[2010] UKPC 10
Privy Council Appeal No 0062 of 2009

JUDGMENT

N. Parsooramen & Co Ltd
V
Mrs Fatma Bibi Mahmood Nahaboo
Shereen Bibi Mia Ayoob Sorefan
Ameenah Bibi Mia Ayoob Sorefan
Oomar Mia Ayoob Sorefan
Mohammad Yusuf Mia Ayoob Sorefan

From the Supreme Court of Mauritius

before

Lord Phillips
Lord Rodger
Lord Walker
Lord Brown
Lord Clarke

JUDGMENT DELIVERED BY
Lord Walker
ON

29 June 2010

Heard on 25 April 2010

Appellant	*Respondent*
Maxime Sauzier Danielle Lagesse (Instructed by Blake Lapthorn)	Not represented

LORD WALKER :

1. This appeal is concerned with rights in or over a piece of tarmacadamed roadway, about 35m long and about 8m wide, in the Impasse Pot de Terre, Curepipe. The Court of Appeal referred to the land as "the space" in order to avoid any element of pre-judgment in the expressions "road" or "roadway", and this judgment generally follows the same course. The central issue in the appeal is the status of all or part of the space as a public road as defined in the Roads Act 1966 (Act 29/66 – "the Act").

2. By section 2 of the Act "road" means "any highway, and any other road to which the public has access and any public place to which vehicles have access and includes any bridge, ford, culvert or other work in the line of such road" and "public road" means any road of a class described in section 3. Section 3(1) divides roads into four classes: (a) motorways (b) main roads (c) urban roads and (d) rural roads. Section 3(3) provides:

> "Notwithstanding any other enactment, urban roads shall be all roads within the boundaries of a proclaimed town which are not motorways or main roads and have either been dedicated to public use or have been accepted as a regular maintenance responsibility of a local authority other than a district council."

It will be necessary to come back to this definition.

3. At trial Matadeen J held that the whole of the space had become a public road, and dismissed the claim of the plaintiff, Dr Mia Ayoob Sorefan to limit the extent of the public road to a strip 10 ft (that is, about 3m) wide. Dr Sorefan died before judgment, but his estate pursued an appeal. The Court of Appeal held that the whole of the space was in the ownership of Dr Sorefan's estate, but that a strip on its south side, 18 ft (that is, about 5.5m) wide had become a public road. The present owner of the land on the south of the space, N Parsooramen & Co Ltd ("Parsooramen") appeals to the Board. The Municipality of Curepipe, originally the second defendant, and the Commissioner of Police, originally the third defendant, are co-respondents to the appeal but have not appeared.

4. The Court of Appeal gave a helpful summary of the relevant geography. The following account is based on the Court of Appeal's summary, but is expanded to explain the most important changes in the physical features of the area that have occurred during the past half-century, so far as relevant to the issues to be decided.

5. “Impasse” is a synonym for “cul de sac” (what the English traffic authorities would designate as “no through road”) and that is what the Impasse was in 1958 when Dr Sorefan first acquired (under community of property with his wife) about 60 perches of undeveloped land in the area. At that time the Impasse was a short and narrow piece of roadway off the Royal Road, Curepipe. It went down the side of what is now the Monoprix supermarket but did not then provide a path for vehicular traffic, as it now does, to Queen Elizabeth II Avenue. Instead it ended with the undeveloped land purchased by Dr Sorefan in 1958. In the 1970s Dr Sorefan became interested in developing part of the land by the erection of shops and flats. He seems to have had extensive discussions with the planning authorities during 1974 and 1975.

6. Ultimately by a letter dated 19 December 1975 the Municipality’s Administrative Commission approved plans submitted by Dr Sorefan on behalf of Nafyros Ltd (a family company of his which was to be the head tenant of the proposed building)

> “on the condition that the road running in front of the aforesaid construction be built at the promoters’ own expenses and in conformity with the terms contained in the annexed schedule with the exclusion of clause no. 6 and to the satisfaction of this Municipality.”

The annexed schedule was a standard-form typed document headed “Specifications et Conditions Generales pour la construction des chemins et des drains aux nouveaux morcellements.” It set out detailed specifications for the construction of roadways and (in para 6, which was omitted) drains. Paragraph 1. (Largeur) provided

> “Le chemin à être créé aura une largeur totale de *dix pieds (10)* pieds d’un parement à l’autre”.

The italicised words and figure were completed in ink.

7. Dr Sorefan’s case attached a good deal of weight to a document (exhibit “P7”) which was a ground floor plan on a scale of 1:96 prepared by ZAC Associates (Architects). There are however some difficulties about this plan. It was dated 14 December 1974, and there is some evidence (in particular the minutes of a meeting of the Administrative Commission on 22 July 1974) to indicate that the proposals changed from time to time. Moreover the plan cannot be related to any feature which then existed on the ground, and it showed the space as having a width of 35 ½ ft (over 10m) between the face of the proposed building and the southern edge of the proposed road (which is shown as 19 ½ ft wide, including a narrow footway).

8. There is some documentary evidence that the discussions about the development which took place in 1974 and 1975 involved the owners of the supermarket, who were interested in obtaining vehicular access to Queen Elizabeth II Avenue. The Municipality also had a proprietary interest, since it owned land between Dr Sorefan's land and the Avenue. The fact that the Impasse is no longer a cul de sac but a busy one-way street (with traffic travelling from the Royal Road towards the Avenue) has no doubt had much to do with the tensions which led to these proceedings.

9. Dr Sorefan's proposed development was carried out to the north of the disputed space. The building (referred to at trial as the Nafyros Building) has a ground-floor arcade which acts as a covered pavement for pedestrians. Dr Sorefan's case at trial was that he paid for the construction of a roadway covering the whole width of the disputed space and that it remained his property, but that (as he conceded) the southern strip of the space (10 ft, or just over 3m wide) was intended to be dedicated, and has been dedicated, as a public road. As the Court of Appeal commented, it was not until Dr Sorefan's reply to the Municipality's defence that his case became clear.

10. At some stage another building with a similar ground-floor arcade was erected on the south side of the disputed space, opposite the Nafyros Building. There was no documentary or oral evidence as to the date of its construction but the land to the south had certainly been developed by 1987, when it was sold, with a building erected on it, to Parsooramen for 2.5 million rupees. On the occasion of this sale the land was subject to a report (not a full survey) by a Mr Chamroo. In his report dated 9 June 1987, in the course of describing the boundaries, the surveyor referred to the disputed space as

> "Un chemin de huit mètres (8.00m) de large entretenu [maintained] par la Municipalité de Curepipe".

This description was repeated in the deed of sale dated 15 July 1987 from Dr Sorefan to Parsooramen.

11. When cross-examined about this by Mr Domaingue on behalf of Parsooramen, Dr Sorefan insisted that only a strip 10ft wide had been dedicated as a public road; the rest, he said, was private land available as a parking place to those whom he allowed to park. He said that the surveyor had made a mistake. Further cross-examined by Mr Bhuckory on behalf of the Municipality, he said that the mistake was made because there was then (that is, in 1987) no marking on the road. He accepted that after about 1980 (when the original surfacing first began to need attention) the Municipality might have patched his parking area, as well as the strip he regarded as having been dedicated, where patching was needed.

12. The judge, who saw and heard the witness, made this finding:

> "Be that as it may, the plaintiff had finally to concede that the 8-metre wide road had indeed been accepted as a regular maintenance responsibility of the second defendant and this, ever since its creation."

The Court of Appeal did not accept this:

> "The Judge went wrong when she concluded that Dr Sorefan had conceded that the road was a maintenance responsibility of the Municipal Council. She may have been swayed by the answer to the very last question put to Dr Sorefan in cross-examination –
>
> > Q. I also put it to you that you have, therefore, no interest in the matter and that anything concerning the public road is a matter for the local authority, that is, for the Municipality of Curepipe. Any action concerning that road can only be taken by the Municipal Council. Do you agree?
> >
> > A. Yes.
>
> There were three questions in one and it would not be in order to infer that Dr Sorefan, after having consistently maintained his property rights on the space, except for the road, to have accepted that he had no interest in the matter and that the Municipal Council had taken over maintenance responsibility [for] the whole space with his consent."

13. On this point, as on several other points, Dr Sorefan's oral evidence was far from satisfactory. Almost the whole of his evidence in chief (apart from the production of documents which were made exhibits) consisted of short answers to leading questions put to him by his counsel. It may be that the witness's age and state of health led the judge to be so indulgent towards leading questions (as already mentioned, Dr Sorefan died before judgment had been given) but the result has been that his own account of the relevant events is exceedingly sparse. In particular, there is no evidence as to what road markings (if any) were put in place when the roadway was first constructed and metalled by Dr Sorefan's contractor in 1977 (the contract with the contractor was made in June 1977). His own counsel, Mr Montochio QC, observed at one point,

> "Nobody wants to take the responsibility of the markings which had been done, neither the Police nor the Municipality nor the parties."

(The transcript says "parkings" but "markings" must have been intended).

14. The only evidence about road markings relates to much more recent years. There is documentary evidence in the form of photographs taken in 1995 from an upper floor of the Nafyros Building showing chevron-pattern lines painted on each side of the one-way street, which runs along the centre (the parking spaces being in front of both the Nafyros Building and the opposite hotel building). On one photograph (exhibit "P19") the markings in front of the hotel have been partially obliterated, apparently with black paint. Dr Sorefan mentioned this in producing the exhibit, but did not say whose hand held the paintbrush. Other documentary evidence (in the form of an official log of road repairs) indicated that the Impasse was to be resurfaced in March or April 1995. It may be that the photographs were taken soon after the resurfacing and the painting of new road markings had taken place.

15. There is also documentary evidence that on 28 November 1995 the Municipality's Town Surveyor's Department served notice on Nafyros Ltd stating that it had "unlawfully placed road markings on Impasse Pot de Terre," and requiring their removal. The company promptly sent (as a "mise en demeure") a counter-notice of objection containing the following paragraphs:

> "3. The said markings are in fact found on a portion of land belonging to the lessor of Nafyros Ltd.
>
> 4. The lessor of the said property did submit in or about the year 1977 to the Municipality of Curepipe site plans indicating car parking facilities to be found on the land belonging to the lessor of the above-named party.
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> 5. The Municipality of Curepipe did request the lessor of the above-named party to provide parking facilities on his land and made it one of the conditions for the granting of a building permit.
>
> 6. The building permit was issued only when the owner agreed to provide parking facilities and indicated same on the plans submitted to the Municipality in or about the year 1977.

7. The said markings were found on private land and were not placed by Nafyros Ltd."

If the year 1977 is correct, it suggests that the plans cannot have been or included exhibit 'P7'.

16. There is also documentary evidence that on 3 June 1998 Dr Sorefan's attorney served a second mise en demeure on Parsooramen, the Municipality and the Commissioner of Police. That was the precursor to these proceedings.

17. That concludes the summary of events down to the issue of proceedings on 4 August 1998. The Court of Appeal's reference to Dr Sorefan "having consistently maintained his property rights on the space, except for the road" seems to be based primarily on the events of 1995 and 1998 mentioned in the three previous paragraphs. Against that, he had in 1987 executed a deed of sale referring to a road 8m wide maintained by the Municipality.

18. The trial took place on 24 May 2005, with final submissions on 2 June 2005. Matadeen J gave judgment on 6 July 2007. She attached weight to the reference in the 1987 survey and deed of sale to the 8m road being maintained by the Municipality; to what she took to be Dr Soferan's own concession of the point; and to the whole of the disputed space having been accepted as a regular maintenance responsibility of the Municipality since its construction. She concluded that the plaintiff had failed to prove his case and she dismissed the whole claim with costs.

19. Dr Sorefan's heirs appealed to the Court of Appeal, on the grounds that the judge had erred both in her findings of fact and in law (disregarding the principle of *res inter alios acta* and misapplying the Act). The Court of Appeal (Yeung Sik Yuen CJ and Bhaukaurally J) sought to resolve the "factual imbroglio" by going back to 1974. It noted that the relevance of exhibit 'P7' had not been seriously contested (whereas before the Board the appellant's counsel drew attention to the difficulties already noted). The Court referred to the incidents in 1995 and 1998 as evidence "that every time his private property rights fell to be threatened, Dr Sorefan would protest and take appropriate action."

20. The Court of Appeal agreed with some of the judge's conclusions but held that her judgment was nevertheless flawed. The Court made four main points:

(1) Dr Sorefan was not claiming an exclusive right over the whole 8m width, as the judge had supposed (perhaps from reading the statement of claim alone without reference to the reply).

(2) The Court considered that the evidence fell short of establishing that the space had been accepted as a regular maintenance responsibility of the Municipality for the purposes of section 3(3) of the Act.

(3) The Municipality had not followed the statutory procedure for turning a private road into a public road under section 60 of the Act.

(4) The incorrect description in the deed of sale of the 8m roadway as maintained by the Municipality could not confer rights on Parsooramen, still less on the Municipality.

The first of these points is clearly correct, but is not determinative. The last point is also correct so far as it goes, but the statement about the maintenance of the roadway is evidence, and in the Board's view important evidence, of Dr Sorefan's state of mind and intentions when he executed the deed of sale (an important document to which he must be supposed to have paid close attention).

20. The other points relate to the Act. Since the respondents did not appear, the Board did not have the benefit of full argument on the Act, and they feel some reluctance at deciding points of construction on the Act that may be of some general importance in Mauritius. They think it better to go no further than is necessary in order to dispose of this appeal.

21. It is appropriate to repeat section 3(3) of the Act:

> "Notwithstanding any other enactment, urban roads shall be all roads within the boundaries of a proclaimed town which are not motorways or main roads and have either been dedicated to public use or have been accepted as a regular maintenance responsibility of a local authority other than a district council."

The word "or" suggests that there are two processes by which a roadway can become a public road of the urban class: dedication or acceptance as a regular maintenance responsibility of the highway authority.

22. In construing section 3(3) and other relevant provisions of the Act the Board approaches the statute on the basis that although parts of it are framed with regard to conditions and needs that are particular to Mauritius, others are clearly based on English statutes going back to the Highway Act 1835 and the Private Street Works Act 1892. The former Act gave statutory force to the English common law doctrine

that a public highway was created by dedication by the owner and acceptance of the dedication by the local inhabitants at large (later represented by the appropriate highway authority). Dedication was occasionally effected by an express declaration but was much more often inferred from long, continuous and uninterrupted use by the public: see *Folkestone Corporation v Brockman* [1914] AC 338; also *Hale v Norfolk County Council* [2001] Ch 717, para 18, where Chadwick LJ said,

> "It is trite law that a public right of way over land may arise either at common law, under the doctrine of dedication and acceptance, or by reason of some statutory provision…."

23. It was not suggested that dedication of a highway was historically part of the law of Mauritius, but the language of sections 3 and 5 of the Act indicates that the doctrine of dedication of highways has, by statute, become part of the law of Mauritius, as it has in other territories outside England: see *Permanent Trustee Company of New South Wales Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401, 420. In order to be complete, dedication requires acceptance by the highway authority (*Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240, 256). Otherwise a highway authority could be saddled with heavy liabilities as a result of dedication of a road in a very bad state of repair.

24. The Private Street Works Act 1892 (now embodied, in England, in Part XI of the Highways Act 1980) deals with the circumstances in which a highway authority may require a street to be made up at the expense of the residents and then adopted as a public highway (so that *future* maintenance will fall on public funds). This may happen against the wishes of one or more individual frontagers so long as the majority of the frontagers are in favour. Part III of the Act (sections 49 to 61) contains a similar code covering these matters. They reflect democracy in action as between the frontagers living on a private road (typically in a new urban development), and a balance between the future advantage of the road being adopted (so that there is no further private expense) against the immediate detriment (the initial cost of bringing the road up to the requisite standard being shared between the frontagers). It would be a mistake to consider section 60 of the Act in isolation, as may have occurred in the courts below. The provisions in Part III of the Act explain the wording "Subject to this Act" at the beginning of section 5(3) (public money not to be spent on private roads).

25. This background helps to explain the word "or" in section 3(3). The maintenance of all public roads is among the responsibilities of the various highway authorities (under section 4 of the Act) and so the use of the word "or" is in a sense redundant. There is an overlap between the two limbs of section 3(3). But the most likely explanation is that the first limb of section 3(3) is directed mainly to roads of some antiquity (whose dedication may have been inferred from long-continued public

use) and the second limb is directed mainly at the special provisions in Part III of the Act.

26. The Board is in full agreement with the Court of Appeal that the procedures in Part III of the Act, if invoked, must be followed strictly, since they may involve compulsory acquisition from some (but not a majority) of unwilling frontagers: *Chadee v Beeharry* [2004] SCJ 126. But the Court of Appeal seems, with respect, to have been too ready to dismiss the possibility that Dr Sorefan had, by acquiescence between 1977 and 1995, raised an inference of an intention to dedicate the whole of the disputed space as a public highway.

27. As already noted, the whole of the disputed space was made up, apparently as a roadway, in 1977. The whole of it was repaired by the Municipality from 1980 (when repairs were first needed), at first by regular patching and then (in 1995) by a complete resurfacing. There was no clear evidence at trial of any marking out of parking spaces until the photographs taken in 1995, and it seems likely that Dr Sorefan was not troubled about the matter until 1987, when he sold the southern part of the property and the hotel on Parsooramen's land began to attract more parked cars. It is not as if Dr Sorefan was an absentee landlord: his family company was head tenant of the Nafyros Building, and he himself seems to have had consulting rooms there. He must have been aware of what was going on, and he spoke with feeling, in his evidence, about the *taxi marrons* which were high-jacking what he regarded as his parking space.

28. Some of these points may be regarded as no more than inferences from the scanty evidence put before the judge at trial. But as she said, it was for Dr Sorefan to prove his case on the balance of probabilities. Section 5(5) of the Act (dealing with burden of proof) seems hardly in point as it is dealing with the case where a private party is seeking to throw the burden of maintenance onto a reluctant highway authority, which is the opposite of the case here. Even if section 5(5) were in point, the unequivocal statements in the 1987 survey and the deed of sale (a formal document executed by Dr Sorefan) and the other circumstances mentioned above would discharge that burden.

29. For these reasons the Board allow the appeal and restore the order of Matadeen J. The estate of Dr Sorefan must pay the respondents' costs in the Court of Appeal and the appellants' costs before the Board.