SUPREME COURT OF SEYCHELLES

Reportable/ Not Reportable / Redact
[2020] SCSC 387
CS 75/2017

In the matter between:

FRANCIS GILL **Plaintiff**
(rep. by Alexandra Benoiton)

and

THE ATTORNEY GENERAL **1st Defendant**
(herein rep. the Government of Seychelles)
(rep. by Rongmei Lansinglu)

TELECOM SEYCHELLES LIMITED **2nd Defendant**
(rep. by Kieran Shah)

Neutral Citation:	*Gill v The Attorney-General and Telecom Seychelles Limited (CS 75/2017)* [2020] SCSC 387 (3rd July 2020)
Before:	Pillay J
Summary:	Delict: where the Government without permission of a landowner builds a road on the land, to the benefit of a license holder under the Broadcasting and Telecommunications Act 2000, such action amounts to a faute in relation to the Government. However, a landowner may not claim a delict against a license holder for damage to their property but must use the Broadcasting and Telecommunication Act 2000 to claim compensation arising from damage to their property by the licensee.
Heard:	24th May 2019, 28th June 2019, 11th November 2019, 15th November 2019, 18th November 2019
Delivered:	3rd July 2020

ORDER

[1] The action against the first Defendant is allowed.

[2] I make the following orders:

(1) Unlawful entry and use and trespass	*SCR 25, 000/*
(2) Loss of enjoyment and use of property	*SCR 30, 000/-*
(3) For moral damages for inconvenience	*SCR 20, 000/-*

[3] The first Defendant is prohibited, permanently, from any further entry and use or trespass on the Plaintiff's land.

[4] Each side shall bear their own costs.

JUDGMENT

PILLAY J

[1] This matter concerns a delictual claim for the building of a road by the Government of Seychelles on private property, and use thereof by a license holder under the Broadcasting and Telecommunications Act 2000, to access the license holder's telecommunication apparatus (Airtel tower)

[2] Initially, the Plaintiff, Mr. Francis Gill, sued the second Defendant, Telecom Seychelles Limited, by way of Plaint filed on 31st July 2017. However, during the trial it came out that the Government of Seychelles was key to the process of constructing the road resulting in the Plaintiff's counsel seeking an adjournment to add the Government as a defendant. Motion to amend the Plaint and add another party was granted on 22nd June 2018 resulting in the current Plaint dated 1st June 2018 before the Court with the Attorney-General representing the Government of Seychelles as the first Defendant and Telecom Seychelles Limited as the second Defendant.

[3] The first Defendant requested that the matter start afresh, which it did, in view of the fact that the first Defendant had not been a party to the case when the evidence of the Plaintiff was taken and the locus in quo conducted.

[4] The Plaintiff claims in its paragraph 4 of the Amended Plaint that:

> 4. *[A]t some point prior to 2013 the 1st Defendant acting through its Ministry Local Government without the permission and consent of the Plaintiff and that approval of the Town and Country Planning Authority entered or caused or directed or*

authorised its employees or agents or contractors to enter unto the Plaintiff's land parcel PR6441 for the purpose of carrying out earthworks therein to construct an earth road on part of the Plaintiff's land parcel PR6441 for the public to use, which road was constructed.

[5] The Plaintiff further claims in paragraph 7 of its Amended Plaint that:

> 7. *[O]n a date unknown within the past five (5) years of the entry of this suit and after the 1st Defendant had constructed the said road on the Plaintiff's land parcel PR6441, the 2nd Defendant without the express or implied permission and consent of the Plaintiff entered, carried out or performed or the 2nd Defendant without the Plaintiff's express or implied permission and consent caused its agents, contractors and/or servants to enter, carry out and/or perform the following on the Plaintiff's and parcel PR6441:-*
>
> 7.1 *enter unto the land; and*
>
> 7.2 *carry out earthworks on part of the land; and*
>
> 7.3 *create or build or extend a road on the land or improve, extend or widen the existing road that the 1st Defendant had built on the land; and*
>
> 7.4 *surface a part of the land and constructed a parking space for vehicles on the land; and*
>
> 7.5 *place concrete surfaces on parts of the land; and/or*
>
> 7.6 *use the land to access land parcel PR5541 for the Defendant to install the Structure on land parcel PR5541 and/or to access the Defendant's Structure on land parcel PR5441.*

[6] By its paragraph 14 the Plaintiff claims that:

> 14. *By reasons of matter aforesaid, ... that:-*
>
> 14.1 *the said entry and works carried out or caused to be carried out by the 1st Defendant on the Plaintiff's land are unlawful and wrongful, which amount to a faute in law, for which the 1st Defendant is responsible to make good to the Plaintiff;*
>
> 14.2 *the said entry, works carried out and use and/or trespass by the 2nd Defendant, its employees, agents and contractors on the Plaintiff's land are unlawful and wrongful, which amount to a faute in law, for which the 2nd Defendant is responsible to make good to the Plaintiff; and*

14.3 the 2nd Defendant, its employees, agents and/or contractors should be ordered to cease the use of, and trespass unto, the Plaintiff's land parcel PR6441;

14.4 the 1st and 2nd Defendants should be ordered to restore the Plaintiff's land to its original state and condition; and

14.5 the Plaintiff has suffered loss and damages in the aggregate sum of SCR 2, 200, 000/- and continuing as set out hereunder for the trespass and unlawful entry, use and construction and damage to the Plaintiff's land parcel PR 6441, which damages the 1st and 2nd Defendants are liable to pay the Plaintiff as set out below.

Particulars of Loss and Damages against the 1st Defendant

14.4.1 Depreciation of land	*SCR 400, 000/-*
14.4.2 Unlawful entry and use and trespass	*SCR 200, 000/-*
14.4.3 Loss of enjoyment and use of property for the period since the construction	*SCR 300, 000/-*
14.4.4 Moral Damages for anxiety, Distress and inconvenience	*SCR 100, 000/-*
Total	*SCR 1, 000, 000/-*

Particulars of Loss and Damages against the 2nd Defendant

14.4.1 Depreciation of land	*SCR 400, 000/-*
14.4.2 Unlawful entry and use and trespass and continuing	*SCR 500, 000/-*
14.4.3 Loss of enjoyment and use of property for the period since the construction	*SCR 200, 000/-*
14.4.4 Moral Damages for anxiety, Distress and inconvenience	*SCR 100, 000/-*
Total	*SCR 1, 200, 000/-*

[7] The Plaintiff prays for judgment as follows:

(i) declare that the 1st Defendant has unlawfully entered unto and constructed an access road on the Plaintiff's land; and/or

(ii) *declare that the 2nd Defendant has unlawfully entered unto and unlawfully carried out works on the Plaintiff's land; and/or*

(iii) *declare that the 2nd Defendant has unlawfully entered unto and used an/or trespassed onto the Plaintiff's land; and*

(iv) *order that the 1st and 2nd Defendants restore the Plaintiff's land parcel PR 6441 to its original state and condition at the Defendant's joint cost and expense; or*

(v) *order that if the Defendants or any one of the Defendants fail to restore the Plaintiff's land to its original state within a specified time limit that the Plaintiff may restore the Plaintiff's land parcel PR 6441 to its original state and condition at the Defendant's cost and expense; and*

(vi) *a permanent injunction requesting that the 1st and/or the 2nd Defendants refrain from any further entry and use or trespass on the Plaintiff's land; and*

(vii) *condemning and ordering the Defendants to pay the Plaintiff damages as follows:-*

(a) *the 1st Defendant in the sum of SCR 1, 000, 000/-; and*

(b) *the 2nd Defendant in the sum of SCR 1, 200, 000/- and continuing with interest; or*

(c) *condemning and ordering the Defendants jointly and severally to pay the Plaintiff damages in the sum of SCR 2, 200, 000/- with interest and cost of the suit.*

[8] The first Defendant by way of Defence dated 3rd October 2018 and the second Defendant by way of Amended Defence to Amended Plaint dated 2nd October 2018 put the Plaintiff to proof of its case.

[9] The first Defendant denied the claim but admitted that the "Department of Local Government concretised a portion approximately 60 x 2 metres of the earth road that was in existence for decades and had been in use by families living in the area as the only access to their homes on the request of the residents." The first Defendant further claimed that it had in fact enhanced the value of the properties in the area including that of the Plaintiff by concretizing that portion of road.

[10] The first Defendant pleaded that the Plaintiff has no cause of action against the first Defendant and the suit is time barred.

[11] The first Defendant prayed for the dismissal of the Plaint with costs.

[12] The second Defendant also denied the claim of the Plaintiff. For its part the second Defendant admitted that it used "a small stretch of road along a well-defined footpath to access Parcel PR5441 and continues to do so occasionally in order to reach the structure for maintenance purposes and repairs whenever required to its antenna and associated equipment." The second Defendant admitted widening part of a well-defined footpath by cutting some wild bushes on both sides to allow a motor vehicle to drive to the structure.

[13] The second Defendant asserted that as a telecommunication licensee has a statutory right to pass on the property of any third party in order to access its telecommunication apparatus and can construct works upon, over, under, across or along any street, road, land, building or other property and in so doing has the right of use of the soil pursuant to the provisions of the Broadcasting and Telecommunication Act 2000 (Cap 19) and as such cannot be a trespasser.

[14] The second Defendant further claimed that if it caused any damage to the Plaintiff's land, which it denied, entitling the Plaintiff to compensation then the Plaintiff must pursue the avenue under section 19 of the Broadcasting and Telecommunication Act (Cap 19) which would determine whether or not the Plaintiff is entitled to compensation and if so, the quantum payable.

[15] The second Defendant prayed for a judgment refusing the declaration, injunctions and damages as well as dismissal of the Plaint with costs.

Plaintiff's Evidence

[16] Mr. Christopher Gill testified that he lives at Anse Takamaka, Praslin. Francis Gill is his older brother. He has a general power of attorney dated 6th February 1992 (PE1) to conduct any transaction on behalf of his brother Francis Gill. He is aware of the property PR6441 in the name of Francis Gill. PR6441 is a subdivision of PR171 which was a property transferred on 27th July 1990 into the name of Francis Gill from Harry Berlouis and registered on 6th September 1990. It was his evidence that a road had been put in without his or his brother's permission. PUC paid for a 10 metres access way which has two strips of concrete. From this, there is another 10 metres of two concrete strips partially filled in (PE3) and another 60 metres stretch of concrete. In 2015 or 2016 when he went up to the

property, because he was interested in developing the site, he was shocked to find the whole place had been paved. He called in Mr. Ah-Kong to survey the land to make sure the Airtel tower was not on the Gill property. The Airtel tower was less than a metre within the neighbouring property and they were using the access on the Gill's property.

[17] It was his testimony that second Defendant (Airtel) never approached him or his brother for permission to use the access. Soil was removed to get a road access. The witness thought it was Airtel that had concretised the road until the first hearing where he heard the testimony of Mr. Pointe and realised it was the government that had built the road. On 31st July 2017 Mr. Frank Ally wrote to the CEO of Airtel to request that the company stop trespassing on the property and to restore it to its original state. Airtel still uses the access, as the witness testified that he sees the truck going up all the time.

[18] The District Administrator never sought his or his brother's permission in respect of the road built on his brother's property.

[19] He explained that he is claiming SCR 400, 000/- from the first Defendant for depreciation of land which he believed was a reasonable price for the damage done; SCR 200, 000/- for the unlawful entry, use and trespass ; SCR 300, 000/- for loss of enjoyment and use of the property since they cannot use the property until the matter is adjudicated and SCR 100, 000/- as moral damages for the government's failure to respect their property rights.

[20] With regards to the second Defendant the witness explained that he was claiming SCR 400, 000/- for depreciation of land because the second Defendant extracted soil on the prime piece of the property; SCR 500, 000/- for unlawful entry, use and trespass that is continuing because there is no reason for Airtel to hold the property business at a disadvantage for its own benefit; SCR 200, 000/- for loss of enjoyment and use of the property because the road going through the property prevented them [Christopher Gill and Francis Gill] going ahead with their project; SCR 100, 000/0 for moral damages because they had an investor from Dubai for SCR 15 million but the project fell through because of the road on the property.

[21] In cross examination the witness stated that Mr. Issaac Orphee moved out from the area in 2012. He never witnessed anyone doing excavation. It was his evidence that where the road

has been built he was going to place a villa and denied that the road had enhanced the value of the property.

[22] Mr. Antoine Ah-Kong testified that he is Land Surveyor by profession. He was requested by the Plaintiff to survey the existing road on PR6441 leading up to the Airtel mass. He was requested to see the alignment of the road.

First Defendant's Evidence

[23] Mr. Daniel Adeline testified that he is the Director General for Project Planning and Maintenance in the Local Government Department. Previously he was the Director of Projects. As the Director of Projects he was responsible for implementing projects which the District Administrator had earmarked for implementation in the district. He recalled a project at Anse La Blague, Praslin. It was a request from the District Administrator to surface an existing dirt road at Anse La Blague. The aim of the project was to facilitate access for a family. A scope of work was produced in order for the contractor to price the project. The road was to be 60 metres length by 3 metres wide with concrete laid. Wayleave was obtained from Mr. Harton Lesperance for parcel PR5541and Mr. Auguste Lesperance for parcel PR 5326.

[24] Mr. Brian Lesperance testified that he is a resident of Anse La Blague, Praslin. Harry Berlouis owned land next to him. It was his testimony that he uses a footpath to access his property and there are three houses using the footpath. The path used to be wide enough for a vehicle to pass through but the bush has grown. (Page 4 of the proceedings of 15th November 2019). He identified the concrete strips on PE3a as being the pathway that had been in existence for around 10, 15 to 20 years. According to him at the time the concrete strips were put in the property belonged to Harry Berlouis and he was allowed to use the footpath.

[25] In cross examination the witness stated that his childhood home was destroyed some 30 years ago. He does not live as far up as the tower but lower down. Another group of people live higher up and use the path. It was his testimony that there used to be just a pathway but about 20 years ago one Aunty Leonie Adrienne cleared up the place so a vehicle could go through. It was further his testimony that before he gave the second Defendant

permission to put in the mast only him and his father used the footpath which then was wide enough for two people to pass through. He supposed "maybe they [Airtel] went up with transport, the cleared some prunes."

Second Defendant's Evidence

[26] Mr. Kenneth Mervin Robert Pointe testified that he is Quarry Manager for CCCL at the Praslin branch. He is a resident of Baie Ste Anne, Praslin. He identified the access to the Airtel mast that was used on the day of the locus in quo. It was his testimony this access was the only motorable access to the property. He further testified that while he was the District Administrator for Baie SteAnne in 2012 the Local Government approved a project to lay concrete on an existing access. He stated that there were a lot of different footpaths from the main access.

[27] In cross examination he stated that when he went up to the area as District Administrator the road was already wide enough to lay the "congregate". The people within the community had already widened the road and the District Administration just came in only for the laying of the concrete. He stated that initially, the road that leads to the antenna was only a footpath, just wide enough for one person. But from his observation at the locus in quo the road is now wider. It was his testimony that "it would have been difficult" to get a car to the Airtel mast before the concrete was laid. He agreed that the landscape had changed. On being asked if only trees had been cut or some soil changed shape, he stated that "a little bit of both" had happened.

Locus In Quo

[28] The Court in the presence of all parties attended a locus in quo on 28th June 2019 at 10am.

[29] It came out on locus that there were three portions of road concretised at different times; the two strips from the main road to the PUC pump, another two strips of concrete from there up to the concretised road.

[30] It also came out in the locus that there were a number of different footpaths on the area. Mr. Gill asserted that the access was from the main road to the Lesperance property on PR 5540 and from there on to the other Lesperance properties, while Mr. Lesperance insisted

that the footpath followed the concretised road and then forked to the left to go to the Airtel tower and to the right to go further uphill.

Submissions

[31] Learned Counsel for the first Defendant submitted that the burden of proving a "fact in issue" generally lies on the party that asserts that that fact exists in order to prove its claim, though the party denying is entitled to admit evidence to show that what is asserted by the opponent is not the case. Learned counsel submitted that the Plaintiff's case being based on "fault" allegedly arising from trespass and building a road on his property by the first Defendant, the Plaintiff must prove the precise nature of the "fault" and the burden of proving the "fault" lies on the Plaintiff. Learned counsel asserted that mere conjectures and presumptions are not sufficient.

[32] Learned counsel for the first Defendant referenced Article 1382 of the Civil Code, submitted that the three elements required to establish delictual responsibility or liability are fault, damage caused and a causal link between the two. Furthermore, that "in light of the evidence led by the Plaintiff, the allegation of 'fault' was not proven against the first Defendant.

[33] It was Learned counsel's submission that the evidence establishes that the access road in dispute has been in existence since the time of the father of Mr. Lesperance and in continuous use ever since by a number of households in the area. It was Learned counsel's submission that they had acquired a right of way by continuous use of 20 years in accordance with Article 685 of the Civil Code. And since concrete was laid on the said right of way, there was no 'faute' committed and therefore no cause of action against the first Defendant. Learned counsel further submitted that as a result of Mr. Lesperance and the family of Mr. Orphee acquiring a right of way by 20 years continuous use and the action being brought in 2018, the action is therefore prescribed by operation of Article 2271 and 2262 of the Civil Code.

[34] Learned counsel submitted that it could not be proved that any damage was caused to the property but that on the other hand the quality of life and value of the properties in the area including the Plaintiff's had improved.

[35] In support of those contentions, Learned counsel for the first Defendant relied on the cases of **Roy Norah & Ors v Berther Otar [1983] SLR 55**; **Mirabeau v Camille [1974] LSR 168** and **Robert Georges v Pierreline Basset [1983] SLR 177.** Learned counsel also relied on the case of **Patric Angelo v Ministry of Local Government (CS 58/2012)** at paragraph 62 in its argument that in the event that the Court finds that there was a cause of action against the first Defendant, the encroachment ay be limited only to the extent of the areas where the concrete was laid.

[36] Learned counsel for the second Defendant submitted that the Plaintiff has erroneously alleged that Airtel, the second Defendant, has built a road, surfaced part of the land, constructed a parking space, placed concrete surface on part of the land and caused damage to the Plaintiff's land but did not produce any evidence of the above against Airtel.

[37] Learned counsel submitted that while the second Defendant admits and showed the Court that is cut a few 'prune de france' trees on a length of about 20 metres of the Plaintiff's land along a footpath leading to the antenna in order to allow a mrtor vehicle access. But it was Learned counsel's submission that the Plaintiff had not shown any economic value of the loss of the 'prune de France'.

[38] Learned counsel for the Plaintiff submitted that it is apparent that at some point there was some form of footpath that lead from the main road to the top of the hill that crossed the Plaintiff's land. It was Learned counsel's submission that the exact location of the footpath varied over time.

[39] With regards to the arguments put forward by the first Defendant, Learned counsel for the Plaintiff submitted that a right of way is an easement that cannot be acquired through prescription by virtue of article 691. It was Learned counsel's submission that if the owners of PR5541 did not have a right of way over the Plaintiff's land then they could not have given the first Defendant permission to concretise the encroaching road.

[40] With regards to the second Defendant, Learned counsel for the Plaintiff queried the reasons for the second Defendant seeking the permission of the owner of parcel PR5541 if the second Defendant has a statutory right under section 18 of the Broadcasting and

Telecommunications Act to enter and construct on land. Learned counsel submitted that the second Defendant having sought permission of the owner of PR5541 to erect the structure should have sought the permission of the Plaintiff as well.

[41] It was Learned counsel's submission that both the first and second Defendants were liable for the acts of damage they have caused to the Plaintiff's land.

Decision

[42] The issues for the Court to consider are as follows:

(1) Does the Plaintiff have a cause of action against the first Defendant?

(2) Is the Plaintiff's suit prescribed?

(3) Is the Broadcasting and Telecommunications Act applicable in this matter?

(4) What damages are payable to the Plaintiff if any?

Does the Plaintiff have a cause of action against the first Defendant?

[43] The Plaintiff's case is based on "faute", under Article 1382 of the Civil Code which reads as follows:

> *1. Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.*
> *2. Fault is an error of conduct which would not have been committed by a prudent person in the special circumstances in which the damage was caused. It may be the result of a positive at or an omission.*
> *3. Fault may also consist of an act or an omission the dominant purpose of which is to cause harm to another, even if it appears to have been done in the exercise of a legitimate interest.*
> *4..*

[44] As Learned Counsel for the first Defendant rightly stated the Plaintiff has to prove that the Defendants through an action of theirs or agents caused damage to the property of the Plaintiff.

[45] Learned counsel for the first Defendant relied on Articles 682, 683 and 685 of the Civil Code of Seychelles which provide as follows in relevant parts:

> *Article 682*
> 1. *The owner whose property is enclosed in all sides, and has no access or inadequate access to the public highway, ether for the private or for the business use of his property, shall be entitled to claim from his neighbours a sufficient right of way to ensure the full use of such property, subject to his paying adequate compensation for any damage that he may cause.*
> 2....
>
> *Article 683*
> *A passage shall generally be obtained from the side of the property from which the access to the public highway is nearest. However, account shall also be taken of the need to reduce any damage to the neighbouring property as far as is possible.*
>
> *Article 685*
> 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 on condition that he is prepared to return such a proportion of any compensation received under paragraph 1 of Article 682 as us reasonable in the circumstances.*
> 2.....

[46] Learned counsel for the first Defendant also relied on the case of **Roy Norah & Others v Berthe Otar [1983] SLR 55** in which the plaintiffs sought a declaration of a right of way over the defendant's land along a footpath they alleged had been used by them to gain access. The defendant denied continuous used of the footpath by the plaintiff and alleged that they had an alternative right of way. Wood J concluded that he was unable to draw the conclusion that the position of the right of way had been fixed by prescription in view of the testimony that the third plaintiff purchased her property in 1980 and 20 years prior all the plots belonged to one Gilbert Lablache. However Wood J went on to grant the declaration being satisfied that the plaintiffs all had a right of way.

[47] In the case of **Mirabeau v Camille [1974] SLR 158** the Court found that the 'assiette du passage' for the exercise of the first plaintiff's right had been prescribed by him by use for at least 20 years.

[48] In the case of **Robert Georges v Pierreline Basset [1983] SLR 177** the Court held that where a right of way has been so provided the land owner had the right to have the 'assiette du passage' fixed by the Court.

[49] The first Defendant's defence is that it did not cause any damage to the Plaintiff's land in view of the right of way that was already in existence and in use by the families in the area.

[50] What the first Defendant has omitted to refer to though is Article 691 of the Civil Code of Seychelles which provides that:

> *Non-apparent continuous easements and discontinuous easements, apparent or non-apparent, may not be created except by a document of title.*
>
> *Possession, even from time immemorial, is not sufficient for their creation.*

[51] As a result of Article 691 of the Civil Code, before the Court can accept the defence raised by the first Defendant, the first Defendant has to show that the residents living in the area has a right of way over the Plaintiff's property and the first Defendant merely assisted in enhancing that right of way.

[52] The Court in the case of **Larue v Boniface & Another (CS52/2016) [2018] SCSC349 (10 April 2018)** explains the position clearly and is right on point. The plaintiff in that case claimed that his land was enclaved and prayed for a right of way from the defendants. The first defendant denied the plaint and averred that there was a more convenient route for the plaintiff to access his land. She counter-claimed for physical damage resulting from the plaintiff acts in entering her land illegally and damaging it. The Chief Justice found that "the law is … clear on the fact that it is incumbent on the person who seeks the right of way to prove it by registered title deed or to claim it in court. The owner of the servient tenement need not prove anything and the dominant tenement is only burdened by registered easements arising from title of court orders". (see para 41. See also **Ramgasamy**

v Chief Executive Officer of Planning Authority[2016] SCSC 865 for a summary of the law)

[53] With regards to the current case there is no testimony as regards the status of the land, whether it is enclaved or not, though it was clear on the cadastral that PR5541 sits between three plots on its four sides. I am in no doubt therefore that PR5541 is enclaved.

[54] In accordance with Article 682 the owner of parcel PR5541, being enclaved, is entitled to a right of way over his neighbour's land provided he has no access or adequate access. That right of way can only be obtained by document of title or by claiming it before the Court.

[55] Indeed Mr. Lesperance testified that the only path to his house was the one located on the Plaintiff's property. The evidence of Mr. Kenneth Pointe supports that of Mr. Brian Lesperance that there has been a footpath in that area for well over 15 to 20 years. However continuous use of at least 20 years becomes relevant only when one claims a right of way before the Court. In such instance the continuous use of at least 20 years will guide the parties and the Court as to the "position and the form" of the right of way. It is irrelevant for the purposes of these proceedings if the families in the area have been using the 'road' for 20 years or more since there is no claim for a right of way. Use of a footpath for 20 years does not give the residents nor the first Defendant a right to convert the footpath into a motorable access without a right of way granted by a document of title or granted by the Court.

[56] With that said I find that the cases of **Norah**, **Mirabeau** and **Georges** referred to above have no relevance to the instant case.

[57] Mr. Lesperance testified that the concrete strips, between the first two concrete strips from the main road and the concretised road, were put in by volunteers about 10, 15 to 20 years ago with the permission of Mr. Harry Berlouis However the evidence is that the property was transferred to the name of Francis Gill in 1990, well over 29 years ago, in which case Mr. Berlouis could not have given permission to put in the concrete even 20 years ago.

[58] In any case I note the evidence of Mr. Gill in cross examination by Mr. Shah, that the "footpath was position at PR5540 up to PR5541, PR5540 gave access to Lesperance

property and then to PR5541 and then from PR5541 to PR5539. The whole idea is that the footpath, Lesperance would have access. So we gave access from the main road and then it goes on to their property and then would have contribute the footpath…the footpath from the main road was after the water tank and right up to where the concrete 5540."

[59] The Plaintiff accepts that the Gill family gave access to the Lesperance family from the main road up to PR5540, which would be over the two concrete strips put in by PUC and the two other concrete strips allegedly put in by volonteers. I note that the Plaintiff has made no claims with regards to those two concrete strips allegedly put in by volunteers.

[60] It was Mr. Pointe's evidence that when he came on site as the District Administrator the road had already been "done" by people in the community, the government only came in to lay concrete. The width of the road is noted as is the level of the road as compared to the prune de france growing on the sides. Moreover the 'parking' beyond the concrete road is also noted, the kind of earth work that has been done could not have been done by hand with a hoe and spade. In fact Mr. Adeline in cross examination by Learned counsel for the Plaintiff explained that "grading means if the road is a bit rough. It come with a machine or with hand you level the road fitting the wholes (sic) everything." Furthermore the wayleaves produced by the first Defendant as D4 and D5 describes the works to be done as "constructing a motorable access road". The scope of work produced by the first Defendant as D2 shows that the description of the work was for "grading of road, level, compact and lay 100mm thick concrete bed…" The attached drawing shows a "200mm compacted hardcore fill". From this it is patent that the 'road' was not 'done' by people in the community but by the first Defendant.

[61] The first Defendant had no right to cut a road in the Plaintiff's property even if it was part of its community development project without the permission of the Plaintiff. The first Defendant did not even have the right to lay concrete, if one is to believe the evidence of Mr. Pointe, on a road 'done' by people in the community without proof that the people in the community had a right of way over the Plaintiff's property granted by document of title or by a Court.

[62] It is also noted that the two way leave produced as D4 and D5 for the first Defendant relate to PR5326 and PR5541 when the road at no point passed nor pass through either property but goes through that of the Plaintiff. The fact that the first Defendant sought way leaves from the beneficiary of the right of way as opposed to the one to be burdened with it speaks to the lack of due diligence of the first Defendant in ascertaining that in fact the road it was going to lay concrete over was in fact a right of way over the land.

[63] On the above I find that the Plaintiff informally granted access from the main road, straight North, up to parcel PR5540. There is no evidence that there was a right of way granted to any of the residents of the area by the Plaintiff anywhere else on his land and more specifically at the position where the concrete road is situated. In that case the plea in limine that there is no cause of action against the first Defendant has to fail.

[64] As a result the first Defendant's act of laying concrete over the 'road' on the Plaintiff's land amounts to a faute for which the first Defendant is liable to the Plaintiff.

Is the Plaintiff's suit prescribed?

[65] Learned counsel relied on Article 2271 and 2262 of the Civil Code for her plea that the action is prescribed by operation of law.

[66] She submitted that the action is prescribed as a result of Mr. Lesperance and the family of Mr. Orphee having acquired a right of way by 20 years continuous use.

[67] In view of the fact that a right of way is a non-continuous easement Learned counsel's submission cannot succeed.

[68] This Court cannot explain the position any better than Msoffe JA did in the case of **Waye-Hive v Welch (SCA 07/2013) [2015] SCCA 9 (17 April 2015)** as follows:

> *[10] Under the Civil Code there are various kinds of easements which can be created over property. Article 688 makes a distinction between continuous and discontinuous easements. Discontinuous easements are those which need human intervention for their use, such as rights of way, draining water, etc. In this case*

the parties are agreed that the right of way in controversy is a discontinuous easement.

[11] The question is whether the right of way in issue can be acquired by prescription as contended by the Appellant. In other words, the issue is whether she has acquisitive prescription over the property after possessing it for a period of over 20 years.

[12] With respect, the answer to the above issue is simple and it is in the negative. Article 691 is very clear on this. It states:-

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

Possession, even ***from time immemorial, is not sufficient for their creation***.
[Emphasis added.]

[13] So, a right of way is a real right. But it requires a document of title under Article 691. Therefore, it can never be created by possession even if the possession was from time immemorial ? See ***Payet v Labrosse and Another*** *[1978] SLR 222,* ***Delorie v Alcindor and Another*** *[1978] – 1982] SCAR 28 and* ***Sinon v Dine*** *[2001] SLR 88.*

[14] Under the French law of property, from which the Seychellois law of property originates, it must be remembered that the guiding principle is the concept of the absolute and inviolable property rights of the owner. This is expressed in Article 545 of the Civil Code of Seychelles which provides that:
No one may be forced to part with his property except for a public purpose and in return for fair compensation. The purposes of acquisition and the manner of compensation shall be determined by such laws as may from time to time be enacted.

The Court de Cassation has in a recent case reaffirmed the strict application of this rule (Cour de Cassation arrêt of 10 novembre 2009. Civ. 3 ème 10 novembre 2009 Pourvoi n? 08-17526).
It is for this reason that the provisions relating to rights of way and encroachments are expressly provided for with strict limitations. Insofar as rights of way are concerned, the guiding provisions of the Civil Code expressly refuse to allow acquisitive prescription. As we have stated rights of way can only be created by a title deed. (Article 691 Civil Code of Seychelles.) (supra).

Is the Broadcasting and Telecommunications Act applicable in this matter?

[69] Learned counsel for the second Defendant submitted there is no evidence that the second Defendant was the one who cut into the soil to make a road to reach the antenna.

[70] Learned counsel relied on the evidence as follows to support his position; the Plaintiff at page 29 of the proceedings of 24th May 2019 at 9am,

> *Q: So the stretch of the road near Airtel tower, there are bushes on both sides?*
> *A: Yes, now there are bushes on both sides. Before that there were all bushes.*
>
> *Q: And the bushes were cleared in order to access the tower?*
> *A: Apparently, but the whole area, there was fire four years ago, it does not have the same fauna that it has before but yes, the are was cleared to access the tower position.*

[71] Mr. Brian Lesperance for his part on being cross examined by the Plaintiff's attorney on 15th November 2019 had this to say:

> *At page 9*
> *Q; So the path goes where?*
> *A: It was pathway used a long time ago.*
>
> *At page 11*
> *Q: Is that the road that goes to the area?*
> *A: Yes, they just cleared few runes, it was a footpath.*
>
> *Q: When you have Airtel permission to put this mast, how wide was this path?*
> *A: It was that wide, (court agrees to 1.5 metre)*
>
> *Q: Before you gave Airtel permission to go to this aerial, were you the only going up and down that road to Airtel?*
> *A: Yes*
>
> *Q: And after you allowed Airtel to put the mast on your property, who made the road wider?*
> *A: Maybe they went up with transport, they cleared some prunes.*

[72] Indeed the second Defendant admitted in paragraph 4 of its Defence to "widen[ing] part of a well-defined footpath by cutting some wild bushes on both sides to allow a motor vehicle to drive to the Structure".

[73] Having admitted to cutting a few 'prune de france' trees in order to widen the footpath the second Defendant cannot now state that there was no damage to the Plaintiff's land caused by the second Defendant. This Court agrees that there is no evidence that the second Defendant concretised, paved or surfaced any road on the Plaintiff's land. However I noted on the site visit that where the road is situated the level of the soil is lower than where the "prune de France" are growing. This is in line with Mr Adeline's evidence where he explained that as part of the scope of work for the concretised potion of the road grading has to be done, which means a machine comes in and levels the road. This is in line with the idea that whereas with a footpath one just clears the brush in order to pass through, a vehicle access by its very nature needs some sort of excavation in order to allow certain levelling to allow a vehicle through. Furthermore, the size of the structure is noted. The second Defendant would have needed big vehicles to transport the parts in order to assemble and erect the antenna.

[74] In addition the evidence of Kenneth Robert in cross examination on the issue was as follows:

> *Q: And again given that you are one of the few people who have been on the site prior to both roads been present would you say that the landscape, just the soil road has changed to what it is now. So before you said it was a footpath, the car would not be able to go through now it is an access road that a car can easily go through. Would you say that the landscape itself has changed?*
> *A: Yes.*
>
> *Q: Or would you say that only some trees has been cut or would you say that soil itself has changed the shape.*
> *A: A little bit of both.*

[75] Even if the second Defendant may have caused damage to the Plaintiff's property, Learned counsel for the second Defendant submitted that the proper manner to claim compensation would be under the Broadcasting and Telecommunications Act.

[76] Section 18 of the Broadcasting and Telecommunications Act

> ***18.*** *(1) A licensee or any person authorised by him in writing may, for the purposes of establishing a broadcasting service or telecommunication service, as the case may be -*
>
> *(i) enter upon any property at any reasonable time for the purposes of such service including any preliminary survey in relation to such service;*
>
> *(ii) subject to any Permission required under the Town and Country Planning Act or to any other law regulating the control and development of land, erect or place any broadcasting apparatus or telecommunication apparatus or posts, or construct works upon, over, under, across or along any street, road, land, building or other property and maintain, after or remove anything so erected, placed or constructed;*
>
> *(iii) subject to any permission required un der the Breadfruit and Other Trees (Protection) Act or any other law regulating the felling of trees, cut or remove any tree or branch thereof which is in contact with any apparatus, post or works erected, plated or constructed under paragraph (ii).*
>
> *(2) A licensee shall not acquire under subsection (1) any 'right other than that of user only of the soil of any street, road, land, building or other property for the purposes of that subsection.*
>
> ***19.*** *(1) In exercise of the powers under section 18, a licensee or the person authorised by him in writing shall do as little damage as may be reasonable in the circumstances.*
>
> *(2) The licensee shall make full compensation to all persons for any actual damage sustained by them by reason, or in consequence, of the exercise of the powers under section 18.*
>
> *(3) Any disputes concerning the amount and application of compensation under subsection (2) shall be determined by the Minister whose determination on the matter shall be final.*

[77] The Court of Appeal judgment of **Cable and Wireless (Seychelles) Ltd v Innocente Gangadoo (Civil Appeal SCA 14/2015) [2018] SCCA 29 (31 August 2018)** is relevant

on this point though the facts are different. The Appellant on or around a date unknown in 1986, built a structure consisting of a telecommunication box and cables in Anse Boileau on land belonging to the Government. On 5 April 2004, the Government transferred Parcel C4755 to the Respondent on which was situated the telecommunication box and in April 2008 the Respondent wrote to the Appellant asking that the structure be removed from her land. The Appellant failed to do so which culminated in the Respondent filing a Plaint in August 2009 in which she prayed for damages from the Appellant for unjust enrichment arising from the structure on her land, and for the Appellant's continued access to the same. That Plaint was dismissed on the grounds that there were alternative legal remedies available to the Respondent. On September 2011, the Respondent filed a fresh plaint, this time claiming indemnity as arrears of rent from the Appellant for the telecommunication box remaining on her land from the Appellant from the time she purchased the property and continuing and also for moral damages. The Appellant appealed against that decision and the Court of Appeal allowed the appeal

[78] The Court of Appeal found that:

> *36. ... Article 26 of the Constitution confers no absolute right to property and that these rights can be necessarily restricted when there are provisions in law necessary in a democratic society for the qualification of the right.*
>
> *37. In the present matter, it remains for us to decide whether the provisions of the Broadcasting and Telecommunications Act meet the qualifications we have extrapolated above in order to be construed as permissible limitations to the right to property. The Act provides the following relevant provisions:*
>
> *"12. (1) The Minister shall be responsible for the general superintendence and supervision of all matters relating to broadcasting and telecommunication and shall carry the provisions of this Act into execution.*
> *(2) The Minister, in exercising the powers conferred by this Act, shall -*
> *(a) take all reasonable measures to provide throughout Seychelles, such broadcasting and telecommunication that will satisfy all reasonable demand for such services, including emergency services, public pay phone services and directory information services;*
> *(b) promote the interests of consumers, purchasers and other users of broadcasting and telecommunication services in respect of the prices charged for, and the quality*

and variety of, such services and equipment supplied in connection with such services;
(c) promote and maintain competition among persons engaged in commercial activities for, or in connection with, the provision of broadcasting and telecommunication services and promote efficiency and economy on the part of such persons; and
(d) promote the goals of universal service.
...

18. (1) A licensee or any person authorised by him in writing may, for the purposes of establishing a broadcasting service or telecommunication service, as the case may be -
(i) enter upon any property at any reasonable time for the purposes of such service including any preliminary survey in relation to such service;
(ii) subject to any Permission required under the Town and Country Planning Act or to any other law regulating the control and development of land, erect or place any broadcasting apparatus or telecommunication apparatus or posts, or construct works upon, over, under, across or along <u>any</u> street, road, <u>land</u>, building or other property and maintain, after or remove anything so erected, placed or constructed;
...

19.(1) In exercise of the powers under section 18, a licensee or the person authorised by him in writing shall do as little damage as may be reasonable in the circumstances.
(2) The licensee shall make full compensation to all persons for any actual damage sustained by them by reason, or in consequence, of the exercise of the powers under section 18.
(3) Any disputes concerning the amount and application of compensation under subsection (2) shall be determined by the Minister whose determination on the matter shall be final."

38. It cannot be doubted that these sections of the Act certainly provide for the public interest, convenience and even necessity of accessing telecommunication services. We note in this context that Article 22 of the Constitution provides for the freedom of expression which includes the right "to seek, receive and impart ideas and information without interference."

[79] The Court of Appeal concluded that:

In this respect given the provisions of section 19 of the Broadcasting and Telecommunications Act, we urge both the Vice President with the portfolio for nformation Communication Technology and the Minister responsible for Land *to consider this matter with a view to correcting the injustice caused by the Government and compensating the Respondent for the loss arising from the fact that her enjoyment of her property is limited given the continued siting the Appellant's infrastructure on her land.*

[80] Given the above I have to agree with Learned counsel for the second Defendant and find that s.19 of the Broadcasting and Telecommunications Act is the proper route for the Plaintiff to follow in order to seek compensation for any damage by the second Defendant in the exercise of its powers under section 18. However, it needs to be said though that merely because the second Defendant has the right in law to use of a person's property in order to provide the essential service it does, it should also be mindful not to act in an arbitrary manner. There is no law stopping the second Defendant from communicating with the land owner in order to arrive at a mutually agreeable conclusion with regards to each side's use of the land. Fostering good relations helps both sides.

[81] I decline to address with Learned counsel's submission that the land was enclaved in view that there was no plea of enclavement by the second Defendant.

[82] On the findings at paragraph 80, the Plaint is dismissed against the second Defendant.

What damages are payable if any?

[83] With regards to the quantum payable by the first Defendant, there is no evidence of the value of the land and the depreciation as a result of the road other than the Plaintiff's own evidence that he believes the sum claimed is a reasonable sum. Nor is there any evidence of anxiety or stress. On being asked about his claim for moral damages Mr. Christopher Gill explained that "it is outrageous that the government today and 2000 and beyond has been doing something like this. When we went through the Constitutional Commission in 1992, everybody raised their hands and taken respect to put it right, we argued and debated as a nation that we are going to respect, not taking of private property and there was a legislature process to follow because we can secure someone's land for public use and the

government neglected the process. I think the court needs to send the message to the government that they need to take property rights seriously because property rights are the basic foundation of economic growth of prosperity". His answer spoke more to his indignation at the conduct of the government in putting in the road without seeking permission than the anxiety or stress that was caused by the government's action. In as much as I understand his indignation at the conduct of the government it does not fall within the category of anxiety or stress. In fact his condescending tone with the Learned counsel for the first Defendant is noted as compared to his more cordial tone towards the Learned counsel for the second Defendant. It is noted though the Plaintiff explained that it has taken time to resolve and rectify the case.

[84] It is also noted that the Plaintiff explained that they had an investor from Dubai for SCR15 million but the project fell through because of the road on the property. I decline to take that into account for the purposes of deciding the quantum to be paid by the first Defendant since that evidence was specifically given with regards to the quantum payable by the second Defendant for the damage it caused to the Plaintiff's property, which was on a different part of the Plaintiff's land to that caused by the first Defendant.

[85] The case of **Patric Angelo** above, referred to by the first Defendant does not provide much assistance in determining the award to be made in view of the fact that Renaud J based the awards on the valuation report whereas in the present case there is no valuation report.

[86] I find guidance in the case of **Larue v Boniface & Ano (CS/52/2016) [2018] SCSC 349 (10 April 2018)** where the plaintiff bulldozed his way through the defendant's property knocking down several trees and bushes in an attempt to create a right of way. SCR25, 000/- was awarded for physical damage and SCR25, 000/- for moral damages.

[87] In the circumstances I find the below reasonable and make the following awards:

(1) Unlawful entry and use and trespass	*SCR 25, 000/*
(2) Loss of enjoyment and use of property	*SCR 30, 000/-*
(3) For moral damages for inconvenience	*SCR 20, 000/-*

[88] Judgment is entered in favour of the Plaintiff as against the first Defendant in the sum of SCR 75, 000/-.

[89] The Plaintiff has also prayed for:

(1) an order that the 1st and 2nd Defendants restore the Plaintiff's land parcel PR 6441 to its original state and condition at the Defendant's joint cost and expense; or

(2) order that if the Defendants or any one of the Defendants fail to restore the Plaintiff's land to its original state within a specified time limit that the Plaintiff may restore the Plaintiff's land parcel PR 6441 to its original state and condition at the Defendant's cost and expense; and

(3) a permanent injunction requesting that the 1st and/or the 2nd Defendants refrain from any further entry and use or trespass on the Plaintiff's land.

[90] Other than to issue a permanent injunction refraining the first Defendant from any further entry and use or trespass on the Plaintiff's land, this Court cannot issue any of the other requested orders in view of the findings at paragraph 80.

[91] The second Defendant moved for costs including costs for the aborted hearing.

[92] Noting all the circumstances of the case I decline to order costs in favour of the aborted hearing in favour of the second Defendant.

[93] Each side shall bear their own costs.

Signed, dated and delivered at Ile du Port on ... 3rd July 2020

Pillay J