IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV2010/0017

BETWEEN

BENJAMIN PONTEEN

(Lawful Attorney for CAROLIE PONTEEN) Applicant

And

MONTSERRAT LAND DEVELOPMENT AUTHORITY 1st Respondent

THE HONOURABLE ATTORNEY GENERAL 2nd Respondent

APPEARANCES

Dr David Dorsett for the applicant.

Ms Chivone Gerald for the Montserrat Land Development Authority

Ms Cedrecia Shiel for the Attorney General.

2018: JULY 16

NOVEMBER 5[1]

JUDGMENT

On whether a road is a 'public road'

[1] Judgment was due to be delivered on 17.09.18, but was delayed owing to the passing of Storm Isaac on 13.09.18, which led to Morley J having to spend the whole of the weekend 15-16.09.18 at a conference on St Kitts.

1 Morley J: Following argument on 13.07.18, I am asked to decide whether a dirt road on Montserrat leading to property belonging to the applicant (Ponteen[2]) is a public road within the meaning of Roads Act Cap 7.07 (as at 01.01.13), because if so the Montserrat government will be under an obligation to maintain it, which will mean improving it and paving it with tarmac at public expense. In addition, or in the alternative, I must decide if Ponteen has shown on balance there was an enforceable agreement with the first respondent (MLDA), in the form of an implied term, to treat the dirt road as a public road, and therefore pave and maintain it.

2 In 1997, the volcano on Montserrat destroyed the airport, requiring another to be built. In turn, the new airport required the government to relocate James Farrell (aka Mop-up). He was placed at parcel 15/7/45. To get to his property, a road was cut, but on land belonging to Ponteen at parcel 15/7/37. In recompense, on 14.08.01 the MLDA agreed in writing to *'a road being cut by the MLDA starting at the southern end of the border of plot 37 going north and an extension of the road leading to Mop-up approximately 30ft beyond that boundary line'*. The MLDA then did nothing for over ten years, until compelled by threat of court action, leading to a mediation agreement on 17.07.12 and consent order on 23.07.13. A road was duly cut.

3 However, Ponteen wants the road tarmacked and maintained by the government. He argues it was an implied term it shall be.

4 But in the agreement of 14.08.01, the word used was 'cut', which imports the plain meaning of a one-off event, and does not naturally lend itself to later maintenance. Moreover, to cut a road means the ground will be stripped, gouged and flattened so that vehicles can pass, and does not imply the road will be made any more sophisticated. There have been many such roads cut on Montserrat. If Ponteen was to have shown an agreement to tarmac and maintain, I would expect the agreement at least to say a road was to be 'constructed', which could imply something more than simply 'cut'.

[2] For the purposes of this judgement, for ease of reading, the parties will be referred to as bracketed, with no disrespect intended by not writing out on each mention full names, offices, and titles, or the legalese as to whether an applicant or respondent.

5 In addition, Ponteen argues the term must be implied, of necessity, as otherwise there can be no effect to the agreement.

6 This is plainly not so, as the Court has visited the road and what has been cut is usable and passable by vehicles, which was what the agreement was for.

7 Finally, the MLDA would not have agreed to tarmac and maintain, so that it is positively a term of the contract merely to cut the road, not more, as it had no authority to bind the Inspector of Works and Roads, within the Ministry of Communications and Works, who has the responsibility for maintenance, per s6 and s7 Roads Act Cap 7.07, as amended.

8 For these reasons, I find there was no implied term to tarmac and maintain the road cut.

9 Ponteen then argues the road cut is a 'public road' within in the meaning of s2 Roads Act, which defines one as a road *'over which the public has a right of way'*. He declares the road cut is a public right of way to his property, expressly granting the right. If a public road, then under *s7* supra, the inspector has a duty to maintain it.

10 However, there are two flaws in the argument presented.

11 The first is close reading of the Roads Act shows that, under s3, public roads *are 'Such roads as the Governor acting on the advice of Cabinet may by order appoint'*. It follows a public road needs to be declared by the Governor, not by a landowner.

12 The section goes on: '*The omission of any public road from any order made by the Governor…shall not be deemed to affect the right of the public to such a road'*. It was argued this means that a road can be a public road, requiring the government maintain it, even if not declared by the Governor, as the legislation contemplates the Governor may omit declaring a road to be public which in fact is so. But this is to misread the section. Instead, what is meant by the section is that there can in theory be roads to which the public have a right of way, which is not extinguished or unenforceable if the road is not declared so by the Governor, but unless declared by the Governor the road is not a public road for the purposes of the Act requiring it must be maintained by the government.

13 Moreover, on the facts of this case, the road cut cannot be a public road, no matter that the landowner wishes to declare it so. This is because the road over which one must travel to arrive at Mop-up's home and then at the road cut on Ponteen's land is called 'Boxwood Drive' and is privately owned and maintained by Lauretta Daley and Joseph Ryan, as parcel 15/9/78, who in their affidavit filed on 21.06.18 report its history and how they paid for it to be tarmacked to allow access to their homes on parcels 15/9/76 and 15/9/77. Over Boxwood Drive, the properties owned by Mop-up and Ponteen each have an easement for persons to gain access to the respective parcels, but it is not a general public right of way, for something other than access, allowing for example marching bands, the training of animals, parking cars, playing street football, and so on.

14 An important point of law arose in this case as had Ponteen's interpretation of the Road Act succeeded, the government might have been under an obligation to tarmac and maintain any and all roads over which landowners declared a public right of way. I find this is not so in law. Though many authorities were filed, none assist as none are directly on point[3], and in any event on what here is a simple question of fact, of the language of the agreement, and separately of statutory interpretation.

15 Though Ponteen has lost the argument, there shall be no order as to costs, in light of the importance of the point being ventilated, and in light of the unfathomable delay in cutting the road between 2001 and 2013, which had the effect of delaying the argument arising after.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

5 November 2018

[3] See: Campbell v Peter Gordon Joiners 2016 AC 1513; Cubitt v Lady Caroline Maxse 1873 LR704; Fortune v Wiltshire Council 2013 1WLR 808; Man 'o War Station Ltd v Auckland City Council 2002 UKPC 32; Ali v Petroleum Co of Trinidad and Tobago 2017 ICR 531; Watt v Prime Minister ECSC WIR85; King Emperor v Benoari Lal Sarma 1945 AC14; Roodal v State of Trinidad and Tobago 2003 UKPC 78; Rowley v Tottenham UBC 1914 AC95; Turner v Walsh 1881 HL vol 6 p636; Vernon v Vestry of St James 1879 Ch vol 16 449; AG of Belize v Belize Telecom 2009 1WLR 1988; Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) 2015 UKSC 72; Purcell v Trigell 1971 1QB359; Wentworth v Bullen 9B&C841 313; Liverpool City Council v Irwin [1977] AC 239; Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc; The Reborn [2009] EWCA Civ 531; Shirlaw v Southern Foundries [1939] 2 ALL ER113; Haywood v Cope (1858) 25 Beav. 140; Tito v Waddell (No.2) [1977] Ch. 106.