

Privy Council Appeal No. 41 of 1995

(1) Clarence Michel and

(2) Frances Michel *Appellants*

v.

(1) Lennard Augier

(2) Arlette Augier and

(3) Adrian Augier *Respondents*

FROM

**THE COURT OF APPEAL OF THE EASTERN
CARIBBEAN SUPREME COURT (SAINT LUCIA)**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 16th April 1997

Present at the hearing:-

Lord Browne-Wilkinson

Lord Lloyd of Berwick

Lord Nolan

Lord Nicholls of Birkenhead

Lord Clyde

*[Delivered by **Lord Clyde**]*

1. The appellants are the owners of a plot of land situated at Cambon, Bois d'Orange in the quarter of Gros Islet in the island of Saint Lucia. Their plot is identified as No. 208 on a plan which was produced. They desired to build a house on their plot. But the plot lies some distance to the east of the public highway. It is served by a footpath which for the most part passes through lands owned by the respondents. The appellants require a vehicular access to their land, initially for the passage of vehicles in connection with the construction of their new house and later for a vehicular access to their house. It is with the provision of such a vehicular access that the present case is concerned. It is necessary first to explain the geography more fully. The orientation given in the following paragraph is only approximate. Immediately adjacent to the east of the highway is a narrow strip of land owned by the Crown, known as No. 212. Immediately to the east of that strip lies an area of land referred to as No. 103 which extends from part of the eastern boundary of the strip of Crown land to the western boundary of the appellants' plot No. 208. To the north of plot No. 103 and adjacent to it lie two plots of land Nos. 102 and 122. Plot No. 102 extends for some distance from the other part of the eastern boundary of the parcel of Crown land No. 212. Plot No. 102 belongs to the second respondent and, prior to his death, the first respondent. Their son, who is the third respondent, owns plot No. 122. That plot is bounded on its west side by plot No. 102. However its eastern boundary lies some distance short of the appellants' land, No. 208. Thus while the western boundary of plot 208 is adjacent to plot 103, there is an area of land intervening between the boundaries of plots 208 and 122.

2. On the plan produced the area referred to as plot No. 103 is shown divided up into a number of smaller plots. One of these is a narrow strip extending along the full length of the southern boundary of plots 102 and 122. This strip is numbered as plot 345. The rest of plot 103 is shown on the plan as comprising a series of plots numbered 337 to 344. Their Lordships were informed that plot 345 was designed as a possible proposed footpath to serve the adjoining plots 337 to 344. Plot No.

103 was evidently owned by one Clovis. It appears that since the present litigation began the area formerly referred to as No. 103 has been divided up into the various plots now shown on the plan for the benefit of members of the Clovis family.

3. Plots 102 and 122 are each burdened by a private right of way. This extends from the public highway across the narrow parcel of Crown land, across plots 102 and 122, across a corner of plot 103 and into the appellants' plot No. 208. The line of this right of way has been developed into a vehicular access from the highway up to a point within plot No. 122 where it leaves the line of the right of way to serve the house owned by the third respondent.

4. The appellants asked the respondents if they would agree to a continuation of the vehicular road along the line of the right of way. It was understood that Clovis would agree that such a use could be made of the length of the right of way which crossed his plot. The respondents however refused. The third respondent indeed blocked off the right of way altogether with a fence at the point where it left his plot and entered plot 103. The appellants then sought relief in the High Court claiming among other things a declaration that they were "lawfully entitled to the said Right of Way in accordance with Article 486 of the Civil Code Chapter 242". Article 486 provides as follows:-

"486. A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, may claim a way upon that of his neighbours for the use of his property, but must pay an indemnity proportionate to the damage he may cause."

5. Reference should also be made to the three Articles which follow Article 486.

6. Article 487 gives guidance on the selection of the neighbouring lands over which the right may be established. It provides:-

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

7. Further guidance is given on the situation of the route in Article 488. It provides:-

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

8. Article 489 provides for the eventuality of land becoming enclosed in certain circumstances. It provides:-

"489. If the land becomes so enclosed in consequence of a sale, of a partition, or of a will, it is the vendor, the copartitioner, or the heir, and not the proprietor of the land which offers the shortest crossing, who is bound to furnish the way, which is in such case due, without indemnity."

9. The matter came before Matthew J. on an application for an interim injunction to restrain the respondents from blocking the existing road. He understood mistakenly from records in the Land Registry that there was a vehicular right of access to the appellants' land through the respondents' lands. The action later was set down for hearing and at the trial he heard evidence and submissions and also made a visit to the site. It was by that stage clear that the appellants had only a pedestrian right of access over the respondents' lands. The appellants were claiming a vehicular right of way of necessity. They wanted to make a connection with the vehicular road which extended through plot 102 and into 122. They wanted to change the pedestrian path which served their own plot into a road, so that a road would pass through the whole of the respondents' lands. This route may be referred to as Route A. The judge held that the least injurious path, and the shortest one, was a route which would run straight down the northern boundary line of plot No. 103 ("Route B"). That route involves further encroachment onto the lands of Clovis and it was not known what his attitude might have been to such a course. The trial judge dismissed the action.

10. The appellants then appealed to the Court of Appeal. Two issues were then identified: whether the appellants were entitled to a right of way over route A and whether they were entitled to an enlargement and conversion of the pedestrian right of way to a vehicular access to their plot. The Court of Appeal unanimously dismissed the appeal. The appellants have now appealed to the Board on the former of the two issues alone. It is not now argued that the right of way can be enlarged in the manner previously suggested.

11. A submission was made by counsel for the appellants which was not seriously challenged by counsel for the respondents to the effect that the provisions of the

Code require to be given in the public interest a liberal and purposive construction, and in particular that considerations of cost in the provision and the choice of a right of way were relevant considerations. It may be seen as contrary to the public interest that there should be land left barren for want of adequate access to it. The origins of the relevant provisions in the Civil Code of Saint Lucia can be traced back to the Napoleonic Code. Similar provisions can be found in the Civil Code of Quebec which derives from the same origin and the jurisprudence which exists in relation to the Quebec Code is of assistance in exploring the meaning and intention of the Code of Saint Lucia. Thus Articles 486, 487, 488 and 489 of the Saint Lucian Code which have been already quoted correspond almost exactly with Articles 540, 541, 542 and 543 respectively of the Quebec Code. It may be noticed that while the provisions of Article 487 (and Article 541 of the Quebec Code) are qualified by the word "generally" that word does not appear in Article 488 (or Article 542). But that does not mean that a less flexible construction of the latter Article is intended. Indeed in the Napoleonic Code both of these Articles were united in a single Article.

12. In the treatise by Montpetit and Taillefer in relation to Articles 540 to 543 of the Quebec Code there is support for the view that economic considerations may properly be taken into account in the application of them. Further support can be found in the three cases from the Appeal Court of Quebec to which their Lordships were referred, *Beaulieu v. Ayotte* [1968] B.R. 367, *Morrisette et Dame Bienvenue v. Bessette* [1971] C.A. 356 and *Bissonette-Courteau v. Gougoux* [1982] C.A. 565. There may be room for argument whether in relation to these Articles, and more particularly to the equivalent Articles of the Saint Lucian Code, the assessment of the excessive extent of the cost of the relevant works falls to be measured by reference to the value of the enclosed property, or by comparison with the cost of alternative routes, or by some other standard. The expressions used in the treatise and in the cases to which their Lordships were referred admit of some variation between the different Articles. It is not necessary in the present case to determine the question and their Lordships express no view upon it. What is clear is that consideration of cost is a relevant and proper matter to be taken into account in the application of these Articles of the Saint Lucian Code. But that consideration is not merely a matter of comparing the relative costs involved simply with a view to ascertaining or selecting a cheaper alternative. The general rules of the Code should only be departed from where their application involves costs of a disproportionate nature or of a substantially excessive or even prohibitive amount. It is also evident that the burden of proving that the circumstances justify the making of an exception to the rules contained in the Code lies on the person who asserts that an exception should be made. In one passage in his judgment the trial judge stated that the question of the route was not a question of economics. If, but the point is not altogether clear, he was meaning that the construction of the Code excluded economic considerations, that was a mistaken view.

13. But while the law in that regard is clear, and indeed was not seriously disputed, that does not, in the view of their Lordships, materially advance the appellants' case. Their counsel sought to argue not only that the lower court had erred in ignoring economic considerations but also that such considerations pointed to the propriety of upholding the appellants' contention that route A should be adopted. But it is at this point that his argument fails for lack of sufficient support on the facts. The issue which was raised in the writ of summons and responded to in the defence was simply that of a claim for a vehicular right of access over what was alleged to be a road across the lands of the respondents. In the course of the submissions before the trial judge some mention was made of an alternative route on the line of the boundary of plot 103, and it was noted that Clovis would require to be involved if that route was to be pursued. There was mention made of the incurring of a disproportionate cost in the obtaining of an access but that was in the context of a question whether the appellants' land was to be regarded as enclosed. That matter is not in dispute. What is of importance is that neither in the evidence nor in the submissions was any serious attempt made to establish that on economic grounds route A was to be preferred to route B or indeed any other route. The trial judge held that route A was not the shortest route. He held that the least injurious route would be that which he also found to be the shortest. That was route B. From his site visit he was not prepared to hold that, as the appellants had suggested, it was not possible to build an access along route B. He observed that there was no evidence of any cost of the intended road, by which he evidently meant route A, being entirely disproportionate. But that observation came in a passage where, taking up the point made in the submissions, he was considering the enclosed nature of the land. As between the two routes he observed that the making of a connection with the respondents' road would be "simpler, perhaps easier and perhaps cheaper". What he did not do was to balance the considerations including the economic considerations between the two routes. But it does not seem that it was suggested to him that he should do that and no attempt was made by the appellants to give him the material on which he could have done it. It appears that route B involves overcoming a quagmire and what is described as a ravine. But without further detail it cannot be determined that the cost of the work would be disproportionate. While a preliminary view might be hazarded that the construction of a new and longer stretch of roadway over terrain of some difficulty might well be more expensive than the achieving of some connection with the existing roadway in plots 102 and 122, the extent of the difference is by no means clear, the extent of the practical difficulties in the construction of a road along route B remains obscure, and the value of the enclosed land is not available for the purpose of comparison.

14. In the Court of Appeal Sir Vincent Floissac C.J. with whose judgment Dennis Byron J.A. concurred, sought to make a comparison of the relative suitabilities and conveniences of the respective plots of land. He concluded that Clovis' land was the appropriate servient tenement for the appellants' access but since he was not a

party to the proceedings and had no opportunity to be heard no decision affecting him could be given. In making the comparison no account was taken of economic considerations for the very good reason that there had been no particular evidence on that matter. Even in their grounds of appeal the appellants, while criticising the trial judge for holding that what he had to decide was not a question of economics, tied that complaint to the issue whether the lands were enclosed or not and did not even at the stage of appeal argue that as between the alternative routes economic considerations required the adoption of route A.

15. It was then with good reason that counsel for the respondents before the Board complained that new matter was now being raised for the first time in the case, that the case was now different from what it had been, and that he had no opportunity of addressing the issue before. In this connection it may be noticed that, in agreeing that the appeal before the Court of Appeal should be dismissed, Liverpool J.A. held that the right of way was not to be enlarged and that, in the absence of any notice of the point in their pleadings, it was not open to the appellants to seek a determination of their rights on a broader basis.

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

17. For the reasons given above their Lordships find no grounds for interfering with the decision reached by the Court of Appeal. They will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs before their Lordships' Board.

