

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS72/2015**

[201 ] SCSC

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1. Terence Mondon
2. Petronella Hoarau
3. The Executor of the Estate of Marie-Lise MacLean
4. Jeanne Marie Miette Winter
5. The Executor of Estate of Raoul Edmond Hoareau          Plaintiffs

versus

1. Nathalie Weller
  2. Michelle Jeanette Ward    Defendants
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Heard: 14 January 2016, 5-6 May 2016,

Counsel: Serge Rouillon for plaintiffs

Frank Elizabeth for defendants

Delivered: 30<sup>th</sup> June 2016

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JUDGMENT

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## M. TWOMEY, CJ

### *Background to the case*

- [1] The parties are all related by blood or marriage and derive title to adjoining lands at Anse Bazarka, Mahé from Didier Francois Hoarau, the owner of the root title, namely Parcel T560.
- [2] Parcel T560 after partition by the heirs of Didier Francois Hoarau was subdivided in December 1998 and registered in May 1999 at the Land Registry as follows:  
Parcel T1982 transferred to Kiarin Hoarau (heirs and assigns are 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs)  
Parcel T1983 transferred to Marie Lise MacLean née Hoarau (heirs represented by 3<sup>rd</sup> Plaintiff)  
Parcel T1984 transferred to Jeanne Marie, Therese Winter née Hoarau (4<sup>th</sup> Plaintiff)  
Parcel T1985 transferred to Brendan Hoarau (heirs are 1<sup>st</sup> and 2<sup>nd</sup> Defendants)  
Parcel T1986 transferred to Raoul Edmond Hoarau (heirs represented by 5<sup>th</sup> Plaintiff)
- [3] The Plaintiffs aver in their Complaint that these owners of land signed an agreement in October 2000 to have an access road built to their respective properties across each other's land. They also aver that the road was built in 2001 by contributions of money from all the land owners referred to above.
- [4] In 2004, Kiarin Hoarau subdivided Parcel T1982 into two parcels of land namely Parcel T2635, and T2636. Parcel T 2636 was transferred in 2004 to the 1<sup>st</sup> Plaintiff. It is access to that parcel of land (later subdivided by the 1<sup>st</sup> Plaintiff into Parcels T2752 and T2753) which has triggered this litigation.
- [5] The Plaintiffs aver that they used the road for a number of years as designated in the agreement of October 2000 but that on 1st September 2014 the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were denied access over parcel T1985 in breach of the said agreement. They further aver that their parcels of land are enclaved and that the road at issue is the only access to their land. They prayed therefore, inter alia, for an order that the road built since the agreement in October 2000 be declared a motorable right of way.

[6] The Defendants resist this application and in their statement of defence aver that the October agreement is prescribed by law and cannot be enforced. They also state that there was no agreement in 2000 between the adjoining land owners over a right of way and that all that occurred were the issue of letters of consent to part of the road being built and which in any case was not built with contributions from all the adjoining land owners.

[7] They further aver that the Plaintiffs have no right of access over Parcel T 1985, that the 4<sup>th</sup> Plaintiff intentionally enclaved her property when further subdividing it and that there was never any intention that the access road would accommodate the Plaintiffs, their heirs and assigns and that both Plaintiffs have alternative access to their property, with the 1<sup>st</sup> Plaintiff having access through a footpath.

### ***Issues to be decided***

[8] The issues agreed by the parties to be decided at the beginning of the hearing were the following:

1. Was there an Agreement creating a motorable right of way over contiguous land of owners at Bazarka in October 2000?
2. What was the *assiette de passage* of this right of way?
3. If there was no right of way agreed, are the lands of the Plaintiffs enclaved and therefore requiring a right of way.

### ***The Evidence***

#### ***The Plaintiffs Case***

[9] Colin Maclean testified that he was bringing the Plaint on behalf of the 3<sup>rd</sup> Plaintiff in his capacity as executor, on behalf of the 4<sup>th</sup> Plaintiff through a special power of attorney and on behalf of the 5<sup>th</sup> Plaintiff as executor. He supported these by duly authenticated documents which were admitted as exhibits.

[10] He stated that in October 2000, the five heirs to the estate of Francois Didier Hoarau agreed to an estate road being built after the subdivision of their father's land and the

allocation of contiguous parcels to each of the heirs. They expressed their consent by writing letters agreeing to have the road built across their respective properties.

**[11]** The road commenced from the main road at Anse Bazarka on Parcel T1985 belonging to Brendan Hoarau, the father of the two Defendants, then proceeded into the mountainside slightly crossing into Parcel T1984 belonging to the 4<sup>th</sup> Plaintiff, back onto Parcel T1985 and then onto Parcel T 1986 belonging to the 5<sup>th</sup> Plaintiff and then again through the two Defendants' land, through the 4<sup>th</sup> Plaintiff's land, then the 3<sup>rd</sup> Plaintiff's land and ending on the land now belonging to the 1<sup>st</sup> Plaintiff.

**[12]** He admitted that when Mr. Kiarin Hoarau (husband of 2<sup>nd</sup> Plaintiff) sold the top part of his property (Parcel T2636 later subdivided into Parcels T27252 and T2753) to the 1<sup>st</sup> Plaintiff, he extended the road to it so that the 1<sup>st</sup> Plaintiff could have access to the property he had purchased.

**[13]** He stated that the estate road was built with contributions from all the different heirs or their children, that there were no objections to the road being built and that there was no other way to access the top part all the properties except through the estate road as there were rock formations, cliffs and other obstacles along the way. He further stated that the 1<sup>st</sup> Plaintiff had concreted a large part of the estate road across Parcel T1983 and T1984 and that the length of the estate road from the main road at Bazarka to the 1<sup>st</sup> Plaintiff's land was about 500 metres.

**[14]** He further testified that there were no complaints from any of the landowners about the use of the estate road until the death of three of the landowners: Kiarin, Edmond and Brendan Hoarau.

**[15]** In cross examination he stated that all the letters of consent from the adjoining land owners were in the same format agreeing to the construction of the road. He denied that the road was only to provide access as far as Brendan Hoarau's land (T1985). He explained that although there is a demarcated right of way to T2635 (the 2<sup>nd</sup> Plaintiff's land) on its boundary with the original Parcel T1983 (the 3<sup>rd</sup> Plaintiff's land), it does not extend to the upper part of the property, that is, to Parcels T2752 (now sold to Jana

Stefankova) and T2753 (the 1<sup>st</sup> Plaintiff's land) and that access to these parcels is through the estate road as demarcated in the plan (Exhibit 6b) from the Agreement of 2000.

**[16]** He denied that the road had not been in continuous use but agreed that the 4<sup>th</sup> Plaintiff who lived in Australia had not been using the road. Nor had the 5<sup>th</sup> Plaintiff who had lived in Kenya up to his death. He stated that the 2<sup>nd</sup> Plaintiff used the road to collect her daughters from the 1<sup>st</sup> Plaintiff's house where they stay after school. He also stated that the 1<sup>st</sup> Plaintiff uses the road daily.

**[17]** He stated that there is a right of way demarcated on T2635 which does give access to the lower part of parcel T1983 and that this constituted an easement granted and registered on Parcel T2635. He admitted having sold three subdivisions of Parcel T1983 but denied that he did this deliberately to enlave the rest of T1983 and stated that it would be impractical to build a road for each property. He admitted that Brendan Hoarau had graded and concreted part of the access road but that it had been for the use of everyone on the estate and that he had never objected to the Plaintiffs using the road. The 1<sup>st</sup> Plaintiff had also concreted a section of the road traversing T1986, T1983 and T1984 and concreted the rest of the road extended by Kiarin Hoarau in 2004.

**[18]** Mr. Gerard Hoarau, the Chief Planning Officer of the Planning Authority also testified. He produced a report to the court (Exhibit P.15) in which he summarised the developments at Anse Bazarka in relation to the court case. The report and annexures support the evidence of the Plaintiffs in relation to the estate road being built across the adjoining lands for which approval was granted for the subdivision of the parcels of land. He stated that there was an issue with the access road but that this was resolved when the documents were produced to show that consent for a right of way by adjacent landowners had been granted.

**[19]** Mr. Benjamin Prea was called by the Plaintiffs. He confirmed that he had done the work for the subdivision and demarcation of the estate road to the contiguous properties over a period of time. He stated that the access to the 1<sup>st</sup> Plaintiff's land was through the estate road which starts from Parcel T1985 and that the topography of the land would not permit an alternative access route to the land on the mountainside. He further testified that there was a difficulty with further subdivisions in 2004 and 2009 as the Planning

Authority sought proof of authorisation of the estate road by the land owners. He testified that the letters of consent signed in 2000 were produced and the Authority was satisfied and granted retrospective permission for the road. He distinguished between the existing right of way starting from Parcel T1985 and the rights of way granted subsequently to assigns of the 1<sup>st</sup> Plaintiff who were granted access through the 1<sup>st</sup> Plaintiff's land. He explained that the 1<sup>st</sup> Plaintiff derived the right to use the right of way being disputed as he was an assign of Mr. Kiarin Hoarau.

**[20]** The 1<sup>st</sup> Plaintiff, Terence Mondon testified. He is the present proprietor of Parcel T2753 (a subdivision of Parcel T 26346 which is a subdivision of Parcel T1982) which he purchased from the late Kiarin Hoarau in 2004. At that time the estate road went as far as the top part of parcel T1984, a distance of 417 meters from the main road at Bazarka. Mr. Kiarin Hoarau constructed a further 60 metres of road so that the estate road reached parcel T2753. The 1<sup>st</sup> Plaintiff stated that he constructed his house in 2007. He concreted two sections of the estate road - a 110 metre section along T1986 and a 6 metre section where the estate road crosses from T1983 to T1984. The road is 3 metres wide with eleven spots where there are side overs to allow for traffic to pass in opposite directions. He further testified that it would not be possible to access the main Bazarka road from his land along the original mother parcel T1982 given the topography of the land which included a 10 metre drop in parts.

**[21]** In cross examination he maintained that when he purchased the land, Kiarin Hoarau explained that access to the property was through the estate road as agreed between the heirs in 2000. He had to produce this evidence when he applied to the Planning Department for further division of his property. The extension of the estate road from Parcel T1985 to T1983 where he was constructing his house was made without planning permission.

### ***The Defendants' case***

**[22]** The 1<sup>st</sup> Defendant, Nathalie testified on her own behalf and as the representative of the 2<sup>nd</sup> Defendant, Michelle Ward, her sister both the daughters of Brendan Hoarau. She stated that it was her father who had built the road on T1985 in 2001. He graded the road and the purpose of the road was for use by other members of the family. The road was built to

reach the reservoir situated at the top part of Parcel T1985 as it was the intention of Brendan Hoarau to build a family house there. He built the road with his own means with the expectation that he would be reimbursed by other family members.

**[23]** He also concreted the road and hoped to build chalets for tourists but did not want lots of traffic passing. He gave no one the right to use the road over Parcel T1985. There was a chain across the road with a padlock; keys to the padlock were held by himself and Kiarin Hoarau. The key was not given to the 1<sup>st</sup> Plaintiff by her father. She stated that the 2<sup>nd</sup> Plaintiff had not used the road, nor had the Mrs. MacLean or the 4<sup>th</sup> Plaintiff. She accepted that Mr. MacLean had used the road. She noticed the 1<sup>st</sup> Plaintiff doing a lot of clearing at the top of the land in 2012. Her sister Debra Hoarau told Mr. Mondon that he had no right to extend the road.

**[24]** In cross examination she reiterated that her father's intention was to sell the lower part of Parcel T1985, build some chalets and a family home near the reservoir at the top of the property. He died suddenly and the plan did not come to fruition. When she was asked to sign a planning application form to permit subdivision of adjoining parcels of land with the use of the road she refused as this would devalue her property. She admitted looking for a friendly buyer to sell some of her own property in order to assist her sister Debra who was separated from her husband and had two children for whom she had to pay school fees. The property was sold outside the family to Unicorn Investment Company Limited represented by Frank Elizabeth, her Counsel in this matter.

**[25]** She admitted that the estate road to her father's property traverses other properties, namely parcels T1984 and T1986 and that contributions had come from other adjoining land owners. She stated that the retrospective grant of permission for the road had not included notification to the 3<sup>rd</sup> Plaintiff as the access road had not crossed her property (that is Parcel T1983). She admitted that both the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs had made contributions for the construction of the road. She also admitted that the various letters signed in 2000 indicate that "each heir allows for the passage of the road through their properties". She stated that the chain was put across the road to prevent public access to the property as people would go up and take coconuts.

[26] Mr. Fred Hoarau, the Deputy Registrar General testified and produced official search certificates relating to the Defendants' land. From the certificates produced it was observed that although there are unspecified inhibitions and cautions on the land concerned, there are no registered entries of access roads or rights of way to contiguous parcels encumbering the land.

[27] Denis Barbe the director of Land Survey also testified. He confirmed that access to sub plots must be provided in order for planning permission to be granted for the subdivision of land.

### ***Discussion***

#### ***Plea in liminelitis – Prescription of Action***

[28] Before the merits of this case can be decided, a plea in *limine litis* by the Defendants has to be addressed. It is submitted by the Defendants that this suit is prescribed. They rely on the fact that a breach of the alleged accord signed in 2000 permitting the establishment of the right of way over the parties' land is subject to the five year limitation rule under Article 2271 of the Civil Code of Seychelles.

[29] The regime relating to the limitation of actions is contained in several provisions of the Civil Code. Article 2271 of the Civil Code provides in relevant part that :

*1. All rights of action shall be subject to prescription after a period of five years except as provided in articles 2262 and 2265 of this Code...*

Article 2262 also provides:

*All real actions in respect of rights of ownership of land or other interests therein shall be barred by prescription after twenty years whether the party claiming the benefit of such prescription can produce a title or not and whether such party is in good faith or not.*

Article 2265states:



*If the party claiming the benefit of such prescription produces a title which has been acquired for value and in good faith, the period of prescription of article 2262 shall be reduced to ten years.*

[30] In the present case the Plaintiffs are neither suing on an action *in personam* nor are they claiming the benefit of prescription under a title (*titre*); therefore the limitation of periods of five years and ten years respectively have no application. All servitudes and easements are rights *in rem*. A right of way is such a servitude or easement and is a real right as contained in the formal *numerus clausus* rule and article 597 of the Civil Code. Furthermore articles 706 and 707 of the Code provide that easements are extinguished by non-users over a period of twenty years and that the limitation period for the extinction of discontinuous easements such as rights of way begins to run only when the enjoyment of the right ceases.

[31] The issue is not whether the Plaintiffs are suing on the agreement - a personal action subject to the five year limitation rule - but rather whether the agreement granted a real right - an absolute right - subject to the twenty year limitation rule. For this reason the plea in *limine litis* fails.

***Issue 1- Was there an Agreement creating a motorable right of way over contiguous land of owners at Bazarka in October 2000?***

[32] The merits of the case rest on whether an alleged agreement between the parties in this case created a right of way.

[33] The evidence adduced by the Plaintiffs is to the effect that the heirs of Didier Francois Hoarau, after the partition of the land in the root title namely Parcel T560, granted each other a right of way over their contiguous plots of land to access the upper reaches of all their property. As the Court understands it, this was necessary as the land having been partitioned into contiguous ribbons of land running from the Bazarka road at the seaside, rose sharply into the mountainside and hence the only road that could be constructed was one following the contour lines across all the properties.

[34] The evidence consisted of the following letters contained in Exhibit P5:

1. An unregistered To Whom It May Concern document signed by Kiarin Hoarau dated 30<sup>th</sup> October 2000 in which he states that he has no objection to the road being built at Bazarka crossing his land.
2. A registered To Whom It May Concern document witnessed and signed by Marie-Lise MacLean (nee Hoarau) dated 31<sup>st</sup> October 2000 in which she states that she confirms her agreement to a private road being constructed on her land adjoining that of her siblings.
3. An unregistered To Whom It May Concern document signed by Miette Winter dated 29<sup>th</sup> October 2000 in which she states that she has no objection to the road being built at Bazarka crossing her portion of land.
4. A registered To Whom It May Concern document signed by Brendan Hoarau dated 30<sup>th</sup> October 2000 in which he states that he has no objection to the road being built at Bazarka crossing his portion of land.
5. A registered To Whom It May Concern document signed by Edmond Hoarau dated 30<sup>th</sup> October 2000 in which he states that he has no objection in joining his brothers and sisters in the construction of a private road from “the base point of the sea front main road of Parcel T560, through subdivided plot sections T1982, T1983, T1984 and T1985 and then through my plot section T1986 and then further along the summit of the boundary of my plot section T1886, as that end of the said road will be so determined.”

**[35]** Those documents signed by each sibling is evidence of their intention and I find that the documents together with the evidence of the Plaintiffs and their witnesses irrefutably indicate that the five children of Didier Francois Hoareau did agree to mutually grant each other a right of way over each other’s land. Whether this bound only the siblings, parties to this agreement, or their heirs and assigns is the issue to be resolved.

**[36]** Several provisions of the Civil Code provide for the regime relating to rights of way in Seychelles.

First, Article 639 states:

*An easement arises either from the natural position of land or from obligations imposed by law or from agreements amongst owners.*

Article 691 also provides in relevant part that:

*Non-apparent continuous easements and discontinuous easements, apparent or non-apparent, may not be created except by a document of title.*

[37] The principles that we can distil from these provisions is that an agreement among owners can create a right of way and that that agreement can only be created by a document of title.

[38] The difficulty lies in construing the definition of the word *title*. It must be borne in mind that the French Civil Code which had been adopted by Seychelles was translated, modified by Alexander Chlorosand re-enacted as the Seychelles Civil Code in 1975. The original wording of article 691 in French is the following:

*Les servitudes continues non apparentes, et les servitudes discontinues apparentes ou non apparentes, ne peuvent s'établir que par titres.*

[39] The literal translation of *titre* to title has created many difficulties over the years. The word title in the context of property in the English language refers to a formal document evidencing the interest of the owner in the property concerned. The word *titre* in French does not necessarily mean title. *Titre* can refer to the fact of being the owner of something. It can mean a right but also mean a written or formal document. I am of the view that Article 690 is about evidence and *titre* in that context refers to a written document.

[40] I also note that section 52 of the Land Registration Act (LRA) provides in relevant part:

*(1) The proprietor of land or a lease may, by an instrument in the prescribed form grant an easement to the proprietor or lessee of other land for the benefit of that other land.*

*(2) The instrument creating the easement shall specify clearly-*

*(a) the nature of the easement, the period for which it is granted and any conditions, limitations or restrictions intended to affect its enjoyment; and*

*(b) the land burdened by the easement and, if required by the Registrar, the particular part thereof so burdened; and*

*(c) the land which enjoys the benefit of the easement, and shall, if so required by the Registrar, include a plan sufficient in the Registrar's estimation to define the easement.*

*(3) The grant of the easement shall be completed by its registration as an encumbrance in the register of the land burdened and in the property section of the register of the land which benefits, and filing the instrument (emphasis mine)*

**[41]** The word *instrument* is defined in section 2 of the LRA as including “any deed, judgment, decree, order or other document requiring or capable of registration under th[e] Act” (emphasis mine).

**[42]** However, I also note that section 58 of the LRA provides in relevant part that:

*(1) Every disposition shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve (emphasis mine).*

**[43]** I have emphasised phrases in the provisions above to underline the fact that although the road traversing the contiguous subdivisions of the parent parcel T 560 is not registered as an encumbrance in the prescribed form, namely Form L.R.10 under the LRA, the five documents signed by the Hoareau siblings in 2000 can constitute such an agreement capable of being registered. Moreover as I have pointed out in paragraph 34 above, three of the five documents were indeed registered. The fact that they were not entered correctly in the Land Register to give notice to the whole world is neither here nor there. All the siblings had notice of this agreement and it bound them. They also had notice of the unregistered documents as the evidence showed that they then proceeded to contribute to and construct the road to which they all had access until it was blocked in 2015.

[44] In any case even in the absence of the documents providing complete proof of such an agreement creating the right of way, jurisprudence has established that such documents can constitute a beginning of proof in writing.

[45] In *Morin v Westergreen* (unreported) SCA 25 of 1999 the Court of Appeal held that the reference in a title deed to land being sold "together with all rights, privileges, easements, servitudes and appurtenances thereto" constituted [such] a beginning of proof in writing to allow witnesses' evidence to show the existence of the right of way.

Similarly the abundant evidence of the Plaintiffs in the present case would support the documents of 2000 that such a motorable right of way was indeed created across the Hoarau siblings' land.

[46] The evidence from the Defendants is that the road which I have established is a right of way, was for the use of family members only and not for general members of the public. Indeed the evidence suggests that until various land owners started subdividing and selling land there had been no issue with the use of the road by all concerned. Matters came to a head when an assignee of Kierin Hoareau, namely the 1<sup>st</sup> Plaintiff started concreting the road to make it more accessible. Things were made worse as far as relations between the plaintiffs and defendants are concerned by the fact that the 1<sup>st</sup> Plaintiff then subdivided his land and sold it to yet another third party.

[47] The unpalatable legal implication of a right of way, as far as the Defendants are concerned, is that such an easement is attached to the property itself and not to the owner of the property. Nobody owns a right of way. It is simply a right of way. Article 686 of the Civil Code makes that fact clear when it states in relevant part that:

*An owner may create upon his property or in favour of his property such easements as he deems proper, provided however that the easements created neither bind persons nor are they in favour of persons but apply only to property and are for the benefit of property. . . (my emphasis).*

[48] Hence, when the property concerned subject to an existing right of way is alienated by sale or by transfer, the property continues to be subject to the right of way.

[49] On the first issue I therefore find that the five documents dated October 2000 and on the evidence of the parties in the present case create a right of way across the land of the five siblings which right of way continues to apply to all the servient tenements.

***Issue 2: What was the assiette de passage of this right of way?***

[50] The *assiette de passage* (position) of the said road was not specified but it is not disputed that the road that was eventually built followed the direction evidenced on different plans produced by both the Plaintiffs and the Defendants.

[51] It begins at the main Bazarka Road on land (parcel T1985) that belonged to Brendan Hoarau (the father of the Defendants) and generally follows the contour lines, passing for a short distance though Parcel T1984 belonging to Miette Winter (the fourth Plaintiff) continues through the Parcel T1985 again and then onto Parcel T1986 (belonging to the 5th Plaintiff ) before crossing Parcel T1985 again onto parcel T1984, onto Parcel T1983 belonging to the 3<sup>rd</sup> Plaintiff and then onto the parcel T1982 now belonging to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.

[52] The Defendants do not dispute that the road was indeed built with contributions from other family members although they contend that by far the biggest financial contribution for the road was from their father Brendan Hoareau who expected a refund from the rest of the siblings. However they submit that the road only went as far as the reservoir on Parcel T1985. I do not however find this submission supported by any evidence apart from the 1<sup>st</sup> Defendant's own testimony that this was the case. In stark contrast to this evidence the Plaintiffs and their witnesses all maintain that the road continued after the reservoir. I am more inclined to believe them.

[53] It certainly is not logical that the third and fourth Plaintiffs would sign a document stating that they had no objection to the road crossing their land if it did not do so and only end at the reservoir on the Defendants' land. It would also make no sense to contribute to a road that would not benefit them.

[54] Article 685 of the Civil Code of Seychelles provides in relevant part that:

*1. The position and the form of the right of way on the ground of non-access are determined by twenty years' continuous use. If at any time before that period the dominant tenement obtains access in some other way, the owner of the servient tenement shall be entitled to reclaim the right of way...*

[55] The 1<sup>st</sup> Defendant has alluded to the fact that there is an alternative right of way that can be used to access the dominant tenements affected by their refusal to allow access through the existing road. She attempted to show this by the production of a google map of the area showing in her view alternative access routes used before the road in issue was constructed. Having studied this evidence I am not able to accept this submission. There is no comprehensive or convincing evidence of an alternative route. The photographs produced by the 1<sup>st</sup> Plaintiff show sheer rock and cliff faces that in my view would not be amenable to road construction through the 2<sup>nd</sup> Plaintiff's land. The provisions of Article 685 therefore have no application in the present case.

[56] If the Defendants propose an alternative route to the one currently in use it is incumbent on them to prove that this is so to the satisfaction of the court on a balance of probabilities. They have failed to do so.

[57] I find therefore on the second issue that the *assiette de passage* is indeed that as is evident on Planning Department documents, namely as shown in Exhibit P6 (b) and marked in yellow.

[58] Having found in favour of the Plaintiffs on both Issues 1 and 2 there is no need to consider Issue 3. I wish to state however that as the decision on Issue 2 shows the impracticality and even perhaps the impossibility of building an alternative access road to the Plaintiffs' land I would have granted a right of way under Article 682 of the Civil Code as the upper lands are demonstrably enclaved.

### ***Decision***

[59] In the circumstances this action succeeds. Accordingly, I grant the Plaintiffs' claim and declare that they, their heirs and assigns have a motorable right of way over the

Defendants' property to comply as much as possible with the road marked in yellow on the Planning Department document Exhibit it P6 (b). Accordingly, the motorable access is to begin at the main Bazarka Road on land (Parcel T1985) that belonged to Brendan Hoarau (the father of the Defendants, passing for a short distance though Parcel T1984 belonging to Miette Winter (the fourth Plaintiff) continuing through to Parcel T1985 again and then onto parcel T1986 (belonging to the 5th Plaintiff) before crossing Parcel T1985 again onto Parcel T1984, then onto Parcel T1983 belonging to the 3rd Plaintiff and then onto Parcel T1982 belonging to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively. There is to be no hindrance and obstruction to the said access by the Defendants.

[60] The costs of this action is taxed against the Defendants.

Signed, dated and delivered at Ile du Port on 30<sup>th</sup> June 2016.

**M. TWOMEY**  
Chief Justice