that the claimant is not entitled to and has not acquired a vehicular right of way by prescription over parcel 865 or the vehicular right of way over parcel 865; (3) that the prescriptive right acquired by the claimant was uninterrupted; (4) the claimant is not entitled to an enlargement of the pedestrian right of way over the remaining portion of the unpaved right of way into a vehicular right of way; and (5) the claimant has acquired an overriding interest in the form of a pedestrian right of way over the preexisting footpath which has been transformed into a vehicular access and existing pedestrian footpath located on parcel 865.

Discussion

[153] Having assessed the evidence led at trial, particularly as it came from Ms. Mangal, the court has been led to the ineluctable conclusion that the dispute between the parties concerned not so much the use of the right of way existing on parcel 865 by foot or pedestrian traffic but rather the vehement objection was in respect of the use of the said right of way as a vehicular access to parcel 78. The court is fortified in this view not only by the conduct of the parties in restricting vehicular access over the existing right of way part of which over time had been partially transformed from a pedestrian footpath to a vehicular road, but specifically in respect of what is contained in Ms. Mangal's written evidence. Notably Ms. Mangal said:

"The private vehicular access road which forms part of Block and Parcel No. 1828B Parcel 865 is private property and was built with the sole funds of the Defendants. It is maintained only by the Defendants. The claimant has never contributed towards the building costs of the road or its upkeep neither has she paid or agreed to pay an indemnity proportionate to the damage that she may cause by the use of the road."³⁵

This is also evident in other parts of her written evidence where she appeared to have taken objection to the use of the vehicular right of way on Parcel 865 particularly by the claimant's daughter and her grandchildren.³⁶

[154] So vehement was Ms. Mangal's aversion to the claimant's use of the right of way she testified under cross-examination that she would not grant permission to the claimant to use the road even if she undertook to give an indemnity in writing. She said that the defendants would not agree to the claimant using the road even if she gave an indemnity with respect to the use of the same.

[155] Additionally, it appears from the evidence identified by the court that at the center of the dispute between the parties is the claimant's claim to the entitlement to the use of that portion of the preexisting pedestrian right of way that has been paved by Mrs. Mangal and her deceased husband either by way of prescription, necessity or otherwise. Essentially, Mrs. Mangal is vehemently opposed to the use of the paved

³⁵ At para 32

³⁶ At paras 31, 41-49, 51-58.

portion of the right of way for vehicular access to Parcel 78 or the conversion of the existing pedestrian right of way into a vehicular right of way.

[156] It appeared to the court, having assessed Mrs. Mangal's evidence in its entirety, that her position was that the claimant's entitlement to the use of the right of way over Parcel 865 ought to be limited to its use as a pedestrian right of way and not a vehicular right of way. In other words, the only right of way which the claimant could establish by way of prescription over Parcel 865 was limited to a private pedestrian right of way.

[157] The court having found that the claimant was entitled to a servitude in the form of a pedestrian right of way located on parcel 865, the question which therefore arises and seems to be at the heart of the dispute between the parties is whether the claimant is entitled to an enlargement of the preexisting footpath into a vehicular road or to the conversion of the remainder of the preexisting pedestrian right of way from a pedestrian to a vehicular right of way. To put the issue another way, the claimant having established a right of way over parcel 865 by prescription, whether she is entitled to the enlargement of the pedestrian right of way into a vehicular right of way by necessity. In answering the foregoing question, the court is fortified by its analysis and interpretation of the decision of the JCPC in **Michel v Augier**. Therefore, the court declines to make any further finding relative to this issue save and except for what it has already stated earlier in this judgment.

[158] In the present case, all that the claimant is desirous of obtaining is vehicular access over the preexisting pedestrian right of way over parcel 865 which has been converted to a vehicular access. It is in considering this issue that the court was called upon to assess the economic considerations which the claimant has relied on and which became a live issue relative to the competing expert opinions of Mr. Louis and Mr. Polius and the non-expert evidence of Mr. Boland.

[159] In the court's view, it seems that the resolution of this issue should best be left to negotiations between the parties. It did not appear from the evidence that the claimant made any overtures to the defendants related to the payment of indemnity

for the use of vehicular right of way or the absorption of the cost of converting the existing pedestrian right of way shown on the Map Sheet for the area into a vehicular right of way. The court recommends that the parties have discussions regarding these issues. The court is in no position to render any opinion with respect to these issues as it did not appear that they were properly or at all raised before the court in evidence. In any event, the guiding principles relative to matters such as these are properly set out in the Civil Code.

Order

[160] For the reasons which this court has stated in this judgment, the court makes the following orders, namely:

- (1) That the claimant's claim to the entitlement of a vehicular right of way over the private vehicular right of way on parcel 865 by prescription; and that she had acquired an overriding interest therein is dismissed.
- (2) The court declares that the claimant is entitled to a pedestrian right of way over the private vehicular right of way located on parcel 865 by way of prescription.
- (3) The court declares that the claimant has an overriding interest over the private vehicular right of way located on parcel 865 in the form of pedestrian access.
- (4) The defendants shall pay nominal damages to the claimant in the sum of \$5,000.00.
- (5) The claimant is granted a permanent injunction restraining the defendants, whether by themselves, their servants and or agents, or any person deriving title from them or otherwise authorised by them, from impeding the claimant, the claimant's licensees and or agents from traversing the private vehicular right of way on parcel 865 on foot.
- (6) The claimant is awarded prescribed costs in the sum of \$3,750.00 which represents 50% of the costs payable on a prescribed costs basis, the claimant having only been partially successful on the present claim.

[161] The court takes this opportunity to apologise to both Counsel and the litigants for the delay in the delivery of this judgment. The delay arose out of a series of intervening circumstances that impeded the finalisation of the final text of the judgment.

Shawn Innocent
High Court Judge

By the Court


Dp. Registrar

