

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS389/2006

[201] SCSC

Rosa Morin

Plaintiff

versus

1. Mireille Simeon
2. Michel Simara
3. Remi Simara
4. Raymond Tirant

Defendants

Heard: 17th March 2014, 18th July 2014, 29th September 2014, 28th October 2014, 29th January 2016, 4th May 2016, 24th May 2016, and 17th June 2016.

Counsel: Basil Hoareau for plaintiff

Divino Sabino for 1st, 3rd and 4th defendant^s

Delivered: 15th July 2016

JUDGMENT

M. TWOMEY, CJ

[1] The Plaintiff, the owner of Parcel H4053, sues adjoining land owners at Machabée, Glacis for a declaration that her land has a motorable right of way over other parcels of land, namely Parcels H4999 owned by the 1st Defendant, H4988 owned by the 2nd Defendant, H2470 owned by the 4th Defendant. In the alternative she prayed for a declaration that she had a right of way by foot over the said parcels of land and to injunct the Defendants from obstructing the right of way.

[2] The 2nd Defendant has not defended the action and instead supports the Plaintiff's claim.

[3] The 1st, 3rd and 4th Defendants aver that they do not block the right of way to the Plaintiff's land but that the Plaintiff has no motorable right of way over their land to hers.

Issues to be Decided

1. Is there a motorable right of way over contiguous land of owners at Machabée Mahé?
2. If so, what is the *assiette de passage* of this right of way?
3. If the right of way is obstructed what are the remedies available to the person to whom the servitude is owed?

The Plaintiff's Case

[4] The Plaintiff testified. She stated that she bought her land, Parcel H4053 from her father and that the land was served by a 3 metre right of way from the main road starting on Parcel H2470 belonging to the 4th Defendant and traversing land belonging to the other Defendants. She grew up on the land and both people and vehicles could travel on the road. The road was still accessible by vehicles in 1995 when her elder sister was building her house and her brother could bring an excavator close to the house. The 4th Defendant's house was built on the right of way on a date that she could not remember but which she estimated as around 2008 or 2009 and later in cross examination as more than ten years before the filing of the plaint. She produced certificates of official searches at the Land Registry, a transcription of the original sale of the land and a deed of the subsequent partition of the land.

[5] She admitted that there were two possible routes to reach her house from the main road, one past Balu's shop on Parcel H4192 and one past Mr. Tirant's shop on Parcel H2388 but that the easier access was the latter as the former flooded whenever there was rain.

[6] Her father objected to the 4th Defendant building his house on the right of way. Her mother went to the Ministry of Land Use and Habitat at the time and her sister to the District Administrator to complain. Subsequently, there had been a plan by the

government to build an alternative access past Balu's shop but the engineer had not approved it as it went over a river liable to flooding. In any case, rights of way were provided for in the deed of partition over the Defendants' land.

- [7] The 2nd Defendant was called on his personal answers. He stated that he was the owner of Parcel H4988 and had sold parcel H4999 to the 1st Defendant, Mireille Simeon on 14th November 1996. The document of transfer stated "it is hereby observed that a 3-metre right of way exists" on the parcel sold.
- [8] He was born and had lived all his life at Machabée and had bought his land from one Tibert Tirant who had told him about the right of way serving plots further up from his land. He had observed vehicles along the right of way as far as the land of *Tinar* Hoareau (Emmanuel Hoareau) which land was subsequently sold to Maxime Michel (Parcel H1951). He remembered seeing the vehicles when he was about 12 years old as they were trucks collecting coconuts from Mr. Tinar Hoareau's land. The road could not be accessed after his brother, the 3rd Defendant, built his house. He stated that there was another footpath leading from the 3rd Defendant's house over a footbridge on the river to the main road but that vehicles could not use it; it is rocky and floods and one has to use steps up to the main road.
- [9] Mr. Roger Hoareau, the Plaintiff's father also testified. He stated that he had sold Parcel H4053 to his daughter but continues to occupy the house situated thereon. All the property in the vicinity, including the land of all the defendants had once belonged to one Mrs. Evariste Hoareau, his grandmother. In 1949 the land was partitioned among her four heirs. Lot 1 was allocated to Marthe Tirant, Lot 2 to Eva Barbier, Lot 3 to Elias Hoareau (his father) and Lot 4 to Emmanuel Hoareau. The Plaintiff's land forms part of Lot 3. The Defendants' land are contained in Lot 1. The access road started at Lot 1 and continued to Lot 3. The road was damaged after the partition in 1949 when everyone started constructing on their respective lands.
- [10] He remembered a Dodge Truck belonging to Moosa, registration Number S116 coming to his father's place on Lot 3 to collect coconuts. He also remembered his uncle's black Austin being driven to his father's property.

- [11] The 2nd Defendant built his house about 18 years ago and was told that it was on the right of way but had proceeded with the construction nevertheless. Since then, vehicles are unable to reach the house on the Plaintiff's land. He is sometimes sick and he has to be carried to the main road.
- [12] H1951 presently owned by Maxime Michel was distracted from land belonging to his father and his brother Emmanuel Hoareau who has no objection to him or his family continuing to use the right of way. The road had been damaged even before the 2nd Defendant built his house but he did not use the footpath exiting at Balu' shop.
- [13] Mr. Yvon Fostel, a land surveyor was called by the Plaintiff. He testified that he paid two site visits to ascertain whether it was feasible to have motorable access to Parcels H4042 - H4054 from the main road. He also prepared a report and survey plan which was exhibited as P 6(a) and (b) respectively.
- [14] He found a footpath leading from an Asian shop, over a bridge to the right of way leading from the 4th Defendant's shop. The existing footpath was along the route of the old colonial road but could only be accessed from the main road and although closer to the Plaintiff's land it was physically impossible to access it by a vehicle.
- [15] The land had been surveyed in 1974 from which the existing parcels were created. The cadastral plans showed a right of way leading from Lot 1 now Parcel H2470, through H4998 and H4999 to Parcel H1951 on which there was a footpath to Parcels H4052 and H4053.
- [16] He estimated the width of the right of way from the 4th Defendant's shop to be about 2.5 metres. At the 3rd Defendant's house the road narrowed because his house was built on the right of way but it would still be possible to build a motorable right of way between the 3rd Defendant's house and that of the 1st Defendant. There would however be a need to cut through an embankment on Parcel H4999 belonging to the 1st Defendant to widen the road between the houses belonging to the 1st and 3rd Defendants.
- [17] The Plaintiff's brother, Alain Hoareau, also testified. He owned the land comprised in Parcel H4052 directly north of that of his sister's and next to Parcel H1951. He had no objection to a right of way over his land to provide access to that of his sister's. When he

was building his house in 1998, material for his house could be transported as far as the 3rd Defendant's house.

The Defendants Case

- [18] The 1st Defendant testified, confirming that she was the owner of Parcel H4999. She was the cousin of the Plaintiff and had lived in the vicinity all her life. She had never seen a vehicle come up to her house. There had been many trees in the area which she cut down in order to build her house in 1997. The access road had been overgrown with *bwazozo*, *kasis*, *napoleon* and *prin de frans* trees and bushes. She was adamant that trucks had not come up the road. Coconuts were not collected on Emmanuel Hoareau's land (Title H1851) but were carried down in sacks to the main road along the footpath.
- [19] The first part of the present access road at the 4th Defendant's shop had only been widened following the clearing of debris occasioned from heavy rain. In any case the road next to the shop was rarely used as most people used the footpath to Balu's shop. There had been plans to build an alternative access road by the government but it had not come to fruition.
- [20] The 3rd Defendant had built his house before hers. She started building in 1997. There were about nine steps leading down from her house to the footpath. If the present footpath between her house and that of the 3rd Defendant's was widened, her house would be affected and she would have no yard.
- [21] She had lived in the area for most of her life apart from an absence of about fourteen years. The Plaintiff's family had to go through her property to access their houses and the transfer document relating to her property made reference to a 3metre right of way. The 3rd Defendant used a caterpillar along the access road when he was building his house in 1997. He had been in the army when he had his house built and when he came to check on the work, discovered the construction on the right of way had already begun although she had not authorised it.
- [22] The 3rd Defendant also gave evidence. He had built his house about twenty years ago when the land was co-owned by himself and the first three defendants. Together with his

brother in 1980 they had also reconstructed their mother's house which was situated in the middle of Parcel H2469.

[23] The construction materials had been transported on their heads from the 4th Defendant's land to theirs as there was no vehicular access to the site. The access road had been overgrown with trees and bushes. He had never seen a pickup truck coming anywhere near his house. The area was so overgrown he had to get help from the army to cut down trees to clear a site for his house. No one had complained about where his house had been sited. It was only ten years later that the present case was brought. He had seen the footpath but had not known that there was a right of way on the property. Had he known there was a right of way on the land he would not have blocked it.

[24] The 4th Defendant also testified. He was the owner of Parcel H2470 and built and opened a shop on the land in 1977. Prior to living in the area he had lived at Glacis, he had been engaged with his father in the copra business. He had collected coconuts in a lorry. These were left by the road side from Machabée to Beau Vallon all along North Mahé. In 1974 he acquired a small pickup and used it to collect coconuts for his own business.

[25] Prior to building his house he had to clear the site of *prin de frans* bushes and cashew nut trees. There was no possibility of a road going through it. Even after he built his house there was no vehicular access from the back of his shop to the parcels of land on the mountainside. Persons living beyond his house used the footpath from Balu's shop. He admitted that the Plaintiff used to park her car behind his shop. The road went as far as the 2nd Defendant's house (Parcel H4998).

[26] In cross examination by the 2nd Defendant he admitted that there had been a public road, the old colonial road on his property and that after the new main road was built it remained but it was not a right of way. He also admitted that when he built flats behind his shop he used the right of way to access the construction site.

[27] Whilst building a wall on his property he was issued with a "stop notice" by the Planning Authority. There had been altercations about the fact that he parked his four ton pick-up across the right of way but insisted that people could have got through in any case. He admitted that a right of way had existed on the parent parcel from which his land had

been extracted, that a right of way traversed Heirs Tirant land and ended at the colonial road.

[28] Julia Lajoie from the Registration Division at the Land Registry stated that there were no registered encumbrances on Parcel H4192 (which is the land accommodating the footpath from Balu's shop). Parcel H2388 abutting the 4th Defendant's land and the main road did have a right of way encumbering it. Parcel H2470 owned by the 4th Defendant also had a right of way encumbering it. She confirmed that the right of way in the land register was identical to the right of way on the cadastral plans. There was also a right of way registered as an encumbrance against Parcel H4999 and that right of way was identical to the one marked on the cadastral plan.

[29] Fred Hoareau, the Deputy Registrar General also testified. Parcel H2469 was owned by the 3rd Defendant. There was an encumbrance against the land, namely a 3 meter right of way.

The *Locus in Quo*

[30] The court paid a visit to the *locus in quo* on 17th June 2016. Its observations are that the right of way in issue starting from the 4th Defendant's shop is accessible by vehicles until the house of the 3rd Defendant. Between his house and that of the 1st Defendant there is a space of about 7 metres in width but between the 3rd Defendant's house to a bank beneath the 1st Defendant's house there is a width of only about 2 metres. The front door of the 3rd Defendant's house exits on the existing footpath between the two houses.

[31] The Court observed the "colonial road" and noted the obstacles on it including rocks and a river.

Discussion

Issue 1- Is there a motorable right of way over contiguous land of owners at Machabée, Mahé

[32] Several provisions of the Civil Code provide 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.

[33] Secondly, 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)

- [34] 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”
- [35] Encumbrances are registered in the prescribed form, namely in Form L.R.10 under the LRA.
- [36] As far as possible the court strives to ensure in its interpretation of laws both the compatibility of legal provisions and the objectives of the laws. *Interpretatio fienda est ut res magis valeat quam pereat.* (Such a construction is to be made that the thing may have effect rather than it should fail). A logical extension of this maxim is that if a particular statute is in apparent conflict with another it is best to construe the statute in *pari materia* with the other. Hence courts are called upon to reconcile and harmonise laws to avoid both inconsistency and repugnancy and to give laws conjoint not discordant effect. It is certainly not the intention of legislature that conflicts should exist in its laws (*Eastbourne Corporation v. Fortes Limited* (1959) 2 ALL ER 102).
- [37] Moreover courts in statutory interpretation are also guided by the informed interpretation rule. This is explained in Bennion on Statute Law as follows:
- “The informed interpretation rule thus requires that, in the construction of an enactment, attention should be paid to the entire content of the Act containing the enactment. It should also be paid to relevant aspects of: (1) the state of the law before the Act was passed, (2) the history of the enacting of the Act, and (3) the events which have occurred in relation to the Act subsequent to its passing. These may be described collectively as the legislative history of the enactment, and respectively as the pre-enacting, enacting, and post-enacting history (Bennion on Statute Law (Longman 1990) Chapter 9, page 104).*
- [38] The courts in Seychelles have on many occasions had cause to marry the provisions of the Civil Code with those of the LRA to resolve any apparent conflicts that may arise.
- [39] Parties in this case have given different versions of the history of the right of way. What is not dispute however is that the land in issue at Machabée originally was owned by one Mrs. Evariste Hoareau, the Plaintiff’s great grandmother. In 1949 the land was partitioned among her four heirs. The deed of transcription of that partition is registered

in Volume 4 of Register C129. Lot 1 was allocated to Marthe Tirant, Lot 2 to Eva Barbier, Lot 3 to Elias Hoareau and Lot 4 to Emmanuel Hoareau. Contained in that deed is the following paragraph:

Les abondonataires des troisième et quatrième lots auront chacun un droit de passage par les sentiers déjà existant et donnant accès a la voie publique, sur les premier et second lots respectivement.

[40] It behoves the court to relate some legal history at this stage. In 1967, the Land Registration Act was passed. It mirrored to some extent the reform of the English Land Registration Act of 1925 in simplifying the processes by which land transactions were carried out and ensuring that interests in land were registered in order to bind future purchasers of the property. An amendment to the Seychellois LRA in 1979 made registration of title compulsory and provided for the adjudication of title of previous registered proprietors in the Mortgage and Registration Register and their transfer to the new Land Register.

[41] Mr. Yvon Fostel, a Land Surveyor testified. The land at issue in the present case had been surveyed in 1974 and the existing parcels were created. The cadastral plans showed a right of way leading from Lot 1 now Parcel H2470, through H4998 and H4999 to Parcel H1951 on which there was a footpath to Parcels H4052.

[42] Section 46 of the LRA Act provides that land transfers are completed by registration of the transferee as proprietor of the land and the filing of the document. Hence, under the current system registration perfects and completes the transfer and certifies the ownership of absolute title to realty.

[43] Section 20 of the LRA provides in relevant part:

Subject to the provisions of this Act-

(a) the registration of a person as the proprietor of land with an absolute title shall vest in him the absolute ownership of that land, together with all rights, privileges and appurtenances belonging or appurtenant thereto;

[44] Insofar as rights, privileges and appurtenances are concerned, section 25 of the LRA also provides in relevant part:

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register:-

(a) easements subsisting at the time of first registration under this Act;

(b) easements for the benefit of the public or arising by law;...

[45] Mr. Sabino for the 1st, 3rd and 4th Defendants has submitted that it is untenable that the motorable right of way was created when the deed of title in 1949 only mentions the right of way (*droit de passage*) as a *sentier* (a footpath). This is an attractive proposition as far as the Defendants are concerned but it is not maintainable given the clear provisions of the LRA referred to above. The whole purpose of the LRA was to give certainty of title and rights appertaining thereto to land owners.

[46] For this purpose the land was surveyed in 1972, obviously with notice to contiguous land owners including the owners of both the dominant and servient tenements. The registration of title in the terms as entered onto the Land Register is binding on the landowners then and on their heirs and assigns today. One cannot forty-two years later challenge the absolute title of the parcels of land as entered onto the Register. To give way to such a proposition would be contrary to public policy and undermine the provision of the LRA.

[47] The evidence submitted by the officers of the Land Registration Department are that it is certified from official searches of Parcel H2470, H4998 and H4999 that they are all burdened by a three metre right of way. These servient tenements remain subject to such an encumbrance.

[48] The provisions of the LRA are to be construed in line with the principles of legal interpretation as set out above. They are in *parimateria* with the provisions of Article 639 of the Civil Code in terms of the requirements for creating the easement. The easement

thus created by law (the provisions of LRA and the registration of the encumbrance) binds the dominant tenements on which they have been created.

[49] The next issue that arises is whether the right of way was extinguished. Mr. Sabino has submitted that under Article 706 of the Civil Code the easement comprising of the motorable right of way would have in any event been extinguished by the fact that it was not used for over twenty years.

[50] The evidence on this issue is controverted. The Plaintiff and her witnesses and the 2nd Defendant testified that the right of way had been used until the 3rd Defendant built his house on it around 1997. On the other hand the 1st, 3rd and 4th Defendants are categorical of the denial of this fact. They state that the right of way was never accessed by a vehicle. The evidence of the 2nd Defendant on this issue was unsworn and although as credible in this case as that of other witnesses it is certainly less weighty.

[51] This Court would have had to make a judgement call on which witnesses were more credible from their demeanour in court and this would have been a most difficult task as the evidence of all the witnesses are in any case self-serving. Each of them have something to gain by either admitting or denying that the right of way had been used before it was extinguished by lack of its usage.

[52] However two matters prevents the need to consider the competing evidence on this issue. First jurisprudence is to the effect that the extinguishment of easements by operation of the provision of Article 707 only applies to the easements granted because of the enclavement of property in situations where the land is no longer enclaved or where an alternative right of way is granted (*Collie v Mousbe* (1977) SLR 118).

[53] Secondly, although Article 706 of the Civil Code provides that an easement is extinguished by non-use over a period of twenty years, it is qualified by the provisions of the LRA which apply equally to the extinguishment of easements as they do to the creation of easements. Once an easement is registered it becomes a right *in rem* in respect of the owners of the dominant tenement. In other words a right of way that has not been registered under the LRA may be extinguished by operation of the provisions of the Civil Code. However a right of way correctly registered under the LRA is subject to the

provisions of the LRA namely sections 20 and 25. Extinguishment of the registered easement can only be sought under section 54 of the LRA which provides in relevant part:

(1) Upon presentation of a duly executed release in the prescribed form or of an order of the court to the same effect the registration of an easement or restrictive agreement shall be cancelled and thereupon the easement or restrictive agreement becomes extinguished.

(2) On the application of any person affected thereby, the Registrar may cancel the registration of an easement or restrictive agreement upon proof to his satisfaction that-

(a) the period of time for which it was intended to subsist has expired, or

(b) the event upon which it was intended to determine has occurred.

[54] Such an application has neither been made to this Court nor to the Registrar of Lands. Moreover the statement of defence contains no such averment nor is there a counterclaim in respect of the extinguishment of the easement. To grant the extinguishment of the right of way as submitted by the 1st, 3rd and 4th Defendants would in the circumstances be *ultra petita*.

[55] On the first issue therefore, I find that Titles H2470, H4998 and H4999 are burdened by a motorable right of way in favour of the Plaintiff, her heirs and assigns as illustrated by the survey plans attached to the registered encumbrance.

Issue 2 – what is the *assiette de passage* of the right of way?

[56] There was much evidence of alternative routes of access to the Plaintiff's land. However, as discussed already the issue in the present matter does not seem so much to be about the position of the right of way or alternative rights of way but rather about the form of the right of way beginning at the main road next to the 4th Defendant's land.

[57] No one contests that there existed a right of way from the 4th Defendant's land to the Plaintiff's land. The 4th Defendant has been more equivocal in stating that another right of way exists exiting at Balu's shop. The title deeds clearly indicate that two registered rights of way exist over his land- one to Balu's shop and one leading to the Plaintiff's

land. However even if the alternative right of way to Balu's shop was used by the Plaintiff that path would only lead to the 3rd Defendant's house. The court on paying a visit to the *locus in quo* observed the rocky terrain and the river traversing this right of way. There was uncontroverted evidence that during the rainy season the river floods and the right of way becomes impassable. It is an impractical and incomplete solution and is therefore rejected.

[58] In relation to the second issue, I therefore find from the evidence that the *assiette de passage* is as indicated in the survey plans attached to the registered easements over Titles H2470, H4998 and H4999.

Issue 3 - If the right of way is obstructed what are the remedies available to the person to whom the servitude is owed?

[59] Having made these findings it now becomes necessary to decide what must be done about the obstruction caused to the right of way by the 3rd Defendant's house. In respect of the protection of easements the following are the relevant provisions of the Civil Code:

Article 697-

The owner of the dominant tenement shall be entitled to do all that is necessary for the use and preservation of the easement.

Article 698

The cost of such work shall burden the owner of the dominant tenement and not the owner of the servient tenement unless the document creating the easement provides the contrary.

Article 701

The servient tenement shall do nothing to impair the use of the easement or render it more difficult, but he may offer a substitute of equal convenience. This cannot be refused.

Thus, he may not change the condition of the premises nor remove the easement to a different place from that in which it was originally located.

However, if the original location has become more onerous to the owner of the servient tenement or if it prevents him from carrying out improvements upon it, he may offer to the owner of the dominant tenement a place of equal convenience for the use of his right; such an offer may not be refused.

[60] *Mirabeau v Camille* [1974] SLR 158 settled the jurisprudence in Seychelles on the issue of acts that may be performed by persons to whom a servitude is owed. Sauzier J stated:

“...it is clear that the person to whom a servitude is due may make constructions on the land subject to the servitude so that he may use his right in a manner more convenient to him, although such constructions are not absolutely necessary for the exercise of his right provided however that no prejudice is thereby caused to the owner of the land subject to the servitude.

[61] The court is sensitive to the circumstances of the 3rd Defendant and to his evidence that had he known that he was building his house on the right of way he would not have done so. His actions are not excusable but the court does take the reason for his interference in the easement into consideration in the final determination of this case. He has to bear as much of the consequences for his irresponsible acts as the law provides and the court deems just in the circumstances.

[62] Similarly, the court is also sensitive to the fact that the 3rd Defendant in building his house has not only substantially encroached on the right of way but also onto the 1st Defendant's land. She does not seem to have objected then nor does she seem to object today. She even seems to permit the encroachment. She also has to bear some responsibility for condoning the acts of the 3rd Defendant.

[63] The Planning Authority seems also to have absconded from its responsibilities. That a house went up without so much as a visit to the site by the Authority to ensure that it complied with planning permission is beyond belief. Moreover the 3rd Defendant's house is substantially on land not owned by him. The Authority has to bear a certain responsibility for the abdication of its duties.

[64] Mr. Sabino has relied on the authorities of *Nanon v Thyroolmoody* (2011) SLR 92 and *Mancienne and ors v Ah-Time and ors* (2013) SLR 165 for the principle of abuse of right

to temper the right of the Plaintiff to demand the demolition of the 3rd Defendant's house. Both the authorities cited however concerned minimal encroachment by a house owner on land belonging to another. Here the 3rd Defendant's house is less than one third on his own land and two thirds across the right of way and the 1st Defendant's land. In *Mancienne*, Domah JA pointed out that demolition is the rule as anything less would fly in the face of Article 545 of the Civil Code which provides that no one may be forced to part with his property except for a public purpose and in return for fair compensation.

[65] However, as I have pointed out, the 1st Defendant on whose land the encroachment has occurred has not demanded the demolition of the 3rd Defendant's house and seems by her actions to have condoned the construction. The 3rd Defendant also seems to have acted in good faith but he has by his actions obstructed the right of way on her land.

[66] Under the provisions of Article 701 (*supra*) the servient tenement has impaired the use of the motorable right of way. An alternative, causing the least prejudice to the Defendants has to be made available to the dominant tenement. At the visit to the *locus in quo*, the Court explored an alternative route to the west of the 3rd Defendant's house but the terrain and space available make such a proposition impossible.

[67] The surveyor present at the *locus in quo* indicated that it was possible to construct a right of way between the 3rd Defendant's and 1st Defendant's houses. I take into consideration the embankment that would have to be cut into with the result of reducing the 1st Defendant's yard. I also take into consideration the fact that the front door of the 3rd Defendant's house opens out into the right of way. There is however no other alternative route and they are both the authors of the adverse consequences to their properties.

[68] In terms of the provisions of Articles 697 and 698 (*supra*) the cost of any works to restore the right of way has to be borne by the dominant tenement. In the circumstances the costs for the reconstruction of the road must be borne by the Plaintiff.

[69] I make the following orders:

1. The three metre right of way as delineated on the survey plans registered with the encumbrances over Titles H2470, H4998 and H4999 are to be restored. There

should be no further obstructions impeding passage to the dominant tenement, namely Title H4053.

2. The cost of restoring the right of way and road works are to be borne by the Plaintiff.
3. The width of the right of way between the 1st Defendant's house and the 3rd Defendant's house is to be reduced to two and a half meters notwithstanding the registered encumbrance.
4. The Plaintiff is to construct a retaining wall after cutting into the embankment on the 1st Defendants property and to construct steps to allow the 1st Defendant access to her house and to preserve her property.
5. I make no order as to costs.

Signed, dated and delivered at Ile du Port on 15th July 2016.

M. TWOMEY
Chief Justice